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

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

WHEN: Tuesday, July 17, 2007
9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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Rules and Regulations

Federal Register

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Thursday, June 28, 2007

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

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

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

2 CFR Part 376

45 CFR Parts 74 and 76

Implementation of the Office of OMB Guidance on Nonprocurement Debarment and Suspension

AGENCY: Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: The Department of Health and Human Services (''HHS'' or the ''Department'') adopted, by an interim final rule, the Office of Management and Budget (OMB) guidance at 2 CFR part 180 on nonprocurement debarment and suspension including some provisions specific to HHS. Public comment on this action was solicited in a **Federal Register** notice dated March 1, 2007. No comments were received; therefore, the Department makes no changes to its interim final rule and it remains in effect as of March 1, 2007. Pursuant to the requirements in OMB guidance, HHS makes final the following regulatory actions: Removes its existing regulation on nonprocurement debarment at 45 CFR part 76, establishes a new part 376 in title 2 Code of Federal Regulations (CFR) adopting OMB's guidance and adding provisions specific to HHS, and revises the reference in 45 CFR 74.13 to reflect the new citation to 2 CFR part 376.

DATES: Effective June 28, 2007.

FOR FURTHER INFORMATION CONTACT: Nancy Weisman, Office of Grants Policy, Oversight and Evaluation, U.S. Department of Health and Human Services, at (202) 260–4573, or e-mail her at *Nancy.Weisman@hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Procedural Review Requirements

A. Executive Order 12866, Regulatory Planning and Review

HHS has determined that 2 CFR part 376 is not a significant regulatory action.

B. Regulatory Flexibility Act

HHS certifies this rulemaking will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act [5 U.S.C. 605(b)]. Therefore, no regulatory flexibility statement has been prepared. Since this rule relocates existing HHS nonprocurement and debarment policies or procedures and does not promulgate any new policies and procedures that would impact the public, it has been determined that this rule will not have a significant economic effect on a substantial number of small entities, and, thus, a regulatory flexibility analysis was not performed.

C. Unfunded Mandates Reform Act

HHS has determined that 2 CFR 376 does not contain a Federal mandate under 2 U.S.C. 1501(7) 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.

D. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 35, does not apply because the issuance of 2 CFR part 376 does not impose any new reporting or recordkeeping requirements that require approval by OMB.

E. Executive Order 13132, Federalism

This regulation does not have federalism implications, as set forth in Executive Order 13132. This regulation does not have substantial direct effects on the states, the relationship between the Federal government and the states, or the distribution of power and responsibilities among the various levels of government.

List of Subjects

2 CFR Part 376

Administrative practice and procedure, Debarment and suspension, Grant programs, Reporting and recordkeeping requirements.

45 CFR Part 74

Accounting, Colleges and universities, Grant programs, Hospitals, Indians, Intergovernmental relations, Nonprofit organizations, Reporting and recordkeeping requirements.

45 CFR Part 76

Administrative practice and procedure, Debarment and suspension, Grant programs, Reporting and recordkeeping requirements.

Dated: June 18, 2007.

Michael O. Leavitt,

Secretary.

■ Accordingly, under the authority of 5 U.S.C. 301; 31 U.S.C. 6101 (note); E.O. 12689 (3 CFR, 1989 Comp., p. 235); E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 11738 (3 CFR, 1973 Comp., p. 799), the interim rule amending 2 CFR part 376 and 45 CFR parts 74 and 76 which was published at 72 FR 9233 on March 1, 2007, is adopted as a final rule without change.

[FR Doc. E7–12225 Filed 6–27–07; 8:45 am]

BILLING CODE 4150–24–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2007–28298; Airspace Docket No. 07–ASO–10]

Amendment of Class D Airspace; Valdosta, Moody AFB, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class D airspace at Valdosta, Moody AFB, GA. The Air Education Training Command (AETC) T–6 mission at Moody AFB has been eliminated. Therefore, the requirement for a 7-mile radius of Moody AFB is no longer required. The Moody AFB Class D airspace is amended to airspace upward from the surface up to and including 2,700 MSL within a 5-mile radius of the airport.

DATES: *Effective Date:* 0901 UTC, August 30, 2007. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order

7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Mark D. Ward, Group Manager, System Support, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5581.

SUPPLEMENTARY INFORMATION:

History

In July 2001, the Moody AFB Class D airspace was expanded from a 5-mile radius to a 7-mile radius of the airport to support the Air Education Training Command (AETC) T–6 mission at Moody AFB to protect the longer and wider patterns required for this training mission. The Base Realignment and Closure (BRAC) Commission actions in 2005 has now eliminated the T–6 mission at Moody AFB. The 7-mile radius Class D airspace area is no longer required. On May 29, 2007, the U.S. Air Force requested the Valdosta Moody AFB, GA, Class D airspace to be reduced in size to a 5-mile radius of the airport. This rule becomes effective on the date specified in the ''Effective Date'' section. Since this action eliminates the impact of controlled airspace on users of airspace in the vicinity of Valdosta, Moody AFB, GA, notice and public procedure under 5 U.S.C. 553(b) are not necessary. Designations for Class D airspace areas extending upward from the surface of the earth are published in paragraph 5000 of FAA Order 7400.9P, dated September 01, 2006, and effective September 15, 2006, which is incorporated by reference in 14 CFR 71.1. The Class D airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations (14 CFR Part 71) amends Class D airspace at Valdosta, Moody AFB, GA.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by Reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; EO 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 14 CFR 11.69.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9P, Airspace Designations and Reporting Points, dated September 1, 2006, and effective September 15, 2006, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ASO GA D Valdosta Moody AFB, GA [REVISED]

Valdosta, Moody AFB, GA
(Lat. 30°58′04″ N, long. 83°11′35″ W)

That airspace extending upward from the surface, to and including 2,700 feet MSL, within a 5-mile radius of Moody AFB. This Class D airspace area is effective during the specific days and times established in advance by a Notice to Airmen. The effective days and times will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in College Park, Georgia, on June 1, 2007.

Barry A. Knight,

Acting Group Manager, System Support Group Eastern Service Center.

[FR Doc. 07–3129 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD01–07–082]

RIN 1625–AA00

Safety Zone: Westport PAL Fireworks, Westport, CT

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the Westport PAL Fireworks in Westport, CT. The safety zone is necessary to protect the life and property of the maritime community from the hazards posed by the fireworks display. Entry into or movement within this safety zone during the enforcement period is prohibited without approval of the Captain of the Port, Long Island Sound.

DATES: This rule is effective from 8:15 p.m. on July 3, 2007 until 11:15 p.m. on July 5, 2007.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket CGD01–07–082 and will be available for inspection or copying at Sector Long Island Sound, New Haven, CT, between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant D. Miller, Chief, Waterways Management Division, Coast Guard Sector Long Island Sound at (203) 468–4596.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. The Coast Guard did not receive an Application for Approval of Marine Event for this event with sufficient time to implement a NPRM, thereby making an NPRM impracticable. A delay or cancellation of the fireworks in order to accommodate a full notice and comment period would be contrary to public interest.

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**. Any delay encountered in this regulation's effective date would be impracticable and contrary to public interest since immediate action is

needed to prevent traffic from transiting a portion of Long Island Sound off Westport, CT and to protect the maritime public from the hazards associated with this fireworks event.

The temporary zone should have minimal negative impact on the public and navigation because it will be enforced for only a three hour period on only one day. In addition, the area closed by the safety zone is minimal, allowing vessels to transit around the safety zone in Long Island Sound off Westport, CT.

Background and Purpose

The Westport PAL Fireworks display will be taking place in Long Island Sound off Westport, CT from 8:15 p.m. to 11:15 p.m. on July 3, 2007. If the fireworks display is cancelled due to inclement weather on July 3, 2007, it will take place during the same hours on July 5, 2007. This safety zone is necessary to protect the life and property of the maritime public from the hazards posed by the fireworks display. It will protect the maritime public by prohibiting entry into or movement within this portion the navigable waters of Long Island Sound one hour prior to, during, and one hour after the stated event.

Discussion of Rule

This regulation establishes a temporary safety zone on the navigable waters of Long Island Sound off Westport, CT within a 800-foot radius of the fireworks barge located at approximate position 41°06′14.834″ N, 073°20′56.52″ W. The temporary safety zone will be outlined by temporary marker buoys installed by the event organizers.

This action is intended to prohibit vessel traffic in a portion of Long Island Sound off Westport, CT to provide for the protection of life and property of the maritime public. The safety zone will be enforced from 8:15 p.m. until 11:15 p.m. on July 3, 2007 and if necessary due to inclement weather, will be enforced from 8:15 p.m. to 11:15 p.m. on July 5, 2007. Marine traffic may transit safely outside of the safety zone during the event thereby allowing navigation of the rest of Long Island Sound except for the portion delineated by this rule.

The Captain of the Port anticipates minimal negative impact on vessel traffic due to this event due to the limited area and duration covered by this safety zone. Public notification will be made prior to the enforcement period via local notice to mariners and marine information broadcasts.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

This regulation may have some impact on the public, but the potential impact will be minimized for the following reasons: Vessels will only be excluded from the area of the safety zone for 3 hours and vessels will be able to operate in other areas of Long Island Sound off Westport, CT during the enforcement period.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in those portions of Long Island Sound off Westport, CT covered by the safety zone. For the reasons outlined in the Regulatory Evaluation section above, this rule will not have a significant impact on a substantial number of small entities.

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

Assistance for Small Entities

Under subsection 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 [Pub. L. 104–121], the Coast Guard wants to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If this rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call Lieutenant D. Miller, Chief, Waterways Management Division, Sector Long Island Sound, at (203) 468–4596.

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 the rule or any policy of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to

minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

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

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it will 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 Commandant Instruction M16475.1D 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 concluded that there are no factors in this case that would limit the use of the categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. This rule falls under the provisions of paragraph (34)(g) because the rule establishes a safety zone.

A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' will be 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 and 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T01–082 to read as follows:

§ 165.T01–082 Safety Zone: Westport PAL Fireworks, Westport, CT.

(a) *Location*. The following area is a safety zone: All navigable waters of Long Island Sound off of Westport, CT within an 800-foot radius of the fireworks barge located in approximate position 41°06′14.834″ N, 073°20′56.52″ W.

(b) *Definitions*. The following definitions apply to this section: *Designated on-scene patrol personnel*, means any commissioned, warrant and petty officers of the U.S. Coast Guard operating Coast Guard vessels in the enforcement of this safety zone.

(c) *Regulations*. (1) The general regulations contained in 33 CFR 165.23 apply.

(2) In accordance with the general regulations in § 165.23 of this part, entry into or movement within this zone is prohibited unless authorized by the Captain of the Port Long, Island Sound or his designated on-scene patrol personnel.

(3) All persons and vessels shall comply with the orders of the Coast Guard Captain of the Port or designated on-scene patrol personnel.

(4) Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed.

(5) Persons and vessels may request permission to enter the zone on VHF–16 or via phone at (203) 468–4401.

(d) *Enforcement period*. This section will be enforced from 8:15 p.m. to 11:15 p.m. on Tuesday, July 3, 2007 and if the fireworks display is postponed, from 8:15 p.m. to 11:15 p.m. on Thursday, July 5, 2007.

Dated: June 13, 2007.

D.A. Ronan,

Captain, U. S. Coast Guard, Captain of the Port, Long Island Sound.

[FR Doc. E7–12458 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD01–07–075]

RIN 1625–AA00

Safety Zone: Lawrence Beach Club Fireworks, Atlantic Beach, NY

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the Lawrence Beach Club Fireworks, Atlantic Beach, NY. The safety zone is necessary to protect the life and property of the maritime community from the hazards posed by the fireworks display. Entry into or movement within this safety zone during the effective period is prohibited without approval of the Captain of the Port, Long Island Sound.

DATES: This rule is effective from 8 p.m. to 11 p.m. on June 30, 2007.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket CGD01–07–075 and will be available for inspection or copying at Sector Long Island Sound, New Haven, CT, between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant D. Miller, Chief, Waterways

Management Division, Coast Guard Sector Long Island Sound at (203) 468–4596.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. The Coast Guard did not receive an Application for Approval of Marine Event for this event with sufficient time to implement a NPRM, thereby making an NPRM impracticable. A delay or cancellation of the fireworks display in order to accommodate a full notice and comment period would be contrary to the public interest.

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**. Any delay encountered in this regulation's effective date would be impracticable and contrary to public interest since immediate action is needed to prevent traffic from transiting a portion of Atlantic Beach, NY and to protect the maritime public from the hazards associated with this fireworks event.

The temporary zone should have minimal negative impact on the public and navigation because it is only effective for a three hour period on a single day. In addition, the area closed by the safety zone is minimal, allowing vessels to transit around the zone in Atlantic Beach, NY.

Background and Purpose

The Lawrence Beach Club Fireworks display will be taking place in Atlantic Beach, NY from 8 p.m. to 11 p.m. on June 30, 2007. This safety zone is necessary to protect the life and property of the maritime public from the hazards posed by the fireworks display. It will protect the maritime public by prohibiting entry into or movement within this portion of the navigable waters off of Atlantic Beach, NY one hour prior to, during, and one hour after the stated event.

Discussion of Rule

This regulation establishes a temporary safety zone on the navigable waters of Atlantic Beach, NY within a 1200-foot radius of the fireworks barge located at approximate position 40°34′42.65″ N, 073°42′56.02″ W. The temporary safety zone will be outlined by temporary marker buoys installed by the event organizers.

This action is intended to prohibit vessel traffic in a portion of Atlantic Beach, NY to provide for the protection of life and property of the maritime public. The safety zone will be enforced from 8 p.m. until 11 p.m. on June 30, 2007. Marine traffic may transit safely outside of the safety zone during the event thereby allowing navigation of the rest of the navigable waters off of Atlantic Beach, NY except for the portion delineated by this rule.

The Captain of the Port anticipates minimal negative impact on vessel traffic due to this event due to the limited area and duration covered by this safety zone. Public notifications will be made prior to the effective period via local notice to mariners and marine information broadcasts.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this rule will be so minimal that a full Regulatory Evaluation is unnecessary.

This regulation may have some impact on the public, but the potential impact will be minimized for the following reasons: Vessels will only be excluded from the area of the safety zone for 3 hours; and vessels will be able to operate in other areas of Atlantic Beach, NY during the enforcement period.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in those portions of Atlantic Beach NY covered by the safety zone. For the reasons outlined in the Regulatory Evaluation section above, this rule will not have a significant impact on a substantial number of small entities.

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

Assistance for Small Entities

Under subsection 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 [Pub. L. 104–121], the Coast Guard wants to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If this rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call Lieutenant D. Miller, Chief, Waterways Management Division, Sector Long Island Sound, at (203) 468–4596.

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions

that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it will 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 Commandant Instruction M16475.1D 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 concluded that there are no factors in this case that would limit the use of the categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. This rule falls under the provisions of paragraph (34)(g) because the rule establishes a safety zone.

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

■ 2. Add temporary § 165.T01–075 to read as follows:

§ 165.T01–075 Safety Zone: Lawrence Beach Club Fireworks, Atlantic Beach, NY.

(a) *Location.* The following area is a safety zone: All navigable waters of Long Island Sound off of Atlantic Beach, NY within a 1200-foot radius of the fireworks barge located in approximate position 40°34′42.65″ N, 073°42′56.02 W.

(b) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply.

(2) In accordance with the general regulations in § 165.23 of this part, entry into or movement within this zone is prohibited unless authorized by the Captain of the Port Long, Island Sound.

(3) All persons and vessels shall comply with the Coast Guard Captain of the Port or designated on-scene patrol personnel. These personnel comprise commissioned, warrant and petty officers of the U.S. Coast Guard. Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed.

(c) *Enforcement period.* This section will be enforced from 8 p.m. to 11 p.m. on Saturday, June 30, 2007.

Dated: June 13, 2007.

D.A. Ronan,

Captain, U.S. Coast Guard, Captain of the Port, Long Island Sound.

[FR Doc. E7–12461 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, 72, 73, 74, 78, 96, and 97

[EPA–HQ–OAR–2004–0076; FRL–8333–1]

RIN 2060–AM99

Rulemaking on Section 126 Petition From North Carolina To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone: Notice of Actions Denying Petitions for Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Actions Denying Petitions for Reconsideration.

SUMMARY: The EPA is providing notice that it has responded to 4 petitions for reconsideration of a final rule published in the **Federal Register** on April 28, 2006. The rule promulgated Federal implementation plans (FIPs) for the Clean Air Interstate Rule (CAIR) and responded to a petition from North Carolina that was submitted under section 126 of the Clean Air Act (CAIR FIPs-Section 126 Rule). Subsequent to publishing the rule, EPA received 4 petitions for reconsideration from ARRIPA (dated June 26, 2006), Colver

Power Project (dated June 27, 2006), the State of North Carolina (dated June 26, 2006), and Southern Environmental Law Center (on behalf of Southern Environmental Law Center, Sierra Club, and Environment North Carolina) (dated June 27, 2006). The EPA considered the petitions and supporting information along with information contained in the rulemaking docket (Docket No. EPA–OAR–HQ–2004–0076) in reaching a decision on the petitions. EPA Administrator Stephen L. Johnson denied the petitions for reconsideration in separate letters to the petitioners dated February 27, 2007 to ARRIPA and to Colver Power Project and dated May 7, 2007 to Southern Environmental Law Center and to the State of North Carolina. The letters explain EPA's reasons for the denials.

FOR FURTHER INFORMATION CONTACT: Sonja Rodman, U.S. EPA, Office of General Counsel, Mail Coder 2344A, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, telephone (202) 564–4097, e-mail at *rodman.sonja@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. How Can I Get Copies of This Document and Other Related Information?

This **Federal Register** notice, the petitions for reconsideration, and the letters denying the petitions for reconsideration are available in the docket that EPA established for the CAIR FIRs-Section 126 Rule under Docket ID No. EPA–HQ–OAR–2004–0076. The document identification numbers for the petitions for reconsideration are: ARRIPA, EPA–HQ–OAR–2004–0076–0284; North Carolina, EPA–HQ–OAR–2004–0076–0293.1 (petition) and EPA–HQ–OAR–2004–0076–0293.2 through EPA–HQ–OAR–2004–0076–0293.21 (supporting materials); and Southern Environmental Law Center, Sierra Club, and Environment North Carolina, EPA–HQ–OAR–2004–0076–0233. The document identification numbers for EPA's response letters are: to ARRIPA, EPA–HQ–OAR–2004–0076–0307; to Colver Power Project, EPA–HQ–OAR–2004–0076–0308; to North Carolina, EPA–HQ–OAR–2004–0076–0305; and to Southern Environmental Law Center, EPA–HQ–OAR–2004–0076–0306.

All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the EPA Docket Center (Air Docket), EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744 and the telephone number for the Air Docket is (202) 566–1742.

This **Federal Register** notice, the petitions for reconsideration, and the letters denying the petitions can also be found on EPA's Web site *http://www.epa.gov/cair.* The CAIR FIPs-Section 126 Rule was published in the **Federal Register** on April 28, 2006 at 71 FR 25328.

II. Judicial Review

Section 307(b)(1) of the Clean Air Act indicates which Federal Courts of Appeals have venue for petitions for review of final actions by EPA. This section provides, in part, that the petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit if (i) the agency action consists of ''nationally applicable regulations promulgated, or final action taken, by the Administrator,'' or (ii) such actions are locally or regionally applicable, if ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.''

The EPA has determined that its actions denying the petitions for reconsideration are of nationwide scope and effect for purposes of section 307(d)(1) because the actions directly affect the CAIR FIPs-Section 126 Rule, which previously was found to be of nationwide scope and effect. Thus, any petitions for review of the letters denying the petitions for reconsideration described in this Notice must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this Notice is published in the **Federal Register**.

Dated: June 22, 2007.

Stephen D. Page,

Director, Office of Air Quality Planning and Standards.

[FR Doc. 07–3188 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2006–0130–200714(w); FRL–8332–6]

Approval and Promulgation of Implementation Plans: State of Florida; Prevention of Significant Deterioration Requirements for Power Plants Subject to the Florida Power Plant Siting Act; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to an adverse comment, EPA is withdrawing the direct final rule published May 25, 2007 (72 FR 29273), approving a revision to the State Implementation Plan of the State of Florida. This revision grants full approval to implement the State's Clean Air Act Prevention of Significant Deterioration program for electric power plants subject to the Florida Electrical Power Plant Siting Act. EPA stated in the direct final rule that if EPA received an adverse comment by June 25, 2007, the rule would be withdrawn and not take effect. EPA subsequently received an adverse comment. EPA will address the comment in a subsequent action.

DATES: The direct final rule is withdrawn as of June 28, 2007.

FOR FURTHER INFORMATION CONTACT: Ms. Kelly Fortin, Air Permits Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9117. Ms. Fortin can also be reached via electronic mail at *fortin.kelly@epa.gov.*

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: June 19, 2007.

Russell L. Wright, Jr.,

Acting Regional Administrator, Region 4.

Accordingly, the amendments to 40 CFR 52.530 (which published in the **Federal Register** on May 25, 2007, at 72 FR 29273) is withdrawn as of June 28, 2007.

[FR Doc. E7–12585 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–HQ–OAR–2003–0090; FRL–8332–2]

RIN 2060–AO05

Extension of the Deferred Effective Date for 8-Hour Ozone National Ambient Air Quality Standards for the Denver Early Action Compact

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action to extend the deferral of the effective date of the 8-hour ozone National Ambient Air Quality Standard (NAAQS) designation for the Denver Early Action Compact (EAC) from July 1, 2007 to September 14, 2007. The EAC areas have agreed to reduce ground-level ozone pollution earlier than the Clean Air Act (CAA) requires. On November 29, 2006, EPA extended the deferred effective date for the Denver EAC area from December 31, 2006, to July 1, 2007. In that final rulemaking, EPA noted that there were issues with Denver's EAC that would need to be addressed before EPA would extend their deferral until April 15, 2008. The action extending the deferral to July 2007 was challenged, and the parties are discussing settlement. EPA is now issuing a short further deferral to preserve the status quo as settlement discussion take place. EPA is issuing at this time a short further deferral of the effective date of Denver's designation for the 8-hour ozone standard from July 1, 2007 to September 14, 2007.

DATES: *Effective Date:* This final rule is effective on June 28, 2007.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2003–0090. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Office of Air and Radiation Docket is (202) 566–1742. In addition, we have placed a copy of the rule and a variety of materials relevant to Early Action Compact areas on EPA's Web site at *http://www.epa.gov/ttn/naaqs/ozone/eac/*.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Driscoll, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C539–04, Research Triangle Park, NC 27711, phone number (919) 541–1051 or by e-mail at: *driscoll.barbara@epa.gov* or Mr. David Cole, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail Code C304–05, Research Triangle Park, NC 27711, phone number (919) 541–5565 or by e-mail at: *cole.david@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

This action applies only to the Denver EAC area.

B. How Is This Document Organized?

The information presented in this preamble is organized as follows:

Outline

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  B. How Is This Document Organized?
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V. What Comments Did EPA Receive on the March 1, 2007 Proposal To Extend the Deferral of the Effective Date of the Nonattainment Designation for the Denver Early Action Compact?
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  J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
  K. Congressional Review Act
  L. Petitions for Judicial Review

II. What Is the Purpose of This Document?

The purpose of this document is to issue a short further deferral of the effective date of the 8-hour ozone nonattainment designation for the Denver EAC area from July 1, 2007 to September 14, 2007.

III. What Action Has EPA Taken to Date for Early Action Compact Areas?

This section discusses EPA's actions to date with respect to deferring the effective date of nonattainment designations for certain areas of the country that are participating in the EAC program. The EPA's April 30, 2004, air quality designation rule (69 FR 23858) provides a description of the compact approach, the requirements for areas participating in the compact and the impacts of the compact on those areas.

On December 31, 2002, we entered into compacts with 33 communities. To receive the first deferral, these EAC areas agreed to reduce ground-level ozone pollution earlier than the CAA would require. The EPA agreed to provide an initial deferral of the nonattainment designations for those EAC areas that did not meet the 8-hour ozone NAAQS as of April 30, 2004, and to provide subsequent deferrals contingent on performance vis-à-vis certain milestones. On December 16, 2003 (68 FR 70108), we published our proposed rule to defer until September 30, 2005, the effective date of designation for EAC areas that did not meet the 8-hour ozone NAAQS. Fourteen of the 33 compact areas did not meet the 8-hour ozone NAAQS.

Our final designation rule published April 30, 2004 (69 FR 23858), as amended June 18, 2004 (69 FR 34080), included the following actions for compact areas: deferred the effective date of nonattainment designation for 14 compact areas until September 30, 2005; detailed the progress compact areas had made toward completing their milestones; described the actions/milestones required for compact areas in order to remain eligible for a deferred effective date for a nonattainment designation; detailed EPA's schedule for taking further action to determine whether to further defer the effective date of nonattainment designations; and described the consequences for compact areas that do not meet a milestone.

In the April 2004 action, we also discussed three compact areas which did not meet the March 31, 2004, milestone: Knoxville, Memphis, and Chattanooga, Tennessee. Knoxville and Memphis were designated nonattainment effective June 15, 2004. Chattanooga was later determined to have met the March 31, 2004, milestone, and we deferred the designation date until September 30, 2005 (69 FR 34080). This brought the number of participating compact areas to 31. Since then, two additional areas, Haywood and Putnam Counties, Tennessee have withdrawn from the program, leaving the participating number of compact areas at 29.

On August 29, 2005, we published a final rule extending the deferred effective date of designation from September 30, 2005, to December 31, 2006, for the same 14 compact areas. In order to receive this second deferral, EAC areas needed to submit a State Implementation Plan (SIP) with locally adopted measures and a modeled attainment demonstration by December 31, 2004. The EPA approved the SIP revisions as meeting the EAC Protocol and EPA's EAC regulations at 40 CFR 81.300, and these approvals were the basis for extending the deferred effective date until December 31, 2006. Information on local measures, SIP submittals and background on the EAC program may be found on EPA's Web site at: *http://www.epa.gov/ttn/naaqs/ozone/eac/*.

On November 29, 2006, we published a final rule extending the deferred effective date of designation for 13 EAC areas from December 31, 2006, to April 15, 2008, and for the Denver EAC area until July 1, 2007. For that deferral, all compact areas were required to submit two progress reports, one by December 30, 2005, and the other by June 30, 2006. In these progress reports, the States provided information on progress towards implementing local control measures that were incorporated in their SIPs. Each of the EAC areas submitted the required progress reports and these reports are available at *http://www.epa.gov/ttn/naaqs/ozone/eac/*. Issues were noted by the State of Colorado with the Denver EAC area regarding emissions from oil and gas exploration and production condensate tanks. In a report and action plan submitted by the State of Colorado to EPA, dated June 2, 2006, the State provided information that indicated volatile organic compound (VOC) emissions from oil and gas operations within the Denver EAC area were higher than had been estimated in the attainment demonstration modeling. In response to this issue, the State of Colorado initiated public rulemaking activities to amend Colorado's Regulation No. 7 to require additional emissions reductions from oil and gas exploration and production condensate tanks to achieve the level of reductions relied on in the EPA-approved modeled attainment demonstration. However, an issue arose because the State's rulemaking efforts before the Colorado Air Quality Commission (AQCC) in the latter part of 2006 would not be completed before EPA needed to publish a final rule for the last deferral of the effective date of the nonattainment designations for all of the EAC areas (see 71 FR 69022, November 29, 2006).

Based on the above information, EPA decided to defer the effective date of the nonattainment designation for the Denver EAC area until July 1, 2007. This decision was designed to accommodate the necessary State rulemaking activities and to also ensure that continued progress was made on the Regulation No. 7 rulemaking actions as they proceeded before the AQCC and State Legislature. In our November 29, 2006, final rulemaking, we detailed a timeline for subsequent rulemaking action for the Denver EAC area.

Since the November 29, 2006, rulemaking, all compact areas submitted their six month progress reports in December 2006 as required. These reports were reviewed and approved by EPA. You may find copies of the December progress reports at *http://www.epa.gov/ttn/naaqs/ozone/eac/index.htm#List*.

IV. What Progress Has the Denver Early Action Compact Area Made?

On December 31, 2006, the State of Colorado submitted their progress report for the Denver EAC area to EPA indicating that progress had been made in several areas. On September 21, 2006 the Colorado Department of Public Health and Environment's (CDPHE) Air Pollution Control Division (APCD) presented proposed revisions to Colorado's Regulation No. 7, before the Colorado AQCC, for a more stringent regulatory scheme to control VOCs from oil and gas exploration and production condensate tanks located in the Denver EAC area. These proposed revisions to Section XII of Regulation No. 7 were amended and adopted by the AQCC on December 17, 2006 along with associated revisions to the EPA-approved Denver EAC Ozone Action Plan. These AQCC rulemaking actions are for the purpose of achieving the required VOC emissions reductions from the oil and gas exploration and production condensate tanks that are located within the Denver EAC area boundary. In addition, the State continues working with all parties to reduce emissions of ozone and its precursors.

The EPA's deferral of the effective date of the nonattainment designation of the Denver EAC area was based upon the actions of the AQCC on December 17, 2006, to approve revisions to Colorado's Regulation No. 7 and also in consideration of the review of those AQCC-approved revisions, from January 15, 2007, to February 15, 2007, by the Colorado State Legislature. The State Legislature did not object or seek further review of the December 17, 2006, actions of the AQCC, which meant that all changes to Regulation No. 7 were automatically adopted and were to be submitted to EPA for final approval and incorporation into the SIP. The changes in Regulation 7 contain a compliance date of May 1, 2007, which is just before the beginning of the Colorado high ozone season.

V. What Comments Did EPA Receive on the March 1, 2007 Proposal To Extend the Deferral of the Effective Date of the Nonattainment Designation for the Denver Early Action Compact?

We received 12 comments on the proposed rule to extend the deferred effective date of the nonattainment designation for the Denver EAC to April 15, 2008. We have responded to the comments in this section.

Comment: Two commenters stated that EPA lacks authority under the CAA to defer the effective date of nonattainment designations (in particular as this applies to the Denver EAC); enter into EACs with areas; and allow areas to be relieved of obligations under Title I, Part D of the CAA while they are violating the 8-hour ozone standard or are designated nonattainment for that standard.

Response: We have determined that EACs as designed, give local areas and the State the flexibility to develop their own approach to meeting the 8-hour ozone standard. In this case, the State of Colorado is serious in its commitment and has made progress implementing State and local measures for controlling emissions from sources earlier than the CAA would otherwise require. People living in the Denver metropolitan area and other EAC areas are already breathing healthier air due to reductions in ozone pollution achieved by the EAC attainment plan and these benefits would not otherwise have been realized until after June 2007 if the Denver EAC and other EAC areas had been designated nonattainment.

Comment: One commenter expressed concerns that if Denver violated the 8-hour ozone standard, EPA would not designate the area nonattainment.

Response: EPA's requirements for EAC areas are codified at 40 CFR 81.300, and ensure that if Denver violates the 8-hour ozone standard, the nonattainment designation for the area will take effect. Under these provisions, States with EAC areas have until December 31, 2007, to demonstrate attainment of the 8-hour ozone NAAQS. If an EAC area does not attain the 8-hour ozone standard, the nonattainment designation becomes effective as of April 15, 2008. See 40 CFR 81.300(e)(3)(ii)(C). The area will then be subject to the full planning requirements of title I, part D of the CAA. 40 CFR 81.300 requires former EAC areas that are designated nonattainment to submit a revised attainment demonstration SIP within 1 year of the effective date of the nonattainment designation.

Comment: The emissions reductions from the final revised Regulation No. 7 will be less than reductions that would have been achieved by the original proposed revisions.

Response: We believe the modeled attainment demonstration is the appropriate benchmark for our consideration, not whether the original proposed revisions would have achieved a 77% reduction versus a 75% reduction achieved by the adopted rules. After EPA initially approved the attainment demonstration for the area, the State and EPA realized that the rules requiring reductions of VOC emissions from condensate tanks did not achieve the level of reduction relied on as part of the modeled attainment demonstration. This is because growth in condensate tank flash emissions was significantly greater than anticipated. According to the State's updated inventory projections and calculations, the 75% reduction of VOC emissions required by Section XII of Colorado's revised Regulation No. 7 is consistent with the control scenario inventory value for 2007 (91.3 tons per day) relied on in the modeled attainment demonstration. See the Colorado Air Pollution Control Division's presentation for the rulemaking hearing on the revisions to Regulation No. 7, which can be found at *http://www.cdphe.state.co.us/ap/reg7/Reg7AQCCDec.pdf*.

Comment: Due to the change to weekly calculations of emissions and the use of a system-wide approach, APCD and citizens won't know if required reductions are met until after the fact. Citizens will not be able to react in time to prevent unhealthy ozone pollution if companies fail to meet the required emissions reductions.

Response: While we originally favored the threshold approach, we believe the system-wide approach is enforceable and will lead to the projected reductions. We already approved a system-wide approach when we approved the previous revisions to Regulation No. 7 (See 70 FR 48652, August 19, 2005). We believe the current revisions make significant improvements to the original approach that will lead to improved compliance. We note that with any emission limit, compliance is judged after the fact. The commenter did not provide (and EPA is not aware of) any support for his concern that weekly calculations will significantly alter EPA's, the State's or a citizen's ability to address violations in a timely way.

Comment: The commenter is concerned that the Denver EAC area's ozone levels approached unhealthy levels in 2006.

Response: EPA agrees that several exceedances of the 8-hour ozone NAAQS were observed in the Denver EAC area's air quality monitoring network in 2006. However, even with these exceedances none of the ambient air quality monitors in the 8-hour ozone monitoring network recorded a violation of the 8-hour ozone NAAQS. Further, we note that the ambient air quality monitors for the Denver EAC area have shown attainment of the 8-hour ozone NAAQS for the periods, 2002 through 2004, 2003 through 2005, and 2004 through 2006. Although the Denver EAC area has not violated the standard for the past three 3-year periods, EPA notes that air quality in the area remains very close to the standard, indicating that the additional emission reductions revised Regulation No. 7 will achieve are important to ensure that air quality in the area remains below the standard. EPA notes the commenter's concerns for the potential for a violation of the 8-hour ozone NAAQS during the 2007 ozone season. If this happens, the area will be designated nonattainment.

Comment: It is unclear how deferring Denver's nonattainment designation will further the goal of reducing ozone pollution/protecting health.

Response: We believe that the EAC has already achieved reductions in ozone precursor emissions that would not yet have been achieved had Denver followed the traditional nonattainment designation pathway. The State's and the area's desire to achieve an attainment designation has led to two rounds of significant revisions to Colorado's Regulation No. 7, revisions that are already reducing ozone pollution in the area. If the area had been designated nonattainment on June 15, 2004, an attainment demonstration SIP wouldn't have been due until June 15, 2007. Thus, with the EAC, emission reductions have been achieved earlier than they would have been under the standard designation procedures.

Comment: The commenter notes that the Denver EAC has fallen short of achieving the planned reductions in emissions of ozone forming compounds from condensate tanks.

Response: The commenter is correct that actual growth in flash emissions of VOCs has significantly exceeded the State's projections in the original Denver EAC SIP as approved by EPA on August 19, 2005 (70 FR 48652). The State identified this issue in its June 2, 2006, EAC progress report and has since taken steps to address it.

We explain this more fully in our final rule of November 29, 2006 (71 FR 69022). In that final rule, we discuss the State's acknowledgement of the increase in VOC emissions from oil and gas activities, the State's report of June 2, 2006, detailing these findings (see 71 FR 69023), and the State's rulemaking efforts to achieve the necessary additional emission reductions to meet the projections relied upon in the EPA-approved attainment demonstration (see 71 FR 69025.) As noted in our proposed rule of March 1, 2007 (72 FR 9285), the State revised Colorado's Regulation No.7, ''Emissions of Volatile Organic Compounds,'' to require additional emission reductions from oil and gas exploration and production condensate tanks to achieve the level of reductions relied on in the EPA-approved modeled attainment demonstration. The Colorado AQCC approved these revisions to Regulation No. 7 on December 17, 2006. Thus, the State has taken the steps necessary to address the shortfall in emission reductions under the prior version of Colorado's Regulation No. 7.

Comment: The commenter expresses concerns with emissions of ozone forming compounds from other oil and gas exploration and production activities that were not addressed as part of the Denver EAC attainment demonstration, such as emissions from drill rigs, well completions, fugitive leaks, water tanks, and heater treaters. According to the commenter, oil and gas drilling has increased north of Denver, and infrared photography shows the potentially large amount of fugitive emissions from condensate tanks.

Response: We note that the State is not required to control all emission sources as part of its SIP. Instead, the goal of the SIP program is to ensure that

sources are controlled to ensure that the area will attain and maintain the relevant NAAQS. The State is free to choose the mix of sources necessary to achieve that goal and EPA cannot second guess the State if the plan demonstrates compliance with the NAAQS. At the time the State was conducting the modeling for the attainment demonstration, flash emissions from condensate tanks were considered the most significant source of largely uncontrolled VOC emissions. As a result, the State targeted control of these emissions as the best means to attain the 8-hour ozone standard. By correcting the defects in the regulation regulating these sources, we believe the State's plan will demonstrate attainment and maintenance of the 8-hour NAAQS and we cannot disapprove the plan on the basis that the State has not chosen to regulate certain other sources to reach this goal.

Regarding fugitive emissions and infrared photography, we note that photos at one source may not be representative of emissions at another source, and the infrared photos shown tell us nothing about the VOC concentrations in the emissions.

Comment: The commenter is concerned that 29 reciprocating internal combustion engines have been granted exemptions from installing pollution controls to reduce emissions of VOCs and nitrogen oxide (NOx). The commenter indicates that Kerr-McGee has simply failed to install the controls at 11 of its internal combustions engines.

Response: Certain reciprocating internal combustion engines have been granted exemptions from controlling emissions of VOCs because they meet the exemption criteria stipulated in section XVI of Colorado's Regulation No. 7. EPA approved the control requirements and these exemption criteria for internal combustion engines when it approved the rest of Colorado's Regulation No. 7 on August 19, 2005 (see 70 FR 48652).

Regarding Kerr-McGee's 11 engines, the State has issued a Notice of Violation and is currently negotiating a settlement with Kerr-McGee to control emissions from these engines. In other words, the State is taking appropriate steps to ensure compliance with the EAC plan and Colorado's Regulation No. 7.

Comment: The commenter is concerned that the modeling for the EAC may have underestimated emissions due to the reactivity of VOC emissions.

Response: The reactivity of VOC emissions is embedded as a function in the EPA-approved CAM_x dispersion model that the State used to model attainment in the Denver EAC area. Measured values for the various VOCs are input into the CAM_x model, and the model's embedded Carbon Bond photochemical algorithm processes these values to produce an estimate of ozone concentrations. This algorithm has reactivity profiles for each VOC chemical species already built into it. We don't adjust the reactivities for individual SIP applications—the Carbon Bond mechanism is a ''canned'' algorithm. While the commenter is correct that alkanes as a group may be more reactive as an ozone precursor in an urban atmosphere where there are more compounds with which to react, the Carbon Bond mechanism already accounts for this; the reactivity profiles account for a higher degree of chemical reactivity in a polluted urban environment. We note that the State's contractor utilized the most current version of CAM_x when it conducted the dispersion modeling in 2003 and early 2004.

Comment: The commenter noted that industry is failing to fully comply with the required emission reductions from flash emissions from condensate tanks as required under the EAC.

Response: While EPA agrees that compliance with the control requirements in the approved attainment demonstration has not been 100%, we note that the State is taking appropriate steps to achieve the compliance effectiveness to support the EAC. We note the table provided in the commenter's letter presents historical information from 2005.

On December 31, 2006, the State submitted a progress report for the Denver EAC area to EPA indicating that progress has been made in several areas. Additional compliance data collected by the State indicated overall control for the 2006 ozone season met Regulation No. 7's 47.5% VOC emission reduction requirement. This is because some larger sources achieved greater reductions than required. For those sources that did not meet the regulation's requirements, the State is pursuing enforcement/negotiations to ensure compliance.

Additionally, the table the commenter cites may not accurately address those condensate tanks that were exempt from the requirements of section XII of Regulation No. 7. For example, the entry for Machii Ross shows uncontrolled emissions of 17.04 tons per year which would have made this an exempt facility; at that time, controls were only required if emissions were 30 tons per year or greater.

Finally, compliance shortcomings are not unusual when an activity or industry is first regulated. We have no reason to think that compliance would have been better if the area had been designated nonattainment. If the State had not moved to rectify the problems, we would be very concerned. However, we believe the State is taking appropriate steps to ensure compliance with the EAC attainment plan and Colorado's Regulation No. 7, and we believe these steps will result in rates of compliance consistent with projections.

Comment: The commenter raises a concern that the revisions to Colorado's Regulation No. 7, adopted by the AQCC on December 17, 2006, have not been incorporated into the Colorado SIP.

Response: The commenter is correct that the revisions to Regulation No. 7 have not been federally-approved and incorporated into Colorado's SIP. However, as described in our proposed rule of March 1, 2007 (72 FR 9285), the revisions to Colorado's Regulation No. 7 made it through Colorado's Legislative review process without changes, and we expect to receive the Governor's submittal of the revisions for our approval shortly. Once we receive the submittal, we intend to expedite our action on it.

In the meantime, the Regulation No. 7 revisions have been adopted by the State and are fully enforceable by the State. Sources must start complying with the revised regulation by May 1, 2007. As indicated in response to previous comments, the State is taking appropriate steps to ensure compliance with the regulation, and we fully expect the State will continue its efforts.

VI. What Is the Final Action for the Denver Early Action Compact Area?

Rocky Mountain Clean Air Action (RMCAA) challenged our action deferring the effective date of the nonattainment designation of the Denver EAC area until July 1, 2007. 71 Fed. Reg. 69022 (November 29, 2006). *Rocky Mountain Clean Air Action* v. *EPA*, D.C. Cir. No. 07–1012. We are currently in settlement discussions with RMCAA. In order to preserve the status quo while we continue settlement discussions, we are taking final action at this time to issue a short further deferral of the effective date of designation for Denver until September 14, 2007. We are leaving open our proposal to the extent that we initially proposed to extend the deferral to as late as April 15, 2008. We may in the future take additional final action pursuant to that proposal to extend the deferral beyond September 14, 2007.

This action will be effective June 28, 2007. Because this action will relieve a restriction by further deferring the effective date of the nonattainment designation for the Denver EAC area, the requirement of section 553(d) of the Administrative Procedure Act that a rule not take effect earlier than 30 days following publication does not apply.

VII. What Is EPA's Schedule for Taking Further Action for Early Action Compact Areas?

All EAC areas have one remaining milestone which is to demonstrate attainment with the 8-hour ozone NAAQS by December 31, 2007. No later than April 15, 2008, we will determine whether the compact areas that received a deferred effective date of April 15, 2008, attained the 8-hour ozone NAAQS by December 31, 2007, and met all compact milestones. If the area did not attain the standard, the nonattainment designation will take effect. If the compact area attained the standard, EPA will designate the area as attainment. Any compact area that did not attain the NAAQS and thus has an effective nonattainment designation will be subject to the full planning requirements of title I, part D of the CAA, and the area will be required to submit a revised attainment demonstration SIP within 1 year of the effective date of designation.

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' in that it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the EO. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This final rule does not require the collection of any information.

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; 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.

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 Office of Management and Budget (OMB) control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of this proposed rule on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this rule will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. Rather, this rule would extend the deferred effective date of the nonattainment designation for the Denver area to implement control measures and achieve emissions reductions earlier than otherwise required by the CAA in order to attain the 8-hour ozone NAAQS.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. In this final rule, EPA is deferring the effective date of nonattainment designation for the Denver EAC. Thus, this final rulemaking is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments because this rule does not contain Federal mandates.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the E.O. to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The CAA establishes the scheme whereby States take the lead in developing plans to meet the NAAQS. This final rule would not modify the relationship of the States and EPA for purposes of developing programs to implement the NAAQS. Thus, E.O. 13132 does not apply to this final rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have ''Tribal implications'' as specified in E.O. 13175. It does not have a substantial direct effect on one or more Indian Tribes, since no Tribe has implemented a CAA program to attain the 8-hour ozone NAAQS at this time or has participated in a compact.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children From Environmental Health and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This final rule is not subject to E.O. 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355; May 22, 2001 because it is not a significant regulatory action under E.O. 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

This final rule does not involve technical standards. Therefore, EPA is not considering the use of any VCS. The EPA will encourage States that have compact areas to consider the use of such standards, where appropriate, in the development of their SIPs.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629; Feb. 16, 1994 establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The health and environmental risks associated with ozone were considered in the establishment of the 8-hour, 0.08 ppm ozone NAAQS. The level is designed to be protective with an adequate margin of safety.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective June 28, 2007.

L. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by August 27, 2007. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review must be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* CAA Section 307(b)(2).

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control.

Authority: 42 U.S.C. 7408; 42 U.S.C. 7410; 42 U.S.C. 7501–7511f; 42 U.S.C. 7601(a)(1).

Dated: June 22, 2007.

Stephen L. Johnson,

Administrator.

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

PART 81—[AMENDED]

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

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

Subpart C—Section 107 Attainment Status Designations

■ 2. Section 81.300 is amended by revising the last sentence in paragraph (e)(3)(i) to read as follows:

§ 81.300 Scope.

* * * * *

(e) * * *

(3) * * *

(i) *General.* * * * The Administrator shall defer until September 14, 2007 the effective date of a nonattainment designation of the Denver area.

* * * * *

■ 3. In § 81.306, the table entitled ''Colorado-Ozone (8-Hour Standard)'' is amended by revising footnote 2 to read as follows:

§ 81.306 Colorado.

* * * * *

Colorado-Ozone (8-Hour Standard)

* * * * *

[2] Early Action Compact Area, effective date deferred until September 14, 2007.

* * * * *

[FR Doc. E7–12570 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1983–0002; FRL–8331–4]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Direct Final Deletion of the Mannheim Avenue Dump Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA), Region II, announces the deletion of the Mannheim Avenue Dump Superfund Site (Site), located in Galloway Township, New Jersey, from the National Priorities List (NPL) and will consider public comment on this action. The NPL was promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended and is Appendix B of 40 CFR part 300, which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This Direct Final Deletion is being published by EPA with the concurrence of the State of New Jersey, through the New Jersey Department of Environmental Protection (NJDEP). EPA and NJDEP have determined that potentially responsible parties have implemented all appropriate response actions under CERCLA, and further remedial action pursuant to CERCLA is not appropriate. Moreover, EPA and NJDEP have determined that the Site poses no significant threat to public health and the environment.

DATES: This direct final deletion will be effective August 27, 2007 unless EPA receives significant adverse comments by July 30, 2007. If significant adverse comments are received, EPA will publish a timely withdrawal of the direct final deletion in the **Federal Register**, informing the public that the deletion will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1983–0002, by one of the following methods:

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

E-mail: robinson.nigel@epa.gov: Nigel Robinson, Remedial Project Manager *seppi.pat@epa.gov:* Pat Seppi, Community Involvement Coordinator.

Fax: (212) 637–4429

Mail: Nigel Robinson, Remedial Project Manager, U.S. Environmental Protection Agency, Region II, Emergency & Remedial Response Division, 290 Broadway, 19th Floor, New York, NY 10007; or Pat Seppi, Community Involvement Coordinator, U.S. Environmental Protection Agency, Region II, Public Affairs Division, 290 Broadway, 26th Floor, New York, NY 10007.

Hand delivery: U.S. Environmental Protection Agency, Emergency & Remedial Response Division, 290 Broadway, 19th Floor, New York, NY 10007.

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–SFUND–1983–0002. 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 *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statue. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at:

U.S. Environmental Protection Agency, Region II, Superfund Records Center, 290 Broadway, Room 1828, New York, New York 10007–1866, (212) 637–4308, Hours: 9 a.m. to 5 p.m., Monday through Friday; and at

Atlantic County Library, Galloway Township Branch, 306 W. Jimmie Leeds Road, Pomona, NJ 08240; Hours: Mon–Th, 9 a.m.–8 p.m., Fri–Sat, 9 a.m.–5 p.m., (609) 652–2352.

Nigel Robinson, Remedial Project Manager, Emergency & Remedial Response Division, U.S. Environmental Protection Agency, Region II, 290 Broadway, 19th floor,

New York, New York 10007–1866; or e-mail to: *robinson.nigel@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Nigel Robinson, Remedial Project Manager, U.S. Environmental Protection Agency, Emergency & Remedial Response Division, 290 Broadway, 19th floor, New York, New York 10007; telephone number (212) 637–4394; Fax Number (212) 637–4429; e-mail address: *robinson.nigel@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. NPL Deletion Criteria
III. Deletion Procedures
IV. Basis for Site Deletion
V. Deletion Action

I. Introduction

EPA Region II announces the deletion of the Mannheim Avenue Dump Superfund Site from the NPL. EPA maintains the NPL as the list of those sites that appear to present a significant risk to public health or the environment. Sites on the NPL can have remedial actions financed by the Hazardous Substances Superfund Response Trust Fund. As described in Section 300.425(e)(3) of the NCP, a site deleted from the NPL remains eligible for remedial actions if conditions at the site warrant such action.

EPA considers this action to be noncontroversial and routine, and therefore, EPA is taking it without prior publication of a Notice of Intent to Delete. This action will be effective August 27, 2007 unless EPA receives significant adverse comments by July 30, 2007 on this action or the parallel Notice of Intent to Delete published in the Notice section of today's **Federal Register**. If significant adverse comments are received within the 30-day public comment period of this action or the Notice of Intent to Delete, EPA will publish a timely withdrawal of this Direct Final Deletion before the effective date of the deletion and the deletion will not take effect. EPA will, if appropriate, prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments already received. There will be no additional opportunity to comment.

Section II explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the Mannheim Avenue Dump Superfund Site and demonstrates how it meets the deletion criteria. Section V discusses EPA's action to delete the Site from the NPL unless adverse comments are received during the public comment period.

II. NPL Deletion Criteria

Section 300.425(e) of the NCP provides that sites may be deleted from the NPL where no further response is appropriate. EPA shall consider, in consultation with the State of New Jersey, whether any of the following criteria has been met:

i. Responsible parties or other parties have implemented all appropriate response actions required;

ii. All appropriate Fund-financed response under CERCLA has been implemented, and no further action by responsible parties is appropriate; or

iii. The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, taking remedial measures is not appropriate.

Further, the State of New Jersey shall concur with the deletion, in accordance with Section 300.425(e)(2) and the public will be informed of the proposed and final deletion action, in accordance with Section 300.425(e)(4) and (5). In addition, a site deleted from the NPL remains eligible for remedial actions if conditions at the Site warrant such action, in accordance with Section 300.425(e)(3).

III. Deletion Procedures

The following procedures apply to deletion of the Site:

(1) The EPA consulted with the NJDEP and NJDEP concurred with the deletion on August 30, 2006.

(2) A Final Close Out Report was prepared on April 2, 2007.

(3) Concurrently with the publication of this Direct Final Deletion, a Notice of Intent to has been published today in the ''Notice'' section of the **Federal Register**. Notices are also being published in a major local newspaper of general circulation at or near the Site and is being distributed to appropriate federal, state, and local government officials and other interested parties; the newspaper notice announces the 30-day public comment period concerning the Notice of Intent to Delete the Site from the NPL.

(4) The EPA placed copies of documents supporting the deletion in the Site information repositories identified above.

(5) If no significant adverse comments are received, the Site will be deleted. If adverse comments are received within the 30-day public comment period on this action, EPA will publish a timely notice of withdrawal of this deletion before its effective date and will prepare, if appropriate, a response to comments and may continue with the deletion process on the basis of the Notice of Intent to Delete and the comments received.

Deletion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a site from the NPL does not in any way alter EPA's right to take enforcement actions, as appropriate.

IV. Basis for Site Deletion

The following summary provides a brief description of the actions taken at this Site which provides the Agency's rationale for deletion. The Mannheim Avenue Dump Site is located along Mannheim Avenue in a two acre sand and gravel clearing occupying Lots 2 and 3 of Block 54 in Galloway Township, Atlantic County, New Jersey. The Site lies on Mannheim Avenue between Shiler Road and Clarks Landing Road. The Site is approximately 1,500 feet southeast of Tar Kiln Branch and two miles southwest of the Mullica River.

The Site was originally used as a sand and gravel excavation operation by Galloway Township for road construction materials. After mining operations ceased in 1964, the excavated portions of the Site were used for waste disposal. Beginning in 1964, Lenox, Inc. obtained permission from Galloway Township to use the Site to dispose of industrial waste produced at its manufacturing facility in Pomona, New Jersey. Drummed wastes from Lenox, Inc. along with other municipal waste were disposed of in the excavated areas and covered with soil. Leaded porcelain fragments and household refuse were also mixed in with the waste. An investigation by NJDEP in 1982 revealed that many of the drums were exposed and deteriorating. Samples collected from the exposed drums indicated the presence of trichloroethylene (TCE), toluene, ethylbenzene, methylene chloride, cadmium, lead, nickel and chromium. The Site was placed on the National Priorities List (NPL) in 1983. Under a 1984 EPA Administrative Order, Lenox, a PRP, undertook the removal and off-site disposal of waste material buried in soil mounds at the Site. In July and August of 1985, the site was fenced and approximately 25,000 pounds of waste, 95 percent of the wastes, were consolidated into drums and disposed of off-site. In June 1989, the remaining wastes were also disposed of, off-site. In 1985 and 1986, Lenox conducted soil, groundwater, surface water, and domestic well sampling. This sampling showed that the principal contaminants within the waste at the Site were lead

and TCE. In accordance with a 1988 Administrative Order on Consent, Lenox and the Township of Galloway conducted a remedial investigation (RI). The RI revealed levels of TCE below the detection limit of 0.5 parts per million (ppm) for Site soils. For lead, only one of the twenty samples analyzed contained lead above EPA's acceptable level for residential use of 400 ppm. The average lead concentrations in these samples was 80 ppm, substantially below EPA's current cleanup criteria of 400 ppm. Consequently, no further action for Site soils was conducted under CERCLA.

On September 27, 1990, EPA issued a ROD for the groundwater remediation. The selected remedy included:

—Restoration of the groundwater aquifer to the maximum contaminant level (MCL) of 1 part per billion (ppb) for TCE by extracting contaminated groundwater from both the shallow and deep zones of the aquifer system, followed by on-site treatment and discharge of the treated groundwater back to the aquifer;

—Short-term and long-term monitoring of the groundwater to ensure the effectiveness of the system in removing contaminants and controlling migration; and

—Contingency planning to install individual carbon adsorption treatment units at residences, if monitoring indicates that site-related contamination is threatening residential wells.

In June 1991, Lenox and the Township of Galloway, entered into a Consent Decree with EPA to implement the remedy selected in the ROD. This implementation involved the performance of the Remedial Design (RD) and the construction of the remedy. Between November 1993 and January 1994, Lenox installed Point of Entry Treatment Systems (POETS) to six of the fourteen residential wells downgradient of the Site. The installation was based on the detection of low levels of TCE in one of the monitoring wells located on-site upgradient of the residential wells. POETS are granular activated carbon absorption filter systems that provide clean drinking water by removing organic contaminants from the incoming groundwater supply. The POETS were sampled on the same sampling schedule as the monitoring wells. In 1994, construction of the groundwater remediation system was completed and the system began operating. Sampling of the groundwater monitoring wells, the POETS and the treatment system influent and effluent was initially performed. After operating for 14 months, sampling data in 1995 indicated that TCE in the influent groundwater to the treatment plant had decreased to less than 1 ppb. The data prompted Lenox to petition EPA for permission to shut down the treatment plant. EPA agreed with the shut down of the treatment plant, but required that monitoring continue.

EPA conducted a five-year review of the site in September 1999 and found the remedy protective of human health and the environment. From January 1999 through April 2002, all but one monitoring well achieved the New Jersey Drinking Water Standard of 1 ppb for TCE. This well did however achieve the cleanup standard in October 2002. From October 2002 through October 2003, four rounds of groundwater sampling indicated that all monitoring wells had achieved the groundwater cleanup standard of 1 ppb for TCE. Based on the sampling data, EPA allowed the PRPs to discontinue groundwater monitoring at the site. The second five-year review, completed in September 2004 determined that the implemented remedy not only continued to be protective of human health and the environment but had achieved the goal set forth in the ROD of restoring the groundwater aquifer to Drinking Water Standard and recommended deletion of the site from the NPL.

In 2005, the PRPs initiated the closure of all monitoring and extraction wells; this task was completed in 2006. Monitoring is no longer being conducted because the site allows for unlimited use and unrestricted exposure, residential cleanup criteria have been achieved for both groundwater and soils. No further monitoring is required for POETS, since the residential groundwater cleanup criteria for the site has been achieved. The POETS are currently owned and maintained by the PRPs. Since the POETS are no longer required, they will either be disconnected or their ownership will be transferred to the homeowners who will then be responsible for future sampling and maintenance. The State of New Jersey and the Atlantic County Health Department are aware of this process and may decide to continue the sampling and maintenance of these POETS.

Public participation activities for the Site have been satisfied as required in CERCLA section 113(k), 42 U.S.C. 9613(k), and CERCLA section 117, 42 U.S.C. 9617. The RI/FS and the 1990 ROD were both subject to a public review process. The five-year reviews were also locally noticed to the public. All documents and information which EPA relied on or considered in reaching the conclusion that this Site can be deleted from the NPL are available to the public in the information repositories.

V. Deletion Action

The EPA, with concurrence of the State of New Jersey, has determined that all appropriate responses under CERCLA have been completed, and that no further response actions, under CERCLA are necessary. Therefore, EPA is deleting the Site from the NPL.

Because EPA considers this action to be noncontroversial and routine, EPA is taking it without prior publication. This action will be effective August 27, 2007 unless EPA receives adverse comments by July 30, 2007. If adverse comments are received within the 30-day public comment period, EPA will publish a timely withdrawal of this direct final notice of the deletion before the effective date of the deletion and it will not take effect and, EPA will prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete and comments already received. There will be no additional opportunity to comment.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: April 27, 2007.

Alan J. Steinberg,

Regional Administrator, Region 2.

■ For the reasons set out in this document 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

■ 1. The authority citation for Part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9675; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Appendix B—[Amended]

■ 2. Table 1 of Appendix B to part 300 is amended under New Jersey (NJ) by removing the site name ''Mannheim Avenue Dump'' and the corresponding city/county designation ''Galloway Township.''

[FR Doc. E7–12536 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 07–2389; MB Docket No. 03–57; RM–10565]

Radio Broadcasting Services; Crede, Fort Collins, Westcliffe and Wheat Ridge, CO

AGENCY: Federal Communications Commission.

ACTION: Final rule; dismissal.

SUMMARY: This document dismisses an Application for Review filed by Meadowlark Group, Inc. directed to the *Memorandum Opinion and Order* in this proceeding. With this action, the proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Media Bureau, (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Memorandum Opinion and Order* in MB Docket No. 03–57, adopted June 6, 2007, and released June 8, 2007. The full text of this decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* This document is not subject to the Congressional Review Act. (The Commission is, therefore, not required to submit a copy of this Report and Order to GAO, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because this proposed rule was dismissed.)

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E7–12546 Filed 6–27–07; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register

Vol. 72, No. 124

Thursday, June 28, 2007

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 1, 101, 400, and 401

[Docket No. FAA–2007–27390; Notice No. 07–06]

RIN 2120–AI88

Requirements for Amateur Rocket Activities; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rule; correction.

SUMMARY: This document corrects the docket number to a proposed rule published in the **Federal Register** of Thursday, June 14, 2007, regarding Requirements for Amateur Rocket Activities.

DATES: The comment period will close September 12, 2007.

FOR FURTHER INFORMATION CONTACT: Charles P. Brinkman, telephone: (202) 493–4562, or E-mail: *phil.brinkman@faa.gov.*

Correction

In proposed rule Requirements for Amateur Rocket Activities beginning on page 32816 in the **Federal Register** issue of June 14, 2007, make the following corrections.

1. On page 32816, in the first column, fourth line of the heading, ''Docket No. FAA–2007–27310'' should have read, ''Docket No. FAA–2007–27390.''

2. On page 32816, in the first column, in the **ADDRESSES** paragraph, in the second and third lines, ''Docket Number FAA–2007–27310'' should have read ''Docket Number FAA–2007–27390.''

Issued in Washington, DC on June 21, 2007.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. E7–12463 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28172; Directorate Identifier 2007–NE–23–AD]

RIN 2120–AA64

Airworthiness Directives; General Electric Company (GE) CF6–80C2A5F Turbofan Engines

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for GE CF6–80C2A5F turbofan engines installed on Airbus A300 series airplanes. This proposed AD would require removing previous software versions from the engine electronic control unit (ECU). Engines with new version software will have increased margin to flameout. This proposed AD results from reports of engine flameout events during flight, including reports of events where all engines simultaneously experienced a flameout or other adverse operation. Although the root cause investigation is not yet complete, we believe that exposure to ice crystals during flight is associated with these flameout events. We are proposing this AD to minimize the potential of an all-engine flameout event caused by ice accretion and shedding during flight.

DATES: We must receive any comments on this proposed AD by August 27, 2007.

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

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *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.
- *Fax:* (202) 493–2251.

You can get the service information identified in this proposed AD from General Electric Company via Lockheed Martin Technology Services, 10525 Chester Road, Suite C, Cincinnati, Ohio 45215, telephone (513) 672–8400, fax (513) 672–8422.

FOR FURTHER INFORMATION CONTACT: John Golinski, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *john.golinski@faa.gov;* telephone: (781) 238–7135, fax: (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2007–28712; Directorate Identifier 2007–NE–23–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Discussion

GE CF6–80C2 and CF6–80E1 series turbofan engines continue to experience flameout events caused by ice accretion and shedding into the engine during flight. Although the investigation is not yet complete, we believe that the ice accretion is caused by exposure to ice crystals during flight. Industry reports 34 airplane flameout events, including reports of multi-engine events where all engines on the airplane simultaneously experienced a flameout. Some of these events had high pressure compressor blade damage that may have been caused by impact with shedding ice. In all events, the engines restarted and continued to operate normally for the remainder of the flight.

This proposed AD addresses only the CF6–80C2A5F turbofan engines, installed on Airbus A300 series airplanes. We believe this model of CF6–80C2 engine is susceptible to flameouts caused by ice accretion and shedding into the engine during flight. Similar AD actions for other CF6–80C2 and CF6–80E1 series engines may be forthcoming.

We view an all-engine flameout event as an unsafe condition particularly for low-altitude events, or other factors that might result in the inability to restart the engines and regain control of the airplane. Since some aspects of this problem are not completely understood, this proposed AD is considered an interim action due to GE's on-going investigation. Future AD action might become necessary based on the results of the investigation and field experience. This condition of insufficient margin to engine flameout due to ice accretion and shedding during flight, if not addressed, could result in an all-engine flameout event during flight.

Relevant Service Information

We have reviewed and approved the technical contents of GE Service Bulletin (SB) No. CF6–80C2 S/B 73–0352, dated February 7, 2007. That SB describes procedures for removing certain software versions from the ECU, and installing a software version that is FAA-approved. The new FAA-approved software version described in the SB modifies the variable bleed valve schedule, which will provide an increased margin to flameout. This increased margin is expected to reduce the rate of flameout occurrences due to ice accretion and shedding during flight.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD, which would require removing certain software versions from the engine ECU.

Interim Action

These actions are interim actions due to the on-going investigation. We may take further rulemaking actions in the future, based on the results of the investigation and field experience.

Costs of Compliance

We estimate that this proposed AD would affect 81 CF6–80C2A5F turbofan engines installed on Airbus A300 series airplanes of U.S. registry. We also estimate it would take about 3.5 work-hours per ECU to perform the proposed actions. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost to U.S. operators to be $22,680. Our cost estimate is exclusive of warranty coverage.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this 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 that the proposed AD:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Under the authority delegated to me by the Administrator, the Federal Aviation Administration 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:

General Electric Company: Docket No. FAA–2007–28172; Directorate Identifier 2007–NE–23–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by August 27, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to General Electric Company (GE) CF6–80C2A5F turbofan engines, installed on Airbus A300 series airplanes.

Unsafe Condition

(d) This AD results from reports of engine flameout events during flight, including reports of events where all engines simultaneously experienced a flameout or other adverse operation. We are issuing this AD to minimize the potential of an all-engine flameout event, due to ice accretion and shedding during flight. Exposure to ice crystals during flight is believed to be associated with these flameout events.

Compliance

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

Interim Action

(f) These actions are interim actions due to the on-going investigation, and we may take further rulemaking actions in the future based on the results of the investigation and field experience.

Engine ECU Software Removal

(g) Within 24 months after the effective date of this AD, remove software version 8.4.E or older versions, from the engine ECUs, part numbers 1797M63P01, 1797M63P02, 1797M63P03, 1797M63P04, 1797M63P05, 1820M99P01, 1820M99P02, 1820M99P03, 1820M99P04, and 1820M99P05.

Previous Software Versions of ECU Software

(h) You may use an ECU installed on an engine with a software version of 8.4.E or older for no longer than 24 months after the effective date of this AD.

(i) Once software version 8.4.E or older has been removed and new FAA-approved software version is installed in an ECU, reverting to version 8.4.E or older of ECU software in that ECU is prohibited.

(j) After 24 months from the effective date of this AD, use of an ECU with a software version of 8.4.E or older is prohibited.

Alternative Methods of Compliance

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

Special Flight Permits

(l) Special flight permits are not authorized.

Related Information

(m) Information on removing ECU software and installing new software, which provides increased margin to flameout, can be found in GE Service Bulletin No. CF6–80C2 S/B 73–0352 dated February 7, 2007.

(n) Contact John Golinski, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; email: *john.golinski@faa.gov*; telephone: (781) 238–7135, fax: (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on June 22, 2007.

Francis A. Favara,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E7–12490 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28379; Directorate Identifier 2007–NM–077–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

[T]he FAA has published SFAR 88 (Special Federal Aviation Regulation 88). * * * Under this regulation, all holders of type certificates for passenger transport aircraft * * * are required to conduct a design review against explosion risks. This Airworthiness Directive (AD), which renders mandatory the modification of the fuel pump wiring against short circuit, is a consequence of this design review.

The unsafe condition is chafing of the fuel pump cables, which could result in short circuits leading to fuel pump failure, intermittent operation, arcing, and possible fuel tank explosion. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by July 30, 2007.

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

- *DOT Docket Web Site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Fax:* (202) 493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5227) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Stafford, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1622; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Streamlined Issuance of AD

The FAA is implementing a new process for streamlining the issuance of ADs related to MCAI. This streamlined process will allow us to adopt MCAI safety requirements in a more efficient manner and will reduce safety risks to the public. This process continues to follow all FAA AD issuance processes to meet legal, economic, Administrative Procedure Act, and **Federal Register** requirements. We also continue to meet our technical decision-making responsibilities to identify and correct unsafe conditions on U.S.-certificated products.

This proposed AD references the MCAI and related service information that we considered in forming the engineering basis to correct the unsafe condition. The proposed AD contains text copied from the MCAI and for this reason might not follow our plain language principles.

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–28379; Directorate Identifier 2007–NM–077–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 based on those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each

substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2007–0066, dated March 13, 2007 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> [T]he FAA has published SFAR 88 (Special Federal Aviation Regulation 88). In their letters referenced 04/00/02/07/01–L296, dated March 4th, 2002 and 04/00/02/07/03–L024, dated February 3rd, 2003, the JAA (Joint Aviation Authorities) recommended the application of a similar regulation to the National Aviation Authorities (NAA).
>
> Under this regulation, all holders of type certificates for passenger transport aircraft with either a passenger capacity of 30 or more, or a payload capacity of 7,500 pounds (3402 kg) or more, which have received their certification since January 1st, 1958, are required to conduct a design review against explosion risks.
>
> This Airworthiness Directive (AD), which renders mandatory the modification of the fuel pump wiring against short circuit, is a consequence of this design review.
>
> **Note:** For A310 and A300–600 aircraft, refer to [EASA] AD 2006–0284R1. [On March 7, 2007, the FAA issued a corresponding NPRM for Model A310 and A300–600 airplanes, which was published in the **Federal Register** (72 FR 11302, March 13, 2007.)]

The unsafe condition is chafing of the fuel pump cables, which could result in short circuits leading to fuel pump failure, intermittent operation, arcing, and possible fuel tank explosion. You may obtain further information by examining the MCAI in the AD docket.

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (i.e., type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The JAA has issued a regulation that is similar to SFAR 88. (The JAA is an associated body of the European Civil Aviation Conference (ECAC) representing the civil aviation regulatory authorities of a number of European States who have agreed to co-operate in developing and implementing common safety regulatory standards and procedures.) Under this regulation, the JAA stated that all members of the ECAC that hold type certificates for transport category airplanes are required to conduct a design review against explosion risks.

We have determined that the actions identified in this AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Relevant Service Information

Airbus has issued Service Bulletin A300–24–0103, Revision 01, dated January 11, 2007. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 29 products of U.S. registry. We also estimate that it would take about 72 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $5,050 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $313,490, or $10,810 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA–2007–28379; Directorate Identifier 2007–NM–077–AD.

Comments Due Date

(a) We must receive comments by July 30, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A300 series airplanes, all certified models, all serial numbers, certificated in any category; except Model A300–600 series airplanes; and except those modified by Airbus Service Bulletin A300–24–0103, Revision 01, dated January 11, 2007.

Subject

(d) Electrical Power.

Reason

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

[T]he FAA has published SFAR 88 (Special Federal Aviation Regulation 88). In their letters referenced 04/00/02/07/01–L296, dated March 4th, 2002 and 04/00/02/07/03–L024, dated February 3rd, 2003, the JAA (Joint Aviation Authorities) recommended the application of a similar regulation to the National Aviation Authorities (NAA).

Under this regulation, all holders of type certificates for passenger transport aircraft with either a passenger capacity of 30 or more, or a payload capacity of 7,500 pounds (3402 kg) or more, which have received their certification since January 1st, 1958, are required to conduct a design review against explosion risks.

This Airworthiness Directive (AD), which renders mandatory the modification of the fuel pump wiring against short circuit, is a consequence of this design review.

Note: For A310 and A300–600 aircraft, refer to [EASA] AD 2006–0284R1. [On March 7, 2007, the FAA issued a corresponding NPRM for Model A310 and A300–600 airplanes, which was published in the **Federal Register** (72 FR 11302, March 13, 2007.)]

The unsafe condition is chafing of the fuel pump cables, which could result in short circuits leading to fuel pump failure, intermittent operation, arcing, and possible fuel tank explosion.

Actions and Compliance

(f) Within 31 months after the effective date of this AD, unless already done, modify the inner and outer fuel pumps wiring, route 1P and 2P harnesses in the LH (left-hand) wing and in the RH (right-hand) wing, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–24–0103, Revision 01, dated January 11, 2007. Actions done before the effective date of this AD in accordance with Airbus Service Bulletin A300–24–0103, dated March 15, 2006, for airplanes under configuration 1 as defined in the service bulletin, are acceptable for compliance with the requirements of this AD.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Stafford, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1622; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2007–0066, dated March 13, 2007, and Airbus Service Bulletin A300–24–0103, Revision 01, dated January 11, 2007, for related information.

Issued in Renton, Washington, on June 21, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–12495 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–27787; Directorate Identifier 2007–CE–032–AD]

RIN 2120–AA64

Airworthiness Directives; DG Flugzeugbau GmbH Model DG–1000T Gliders

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

ACTION: Notice of proposed rulemaking (NPRM).

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

The digital engine indicating system (DEI-NT) and associated control unit must get their latest software update. It has been found out in operation, that some combinations of system states while pressing switches can cause electrical damages to the system. A new software update is mandated to correct this deficiency and to incorporate additional safety functions to the system.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by July 30, 2007.

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5227) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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

SUPPLEMENTARY INFORMATION:

Streamlined Issuance of AD

The FAA is implementing a new process for streamlining the issuance of ADs related to MCAI. This streamlined process will allow us to adopt MCAI safety requirements in a more efficient manner and will reduce safety risks to the public. This process continues to follow all FAA AD issuance processes to meet legal, economic, Administrative Procedure Act, and Federal Register requirements. We also continue to meet our technical decision-making responsibilities to identify and correct unsafe conditions on U.S.-certificated products.

This proposed AD references the MCAI and related service information that we considered in forming the engineering basis to correct the unsafe condition. The proposed AD contains text copied from the MCAI and for this reason might not follow our plain language principles.

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–27787; Directorate Identifier 2007–CE–032–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://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD No. 2007–0040, dated February 23, 2007 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

The digital engine indicating system (DEI-NT) and associated control unit must get their latest software update. It has been found out in operation, that some combinations of system states while pressing switches can cause electrical damages to the system. A new software update is mandated to correct this deficiency and to incorporate additional safety functions to the system.

As a result, the Flight and Maintenance Manuals need to be revised, specifically regarding the stall warning.

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

Relevant Service Information

DG Flugzeugbau GmbH has issued Technical Note No. 1000/09, EASA approved December 12, 2006. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are

highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 1 product of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $80, or $80 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

DG Flugzeugbau GmbH: Docket No. FAA–2007–27787; Directorate Identifier 2007–CE–032–AD.

Comments Due Date

(a) We must receive comments by July 30, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to DG–1000T gliders, all serial numbers, certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 77: Engine Indicating.

Reason

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

The digital engine indicating system (DEI-NT) and associated control unit must get their latest software update. It has been found out in operation, that some combinations of system states while pressing switches can cause electrical damages to the system. A new software update is mandated to correct this deficiency and to incorporate additional safety functions to the system.

As a result, the Flight and Maintenance Manuals need to be revised, specifically regarding the stall warning.

Actions and Compliance

(f) Within the next 60 days after the effective day of this AD, unless already done, do the following actions:

(1) Replace the Digital Indicating System (DEI-NT) unit with an updated unit that incorporates software version V1.5, and replace the control unit with an updated unit that incorporates software version V1.9 following DG-Flugzeugbau GmbH Technical Note No. 1000/09, EASA approved December 12, 2006.

(2) Insert the new Flight Manual pages 0.1, 0.5, 7.14, and 7.15 and the new Maintenance Manual pages 0.1, 0.3, 0.6, 0.10, 1.22, and 1.23, issued October 2006 marked with TN1000/09, and add Diagram 15a into your maintenance program (maintenance manual) following DG-Flugzeugbau GmbH Technical Note No. 1000/09, EASA approved December 12, 2006.

(3) Prior to further flight after the action required by paragraph (f)(1) of this AD, do not install a DEI-NT or control unit in any DG–1000T airplane, unless it incorporates the software versions required in this AD.

Note 1: The referenced DG-Flugzeugbau GmbH Technical Note No. 1000/09, EASA approved December 12, 2006, also includes instructions for replacement of the fuel cock, which is not required by this AD.

Note 2: As specified in the flight manual, the glider can only be operated in the non-powered configuration without the DEI-NT installed. Engine operation is not possible.

FAA AD Differences

Note 3: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

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

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD No. 2007–0040, dated February 23, 2007; and DG-Flugzeugbau GmbH Technical Note No. 1000/09, EASA approved December 12, 2006, for related information.

Issued in Kansas City, Missouri, on June 21, 2007.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–12508 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

Cape Hatteras National Seashore; Off-Road Vehicle Management

AGENCY: National Park Service, Interior.

ACTION: Notice of Intent (NOI) to Establish a Negotiated Rulemaking Committee, Cape Hatteras National Seashore.

SUMMARY: The Secretary of the Interior is giving notice of intent to establish the Negotiated Rulemaking Advisory Committee for Off-Road Vehicle Management at Cape Hatteras National Seashore (Committee) to negotiate and develop special regulations (proposed rule) for management of off-road vehicles (ORV) at Cape Hatteras National Seashore (Seashore).

DATES: Interested persons are invited to comment on the proposal to create this Committee. In addition, any persons who believe that they will be affected significantly by the proposed rule and who believe their interests will not be represented adequately by the persons identified in this NOI are invited to apply for or nominate another person for membership on the Committee. Each application must contain the information described in the ''Application for Membership'' section below. Comments and/or applications or nominations for membership on the Committee must be received by close of business July 30, 2007.

ADDRESSES: Comments and/or applications for membership may be submitted to Michael B. Murray, Superintendent, Cape Hatteras National Seashore, 1401 National Park Drive, Manteo, North Carolina 27954. Alternatively, comments and applications may be submitted on-line through the National Park Service (NPS) Planning, Environment and Public Comment system (PEPC) at *http://parkplanning.nps.gov/CAHA.* Only comments and/or applications submitted through PEPC or hand-carried or mailed to the address above will be accepted. Comments and applications received will be available for inspection at the address listed above from 8:30 to 4, EST, Monday through Friday following the close of the comment period. 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.

FOR FURTHER INFORMATION CONTACT: Michael B. Murray, Superintendent, Cape Hatteras National Seashore at the address listed below, or by telephone at 252 473–2111 extension 148. Information on negotiated rulemaking and on the ORV Management Plan/EIS is also available on-line at *http://parkplanning.nps.gov/CAHA* by clicking on Cape Hatteras National Seashore Off-Road Vehicle Negotiated Rulemaking and Management Plan/EIS, and on Documents List and/or Links.

SUPPLEMENTARY INFORMATION: The establishment of this Committee is in the public interest and supports the NPS in performing its duties and responsibilities under the NPS Organic Act, 16 U.S.C. 1 *et seq.*, Executive Orders 11644 and 11989, 36 CFR 4.10, the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, the enabling legislation for the Seashore, 16 U.S.C. 459 *et seq.*, and other legal authorities. The Committee will negotiate to reach consensus on concepts and language to be used as the basis for a proposed rule governing ORV use at the Seashore. With the participation of knowledgeable affected parties, NPS expects to develop a practical approach to addressing the management and public-use issues involved in the public's desire for (1) access to beach areas by ORV for fishing and other recreational activities, (2) the quiet enjoyment of the natural scenery without motorized vehicles or their tire tracks, or sounds associated with their use, (3) public safety, and (4) the protection of beach environments and their associated plant and wildlife communities.

Background

Use of ORVs has become an issue of concern and a source of controversy at several units of the National Park System in recent years. Executive Order 11644, amended by Executive Order 11989, requires certain Federal agencies permitting ORV use on agency lands to publish regulations designating specific trails and areas for this use. Title 36, § 4.10 of the Code of Federal Regulations implements the Executive Orders for the NPS by providing that routes and areas designated for ORV use shall be promulgated as special regulations. Section 4.10 also provides that the designation of routes and areas shall comply with Executive Order 11644, and with § .5 of Title 36 of the Code of Federal Regulations, regarding closures. While special regulations governing ORVs have been developed at some units of the National Park System, presently no comprehensive ORV Management Plan nor special regulations are in place at the Seashore. An ORV management plan and special regulations are necessary to ensure NPS compliance with the above authorities and NPS management policies. The absence of special regulations governing ORVs at the Seashore has led to inconsistent management of ORV use, increased conflicts between Seashore uses, and potential damage to natural and cultural resources. An ORV Management Plan and special regulations must be developed in order to provide consistency in ORV management and resource protection in areas of ORV use.

The NPS contracted with the U.S. Institute for Environmental Conflict Resolution to provide a feasibility assessment as to whether a negotiated rulemaking is a practicable means to develop consensus on proposed special regulations for the Seashore. The feasibility assessment concluded that this negotiated rulemaking would satisfy the requirements of the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.*, and that a rulemaking for ORV management at the Seashore is appropriate for development through negotiation. Concurrently with the negotiated rulemaking, NPS will develop the ORV Management Plan using the National Environmental Policy Act (NEPA) planning process.

Scope of the Proposed Rule. Within the constraints of NPS statutory and policy responsibilities to preserve natural and cultural resources and to provide for their enjoyment, the Committee will evaluate and address key issues possibly including, but not limited to, the designation of specific ORV routes and areas, the periods of the year and times of day during which ORVs may be operated, and other conditions that govern the operation of ORVs at the Seashore. Special ORV regulations at the Seashore would identify criteria to designate appropriate ORV use areas and routes, and would establish consistent ORV management practices and procedures that include the ability to adjust ORV management in response to changes in the Seashore's dynamic physical and biological environment. The management methodology embodied in the proposed rule would minimize adverse impacts to park resources due to ORV use, provide for visitor enjoyment and safety, and allow ORV use for those activities that are consistent with resource

preservation as recognized under the Seashore's enabling legislation.

List of Interests Significantly Affected. The NPS has identified a number of interests that are likely to be affected significantly by the rule. Those parties are Federal, State, and county government interests; local civic and neighborhood association and homeowner interests; environmental and conservation interests; various Seashore user interests, including ORV use, open access, recreation, water sports, recreational fishing, bird watching, and other general uses; and local tourism, visitation and business interests. Other parties who believe they are likely to be affected significantly by the proposed rule may apply for membership on the Committee under the ''Application for Membership'' section below.

Proposed Agenda and Schedule for Publication of Proposed Rule. Members of the Committee, with the assistance of a neutral facilitator, will determine the agenda for the Committee's work, which will include interactions with the concurrent NEPA planning process for developing an ORV Management Plan at the Seashore.

Records of Meetings. In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. Appx. 1994, the NPS will keep a record of all Committee meetings.

Administrative Support. To the extent authorized by law, the NPS will fund the costs of the Committee, keep a record of all Committee meetings, and provide administrative support and technical assistance for the activities of the Committee. The NPS will also provide staff expertise in resource management and operations to facilitate the Committee's work.

Committee Membership. In accordance with the Negotiated Rulemaking Act, membership is limited to 25, with each member having an alternate, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership. For this committee to achieve balanced membership among diverse national, regional, and local interests the feasibility assessment has recommended and the agency has determined, that a greater number of members is necessary. A membership of 28 is proposed for the Committee, consisting of the following:

Civic and Homeowner Associations:

1. Rodanthe-Waves-Salvo Civic Association, member C.A. Duke, alternate Pat Weston (Greater Kinnakeet Shores Homeowners Inc. and Rodanthe-Waves-Salvo Civic Association)

2. Avon Property Owners Association, member Frank Folb, alternate Pat Weston (Greater Kinnakeet Shores Homeowners Inc. and Rodanthe-Waves-Salvo Civic Association)

3. Hatteras Village Civic Association, member Roy Kingery, alternate Jeffrey Wells (Hatteras Landing Homeowners Association)

Commercial Fishermen:

4. North Carolina Fisheries Association, Michael Peele, alternate William Foster (North Carolina Fisheries Association)

Environmental and Natural Resource Conservation Advocates, State/Regional/Local:

5. Southern Environmental Law Center, member Derb Carter, alternate Michelle Nowlin (Southern Environmental Law Center)

6. North Carolina Audubon, member Walker Golder, alternate Sidney Maddock (National Audubon Society)

Environmental and Natural Resource Conservation Advocates, National:

7. Coalition of National Park Service Retirees, member Robert Milne, alternate Dwight Rettie (Coalition of National Park Service Retirees)

8. Defenders of Wildlife, member Jason Rylander, alternate Andrew Hawley (Defenders of Wildlife)

9. Natural Resources Defense Council and The Wilderness Society, member Destry Jarvis, alternate Leslie Jones (The Wilderness Society)

10. The Nature Conservancy, member Sam Pearsall, alternate Aaron McCall (The Nature Conservancy)

Government, County:

11. Dare County, member Warren Judge, alternate Ray Sturza (Dare County)

12. Hyde County, member David Scott Esham, alternate Kevin Howard (Hyde County)

Government, Federal:

13. Cape Hatteras National Seashore, member Michael Murray, alternate Thayer Broili (Cape Hatteras National Seashore)

14. U.S. Fish and Wildlife Service, member Pete Benjamin, alternate David Rabon (U.S. Fish and Wildlife Service)

Government, State:

15. North Carolina Marine Fisheries Commission, member Wayne Mathis, alternate Sara Winslow (North Carolina Marine Fisheries Commission)

16. North Carolina Wildlife Resources Commission, member David Allen, alternate Susan Cameron (North Carolina Wildlife Resources Commission)

Tourism, Visitation, and Businesses:

17. Cape Hatteras Business Allies, member Judy Swartwood, alternate Stacy Stacks (Cape Hatteras Business Allies)

18. Outer Banks Chamber of Commerce, member Scott Leggat, alternate Sam Hagedon (Outer Banks Chamber of Commerce)

19. Outer Banks Visitors Bureau, member Carolyn McCormick, alternate Renee Cahoon

User Groups, ORV Use:

20. North Carolina Beach Buggy Association, member Jim Keene, alternate David Joyner (North Carolina Beach Buggy Association)

21. United Four Wheel Drive Associations, member Carla Boucher, alternate Lyle Piner (United Four Wheel Drive Associations)

User Groups, Open Access:

22. Outer Banks Preservation Association, member David Goodwin, alternate John Alley (Outer Banks Preservation Association)

User Groups, Other Users:

23. Cape Hatteras Bird Club, member Ricky Davis, alternate Raymond Moore (Cape Hatteras Bird Club)

24. Cape Hatteras Recreational Alliance, member Jim Lyons, alternate Steven Kayota (Frisco and Hatteras Homeowners Coalition)

25. Water Sports Industry Association, member Trip Foreman, alternate Matt Nuzzo (Water Sports Industry Association)

User Groups, Recreational Fishing:

26. American Sportfishing Association, member Bob Eakes, alternate Carol Forthman (American Sportfishing Association)

27. Cape Hatteras Anglers Club, member Larry Hardham, alternate Robert Davis (Cape Hatteras Anglers Club)

28. Recreational Fishing Alliance, member Patrick Paquette, alternate Ronald Bounds (Recreational Fishing Alliance)

Application for Membership. Persons who believe they will be significantly affected by proposals to develop special regulations for ORV use at the Seashore and who believe that their interests will not be represented adequately by any person identified in the ''Committee Membership'' section above may apply for or nominate another person for membership on the Committee. In order to be considered, each application or nomination must include:

1. The name of the applicant or nominee and a description of the interest(s) such person shall represent,

2. Evidence that the applicant or nominee is authorized to represent parties related to the interest(s) the person proposes to represent,

3. A written commitment that the applicant or nominee will actively participate in good faith in the development of the proposed rule, and

4. The reasons that the proposed members of the committee identified above do not represent the interests of the person submitting the application or nomination.

To be considered, the application must be complete and received by the close of business 30 days after publication of this NOI in the **Federal Register** at the location indicated in the **ADDRESSES** section above. Full consideration will be given to all applications and nominations submitted in a timely manner. The decision whether or not to add a person to the Committee will be based on NPS's determination whether an interest of that person will be significantly affected by the proposed rule, whether that interest is already adequately represented on the Committee, and if not, whether the applicant or nominee would adequately represent it.

Certification. I hereby certify that the administrative establishment of the Cape Hatteras National Seashore Negotiated Rulemaking Advisory Committee is necessary and in the public interest in connection with the performance of duties imposed on the Department of the Interior by the Act of August 25, 1916, 16 U.S.C. 1 *et seq.* and other statutes relating to the administration of the National Park System.

Dated: June 13, 2007.

Dirk Kempthorne,

Secretary of the Interior.

[FR Doc. E7–12012 Filed 6–27–07; 8:45 am]

BILLING CODE 4310–Y6–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2007–0011; FRL–8332–4]

RIN 2060–AN72

Standards of Performance for Petroleum Refineries

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of public comment period.

SUMMARY: EPA is announcing that the comment period on the proposed rule amendments for the Standards of Performance for Petroleum Refineries, published on May 14, 2007, is being extended until August 27, 2007.

DATES: *Comments.* Comments on the proposed amendments must be received on or before August 27, 2007.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2007–0011, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* U.S. Postal Service, send comments to: EPA Docket Center (6102T), Docket No. EPA–HQ–OAR–2007–0011, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* In person or by courier, deliver comments to: EPA Docket Center (6102T), EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of two copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2007–0011. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *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 through *www.regulations.gov* or in hard copy at the EPA Docket Center (6102T), EPA West Building, Room 3444, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Lucas, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Coatings and Chemicals Group (E143–01), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–0884; fax number: (919) 541–0246; e-mail address: *lucas.bob@epa.gov.*

SUPPLEMENTARY INFORMATION:

Regulated Entities. Categories and entities potentially regulated by this action include:

Category	NAICS* code	Examples of potentially regulated entities
Industry	32411	Petroleum refiners.
Federal government		Not affected.
State/local/tribal government		Not affected.

* North American Industrial Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in 40 CFR 60.480 and 40 CFR 60.590. If you have any questions regarding the applicability of the proposed amendments to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Submitting CBI. Do not submit information that you consider to be CBI electronically through www.regulations.gov or e-mail. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711, Attention Docket ID EPA–HQ–OAR–2007–0011. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section. *Worldwide Web (WWW).* In addition to being available in the docket, an electronic copy of the proposed amendments is available on the WWW through the Technology Transfer Network (TTN). Following signature, a copy of the proposed amendments will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control.

Comment Period

We received several requests to extend the public comment period to August 27, 2007. We agreed to this request, therefore, the public comment period will now end on August 27, 2007, rather than July 13, 2007.

How can I get copies of the proposed amendments and other related information?

The proposed rule amendments for the Standards of Performance for Petroleum Refineries, published on May 14, 2007 (72 FR 27178). EPA has established the official public docket for the proposed rulemaking under Docket ID No. EPA–HQ–OAR–2007–0011. Information on how to access the docket is presented above in the **ADDRESSES** section.

Dated: June 20, 2007.

Robert J. Meyers,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. E7–12584 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1983–0002; FRL–8331–3]

National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of intent to delete the Mannheim Avenue Dump Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) Region II is issuing a notice of intent to delete the Mannheim Avenue Dump Superfund Site (Site) located in Galloway Township, New Jersey from the National Priorities List (NPL) and requests public comments on this notice of intent. The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is found at Appendix B of 40 CFR part 300, which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of New Jersey, through the New Jersey Department of Environmental Protection, have determined that all appropriate response actions under CERCLA, including operation and maintenance and five-year reviews, have been completed. However, this deletion does not preclude future actions under Superfund.

In the ''Rules and Regulations'' Section of today's **Federal Register,** we are publishing a direct final notice of deletion of the Mannheim Avenue Dump Superfund Site without prior notice of intent to delete because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this deletion in the preamble to the direct final deletion. If we receive no adverse comment(s) on this notice of intent to delete or the direct final notice of deletion, we will not take further action on this notice of intent to delete. If we receive adverse comment(s), we will withdraw the direct final notice of deletion and it will not take effect. We will, as appropriate, address all public comments in a subsequent final deletion notice based on this notice of intent to delete. We will not institute a second comment period on this notice of intent to delete. Any parties interested in commenting must do so at this time. For additional information, see the direct final notice of deletion which is located in the Rules section of this **Federal Register**.

DATES: Comments concerning this Site must be received by July 30, 2007.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1983–0002, by one of the following methods:

- *http://www.regulations.gov.* Follow on-line instructions for submitting comments.
- *E-mail: robinson.nigel@epa.gov:* Nigel Robinson, Remedial Project Manager. *seppi.pat@epa.gov:* Pat Seppi, Community Involvement Coordinator.
- *Fax:* (212) 637–4429.
- *Mail:* Nigel Robinson, Remedial Project Manager, U.S. Environmental Protection Agency, Region II, Emergency & Remedial Response Division, 290 Broadway, 19th Floor, New York, NY 10007 or Pat Seppi, Community Involvement Coordinator, U.S. Environmental Protection Agency, Region II, Public Affairs Division, 290 Broadway, 26th Floor, New York, NY 10007.

Hand delivery: Nigel Robinson, Remedial Project Manager, U.S. Environmental Protection Agency, Emergency & Remedial Response Division, 290 Broadway, 19th Floor, New York, NY 10007.

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–SFUND–1983–0002. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided,

unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statue. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at:

U.S. Environmental Protection Agency, Region II, Superfund Records Center, 290 Broadway, Room 1828, New York, New York 10007–1866, (212) 637–4308; Hours: 9 a.m. to 5 p.m., Monday through Friday; and at

Atlantic County Library, Galloway Township Branch, 306 W. Jimmie Leeds Road, Pomona, NJ 08240; Hours: Mon.–Th., 9 a.m.–8 p.m., Fri.–Sat., 9 a.m.–5 p.m., (609) 652–2352.

FOR FURTHER INFORMATION CONTACT: Nigel Robinson, Remedial Project Manager, U.S. Environmental Protection Agency, Region II, 290 Broadway, 19th Floor, New York, NY 10007, (212) 637–4394.

SUPPLEMENTARY INFORMATION:

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Dated: April 27, 2007.

Alan J. Steinberg,

Regional Administrator, Region 2.

[FR Doc. E7–12537 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–8331–2]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Intent to Delete the Grand Street Mercury Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA), Region 2, is issuing a Notice of Intent to Delete the Grand Street Mercury Superfund Site (Site) from the National Priorities List (NPL) and requests public comment on this action. The Grand Street Mercury Site is located in the city of Hoboken, Hudson County, New Jersey. The NPL is Appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. EPA and the State of New Jersey, through the Department of Environmental Protection (NJDEP), have determined that all appropriate remedial actions have been completed and no further remedial actions are required.

In addition, EPA and NJDEP have determined that the cleanup goals attained at this Site are protective of public health and the environment.

DATES: Comments concerning the deletion of this site from the NPL must be received July 30, 2007.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1997–0001, by one of the following methods: *http://www.regulations.gov.* Follow on-line instructions for submitting comments.

E-mail: saghafi.farnaz@epa.gov.

Fax: 212–637–4429.

Mail: Ms. Farnaz Saghafi, Remedial Project Manager, New Jersey Remediation Branch, Emergency and Remedial Response Division, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 19th Floor, New York, New York, 10007–1866.

Hand delivery: 290 Broadway Street, 18th Floor, New York, New York 10007–1866. 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–SFUND–1997–0001. 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 to *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statue. Certain other material, such as copyrighted material, will be publicly available only in the

hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at:

U.S. EPA Records Center, 290 Broadway—18th Floor, New York, New York 10007–1866. *Hours:* Monday through Friday, 9 a.m. to 5 p.m. *Phone:* 212–637–4308.

Hoboken Public Library, 500 Park Avenue, Hoboken, New Jersey 07030. *Phone:* 201–420–2280.

FOR FURTHER INFORMATION CONTACT: Farnaz Saghafi at (212) 637–4408.

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I. Introduction

EPA Region 2 announces its intent to delete the Grand Street Mercury Superfund Site from the NPL and requests public comment on this action. EPA maintains the NPL as the list of sites that present a significant risk to public health or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund).

EPA will accept comments on the proposal to delete this Site for thirty (30) days after publication of this document in the **Federal Register**. Section II below explains the criteria for deleting sites from the NPL. Section III discusses the procedures that EPA is using for this action. Section IV discusses how this Site meets NPL deletion criteria.

II. NPL Deletion Criteria

Section 300.425(e) of the NCP provides that sites may be deleted from the NPL where no further response is appropriate. In making this determination, EPA, in consultation with NJDEP, will consider whether any of the following criteria have been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required; or

(ii) All appropriate Fund-financed responses under CERCLA have been implemented, and no further response action by responsible parties is appropriate; or

(iii) The remedial investigation has shown that the release of hazardous substances poses no significant threat to public health or to the environment and, therefore, taking of remedial measures is not appropriate.

III. Deletion Procedures

The following procedures apply to the deletion of this Site:

(1) EPA issued a Record of Decision (ROD) on September 30, 1997, which called for: Relocation of the residents of the former industrial building at the Site; gross mercury decontamination and demolition of two buildings; excavation and off-site disposal of mercury-contaminated soils; sampling and assessment of soils at adjacent properties; sampling of groundwater at the Site; and assessment of soil data from the adjacent properties and groundwater data to evaluate the need for future remedial action. (2) All appropriate responses under CERCLA have been implemented as described in a Preliminary Close-Out Report dated September 2005. (3) EPA has recorded a notice with the County Clerk's office for Hudson County advising future owners of the former facility property located at 720–732 Grand Street, Hoboken, New Jersey that the environmental data collected at the Site exceed the screening level for mercury developed pursuant to EPA's Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils, such that further evaluation and/or engineering controls may be necessary when and if structures are erected at the property. (4) The NJDEP concurs with the proposed deletion. (5) A notice has been published in the local newspaper and has been distributed to appropriate federal, state and local officials and other interested parties announcing a 30-day public comment period on EPA's Notice of Intent to Delete. (6) All relevant documents have been made available for public review at the local Site information repository and at EPA Region 2.

Deletion of sites from the NPL does not itself create, alter, or revoke any individual's rights or obligations. The NPL is designed primarily for informational purposes and to assist Agency management of Superfund sites. As mentioned in section II of this document, § 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions.

EPA's Regional Office will accept and evaluate public comments before making a final decision on deletion of this Site. If necessary, EPA will prepare a Responsiveness Summary to address significant public comments received during the public comment period. If after consideration of the comments received, EPA decides to proceed with the deletion, EPA will place a final Notice of Deletion in the **Federal Register**. Generally, the NPL will reflect deletions in the final update following the notice. Public notices and copies of the Responsiveness Summary will be made available to local residents by the Regional Office.

IV. Basis for Intended Site Deletion

The following summary provides the Agency's rationale for the proposal to delete this Site from the NPL.

Background

The Grand Street Mercury Site is located at 720 and 722–732 Grand Street, Hoboken, Hudson County, New Jersey. The Site included a former industrial building which was converted from 1993 to 1995 into 16 residential/studio spaces (722–732 Grand Street), a townhouse formerly used for various purposes which was also intended for residential conversion (720 Grand Street), and an adjacent asphalt-covered parking lot. Soils on five residential properties adjacent to the former industrial facility with mercury at levels greater than 23 mg/kg were also addressed as part of the remedial action.

Mercury, believed to be associated with the use of vacuum pumps containing mercury and the manufacture of mercury vapor lamps and mercury-containing switches, was prevalent throughout the buildings, which have been demolished as part of the remedial action, and the parking lot. Mercury vapor lamps and numerous other types of lamps requiring lesser amounts of and/or no mercury in the manufacturing process were manufactured at the facility from 1910 to approximately 1965.

Response Actions

On January 2, 1996, EPA received a request from NJDEP to conduct an emergency removal action under CERCLA, and to assist the Hoboken Health Department (HHD) in assessing the extent of mercury contamination at 720 and 722–732 Grand Street. EPA asked the Agency for Toxic Substances and Disease Registry (ATSDR) to evaluate the Site. On January 3, 1996, ATSDR issued a Public Health Consultation which concluded that an imminent health hazard existed at the Site, and that the residents should be dissociated from further exposure to this mercury hazard.

On January 4, 1996, the HHD, based on advice from the New Jersey Department of Health (NJDOH), issued an ''Order of Health Officer'', which ordered the residents to vacate the buildings by January 9, 1996. All

occupants had vacated the buildings by 4 p.m. on January 11, 1996.

On January 4, 1996, EPA authorized a Superfund removal action at the Site. The removal action included providing temporary relocation for residents of the Grand Street Site, providing for security and maintenance of the buildings, continued sampling and screening of the buildings as well as the personal possessions of the residents, and transportation, treatment, and/or disposal of contaminated materials generated during previous remediation efforts. The Site was officially added to the NPL on September 25, 1997.

In February 1997, EPA issued a Unilateral Administrative Order (UAO) to Potentially Responsible Parties (PRPs) General Electric Company (GE) and John Pascale, ordering them to take over temporary relocation, site security, building maintenance, and other activities from EPA. EPA subsequently modified the UAO to remove temporary relocation activities. GE initiated work at the Site on August 4, 1997.

In April 1997, EPA completed a Baseline Risk Assessment for the Site. A draft Focused Feasibility Study (FFS) that analyzed remedial alternatives for the Site was completed in July 1997. EPA issued a ROD for the Site on September 30, 1997.

Since the issuance of the ROD, EPA has acquired the former facility property located at 720–732 Grand Street and completed the permanent relocation of the residents. EPA issued a second UAO to GE on April 1, 1998 directing GE to perform the Remedial Design and Remedial Action described in the ROD, excluding relocation activities. GE prepared a Remedial Design (RD) Report for demolition of the two buildings formerly used for manufacturing operations, as well as excavation and removal of contaminated soil from the parking lot and from under the building slab. The demolition phase of the remedial action began in November 2001 and was completed by July 2003.

In March 2001, EPA approved GE's Supplemental Remedial Design Work Plan (SRDWP), concerning the soil sampling at adjacent residential properties required by the ROD. In May 2002, GE submitted to EPA the Supplemental Investigation Report, which describes the results of the SRDWP sampling as well as earlier soil sampling conducted at adjacent properties by EPA and GE.

Cleanup Goals

On April 17, 2003, EPA issued an Explanation of Significant Differences (ESD) setting forth its determination that soil in the backyards of the five residential properties must be addressed as part of the remedial action, requiring the excavation of soil from backyards even if only a single sample showed a concentration of mercury greater than 23 milligrams per kilogram (mg/kg), rather than using an average of all the samples collected at each depth. The basis for this determination is explained in the April 17, 2003 ESD.

By summer 2003, the contaminated industrial building and the attached townhouse had been demolished. During the subsequent removal of the buildings' basement slabs, EPA's oversight personnel and the PRP's consultant observed visible mercury in the underlying soil. Sampling showed that the soil was more contaminated than had been expected, and the contamination was present at depths below the water table.

The remediation goal for mercury in the surface soils, as described in the ROD, is 23 mg/kg and was developed to be protective of public health for both ingestion and inhalation exposure pathways for residential populations, including children. For subsurface soils, which at the Site are considered to be soils below the water table (located approximately 4.5 to 5.5 feet below ground surface), it is unlikely that residential populations would be exposed under typical, or reasonable, scenarios. The populations most likely to come into contact with these soils consist of utility workers and construction workers. Therefore, EPA determined that a distinct remediation goal for subsurface soils was needed to protect those specific populations. A remediation goal of 520 mg/kg of mercury was developed by EPA based on an assumed two-month duration of construction activity within subsurface soils. The addition of a remediation goal for subsurface soils was the subject of the second ESD for the Site issued on July 2, 2004.

The work necessary to achieve this remediation goal was performed in accordance with the approved Soil Removal Work Plan for Former Building Footprint, dated September 2003, prepared by GE. The activities associated with this work were conducted from September through December, 2004. Approximately 2 feet of soil were excavated in most areas below the former building footprint, and 6.5 feet were removed in three grids in this area. In the parking lot area, excavation depth varied from 0.5 to 5 feet depending on levels of mercury contamination detected during the investigation phase of the work. Post-excavation samples were collected every 30 feet throughout the excavation prior to backfilling the areas to ensure that the remaining soils met remediation goals.

An evaluation of the post-excavation sampling data shows that in only one grid in the subsurface soils there is an exceedence of the 520 mg/kg cleanup goal. The outlier data point is within a small grid (112.5 square feet in area) which was part of a larger grid (grid 1). That section was excavated down to 4.5–5 feet and the post-excavation sample was recorded at 676 mg/kg. The soil was further removed down to 6 feet where the meadow mat layer lies. This is a semi-confining layer which should not be punctured. Therefore, no further excavation or sampling at this layer was performed. Although the last data point in this grid has been recorded at 676 mg/kg, the number is not truly representative of what remains in that grid since more soil was removed after the sample was taken. Discounting this outlier data point from the data, the average mercury concentration in both saturated soils and unsaturated soils remaining at the site is 22.71 mg/kg.

The backfill material was sampled and certified to have no unacceptable levels of contamination or radioactivity before use. The backfilled soils met the New Jersey cleanup standards for unrestricted use. The PRP completed all work associated with this phase of cleanup by December 2004.

The soil removal work plan also included the installation of three additional groundwater monitoring wells in the vicinity of the former basement slabs. The new wells were sampled, in addition to the seven existing monitoring wells, in December 2004 to further evaluate groundwater conditions. Results showed that none of the monitoring wells contained mercury levels in the groundwater above 2 parts per billion (ppb), which is both the federal Maximum Contaminant Level (MCL) established pursuant to the federal Safe Drinking Water Act, and the New Jersey MCL established pursuant to the New Jersey Safe Drinking Water Act, and is the designated cleanup level for the Site.

During the soil removal activities, two of the groundwater monitoring wells located in the former parking lot had to be abandoned to enable the complete excavation of contaminated soils. It was determined that sufficient groundwater data would be obtained through the surrounding wells due to their close proximity. The remaining eight wells were sampled in a confirmatory round of groundwater sampling in June 2005. Results again showed that none of the of the monitoring wells contained mercury levels in the groundwater above 2 ppb, the applicable cleanup

level for the Site. All related monitoring wells were sealed and abandoned in accordance with the state of New Jersey's ''General Requirements for the Decommissioning of all Wells'', N.J.A.C. 7:9D–3.1 in October 2006.

EPA issued a third ESD on September 16, 2005 relating to the groundwater at the Site. The ESD describes EPA and NJDEP's determination that no remedial action with respect to the groundwater is necessary. This is due to the findings of the groundwater sampling performed at the Site. Two rounds of groundwater sampling, performed in December 2004 and in June 2005 as well as groundwater sampling performed in 2000 showed that none of the monitoring wells contained mercury levels in the groundwater above 2 parts per billion (ppb), which is both the MCL established pursuant to the federal Safe Drinking Water Act, and the New Jersey MCL established pursuant to the New Jersey Safe Drinking Water Act, and is therefore the designated cleanup level for the Site.

It should be noted that the site-specific mercury clean-up goals for soils established by EPA for the former facility property, which are protective of public health for both ingestion and inhalation exposure pathways, exceed the screening levels found in EPA's Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils. While this does not indicate that a vapor intrusion problem will occur if a building(s) is erected in the future at the now vacant property at 720–732 Grand Street, it does indicate that further evaluation or engineering controls may be necessary when and if structures are erected at the property. To ensure that future owners of 720–732 Grand Street are aware of the exceedence of the screening levels, EPA has recorded a notice with the County Clerk's office for Hudson County advising of this fact. The notice also advises of the final cleanup levels of mercury met at the Site.

Operation and Maintenance

There will be no operation and maintenance plan in place since all remedial actions have been completed at the Site.

Five-Year Review

Upon completion of the remedial activities, hazardous substances do not remain on-site above levels that would prevent unlimited use without restriction. It is the policy of EPA to conduct five year reviews when remedial activities, including monitoring, will continue for more than five years. All cleanup goals have been met for this Site, and there is no action warranted for the groundwater underlying the Site as documented in the September 16, 2005 ESD.

However, because the property is vacant, EPA cannot rule out the possibility that the slight exceedences of screening levels established by EPA's Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils are indicative of the potential for vapor intrusion. The Site has been sold and title has been transferred to a private entity for redevelopment and reuse. The nature of the future use of the Site is unknown at this time and may eliminate any potential for vapor intrusion. Therefore, prior to the time that a five year review would be conducted (five years after the construction completion date of 2005), EPA will evaluate conditions at the Site, and if necessary and appropriate, will conduct a five year review.

Community Involvement

Public participation activities for the Grand Street Mercury Superfund Site have been satisfied as required in CERCLA Section 113(k), 42 U.S.C. 9613(k), and Section 117, 42 U.S.C. 9617. EPA published a Community Relations Plan in July 1997. The ROD was subject to a public review process; public comments were received and addressed in the Responsiveness Summary portion of the ROD. All other documents and information which EPA relied on or considered in recommending that the Site be deleted from the NPL are available for the public to review EPA Records Center.

Applicable Deletion Criteria/Statute Concurrence

All the completion requirements for this Site have been met as described in the Final Remedial Action Report dated August 2005, prepared by GE and approved by EPA on August 30, 2005, and EPA's Preliminary Close Out Report dated September 2005. The State of New Jersey, in its letter of August 30, 2006 concurred on the proposed deletion of this Site from the NPL. Consequently, EPA is proposing deletion of this Site from the NPL. Documents supporting this action are available in the site files.

The NCP specifies that EPA may delete a site from the NPL if ''all appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate.'' 40 CFR 300.425(e)(1)(ii). EPA, with the concurrence of the State of New Jersey, through the Department of Environmental Protection, believes that this criterion for deletion has been met. Consequently, EPA is proposing deletion of this Site from the NPL.

Dated: April 12, 2007.

Alan J. Steinberg,

Regional Administrator, Region 2.

[FR Doc. E7–12450 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 32

RIN 1018–AV36

2007–2008 Hunting and Sport Fishing Regulations for the Upper Mississippi River National Wildlife and Fish Refuge

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service or we) proposes to amend the regulations for the Upper Mississippi River National Wildlife and Fish Refuge (refuge) that pertain to existing programs for migratory game bird hunting, upland game hunting, big game hunting, and sport fishing. These changes would take effect with the 2007–2008 season and would implement the recently completed Comprehensive Conservation Plan (CCP) for the refuge. This amendment would replace current refuge regulations found at 50 CFR 32.32 (Illinois), place the proposed regulations at 50 CFR 32.42 (Minnesota) to match the State listing with the location of the refuge headquarters, and cross reference those regulations in 50 CFR 32.34 (Iowa) and 32.69 (Wisconsin).

DATES: We must receive your comments on or before July 30, 2007.

ADDRESSES: Submit written comments to Refuge Manager, Upper Mississippi River National Wildlife and Fish Refuge, 51 East Fourth Street, Room 101, Winona, MN 55987. See ''Request for Comments'' under **SUPPLEMENTARY INFORMATION** for information on electronic submission. You may also request information on the refuge's public use programs and the conditions that apply to them, or request copies of compatibility determinations or other information, at the above address.

FOR FURTHER INFORMATION CONTACT: Don Hultman, (507) 452–4232; Fax (507) 452–0851.

SUPPLEMENTARY INFORMATION: The Upper Mississippi River National Wildlife and Fish Refuge (refuge) encompasses 240,000 acres in a more-or-less

continuous stretch of 261 miles of Mississippi River floodplain in Minnesota, Wisconsin, Iowa, and Illinois. The refuge was established by Congress in 1924 to provide a refuge and breeding ground for migratory birds, fish, other wildlife, and plants. The refuge is perhaps the most important corridor of habitat in the central United States due to its species diversity and abundance and is the most visited refuge in the United States with 3.7 million annual visitors. Approximately 187,000 acres of the refuge is open to all hunting, and approximately 140,000 acres of surface water is open to year-round fishing.

The development of an Environmental Impact Statement (EIS) and CCP for the refuge began with a notice of intent to prepare the EIS, which we published in the **Federal Register** on May 30, 2002 (67 FR 37852). We followed with a notice of availability of our Draft EIS (April 28, 2005; 70 FR 22085), and we accepted public comments on the Draft EIS for 120 days. On October 7, 2005, we published a notice of intent to prepare a Supplement to the Draft EIS (70 FR 58738). We made the Supplement to the Draft EIS available on December 5, 2005 (70 FR 72462), and accepted public comments on that document for 60 days, extended to 90 days.

We offered public involvement through 46 public meetings and workshops attended by 4,500 persons in 14 different communities in four States during the four-year planning process. In addition, we held or attended 80 other meetings with the States, other agencies, interest groups, and elected officials to discuss the Draft EIS, and mailed three different planning update newsletters to up to 4,900 persons or organizations on our planning mailing list. We also issued numerous news releases at various planning milestones, and held two press conferences.

On July 11, 2006, we published a notice of availability of our Final EIS (71 FR 39125), and we accepted public comments on the Final EIS for 30 days. On August 24, 2006, the Regional Director of the Midwest Region of the Fish and Wildlife Service signed the Record of Decision that documented the selection of Alternative E, the Preferred Alternative presented in the Final EIS. We published a notice of availability of that Record of Decision on November 2, 2006 (71 FR 64553).

In accordance with the Record of Decision, we prepared a CCP based on Alternative E. The CCP was approved on October 24, 2006. The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee, as amended by the National Wildlife Refuge Improvement Act of 1997), requires the Secretary of the Interior (Secretary) to manage each refuge in a manner consistent with a completed CCP. The Final EIS and CCP are available at *http://www.fws.gov/midwest/planning/uppermiss.*

This hunting and fishing regulation proposal implements the goals, objectives, and strategies spelled-out in the CCP pertaining to hunting and fishing and related uses.

The proposal also reflects a fine-tuning of language in the current refuge-specific regulations for clarity and ease of enforcement, and other modest changes to modernize regulations and make them consistent with the principles of sound fish and wildlife management. For example, this proposal includes the requirement for hunters to use nontoxic shot shells for turkey hunting, the only exemption in the previous nontoxic shot shell regulation (50 CFR 32.2(k)).

When all changes in the CCP are implemented in 2009, there will be 23 closed areas or sanctuaries totaling 43,652 acres, compared with the current 15 areas totaling 44,544 acres. Another 1,406 acres will be open the first 30 days of the season, closing November 1. An effective system of strategically located waterfowl closed areas on the 261-mile-long refuge is critical to the Mississippi Flyway, and allows hunting to remain compatible.

There is also a change to open water hunting regulations on 4,000 acres of Pool 11 in Grant County, Wisconsin, and a phase out of permanent hunting blinds on the only areas of the refuge they are still allowed. The Grant County area remains open to hunting, but restricts open water hunting from boats to protect large rafts of scaup and canvasback.

The National Wildlife Refuge System Administration Act of 1966 authorizes the Secretary to allow uses of refuge areas including hunting and/or sport fishing, upon a determination that such uses are compatible with the purposes of the refuge and National Wildlife Refuge System (Refuge System) mission. The action also must be in accordance with provisions of all laws applicable to the areas, developed in coordination with the appropriate State fish and wildlife agency(ies), and consistent with the principles of sound fish and wildlife management and administration. These requirements ensure that we maintain the biological integrity, diversity, and environmental health of the Refuge System for the benefit of present and future generations of Americans.

The Secretary is required to prepare a CCP for each refuge and shall manage each refuge consistent with the CCP. Each CCP must identify and describe the refuge purposes; fish, wildlife, and plant populations; cultural resources; areas for administrative or visitor facilities; significant problems affecting resources and actions necessary; and opportunities for compatible wildlife-dependent recreation. Each CCP must also be developed through consultation with the other States, agencies, and the public, and be coordinated with applicable State conservation plans.

Each CCP is guided by the overarching requirement that refuges are to be managed to fulfill their purposes for which established and the mission of the Refuge System. In addition, the National Wildlife Refuge System Improvement Act requires that the Refuge System be administered to provide for the conservation of fish, wildlife, and plants and their habitats; and to ensure their biological integrity, diversity, and environmental health.

We developed the CCP for the refuge in accordance with all requirements and in accordance with the consultation and public involvement provisions of the National Wildlife Refuge System Improvement Act. This includes new compatibility determinations for hunting and fishing, which are referenced and listed in Appendix E of the Final EIS. We then developed this proposed rule to implement portions of the CCP.

Plain Language Mandate

In this proposed rule, we comply with a Presidential mandate to use plain language in regulations. As examples, we use ''you'' to refer to the reader and ''we'' to refer to the Service, the word ''allow'' instead of ''permit'' when we do not require the use of a permit for an activity, and we use active voice whenever possible (*i.e.*, ''We allow hunting of upland game on designated areas'' vs. ''Upland game hunting in designated areas is allowed'').

Statutory Authority

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee, as amended by the National Wildlife Refuge System Improvement Act of 1977 [Improvement Act]) (Administration Act) and the Refuge Recreation Act of 1962 (16 U.S.C. 460k–460k–4) (Recreation Act) govern the administration and public use of refuges. In addition, the Migratory Bird Treaty Act (16 U.S.C 703–711) grants authority for management of migratory birds and the

closing of any areas to migratory bird hunting.

The Migratory Bird Treaty Act (MBTA) designates the protection of migratory birds as a Federal responsibility. The MBTA enables the setting of seasons, and other regulations including the closing of areas, Federal and non-Federal, to the hunting of migratory birds. You can find regulations stemming from the MBTA pertaining to migratory bird hunting in 50 CFR part 20.

This document proposes to codify in the Code of Federal Regulations amended hunting and sport fishing regulations that are applicable to the Upper Mississippi River National Wildlife and Fish Refuge. We are proposing this to implement the refuge CCP, better inform the general public of the regulations at the refuge, increase understanding and compliance with these regulations, and make enforcement of these regulations more efficient. In addition to finding these regulations in 50 CFR part 32, visitors will find them reiterated in literature distributed by each refuge and posted on signs at major access points. Visitors will also find the boundaries of closed areas or other restricted-use areas referenced in this document marked by specific signs.

This proposal includes cross-references to a number of existing regulations in 50 CFR parts 27 and 32 to assist hunting and sport fishing visitors with understanding safety and other legal requirements on refuges. This redundancy is deliberate, with the intention of improving safety and compliance in our hunting and sport fishing programs.

Fish Advisory

For health reasons, anglers should review and follow State-issued consumption advisories before enjoying recreational sport fishing opportunities on Service-managed waters. You can find information about current fish consumption advisories on the Internet at: *http://www.epa.gov/waterscience/fish/.*

Request for Comments

You may comment on this proposed rule by any one of several methods:

1. *You may comment via e-mail to: uppermississippiriver@fws.gov.* Please include: ''*Attn:* Hunting/Fishing Regs.'' and your full name and return mailing address in your e-mail message (See ''Public Availability of Comments,'' below). If you do not receive a confirmation that we have received your e-mail message, contact us directly at (507) 452–4232.

2. *You may mail or hand-deliver/courier your comments to:* Refuge Manager, Upper Mississippi River National Wildlife and Fish Refuge, 51 East Fourth Street, Room 101, Winona, MN 55987.

3. *You may fax comments to:* Refuge Manager, Upper Mississippi River National Wildlife and Fish Refuge, at (507) 452–0851.

4. You may submit comment online at the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions at that site for submitting comments.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Comment

Department of the Interior policy is, whenever practicable, to afford the public a meaningful opportunity to participate in the rulemaking process. During preparation of the refuge CCP, we used an extensive public information, outreach, and comment process, including 46 public meetings or workshops attended by 4,500 persons and 80 other meetings with State department of natural resources agencies, other agencies, interest groups, elected officials, and other Service and Department of Interior offices. We received and responded to a total of 3,230 written comments in the Final EIS. This document, and its publication as a proposed rule in the **Federal Register**, will provide an additional opportunity for comment during the 30-day comment period.

We believe that a 30-day comment period, through this broader publication following the earlier public involvement, gives the public sufficient time to comment before the upcoming seasons. In addition, in order to continue to provide for previously authorized hunting and fishing opportunities while at the same time providing for adequate resource and visitor protection, we must be timely in providing modifications to hunting and fishing programs on refuges.

If adopted, we will incorporate these proposed regulations into 50 CFR 32.42 (Minnesota). Part 32 contains general provisions and part 32.42 contains refuge-specific regulations for hunting and sport fishing on refuges located or headquartered in Minnesota.

Clarity of This Rule

Executive Order (E.O.) 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (e.g., grouping and order of sections, use of headings, paragraphing) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the ''Supplementary Information'' section of the preamble helpful in understanding the rule? (6) What else could we do to make the proposed rule easier to understand? Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to: *Execsec@ios.doi.gov.*

Regulatory Planning and Review

In accordance with the criteria in Executive Order (E.O.) 12866, the Service asserts that this rule is not a significant regulatory action. The Office of Management and Budget (OMB) makes the final determination under E.O. 12866.

a. This proposed rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government. A cost-benefit and full economic analysis is not required. However, a brief assessment follows to clarify the costs and benefits associated with this proposed rule.

The purpose of this proposed rule is to implement amended hunting and sport fishing regulations on the Upper Mississippi River National Wildlife and Fish Refuge beginning with the 2007–2008 seasons. These regulations are derived from and are consistent with the CCP approved October 24, 2006, and whose environmental and socioeconomic impacts are documented in the Final EIS (available at *http://www.fws.gov/midwest/planning/uppermiss*).

Costs Incurred

Costs incurred by this proposed regulation include signing of areas,

leaflet preparation, and printing to provide information to the public, law enforcement, and monitoring. However, these are regular and reoccurring functions on the refuge with or without these proposed regulations and can be handled within normal budget and staffing levels. Therefore, we expect any costs to be minor in the short term and negligible in the long term.

Benefits Accrued

These proposed regulations would have several effects on current hunting opportunities on the refuge. Although some areas open to hunting would change, the quality of hunting could increase, especially for waterfowl, since the refuge would likely hold more birds in more areas for longer periods of time in the fall. In addition, improvement of habitat quality from ongoing habitat projects will likely result in an increase in some game populations and positively affect the hunting experience for many. Also, the CCP calls for an increase in land acquisition over time, opening several thousand acres to all forms of public hunting. For example, in 2005, an additional 2,000 acres was open to public hunting at the Lost Mound Unit, Savanna District, due to acquisition of the former Savanna Army Depot.

We estimate that hunting visits will increase 10 percent over the 15-year life of the CCP due to overall long-term trends in hunter visits, expected improvements to the hunting experience, and a better distribution of waterfowl and, thus, hunting opportunity. We predict these regulations to have a corresponding increase in positive economic impact as reflected in Table 1 below.

Table 1 shows the expected change by the end of the 15-year life of the CCP resulting from the implementation of the 2007–2008 hunting regulations compared with FY 2003 for the 19-county area on and adjacent to the refuge. We expect annual hunting visitation to increase by 10 percent resulting in 26,362 more hunter visits. Retail expenditures associated with this increased visitation total $520,399 with total economic output (based on an output multiplier of 1.23 for the 19-county region impacted by the refuge) of $642,526. An additional nine jobs with associated income of $145,343 occur along with an additional $68,909 in Federal and State tax revenue.

TABLE 1.—ANNUAL ECONOMIC IMPACTS OF 2007–2008 HUNTING AND FISHING REGULATIONS COMPARED WITH FY 2003 IMPACTS: HUNTING VISITORS

[2003 dollars]

Impacts	FY 2003	2007–2008 Regulations (change from FY 2003 for 15-year span of CCP)
Hunting Visitors	263,623	+26,362
Expenditures	$5,203,988	+520,399
Economic Output	$6,425,261	+$642,526
Jobs	87	9
Job Income	$1,453,433	+$145,343
Federal and State Taxes	$689,090	+$68,909

These proposed regulations would have several effects on current fishing opportunities on the refuge. A minimum of approximately 140,000 acres of water would remain open to year-round fishing, a decrease of about 500 acres from existing conditions. This decrease would be due to changes in waterfowl sanctuaries where we allow no entry during the respective State waterfowl hunting season. However, effects on fall fishing in approximately 31,000 acres of waterfowl hunting closed area included in voluntary avoidance guidelines would be variable since compliance is voluntary. In addition, the voluntary avoidance provision is only in effect from October 15 to the end of the respective State waterfowl hunting season when fishing pressure is much reduced.

Overall fishing opportunities would remain abundant, and fishing would be welcome in closed areas during the peak spring, summer, early fall, and winter period. As called for in the CCP, the improvement of habitat quality from ongoing and planned habitat projects will likely result in an increase in some sport fish populations and positively affect the fishing experience for many. Increased efforts to improve water quality through work with private landowners in tributary watersheds, and more emphasis on control of aquatic invasive species, could also result in increases in sport fish populations and thus fishing success. Despite voluntary guidelines or motor restrictions that may limit fall fishing in waterfowl closed areas, we expect fishing visits to increase 5 percent based on long-term trends in angling visits, improvements in fish habitat, and additional fishing-related facilities. We predict the 2007–2008 regulations to have a corresponding increase in positive economic impact as reflected in Table 2.

Table 2 shows the expected change by the end of the 15-year CCP lifespan resulting from the implementation of the 2007–2008 fishing regulations compared with FY 2003 in the 19-county area. We expect the annual number of fishing visitors to increase by 60,696, with associated retail expenditures of $1,478,817 and total economic output of $1,811,153. We associate these expenditures and output with 24 jobs and $405,965 in job-related income. Federal and State tax revenue would increase by $194,241.

TABLE 2.—ANNUAL ECONOMIC IMPACTS OF 2007–2008 HUNTING AND FISHING REGULATIONS COMPARED WITH FY 2003 IMPACTS: FISHING VISITORS

[2003 dollars]

Impacts	FY 2003	2007–2008 Regulations (change from FY 2003 for 15-year span of CCP)
Fishing Visitors	1,213,916	+60,696
Expenditures	$29,576,333	+$1,478,817
Economic Output	$36,223,053	+$1,811,153
Jobs	483	24
Job Income	$8,119,297	+$405,965
Federal and State Taxes	$3,884,811	+$194,241

b. This proposed rule will not create inconsistencies with other agencies' actions. This action pertains solely to the management of the Refuge System. The fishing and hunting activities located on national wildlife refuges account for approximately 1 percent of the available supply in the United States. Any small, incremental change in the supply of fishing and hunting opportunities will not measurably impact any other agency's existing programs.

c. This proposed rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. This proposed rule does not affect entitlement programs. There are no grants or other Federal assistance programs associated with public use on national wildlife refuges.

d. This proposed rule will not raise novel legal or policy issues that were not addressed in the Final EIS. This proposed rule continues the practice of allowing recreational public use of the refuge. Many refuges in the Refuge System currently have opportunities for the public to hunt and fish on refuge lands.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act [SBREFA] of 1996) (5 U.S.C. 601, *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant impact'' and a threshold for a ''substantial number of small entities.'' See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

This proposed rule does not increase the number of recreation types allowed on the refuge but amends hunting and fishing regulations on the refuge. As a result, opportunities for hunting and fishing recreation on the refuge will remain abundant and increase over time.

Many small businesses within the retail trade industry (such as hotels, gas stations, taxidermy shops, bait and tackle shops, etc.) may benefit from some increased refuge visitation. A large percentage of these retail trade establishments in the majority of affected counties qualify as small businesses (Table 3).

We expect that the incremental recreational opportunities will be scattered, and so we do not expect that the rule will have a significant economic effect (benefit) on a substantial number of small entities in any given community or county. Using the estimate derived in the *Regulatory Planning and Review* section, we expect recreationists to spend an additional $2 million annually in total in the refuges' local economies. As shown in Table 3, this represents 0.02 percent of the total amount of retail expenditures in the 19-county area. For comparison purposes, the county with the smallest retail expenditure total, Buffalo County in Wisconsin, is shown. If the entire retail trade expenditures associated with the 2007–2008 hunting and fishing regulations occurred in Buffalo County, this would amount to 3.4 percent increase in annual retail expenditures.

TABLE 3.—COMPARATIVE EXPENDITURES FOR RETAIL TRADE ASSOCIATED WITH ADDITIONAL REFUGE VISITATION FROM 2007–2008 HUNTING AND FISHING REGULATIONS

	Retail trade in 2002	Change due to 2007–2008 hunting and fishing regulations (15-year span of CCP)	Change as percent of total retail trade (percent)	Total number of retail establishments	Establishments with fewer than 10 employees
19 County Area	$9.8 billion	$1,999,216	0.02	24,878	17,957
Buffalo County WI	$58.3 million	1,999,216	3.4	350	290

Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. We anticipate no significant employment or small business effects. This rule:

a. Would not have an annual effect on the economy of $100 million or more. By the end of the 15-year CCP lifespan, the additional fishing and hunting opportunities on the refuge would generate an additional $2 million in angler and hunter expenditures with an economic impact estimated at $2.5 million per year (2003 dollars). Consequently, the maximum benefit of this rule for businesses both small and large would not be sufficient to make this a major rule. The impact would be scattered across 19 counties and would most likely not be significant in any local area.

b. Would not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. We do not expect this proposed rule to affect the supply or demand for fishing and hunting opportunities in the United States and, therefore, it should not affect prices for fishing and hunting equipment and supplies, or the retailers that sell equipment. Additional refuge hunting and fishing opportunities would account for less than 0.0001 percent of the available opportunities in the United States.

c. Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This proposed rule represents only a small proportion of recreational spending of a small number of affected anglers and hunters, approximately a maximum of $2.5 million annually in impact (economic output). Therefore, this rule would have no measurable economic effect on the wildlife-dependent industry, which has annual sales of equipment and travel expenditures of over $72 billion nationwide.

Unfunded Mandates Reform Act

Since this proposed rule would apply to public use of federally owned and managed refuges, it would not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule would not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (E.O. 12630)

In accordance with E.O. 12630, this proposed rule would not have significant takings implications. This regulation would affect only visitors to the refuge and describe what they can do while they are on the refuge.

Federalism (E.O. 13132)

As discussed in the Regulatory Planning and Review and Unfunded Mandates Reform Act sections above, this proposed rule would not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment under E.O. 13132. In preparing the CCP for the refuge, we worked closely with the four States bordering the refuge, and this proposed rule reflects the CCP.

Civil Justice Reform (E.O. 12988)

In accordance with E.O. 12988, the Office of the Solicitor has determined that the proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. This proposal would clarify established regulations and result in better understanding of the regulations by refuge visitors.

Energy Supply, Distribution or Use (E.O. 13211)

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this proposed rule is a modification of an existing hunting and fishing program on the refuge, it is not a significant regulatory action under E.O. 12866, and we do not expect it to significantly affect energy supplies, distribution, and use. Therefore, this action is a not a significant energy action and no Statement of Energy Effects is required.

Consultation and Coordination With Indian Tribal Governments (E.O. 13175)

In accordance with E.O. 13175, we have evaluated possible effects on federally recognized Indian tribes and have determined that there are no effects. We coordinate recreational use on national wildlife refuges with Tribal governments having adjoining or overlapping jurisdiction before we propose changes to the regulations. During scoping and preparation of the Final EIS, we contacted 35 Indian tribes to inform them of the process and seek their comments.

Paperwork Reduction Act

This regulation does not contain any information collection requirements other than those already approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) (OMB Control Number is 1018–0102). See 50 CFR 25.23 for information concerning that approval. 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.

Endangered Species Act Section 7 Consultation

During preparation of the Final EIS, we completed a section 7 consultation and determined that the preferred alternative, which included hunting and fishing changes reflected in this proposed rule, is not likely to adversely effect individuals of listed or candidate species or designated critical habitat of such species. The Service's Ecological Services Office concurred with this determination. Listed species on the refuge are the Higgins eye mussel and bald eagle; candidate species are the Eastern massasauga and spectaclecase and sheepnose mussels. A copy of the section 7 evaluation and accompanying biological assessment is available from the refuge at the location listed in the **ADDRESSES** section of this document.

National Environmental Policy Act

Concerning the actions that are the subject of this proposed rulemaking, we have complied with NEPA through the preparation of a Final EIS and Record of Decision which include the major hunting and fishing changes reflected in this proposed rule. The NEPA documents are available on our Web site at *http://www.fws.gov/midwest/planning/uppermiss.*

Available Information for Specific Districts of the Refuge

The refuge is divided into four districts for management, administrative, and public service effectiveness and efficiency. These districts correspond to two or more Mississippi River pools created by the series of locks and dams on the river. District offices are located in Winona, Minnesota (Pools 4–6), La Crosse, Wisconsin (Pools 7–8), McGregor, Iowa (Pools 9–11), and Savanna, Illinois (Pools 12–14). If you are interested in specific information pertaining to a

particular closed area, no hunting zone, managed hunt, or other feature discussed in this proposed rule, you may contact the appropriate district office listed below:

Winona District, U.S. Fish and Wildlife Service, 51 East Fourth Street, Room 203, Winona, MN 55987; Telephone (507) 454–7351.

La Crosse District, U.S. Fish and Wildlife Service, 555 Lester Avenue, Onalaska, WI 54650; Telephone (608) 783–8405.

McGregor District, U.S. Fish and Wildlife Service, P.O. Box 460, McGregor, IA 52157; Telephone (563) 873–3423.

Savanna District, U.S. Fish and Wildlife Service, 7071 Riverview Road, Thomson, IL 61285; Telephone (815) 273–2732.

Primary Author

Don Hultman, Refuge Manager, Upper Mississippi River National Wildlife and Fish Refuge, is the primary author of this rulemaking document.

List of Subjects in 50 CFR Part 32

Fishing, Hunting, Reporting and recordkeeping requirements, Wildlife, Wildlife refuges.

For the reasons set forth in the preamble, we propose to amend title 50, Chapter I, subchapter C of the Code of Federal Regulations as follows:

PART 32—[AMENDED]

1. The authority citation for part 32 continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd–668ee, and 715i.

2. Amend § 32.32 Illinois by revising Upper Mississippi River National Wildlife and Fish Refuge to read as follows:

§ 32.32 Illinois.

* * * * *

Upper Mississippi River National Wildlife and Fish Refuge

Refer to § 32.42 Minnesota for regulations.

3. Amend § 32.34 Iowa by revising Upper Mississippi River National Wildlife and Fish Refuge to read as follows:

§ 32.34 Iowa.

* * * * *

Upper Mississippi River National Wildlife and Fish Refuge

Refer to § 32.42 Minnesota for regulations.

4. Amend § 32.42 Minnesota by revising Upper Mississippi River National Wildlife and Fish Refuge to read as follows:

§ 32.42 Minnesota.

* * * * *

Upper Mississippi River National Wildlife and Fish Refuge

A. Migratory Game Bird Hunting. We allow hunting of migratory game birds on areas designated by the refuge manager and shown on maps available at refuge offices in accordance with State regulations subject to the following conditions:

1. You must possess a hunting license valid in the State in which you are hunting and be in compliance with all applicable State and Federal regulations and requirements (see § 32.2). You cannot reserve hunting areas, except at Potter's Marsh Managed Hunt Area, Pool 13, near Thomson, Illinois, in accordance with procedures established by the refuge manager.

2. In areas posted and shown on maps as ''No Entry—Sanctuary,'' we prohibit migratory bird hunting at all times and all public entry except as specified. These areas are named and located as follows:

i. Pool Slough, Pool 9, Minnesota/Iowa, 1,112 acres.

ii. Bertom Island, Pool 11, Iowa, 31 acres.

iii. Guttenberg Ponds, Pool 11, Iowa, 252 acres.

iv. Spring Lake, Pool 13, Illinois, 3,686 acres.

3. In areas posted and shown on maps as ''Area Closed'' and ''Area Closed—No Motors,'' we prohibit migratory bird hunting at all times. We ask that you practice voluntary avoidance of these areas by any means or for any purpose from October 15 to the end of the respective State duck season. In areas also marked ''no motors,'' we prohibit the use of motors on watercraft from October 15 to the end of the respective State duck season.

These ''Area(s) Closed'' are named and located as follows:

i. Nelson-Trevino, Pool 4, Wisconsin, 3,773 acres (no voluntary avoidance provision).

ii. Peterson Lake, Pool 4, Minnesota/Wisconsin, 3,111 acres (no voluntary avoidance provision).

iii. Weaver Bottoms/Lost Island, Pool 5, Minnesota/Wisconsin, 3,508 acres.

iv. Polander Lake, Pool 5A, Minnesota/Wisconsin, 1,907 acres.

v. Lake Onalaska, Pool 7, Wisconsin, 7,369 acres (voluntary avoidance on 3,356 acres until mid-November).

vi. Wisconsin Islands, Pool 8, Minnesota/Wisconsin, 6,510 acres.

vii. Harpers Slough, Pool 9, Iowa/Wisconsin, 5,209 acres.

viii. Wisconsin River Delta, Pool 10, Wisconsin, 1,406 acres (closed November 1 to end of duck season).

ix. 12-Mile Island, Pool 11, Iowa, 1,145 acres.

x. Bertom-McCartney, Pool 11, Wisconsin, 2,384 acres (no voluntary avoidance provision).

xi. Pleasant Creek, Pool 13, Iowa, 2,067 acres.

xii. Elk River, Pool 13, Iowa, 1,237 acres.

The ''Area(s) Closed—No Motors'' are named and located as follows:

xiii. Spring Lake, Pool 5, Wisconsin, 243 acres.

xiv. Sturgeon Slough, Pool 10, Wisconsin, 340 acres.

xv. 12-Mile Island, Pool 10, Iowa, 540 acres.

xvi. John Deere Marsh, Pool 11, Iowa, 439 acres.

xvii. Kehough Slough, Pool 12, Illinois, 343 acres.

xviii. Beaver Island, Pool 14, Iowa, 717 acres.

4. In areas posted and shown on maps as ''No Hunting Zone'' or ''No Hunting or Trapping Zone,'' we prohibit migratory bird hunting at all times. You must unload and encase firearms in these areas. These areas are named and located as follows:

i. Upper Halfway Creek Marsh, Pool 7, Wisconsin, 141 acres.

ii. Hunter's Point, Pool 8, Wisconsin, 82 acres.

iii. Goose Island, Pool 8, Wisconsin, 986 acres (also no motors and voluntary avoidance as in condition A3).

iv. Sturgeon Slough, Pool 10, Wisconsin, 66 acres.

v. Goetz Island Trail, Pool 11, Iowa, 32 acres.

vi. Crooked Slough Backwater, Pool 13, Illinois, 2,467 acres.

vii. Crooked Slough Proper, Pool 13, Illinois, 192 acres.

viii. Frog Pond, Pool 13, Illinois, 64 acres.

ix. Ingersoll Learning Center, Pool 13, Illinois, 41 acres.

5. We prohibit hunting of migratory birds within 50 yards (45 m) of the Great River Trail at Thomson Prairie, within 150 yards (135 m) of the Great River Trail at Mesquaki Lake, and within 400 yards (360 m) of the Potter's Marsh Managed Hunt area, all in or near Pool 13, Illinois.

6. You may retrieve dead or wounded game from areas posted ''Area Closed,'' ''No Hunting Zone,'' and ''No Hunting or Trapping Zone'' provided you do not take a loaded gun into the area and do not attempt to chase birds from the area.

You may not use a motor to aid in the retrieval of game in areas posted ''Area Closed—No Motors.'' You may not retrieve birds or other game from areas posted ''No Entry—Sanctuary.''

7. You may not engage in open-water waterfowl hunting in Pool 11, approximate river miles 586–592, Grant County, Wisconsin as marked with signs and as shown on refuge maps. Open-water hunting regulations and definitions that apply for Wisconsin outside of Grant County will apply in this area.

8. You may possess only approved nontoxic shot shells while in the field (see § 32.2(k)).

9. We allow the use of dogs for hunting in accordance with State regulations. When dogs are not actively engaged in authorized hunting activities, the following conditions apply:

i. We prohibit dogs disturbing or endangering wildlife or people while on the refuge.

ii. All dogs while on the refuge must be under the control of their owners/handlers at all times or on a leash.

iii. We prohibit allowing dogs to roam.

iv. All dogs must be on a leash when on hiking trails, or other areas so posted.

v. We allow working a dog in refuge waters by tossing a retrieval dummy or other object for out-and-back exercise.

vi. Owners/handlers of dogs are responsible for disposal of dog droppings on refuge public use concentration areas such as trails, sandbars, and boat landings.

vii. We prohibit field trials and commercial/professional dog training.

10. We prohibit the construction of permanent hunting blinds (see § 27.92 of this chapter). You may use natural material for seasonal blinds, with restrictions. You may gather grasses and marsh vegetation from the refuge for blind-building materials; however, Phragmites (giant cane) may not be cut or brought onto the refuge. You may not gather, bring onto the refuge, or use for blind building tree(s) or other plant parts, including dead wood on the ground, greater than 2 inches (5 cm) in diameter. We prohibit constructing hunting blinds from rocks placed for shoreline protection (rip rap). You may leave only seasonal blinds made entirely of natural vegetation and biodegradable twines on the refuge. We consider all such blinds public property and open to use by any person on a first-come-first-served basis. You may use manmade material for temporary blinds, with restrictions. You may not use lumber, pipe, posts, or timbers greater than 2 inches (5 cm) in diameter. At the end of each day's hunt, you must remove all manmade blind materials, including boat blinds. Any blinds containing manmade materials left on the refuge are subject to immediate removal and disposal. Manmade materials include, but are not limited to, wooden pallets, metal fence posts, wire, nails, staples, netting, or tarps (see §§ 27.93 and 27.94 of this chapter).

11. We will phase out the construction and use of permanent hunting blinds for waterfowl hunting within the Savanna District of the refuge. We will no longer allow permanent blinds on the refuge in Pool 12 beginning with the 2007–2008 waterfowl hunting season, Pool 14 after the 2007–2008 season, and Pool 13 after the 2008–2009 season. The following regulations apply for phase out of permanent hunting blinds:

i. All permanent blinds must have the current name, address, and telephone number of the blind owner, posted no smaller than 3″ x 5″ (7.5 cm x 12.5 cm) inside the blind.

ii. The blind's owner must remove from the refuge all blind materials, including old blind materials located within 100 yards (90 m) of the blind, within 30 days of the end of the waterfowl hunting season.

iii. After the phase-out year of permanent blinds in each pool, refuge hunting blind regulations in Condition A10 will apply, except that we require a 200-yard (180-m) spacing distance between hunting parties on the Illinois portions of the refuge in Pools 12, 13, and 14.

12. You may set up hunting equipment the day of the hunt but must remove it at the end of each day. You may place and leave hunting equipment and decoys on the refuge only from 1 hour before the start of legal shooting hours until ½ hour after the close of legal shooting hours. You may not use nails, wire, screws, or bolts to attach a stand to a tree, or hunt from a tree into which a metal object has been driven or screwed for support (see § 32.2(i) and § 27.93 of this chapter).

13. We prohibit the cutting, removing, or damaging of any tree or other vegetation except as allowed for blinds in Condition A10 or by written permit. You may not clear vegetation for shooting lanes or limb trees for tree stands (see § 27.51 of this chapter).

14. We prohibit camping during waterfowl hunting seasons within areas posted ''No Entry—Sanctuary,'' ''Area Closed,'' ''Area Closed—No Motors,'' and ''No Hunting Zone'' or on any sites not clearly visible from the main commercial navigation channel of the Mississippi River. We define camping as erecting a tent or shelter of natural or synthetic material, preparing a sleeping bag or other bedding material for use, parking of a motor vehicle, or mooring or anchoring of a vessel for the apparent purpose of overnight occupancy, or occupying or leaving personal property, including boats or other craft, at a site anytime between the hours of 11 p.m. and 3 a.m. on any given day. Where we allow camping, you must occupy claimed campsites each night.

15. We prohibit the building or use of warming fires while hunting (see § 27.95 of this chapter). We only allow campfires in conjunction with camping, day-use activities on beaches, or on the ice while ice fishing using only dead wood on the ground, or materials brought onto the refuge such as charcoal or firewood. You must remove any unused firewood brought onto the refuge upon departure due to threat of invasive insects.

16. We prohibit all vehicle use on or across refuge lands at any time except on designated routes of travel or on the ice over navigable waters accessed from boat landings. We prohibit parking beyond vehicle control barriers or on grass or other vegetation. You may not park or operate vehicles in a manner that obstructs or impedes any road, trail, fire lane, boat ramp, access gate, or other facility or in a manner that creates a safety hazard or endangers any person, property, or environmental feature. We may impound any vehicle left parked in violation at the owner's expense (see § 27.31 of this chapter).

17. We require that you keep all refuge lands clean during your period of use or occupancy. At all times you must keep all refuse, trash, and litter contained in bags or other suitable containers and not left scattered on the ground or in the water. You must remove all personal property, refuse, trash, and litter immediately upon vacating a site. We consider animal carcasses and spent shells to be litter (see § 27.94 of this chapter).

B. Upland Game Hunting. We allow hunting of upland game on areas of the refuge designated by the refuge manager and shown on maps available at refuge offices in accordance with State regulations subject to the following conditions:

1. Condition A1 applies.

2. We prohibit the carrying, possessing, or discharging of firearms (including dog training pistols and dummy launchers), air guns, or any other weapons on the refuge, unless you are a licensed hunter or trapper engaged in authorized activities during

established seasons, in accordance with Federal, State, and local regulations. We prohibit target practice on the refuge (see §§ 27.42 and 27.43 of this chapter).

3. In areas posted and shown on maps as ''No Entry—Sanctuary,'' we prohibit entry and upland game hunting at all times. In areas posted and shown on maps as ''No Entry—Sanctuary October 1 to end of state duck hunting season,'' we allow upland game hunting beginning the day after the respective State duck hunting season until upland game season closure or March 15, whichever comes first, except we allow spring turkey hunting during State seasons. We describe these areas more fully in Condition A2.

4. In areas posted and shown on maps as ''Area Closed'' and ''Area Closed—No Motors,'' we allow upland game hunting beginning the day after the respective State duck hunting season until upland game season closure or March 15, whichever comes first, except we allow spring turkey hunting during State seasons. We ask that you practice voluntary avoidance of these areas by any means or for any purpose from October 15 to the end of the respective State duck season. In areas also marked ''Area Closed—No Motors,'' we prohibit the use of motors on watercraft from October 15 to the end of the respective State duck season. We describe these areas more fully in Condition A3.

5. In areas posted and shown on maps as ''No Hunting Zone'' or ''No Hunting or Trapping Zone,'' we prohibit upland game hunting at all times. You must unload and encase firearms in these areas. We describe these areas more fully in Condition A4.

6. We prohibit hunting of upland game within 50 yards (45 m) of the Great River Trail at Thomson Prairie, within 150 yards (135 m) of the Great River Trail at Mesquaki Lake, and within 400 yards (360 m) of the Potter's Marsh Managed Hunt area, all in or near Pool 13, Illinois.

7. You may only use or possess approved nontoxic shot shells while in the field, including shot shells used for hunting wild turkey (see § 32.2(k)).

8. We prohibit the shining of a light to locate any animal on the refuge except at the point of kill for species specified in respective State night or artificial light hunting regulations (see § 27.73 of this chapter). You may use lights to find your way. We prohibit the distribution of bait or feed, the hunting over bait or feed, and the use or possession of any drug on any arrow for bow hunting (see § 32.2(g) and (h)). You must comply with all other hunt method regulations of the respective State on the refuge.

9. Conditions A6, A9, A10, and A12 through A17 apply.

C. Big Game Hunting. We allow hunting of big game on areas of the refuge designated by the refuge manager and shown on maps available at refuge offices in accordance with State regulations subject to the following conditions:

1. Conditions A1 and B2 apply.

2. In areas posted and shown on maps as ''No Entry—Sanctuary,'' we prohibit entry and big game hunting at all times. In areas posted and shown on maps as ''No Entry—Sanctuary October 1 to end of state duck hunting season,'' we allow big game hunting beginning the day after the respective State duck hunting season until big game season closure or March 15, whichever comes first. We describe these areas more fully in Condition A2.

3. In areas posted and shown on maps as ''Area Closed'' and ''Area Closed—No Motors'' we allow big game hunting beginning the day after the respective State duck hunting season until big game season closure or March 15, whichever comes first. We ask that you practice voluntary avoidance of these areas by any means or for any purpose from October 15 to the end of the respective State duck season. In areas also marked ''Area Closed—No Motors,'' we prohibit the use of motors on watercraft from October 15 to the end of the respective State duck season. These areas are described more fully in Condition A3.

4. In areas posted and shown on maps as ''No Hunting Zone'' or ''No Hunting or Trapping Zone,'' we prohibit big game hunting at all times. You must unload and encase firearms in these areas. We describe these areas more fully in Condition A4.

5. We prohibit hunting of big game within 50 yards (45 m) of the Great River Trail at Thomson Prairie, within 150 yards (135 m) of the Great River Trail at Mesquaki Lake, and within 400 yards (360 m) of the Potter's Marsh Managed Hunt area, all in or near Pool 13, Illinois.

6. Conditions A6, A9, A10, A12 through A17, and B7 apply.

D. Sport Fishing. We allow fishing on areas of the refuge designated by the refuge manager and shown on refuge maps available at refuge offices in accordance with State regulations subject to the following conditions:

1. In the Bertrom Island ''No Entry—Sanctuary'' area, Pool 11, Wisconsin we prohibit entry and fishing at all times.

2. In the Spring Lake ''Area Closed'' area, Pool 13, Illinois, we prohibit fishing from October 1 until the day after the close of the State duck hunting season.

3. In areas posted and shown on maps as ''Area Closed'' and ''Area Closed—No Motors,'' we allow fishing; however, we ask that you practice voluntary avoidance of these areas by any means or for any purpose from October 15 to the end of the respective State duck season. In areas also marked ''Area Closed—No Motors,'' we prohibit the use of motors on watercraft from October 15 to the end of the respective State duck season. We describe these areas more fully in Condition A3.

4. On Mertes Slough, Pool 5, Wisconsin, we allow only hand-powered boats or boats with electric motors.

5. For the purpose of determining length limits, slot limits, and daily creel limits, the impounded areas of Spring Lake, Duckfoot Marsh, and Pleasant Creek in Pool 13, Illinois, are part of the Mississippi River site-specific State regulations.

6. Conditions A10, and A13 through A17 apply.

* * * * *

5. Amend § 32.69 Wisconsin by revising Upper Mississippi River National Wildlife and Fish Refuge to read as follows:

§ 32.69 Wisconsin.

* * * * *

Upper Mississippi River National Wildlife and Fish Refuge

Refer to § 32.42 Minnesota for regulations.

* * * * *

Dated: June 19, 2007.

David M. Verhey,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E7–12514 Filed 6–27–07; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 070613193–7194–01; I.D. 121903C]

Endangered and Threatened Wildlife and Plants; Finding on Whether to List Eastern Oyster as a Threatened or Endangered Species

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

ACTION: Notice of a listing determination and availability of a status review document.

SUMMARY: The eastern oyster biological review team (BRT) has prepared an Endangered Species Act (ESA) status review report for the eastern oyster (Crassostrea virginica) and submitted it to NMFS. After reviewing the best available scientific and commercial information, we (NMFS) have determined that listing the eastern oyster as threatened or endangered under the ESA is not warranted at this time.

DATES: This finding is effective on June 28, 2007.

ADDRESSES: The eastern oyster status review report and list of references are available by submitting a request to the Assistant Regional Administrator, Protected Resources Division, Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930. The status review report and other reference materials regarding this determination can also be obtained via the Internet at: *http://www.nero.noaa.gov/prot__res/CandidateSpeciesProgram/index.html*.

FOR FURTHER INFORMATION CONTACT: Kim Damon-Randall, NMFS, Northeast Region (978) 281–9300 x6535 or Marta Nammack, NMFS, Office of Protected Resources (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

On January 11, 2005, we received a petition from Mr. Wolf-Dieter Busch (the petitioner), Ecosystem Initiatives Advisory Services, to list eastern oyster (Crassostrea virginica) as threatened or endangered under the ESA. After reviewing the information contained in the petition and that which was readily available to us, we determined that there was sufficient information to indicate that the petitioned action may be warranted. On May 18, 2005, we published a positive 90–day finding in the **Federal Register**, which initiated the status review process.

On October 19, 2005, we received a letter from the petitioner dated October 13, 2005, requesting the recall of the eastern oyster petition. In his letter, the petitioner indicated that his request to withdraw the petition was due to the public and industry's confusion over the petition and listing process. He noted the significant concerns of some that the species may be listed as endangered and thereby, create severe restrictions and regulations for this resource. He also expressed concern that, given the timeline of the review, NMFS may not have enough information to determine if eastern oyster subspecies exist. He concluded that he hoped that we would continue with the review as he considers the status review report to be a comprehensive resource which will be of great value in focusing restoration activities for this resource.

We accepted this request and as a result, ceased the evaluation of the petition. However, a considerable amount of effort had been expended by the BRT at the point at which the withdrawal of the petition occurred. Also, the completed status review report is the most timely and comprehensive resource document for this species. As such, we determined that because the report is a useful tool in guiding future management decisions, the BRT would complete its report. We also decided to complete our evaluation of the status of the species under the ESA as stated in the **Federal Register** notice announcing the 90-day finding on the petition (70 FR 28510).

As part of the full evaluation of the status of the species under the ESA, we requested that the Center for Independent Experts provide three independent consultants to serve as peer reviewers. These reviewers were tasked with reading and reviewing the status review report and providing a written summary of their comments. Specifically, they were asked to address the following (at a minimum): (1) Are species and/or subspecies delineations supported by the information presented?; (2) Does the report include and cite the best scientific and commercial information available on the species and threats to it and its habitat?; (3) Are the scientific conclusions sound and derived logically from the results?; (4) Where available, are opposing scientific studies or theories acknowledged and discussed? The peer reviewers completed their task in October 2006 and specifically found that the status review report contained the best scientific and commercial information available.

Biology and Life History of the Eastern Oyster

The eastern oyster occurs naturally in a great diversity of habitats along the western Atlantic Ocean from the Canadian Maritime Provinces to the Gulf of Mexico, Panama, and the Caribbean Islands (Carlton and Mann, 1996; Abbott, 1974; MacKenzie, 1997a; Jenkins *et al.*, 1997; FAO, 1978). The eastern oyster has been transplanted outside of its natural range and now may be found in western Canada, western United States, western Mexico, Hawaii, Fiji, Tonga, Japan, Mauritius-Indian Ocean, and possibly England (Ruesink *et al.*, 2005).

The eastern oyster is protandric, as individuals first mature as males then typically change to female later in life, and there is also evidence suggesting that the process is reversible later in life (Thompson *et al.*, 1996). Oysters may change sex in response to environmental, nutritional, and/or physiological stresses, or sex determination may be influenced by the sex and proximity of nearby oysters (Tranter, 1958, cited by Thompson *et al.*, 1996; Bahr and Hillman, 1967; Davis and Hillman, 1971; Ford *et al.*, 1990; Needler, 1932; Burkenroad, 1931; Smith, 1949; and Menzel, 1951, all cited by Thompson *et al.*, 1996). Estimates of fecundity range from 2 to 115 million eggs per female, depending on size and geographic location (Galtsoff, 1930, 1964; Davis and Chanley, 1956; Cox, 1988; Cox and Mann, 1992; all cited in Thompson *et al.*, 1996).

Spawning is initiated by a combination of factors including water temperature, salinity, and physiochemical interactions (Galtsoff, 1964; and Loosanoff, 1953, cited by Berrigan *et al.*, 1991; Hayes and Menzel, 1981; Hofstetter, 1977, 1983). Spawning is seasonal (summer) throughout the mid- to northern Atlantic portions of the species' range. In southern waters, spawning occurs in all but the coldest months (Berrigan *et al.*, 1991). Conditions generally required for spawning include water temperatures at or above 20 C and salinity higher than 10 parts per thousand (ppt).

After fertilization, oysters develop through several free-swimming larval stages before attaching to a hard substrate and becoming sessile. The mechanisms for larval dispersal and recruitment are still unclear (Epifanio, 1988). Larval dispersal is generally explained by ''passive'' transport induced by physical factors, by an ''active'' process involving larval swimming, or by a combination of both (Deskshenieks *et al.*, 1996). The first larval stage (trochophore) is formed 4 to 6 hours following fertilization and lasts approximately 1 to 2 days. The trochophore larva does not feed, but subsequent larval stages (veliger) are planktotrophic, feeding on small plants and animals (Kennedy, 1996). Veliger stages, lasting up to 2 months (Hopkins, 1931), include several morphological changes to the larvae resulting in fully developed larvae possessing a well-developed foot.

As oyster larvae become competent to settle they must locate a suitable substrate upon which to attach. Larvae may exhibit exploratory behavior in

locating a suitable substrate upon which to settle (Burke, 1983, as cited in Kennedy, 1996). Both environmental and internal cues are used in determining when and where veliger larvae will settle (Kennedy, 1996). Settlement is a behavioral response that can be repeated or reversed and is followed by metamorphosis, which results in morphological changes and is permanent (Kennedy, 1996). There is evidence that suggests metamorphosis is triggered by salinity and by chemicals given off by live oysters and bio-films on other suitable substrates (Hidu and Haskin, 1971; Keck *et al.*, 1971; Kennedy, 1996).

Temperature, salinity, and food availability greatly influence oyster growth, and, therefore, growth rates vary seasonally, with maximum growth occurring during the summer and fall. Eastern oysters have been reported to survive freezing temperatures in shallow-water habitats and after being exposed to temperatures in excess of 45° C in intertidal areas (Galtsoff, 1964; Shumway, 1996). However, exposures to temperatures above approximately 35° C will adversely affect pumping rate and thereby, feeding (Loosanoff, 1958; and Galtsoff, 1928, as cited by Shumway, 1996). Oysters can tolerate salinities from 0 to 42 ppt, although growth rates are affected by lower salinities (Quast *et al.*, 1988; Shumway, 1996).

Oysters are filter feeders, feeding primarily on phytoplankton and suspended detritus (Langdon and Newell, 1996). *Crassostrea virginica* are capable of adjusting feeding rates depending on the size, type, and composition of the available food source (Baldwin, 1995; Baldwin and Newell, 1995a, 1995b, as cited in Kennedy, 1996).

The eastern oyster plays an important ecological role in the environment in which it inhabits. Self sustaining oyster populations form reefs that: (1) contribute to trophic dynamics by promoting species diversity; (2) provide structural integrity that supports community stability, enhances habitat values, and affects water circulation and flow patterns; and (3) perform ecological services which improve water quality and recycle nutrients.

Abundance

Abundance of the eastern oyster is known to have varied or declined in many estuaries in which it was previously known to be abundant. In some estuaries, abundance has declined due to one or more of the stressors discussed below. Some populations have declined dramatically (e.g., the Hudson-Raritan Estuary). However, even in these locations, with effort, oysters can be found. The eastern oyster can be found as isolated individuals or clusters even in unlikely urbanized places, such as the Hackensack River, Arthur Kill, Harlem River, East River and the Bronx River (Steimle, 2005). However, these isolated survivors may currently exist at the thinnest of margins even though habitat quality has measurably improved and is currently suitable for good growth, as evidenced by oyster culturist results in this estuary complex.

The persistence of oysters in isolated areas at low abundance for perhaps decades, is not uncommon. Some local populations are now too widely dispersed to support enough successful spawning-fertilization and recruitment for natural repopulation (Pers. Comm. Luckenbach, 2005). The low abundance situation of the Hudson-Raritan area may exist in other urbanized estuaries where oyster population surveys have not been done for decades. Some shellfish surveys were conducted without proper oyster sampling gear and focus because the oyster was not considered part of a useful or manageable fishery resource any more. Also, local management agencies may not want to publicize the existence of oysters in some areas to avoid potential public health consequences because of bacterially contaminated water.

According to the BRT, the notable decline of the oyster abundance distributions from estimated historic abundance distribution levels seems to be most prevalent in the more urbanized northeast, e.g., Chesapeake Bay, the Hudson-Raritan Estuary, southern Long Island NY, and some New England estuaries. However, most of the data to document this decline comes from fishery-dependent sources, which is somewhat controlled by socio-economic, not ecological, factors (MacKenzie, 1996). This information base may not present an accurate picture of the abundance and status of oyster populations in many areas. Based upon numerous southern Atlantic/Gulf Coast state reports, the oyster distribution abundances south of Chesapeake Bay seem relatively stable, despite occasional major disturbances, such as hurricanes (Marsh, 2004; Perret, 2005).

Consideration as a ''Species'' Under the ESA

Under the ESA, the term ''species'' refers to ''a species, subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' Distinct population segments of the eastern oyster cannot be listed under the ESA because it is an invertebrate. The term ''subspecies,'' while identified as a term in the ESA's definition of ''species,'' is not itself defined in the ESA. As a matter of science, however, subspecies delineations may rely on discernable morphological, behavioral, genetic, or physiological differences.

Due to extreme morphological plasticity, *C. virginica* has not yet been examined with the goal of identifying morphological differences between populations. However, in 1951, Loosanoff and Nomejko recognized the existence of physiological races along the latitudinal range of *C. virginica*. Since that time, most physiological differences have been found to be related to differences in environmental conditions. Whether additional physiological or morphological studies would be informative is questionable, as any differences between Gulf and Atlantic populations are more likely to be due to local environmental conditions rather than genetic differences (Gaffney, 1996).

Populations of *C. virginica* were initially found to be homogenous in allozyme frequencies across a large portion of the species range. An early allozyme study by Buroker (1983) provided evidence of a uniform population from Cape Cod to Corpus Christi using 32 allozyme loci which exhibited estimated genetic similarities among populations of 99 percent. Several recent genetic studies have been undertaken to better understand the population structure of *C. virginica*, and these studies have found strong patterns of differentiation on the basis of different sequencing data. Studies indicate two separate populations, one within the Atlantic region and one within the Gulf of Mexico, with an intermediate zone between these populations found on the eastern coast of Florida in the general area of Cape Canaveral. *Crassostrea virginica* is not the only western Atlantic species with a notable genetic transition from the temperate Atlantic to subtropical Gulf regions. Similar genetic patterns of population subdivision between Atlantic and Gulf populations can be found in a wide variety of coastal and marine species (Avise, 1992; 2000). Also, a genetically distinct population of *C. virginica* was found in the Laguna Madre area of Texas by different studies that have included samples from this general area (Groue and Lester, 1982; Buroker, 1983; Hedgecock and Okazaki, 1984; King *et al.*, 1994). Genetic differentiation of the Laguna Madre

eastern oyster population may be due to adaptation to hypersaline conditions (up to 35 ppt) created by low levels of precipitation and lack of river inflow, as well as selection or genetic drift due to isolation from oyster populations further north (King *et al.*, 1994).

Although the aforementioned studies indicate Atlantic/Gulf population structure, other studies have agreed with Buroker's conclusion of a panmictic population. MacDonald *et al.* (1996) found a lack of genetic structure among six anonymous nuclear DNA loci from oysters in Panacea, FL, and Charleston, SC. In 1998, Hare and Avise (1992) looked at oysters from Massachusetts to Louisiana and found no population structure at three nuclear loci.

Each peer reviewer was individually asked whether species/subspecies delineations existed for the eastern oyster as a matter of scientific fact. Two of the three felt that the existing information was not sufficient to definitively establish eastern oyster subspecies. The remaining reviewer felt that the available genetic information indicates that the Gulf and Atlantic populations of eastern oyster are ''at a stage of incipient speciation and should probably be considered subspecies.'' The peer reviewers and the members of the BRT all agree that it is difficult to define and delineate subspecies under normal scientific definitions of the terms.

In summation, subspecies delineations often rely on discernable morphological, behavioral, or physiological differences. However, these differences are not readily apparent in an invertebrate species such as the eastern oyster. Thus, a subspecies delineation for the eastern oyster would have to rely predominantly on the available genetic data, which have provided mixed results. Because the data needed to support a subspecies delineation are inconclusive, we examined the listing potential for the eastern oyster both as a separate subspecies and as a single biological unit. Ultimately, we determined that in either case, the species/subspecies determination would not impact or alter the final listing determination. Accordingly, we note the genetic differences but do not make a subspecies delineation based on the present facts.

Species/Subspecies Status

The process for determining whether a species (as defined above) should be listed is based upon the best available scientific and commercial information. We must list a species if it is endangered or threatened because of any of the following ESA section 4(a)(1) 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) inadequacy of existing regulatory mechanisms; and (e) other natural or manmade factors affecting the continued existence of the species. These factors are considered in the following sections.

The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range

There are few data available regarding historic and current oyster reef acreage estimates, and available fisheries dependent and independent data are limited. In order to gather additional data to assess the status of the species, the BRT conducted a telephone survey of state resource managers and oyster experts. Respondents were asked to provide the following information for each estuary within their region/area: historic and current oyster acreage estimates; harvest rates and regulations; the sustainability of oyster populations with and without restoration; recruitment; and the primary stressors facing oyster populations. The survey indicated that the eastern oyster is widely distributed throughout its range and is currently present in all but one of the 71 estuaries represented. This wide distribution is beneficial in many ways in that it provides evidence of the species' resiliency and adaptability and makes the species less susceptible to extinction from a localized catastrophic event (e.g., a hurricane or oil spill). We, therefore, concluded that the one estuary without oysters, the upper Laguna Madre region, does not represent a large portion of the vast geographic range of the species/subspecies and is considered minor in terms of the biological significance to the species or hypothetical subspecies.

The BRT reported that the eastern oyster displays a wide range of survival strategies as it is both a colonizer and an ecosystem engineer and has high reproductive potential. The species' ability to adapt to a wide range of environmental conditions (e.g., tolerance for low dissolved oxygen and wide ranges in salinity and temperature) makes it resilient. The eastern oyster inhabits a naturally-variable environment, and evidence suggests that past local extirpations and colonizations have been common over geological time. Crassostrea virginica is broadly distributed in the western North Atlantic, and its distribution has not changed as threats have increased over time. This is significant because range contraction is often used as an indicator of a problem in many widely distributed marine species. While separating the species into the two potential subspecies reduces the range of each of the subspecies (as compared to the full species), Atlantic and Gulf Coast oyster populations are still widespread, occupying areas from Maine to eastern Florida and western Florida to Texas, respectively. Based on the available data, we concluded that oyster abundance throughout these areas is sufficient to sustain these populations and prevent extinction. While the survey indicated some habitat within the range of the eastern oyster has been degraded or lost, we were able to conclude based upon the available information, including the survey, that the species' ability to adapt to various environmental conditions and its vast geographic range results in habitat degradation being a minimal threat that will not affect the species/subspecies' continued existence.

Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Information from the survey indicated that oyster harvests are at or near recent record low levels along the majority of the U.S. Atlantic coast; however, responding resource managers and independent experts considered overutilization (overharvesting) to currently be a minor threat to oyster populations. According to the BRT, areas along the Atlantic coast south of Cape Lookout and through the Gulf of Mexico appear to have avoided some of the extremely heavy historic utilization experienced by the area from Pamlico Sound to Long Island Sound. Harvest parameters in the Gulf of Mexico are currently less restrictive than those in the mid-Atlantic area, but oyster populations there appear to be effectively managed and monitored so that harvest impacts are not substantial (Marsh, 2004). Eastern oyster resources from Pamlico Sound to Long Island Sound appear to have suffered from long-term overutilization. State managers in this region have attempted to protect public oyster stocks by conducting stock assessments, setting conservative harvest quotas, lowering daily catch limits, limiting harmful gear use, and reducing harvest seasons. Attempts to restore oyster populations and rebuild the resource through general cultch planting, reef rebuilding, and oyster sanctuaries/reserves are also becoming common management tools in

this region. In the survey, overharvesting is listed as occurring only in seven estuaries out of the 71 estuaries assessed. These seven estuaries represent a limited portion of the large geographic range of the species/subspecies, and overutilization in these areas represents a localized issue. Recreational harvest and harvest for scientific purposes were not identified as significant stressors to the eastern oyster. Long-term overutilization in many areas of the eastern oyster's range was a significant contributing factor to the species' historical decline. However, survey respondents no longer consider this to be a significant threat to the eastern oyster in the majority of the species/subspecies' range. Thus, we conclude that overutilization is not a significant ongoing threat that affects the continued existence of the eastern oyster species/subspecies.

Disease or Predation

There are several predators on various life stages of the eastern oyster, including boring sponges and clams, mud worms, carnivorous gastropods, ctenophores, and a number of fish species. However, most of these predators exist as natural associations in the oyster reef community and, in general, most oysters in the population survive. Thus, these associations do not seem to be having an effect at the population level. The eastern oyster is affected primarily by two diseases - DERMO (a parasitic disease caused by the protozoan Perkinsus marinus) (Levine, 1978 = *Dermocystidium marinum*; Mackin *et al.*, 1950 = *Layirinthomyxa marina*; Quick and Mackin, 1971) and MSX (another parasitic disease caused by the protozoan *Haplosporidium nelsoni*)(Haskin *et al.*, 1966). The BRT reported that both of these diseases are capable of causing significant oyster mortalities. However, oysters infected by DERMO have the opportunity to spawn the first summer, and others may be able to spawn a second or third time before succumbing to an infection. With MSX, the salinity must be above 15 ppt to sustain an infection. Thus, infections during drought years are more prevalent. As drought conditions wane, survivors and their progeny may reproduce to re-establish oyster populations. During the wetter years that occurred during the 1970s, there was significant recovery of oyster populations that had been devastated during the 1950–1960 MSX epizootic in both Delaware and Chesapeake Bays. Oyster recovery management programs have concentrated on moderate to lower salinity areas that are less likely to support the development of oyster diseases. Research has been ongoing for several years to develop oysters that are disease tolerant. Also, resource managers help to control the spread of DERMO by controlling/preventing the transplantation of infected oysters to areas not currently infected by the disease. Based on the available information, we conclude that while both predation and disease may have effects on localized populations, impacts to the entire species/subspecies vary both spatially and temporally, allowing some affected populations to recover and sustain the species/subspecies. Thus, we conclude that neither disease nor predation are significant threats that affect the continued existence of the eastern oyster species/subspecies.

Inadequacy of Existing Regulatory Mechanisms

The BRT indicated that regulatory mechanisms for eastern oyster are most logically defined as habitat resource protection (preventative measures), fishery-specific, and conservation/replenishment based. The eastern oyster is not a federally managed species. As such, each state is responsible for controlling harvest, protecting habitat, and conserving or replenishing oyster populations. This results in many different types of regulations to protect oysters throughout their range.

Habitat measures are those defined at the Federal, state, or local level designed to protect aquatic resources (including benthic reef habitat and water quality) from various direct or indirect development impacts (e.g., impacts of channel dredging, onshore development, point-source runoff, etc.). Harvest measures are those intended to control or regulate the commercial or recreational catch of the species, and may or may not be resource conservation based. Conservation/replenishment measures are those intended to ensure the continuance of the fishery or habitat resource through various measures including setting aside no-harvest areas, requiring culling of shell during harvest, setting up programs to return shells from harvested product back to reef areas, or natural seed movement programs intended to support either habitat or fishery restoration.

State shellfish control agencies are responsible for managing shellfish harvesting areas for public health protection, which may result in permanent or temporary closures due to the presence of toxic algal blooms, elevated fecal coliforms and/or Vibrio spp., or chemical contamination. According to the Environmental Protection Agency (*http://www.epa.gov/maia/html/es-condition.html*), shellfishing was prohibited from 3 percent (3,660,000 acres, or 1,481,149 hectares) of the classified shellfish areas in the estuaries in the mid-Atlantic in 2006, restricted in 5 percent (179,000 acres, or 72,438 hectares), and conditionally closed in 2 percent (67,000 acres, or 27,113 hectares). Similar closures occur in the Northeast, Southeast, and Gulf of Mexico, varying spatially and temporally. These restrictions may have the ancillary benefit of protecting some populations in chronically contaminated areas from harvest.

Restoration and enhancement efforts for fisheries and conservation are occurring throughout the species' range, but are more common in the north and mid-Atlantic. According to the survey responses, in estuaries where restoration and enhancement efforts are occurring they are considered necessary to sustain populations in roughly half the estuaries in the mid- and south Atlantic regions (presumably, to support commercially viable populations). In the North Atlantic (specifically, Connecticut and Rhode Island) and the Gulf of Mexico, restoration and enhancement efforts are not necessary to sustain biologically viable populations but are considered important to maintaining a fishery and conserving ecosystem services. Many restoration efforts throughout the species' range have been ongoing for many years and have proven successful in maintaining oyster populations. Due to the longevity and success of many of these efforts, they are expected to continue into the future. Consequently, measures to regulate the eastern oyster have been determined to be adequate. Thus, we conclude that the inadequacy of existing regulatory mechanisms is not a significant threat that affects the continued existence of the eastern oyster species/subspecies.

Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Finally, hurricanes, harmful algal blooms, and non-native introductions have been identified as other possible factors affecting the eastern oyster throughout its range. However, none of these stressors are thought to have a significant impact throughout all or a significant portion of the range of either the eastern oyster species or hypothetical subspecies. Thus, we conclude that there are no other natural or manmade factors considered to be significant threats that affect the

continued existence of the eastern oyster species/subspecies.

Summary and Synthesis of Analysis of the Factors Identified in ESA Section 4(a)(1)

While eastern oyster abundance has declined from historic highs, especially in the northern portion of the species' range, the eastern oyster is still present in all areas throughout its historic distribution. According to the survey results, even at the low abundance levels in some areas, recruitment is sufficient to maintain the viability of eastern oyster populations throughout the species' range except in a portion of the mid-Atlantic (e.g., Long Island Sound, Peconic Bay, Hudson Raritan Estuary). This area represents a small portion of the large geographic range of the species and/or hypothetical subspecies and would not be expected to significantly impact or impede larval transport and exchange to and from more productive areas to the north or south. The area also represents a minor percentage of the overall potential oyster biomass and of the total spawning potential of the species/hypothetical subspecies. We conclude that recruitment in other portions of the range is more than sufficient to maintain the continued existence of the species and/or hypothetical subspecies.

In all cases, the analysis of all five factors indicate that the continued existence of the species or hypothetical subspecies is not at risk now or in the foreseeable future. While threats that may be significant at a regional or local level to the species exist, we do not consider any to be overwhelmingly dominant or advancing at a significant rate which would result in the species or hypothetical subspecies becoming threatened or endangered.

Listing Determination

The ESA defines an endangered species as any species in danger of extinction throughout all or a significant portion of its range, and a threatened species as any species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Section 4(b)(1) of the ESA requires that the listing determination be based solely on the best scientific and commercial data available, after conducting a review of the status of the species and after taking into account those efforts, if any, that are being made to protect such species. After reviewing the best available scientific and commercial information for the eastern oyster, we have determined that neither the species nor the potential subspecies warrants listing as threatened or endangered at this time.

While listing the species or hypothetical subspecies under the ESA is not warranted at this time, the BRT and the peer reviewers identified specific research and/or monitoring needs that are considered very important to the long-term conservation and preservation of the eastern oyster. These include the following: fishery independent surveys (quantitative stock assessments for the entire range); effective population size estimates; monitoring of the effectiveness of conservation/restoration efforts; additional genetic analyses to determine population structure with a focus on local or regional adaptations; research on proximity-recruitment relationship; research on effects of combined and chronic stresses including changes due to climate change; continued research on disease susceptibility and development of selectively bred disease tolerant strains; emerging role of endocrine disrupting pollutants; delineation of oyster habitat; compatibility of existing information; continued ecological risk associated with other oyster or other alien species introductions; control and abatement of threats from all sources; developmentof a standard monitoring protocol on a local or regional level; and research on the effects of changes in coastal development and demographics.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: June 22, 2007.

Samuel D. Rauch III,

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

[FR Doc. E7–12564 Filed 6–27–07; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 070417093–7109–01]

RIN 0648–AV54

List of Fisheries for 2008

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

ACTION: Proposed rule; request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) is publishing its proposed List of Fisheries (LOF) for 2008, as required by the Marine Mammal Protection Act (MMPA). The proposed LOF for 2008 reflects new information on interactions between commercial fisheries and marine mammals. NMFS must categorize each commercial fishery on the LOF into one of three categories under the MMPA based upon the level of serious injury and mortality of marine mammals that occurs incidental to each fishery. The categorization of a fishery in the LOF determines whether participants in that fishery are subject to certain provisions of the MMPA, such as registration, observer coverage, and take reduction plan requirements.

DATES: Comments must be received by August 27, 2007.

ADDRESSES: Send comments to Chief, Marine Mammal and Sea Turtle Conservation Division, Attn: List of Fisheries, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Comments may also be sent via e-mail to *2008LOF.comments@noaa.gov*, via fax to 301–427–2522, or to the Federal eRulemaking portal: *http://www.regulations.gov* (follow instructions for submitting comments).

Comments regarding the burden-hour estimates, or any other aspect of the collection of information requirements contained in this proposed rule, should be submitted in writing to Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, or to David Rostker, OMB, by fax to 202–395–7285 or by e-mail to *David_Rostker@omb.eop.gov*.

See **SUPPLEMENTARY INFORMATIO**N for a listing of all Regional offices.

FOR FURTHER INFORMATION CONTACT: Melissa Andersen, Office of Protected Resources, 301–713–2322; David Gouveia, Northeast Region, 978–281–9328; Nancy Young, Southeast Region, 727–551–5607; Elizabeth Petras, Southwest Region, 562–980–3238; Brent Norberg, Northwest Region, 206–526–6733; Bridget Mansfield, Alaska Region, 907–586–7642; Lisa Van Atta, Pacific Islands Region, 808–944–2257. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

Availability of Published Materials

Information regarding the LOF and the Marine Mammal Authorization Program, including registration

procedures and forms, current and past LOFs, observer requirements, and marine mammal injury/mortality reporting forms and submittal procedures, may be obtained at: *http://www.nmfs.noaa.gov/pr/interactions/mmap*, or from any NMFS Regional Office at the addresses listed below.

Regional Offices

NMFS, Northeast Region, One Blackburn Drive, Gloucester, MA 01930–2298, Attn: Marcia Hobbs;

NMFS, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, Attn: Teletha Mincey;

NMFS, Southwest Region, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213, Attn: Lyle Enriquez;

NMFS, Northwest Region, 7600 Sand Point Way NE, Seattle, WA 98115, Attn: Permits Office;

NMFS, Alaska Region, Protected Resources, P.O. Box 22668, 709 West 9th Street, Juneau, AK 99802; or

NMFS, Pacific Islands Region, Protected Resources, 1601 Kapiolani Boulevard, Suite 1100, Honolulu, HI 96814–4700.

What is the List of Fisheries?

Section 118 of the MMPA requires NMFS to place all U.S. commercial fisheries into one of three categories based on the level of incidental serious injury and mortality of marine mammals occurring in each fishery (16 U.S.C. 1387(c)(1)). The categorization of a fishery in the LOF determines whether participants in that fishery may be required to comply with certain provisions of the MMPA, such as registration, observer coverage, and take reduction plan requirements. NMFS must reexamine the LOF annually, considering new information in the Marine Mammal Stock Assessment Reports (SAR) and other relevant sources, and publish in the **Federal Register** any necessary changes to the LOF after notice and opportunity for public comment (16 U.S.C. 1387 (c)(1)(C)).

How Does NMFS Determine in which Category a Fishery is Placed?

The definitions for the fishery classification criteria can be found in the implementing regulations for section 118 of the MMPA (50 CFR 229.2). The criteria are also summarized here.

Fishery Classification Criteria

The fishery classification criteria consist of a two-tiered, stock-specific approach that first addresses the total impact of all fisheries on each marine mammal stock, and then addresses the impact of individual fisheries on each stock. This approach is based on consideration of the rate, in numbers of animals per year, of incidental mortalities and serious injuries of marine mammals due to commercial fishing operations relative to the potential biological removal (PBR) level for each marine mammal stock. The MMPA (16 U.S.C. 1362 (20)) defines the PBR level as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. This definition can also be found in the implementing regulations for section 118 of the MMPA (50 CFR 229.2).

Tier 1: If the total annual mortality and serious injury of a marine mammal stock, across all fisheries, is less than or equal to 10 percent of the PBR level of the stock, all fisheries interacting with the stock would be placed in Category III (unless those fisheries interact with other stock(s) in which total annual mortality and serious injury is greater than 10 percent of PBR). Otherwise, these fisheries are subject to the next tier (Tier 2) of analysis to determine their classification.

Tier 2, Category I: Annual mortality and serious injury of a stock in a given fishery is greater than or equal to 50 percent of the PBR level.

Tier 2, Category II: Annual mortality and serious injury of a stock in a given fishery is greater than 1 percent and less than 50 percent of the PBR level.

Tier 2, Category III: Annual mortality and serious injury of a stock in a given fishery is less than or equal to 1 percent of the PBR level.

While Tier 1 considers the cumulative fishery mortality and serious injury for a particular stock, Tier 2 considers fishery-specific mortality and serious injury for a particular stock. Additional details regarding how the categories were determined are provided in the preamble to the proposed rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995).

Since fisheries are categorized on a per-stock basis, a fishery may qualify as one Category for one marine mammal stock and another Category for a different marine mammal stock. A fishery is typically categorized on the LOF at its highest level of classification (e.g., a fishery qualifying for Category III for one marine mammal stock and for Category II for another marine mammal stock will be listed under Category II).

Other Criteria That May Be Considered

In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, NMFS will determine whether the incidental serious injury or mortality qualifies for Category II by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area, or at the discretion of the Assistant Administrator for Fisheries (50 CFR 229.2).

How Does NMFS Determine which Species or Stocks are Included as Incidentally Killed or Seriously Injured in a Fishery?

The LOF includes a list of marine mammal species or stocks incidentally killed or seriously injured in each commercial fishery, based on the level of serious injury or mortality in each fishery relative to the PBR level for each stock. To determine which species or stocks are included as incidentally killed or seriously injured in a fishery, NMFS annually reviews the information presented in the current SARs. The SARs are based upon the best available scientific information and provide the most current and inclusive information on each stock's PBR level and level of mortality or serious injury incidental to commercial fishing operations. NMFS also reviews other sources of new information, including observer data, stranding data and fisher self-reports.

In the absence of reliable information on the level of mortality or serious injury of a marine mammal stock, or insufficient observer data, NMFS will determine whether a species or stock should be added to, or deleted from, the list by considering other factors such as: changes in gear types used, increases or decreases in fishing effort, increases or decreases in the level of observer coverage, and/or changes in fishery management that are expected to lead to decreases in interactions with a given marine mammal stock (such as a Fishery Management Plan or a Take Reduction Plan). NMFS will provide case specific justification in the LOF for changes to the list of species or stocks incidentally killed or seriously injured.

How do I Determine the Level of Observer Coverage in a Fishery?

Data obtained from observers and the level of observer coverage are important tools in estimating the level of marine mammal mortality and serious injury in commercial fishing operations. The best available information on the level of observer coverage, and the spatial and temporal distribution of observed

marine mammal interactions, is presented in the SARs. Starting with the 2005 SARs, each SAR includes an appendix with detailed descriptions of each Category I and II fishery in the LOF. The SARs generally do not provide detailed information on observer coverage in Category III fisheries because under the MMPA Category III fisheries are not required to accommodate observers aboard vessels due to the remote likelihood of mortality and serious injury of marine mammals. Information presented in the SARs' appendices include: level of observer coverage, target species, levels of fishing effort, spatial and temporal distribution of fishing effort, gear characteristics, management and regulations, and interactions with marine mammals.

NMFS refers readers to the SARs for the most current information on the level of observer coverage for each fishery. Copies of the SARs are available on the NMFS Office of Protected Resource's Web site at: *http://www.nmfs.noaa.gov/pr/sars/*. Additional information on observer coverage in commercial fisheries can be found on the NMFS National Observer Program's Web site: *http://www.st.nmfs.gov/st4/nop/*.

How Do I Find Out if a Specific Fishery is in Category I, II, or III?

This proposed rule includes two tables that list all U.S. commercial fisheries by LOF Category. Table 1 lists all of the fisheries in the Pacific Ocean (including Alaska). Table 2 lists all of the fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean.

Are High Seas Fisheries Included in the LOF?

Currently, high seas fisheries in which U.S. persons or vessels participate are not included in the LOF. However, NMFS is considering the inclusion of U.S.-authorized high seas fisheries (fisheries operating beyond 200 nmi of U.S. coasts) in future LOFs. At this time, NMFS is gathering available information on the number of vessels permitted and/or actively fishing in U.S.-authorized high seas fisheries, gear types used, and marine mammal-fishery interactions data included in documents published under the Magnuson-Stevens Fisheries Conservation and Management Act (MSA), National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and MMPA, and from relevant Regional Fishery Management Organizations (RFMO) and the International Whaling Commission (IWC).

NMFS faces significant challenges in accurately categorizing high seas fisheries in the LOF. As discussed under ''Fishery Classification Criteria'', fisheries are categorized in the LOF based on the level of mortality and serious injury of marine mammal stocks relevant to the stock's PBR level. PBR levels are calculated based on the stock's abundance using data presented in the SARs, required under section 117 of the MMPA. Section 117 requires NMFS to prepare SARs for marine mammal stocks occurring ''in waters under the jurisdiction of the United States''. NMFS does not develop SARs, or PBR levels, for marine mammal stocks on the high seas. As a result, NMFS does not have sufficient information on marine mammal stock abundances or the level of marine mammal-fishery interactions on the high seas to classify high seas fisheries on the LOF at this time. NMFS will continue to explore options for the potential inclusion of high seas fisheries in a future LOF using available information. NMFS will also continue to gather available information on existing U.S.-authorized high seas fisheries, marine mammal stock abundances on the high seas, and levels of marine mammal-fishery interactions on the high seas in order to accurately categorize high seas fisheries for potential inclusion on future LOFs.

Am I Required to Register Under the MMPA?

Owners of vessels or gear engaging in a Category I or II fishery are required under the MMPA (16 U.S.C. 1387(c)(2)), as described in 50 CFR 229.4, to register with NMFS and obtain a marine mammal authorization from NMFS in order to lawfully incidentally take a marine mammal in a commercial fishery. Owners of vessels or gear engaged in a Category III fishery are not required to register with NMFS or obtain a marine mammal authorization.

How Do I Register?

Vessel or gear owners must register with the Marine Mammal Authorization Program (MMAP) by contacting the relevant NMFS Regional Office (see **ADDRESSES**), unless they participate in a fishery that has an integrated registration program (described below). Upon receipt of a completed registration, NMFS will issue vessel or gear owners an authorization certificate. The authorization certificate, or a copy, must be on board the vessel while it is operating in a Category I or II fishery, or for non-vessel fisheries, in the possession of the person in charge of the fishing operation (50 CFR 229.4(e)).

What is the Process for Registering in an Integrated Fishery?

For some fisheries, NMFS has integrated the MMPA registration process with existing state and Federal fishery license, registration, or permit systems. Participants in these fisheries are automatically registered under the MMPA and are not required to submit registration or renewal materials or pay the $25 registration fee. The following section indicates which fisheries are integrated fisheries and has a summary of the integration process for each Region. Vessel or gear owners who operate in an integrated fishery and have not received an authorization certificate by January 1 of each new year or with renewed state fishing licenses (as in Washington and Oregon) must contact their NMFS Regional Office (see **ADDRESSES**). Although efforts are made to limit the issuance of authorization certificates to only those vessel or gear owners that participate in Category I or II fisheries, not all state and Federal permit systems distinguish between fisheries as classified by the LOF. Therefore, some vessel or gear owners in Category III fisheries may receive authorization certificates even though they are not required for Category III fisheries. Individuals fishing in Category I and II fisheries for which no state or Federal permit is required must register with NMFS by contacting their appropriate Regional Office (see **ADDRESSES**).

Which Fisheries Have Integrated Registration Programs?

The following fisheries have integrated registration programs under the MMPA:

1. All Alaska Category II fisheries;
2. All Washington and Oregon Category II fisheries;
3. Northeast Regional fisheries for which a state or Federal permit is required;
4. All Southeast Regional fisheries for which a Federal permit is required, as well as fisheries permitted by the states of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas; and
5. The Hawaii Swordfish, Tuna, Billfish, Mahi Mahi, Wahoo, Oceanic Sharks Longline/Set line Fishery.

How Do I Renew My Registration Under the MMPA?

Vessel or gear owners that participate in fisheries that have integrated registration programs (described above) are automatically renewed and should receive an authorization certificate by January 1 of each new year, with the

exception of Washington and Oregon Category II fisheries. Washington and Oregon fishers receive authorization with each renewed state fishing license, the timing of which varies based on target species. Vessel or gear owners who participate in an integrated fishery and have not received authorization certificates by January 1 or with renewed fishing licenses (Washington and Oregon) must contact the appropriate NMFS Regional Office (see **ADDRESSES**). Vessel or gear owners that participate in fisheries that do not have integrated registration programs and that have previously registered in a Category I or II fishery will receive a renewal packet from the appropriate NMFS Regional Office at least 30 days prior to January 1 of each new year. It is the responsibility of the vessel or gear owner in these fisheries to complete their renewal form and return it to the appropriate NMFS Regional Office at least 30 days in advance of fishing. Individuals who have not received a renewal packet by January 1 or are registering for the first time must request a registration form from the appropriate Regional Office (see **ADDRESSES**).

Am I Required to Submit Reports When I Injure or Kill a Marine Mammal During the Course of Commercial Fishing Operations?

In accordance with the MMPA (16 U.S.C. 1387(e)) and 50 CFR 229.6, any vessel owner or operator, or gear owner or operator (in the case of non-vessel fisheries), participating in a Category I, II, or III fishery must report to NMFS all incidental injuries and mortalities of marine mammals that occur during commercial fishing operations. ''Injury'' is defined in 50 CFR 229.2 as a wound or other physical harm. In addition, any animal that ingests fishing gear or any animal that is released with fishing gear entangling, trailing, or perforating any part of the body is considered injured, regardless of the presence of any wound or other evidence of injury, and must be reported. Injury/mortality report forms and instructions for submitting forms to NMFS can be downloaded from: *http://www.nmfs.noaa.gov/pr/pdfs/interactions/mmap__reporting__form.pdf*. Reporting requirements and procedures can be found in 50 CFR 229.6.

Am I Required to Take an Observer Aboard My Vessel?

Fishers participating in a Category I or II fishery are required to accommodate an observer aboard vessel(s) upon request. Observer requirements can be found in 50 CFR 229.7.

Am I Required to Comply With Any Take Reduction Plan Regulations?

Fishers participating in a Category I or II fishery are required to comply with any applicable take reduction plans. Take reduction plan requirements can be found at 50 CFR 229.30–34.

Sources of Information Reviewed for the Proposed 2008 LOF

NMFS reviewed the marine mammal incidental serious injury and mortality information presented in the SARs for all observed fisheries to determine whether changes in fishery classification were warranted. NMFS' SARs are based on the best scientific information available at the time of preparation, including the level of serious injury and mortality of marine mammals that occurs incidental to commercial fisheries and the PBR levels of marine mammal stocks. The information contained in the SARs is reviewed by regional Scientific Review Groups (SRGs) representing Alaska, the Pacific (including Hawaii), and the U.S. Atlantic, Gulf of Mexico, and Caribbean. The SRGs were created by the MMPA to review the science that informs the SARs, and to advise NMFS on population status and trends, stock structure, uncertainties in the science, research needs, and other issues.

NMFS also reviewed other sources of new information, including marine mammal stranding data, observer program data, fisher self-reports, and other information that may not be included in the SARs.

The proposed LOF for 2008 was based, among other things, on information provided in the final SARs for 1996 (63 FR 60, January 2, 1998), the final SARs for 2001 (67 FR 10671, March 8, 2002), the final SARs for 2002 (68 FR 17920, April 14, 2003), the final SARs for 2003 (69 FR 54262, September 8, 2004), the final SARs for 2004 (70 FR 35397, June 20, 2005), the final SARs for 2005 (71 FR 26340, May 4, 2006), the final SARs for 2006 (72 FR 12774, March 19, 2007), and the draft SARs for 2007. All the SARs are available at: *http://www.nmfs.noaa.gov/pr/sars/*.

Fishery Descriptions

Many fisheries on the LOF only partially been described in the LOF, or not at all. While detailed information describing each fishery in the LOF is included in the SARs, within a Fishery Management Plan (FMP) or Take Reduction Plan (TRP), or by state agencies, general descriptive information is important to include in the LOF for improved clarity. Below, NMFS briefly describes each Category I and II fishery in the proposed LOF for 2008. Fisheries are defined based on the gear and fishing methods, target species, temporal and spatial distribution, and management and regulatory schemes. NMFS refers readers to the SARs for more additional information on Category I and II fisheries.

Category I and II Commercial Fisheries in the Pacific Ocean

HI Swordfish, Tuna, Billfish, Mahi Mahi, Wahoo, Oceanic Sharks Longline/Set Line Fishery

The Category I HI longline fishery targets swordfish, tuna, billfish, mahi mahi, wahoo, and oceanic sharks. The basic unit of gear is a 30–40 mi (48–64 km) long mainline made of 0.13–0.16 in (3.2–4.0 mm) diameter monofilament line, with 800–1,000 hooks attached to the mainline. Deployment and retrieval of gear must occur at night. Shallow swordfish sets are required to use size 18/0 circle hooks with a 10–degree offset and mackerel bait. Using squid bait is prohibited. For deep sets, all float lines must be at least 20 m (65.6 ft) long with a minimum of 15 branch lines attached to the mainline between any 2 floats, except for basket-style longline gear that may have as few as 10 branch lines. The use of any light emitting device is prohibited and vessels may not land or possess more than 10 swordfish at any time. The fishery operates over a huge geographic range extending north-south from 40°N. lat. to the equator and east-west from Kure Atoll to as far as 135°W. long. Fishing for swordfish generally occurs north of Hawaii (as much as 2,000 mi (3,219 km) from Honolulu), whereas fishing for tunas occurs primarily around the main Hawaiian Islands and south of the Hawaiian Islands. The fishery operates year-round, with effort generally lower in the third quarter of the year.

The HI longline fishery is managed in part under the FMP for Pelagic Fisheries of the Western Pacific Region. The shallow-set swordfish component has annual fleetwide limits on interactions with leatherback and loggerhead sea turtles, an annual fleetwide limit of 2,120 shallow sets north of the equator per year, and a requirement for operators to annually participate in a protected species workshop and get a valid protected species certification. Also, regulations mandate 100 percent observer coverage in the shallow-set component of the fishery and at least 20 percent observer coverage in the deep-set component.

CA/OR Thresher Shark/Swordfish Drift Gillnet Fishery (≥14 in Mesh)

The Category I CA/OR thresher shark/swordfish drift gillnet fishery primarily targets common and pelagic thresher sharks, swordfish, and mako shark using a 1000–fathom (6,000 ft; 1,829 m) gillnet with stretched mesh size from 18–22 in (46–56 cm) with a 14–in (35.6 cm) minimum. Other species caught include: pelagic thresher, bigeye thresher, shortfin mako, blue shark, albacore, other tunas, dorado, groundfish, coastal pelagics, and crab. One end of the net is typically attached to the vessel and is set at dusk and allowed to drift during the night, typically for 12–14 hours. Fishing effort extends from the U.S.-Mexico border north to waters off of Oregon, with the majority of effort occurring from October to December. Oregon restricts landings to swordfish only.

This fishery is a limited entry fishery managed under the Pacific Highly Migratory Species (HMS) FMP and by regulations under the Pacific Offshore Cetacean Take Reduction Plan (POCTRP), including multiple area-season closures and gear restrictions, a requirement for pingers on drift gillnets, a requirement that extenders (buoy lines) be at least 36 ft (11 m) long, and a requirement for vessel captains to attend skipper education workshops.

CA Angel Shark/Halibut and Other Species Set Gillnet Fishery (<3.5 in mesh)

The Category I CA angel shark/halibut and other species set gillnet fishery targets angel shark and halibut from the U.S.-Mexico border north to Monterey Bay using 200 fathom (1,200 ft; 366 m) gillnet with a stretch mesh size of 8.5 in (31.6 cm). Net soak duration is typically 8–10, 19–24, or 44–49 hours at a depth ranging from 15–50 fathoms (90–300 ft; 27–91 m) with most sets from 15–35 fathoms (90–210 ft; 27–64 m). No more than 1500 fathoms (9,000 ft; 2,743 m) of gill or trammel net may be fished in combination for CA halibut and angel shark. Fishing occurs year-round, with effort generally increasing during summer months and declining during last the 3 months of the year. The central CA portion of the fishery from Point Arguello to Point Reyes has been closed since September, 2002, following a ban on gillnets inshore of 60 fathoms (360 ft; 110 m). Set gill nets have been prohibited in state waters south of Point Arguello and within 70 fathoms (420 ft; 128 m) or one mile (1.6 km), whichever is less, around the Channel Islands since 1990. The California Department of Fish and Game (CDFG) manages the fishery as a limited entry fishery with gear restrictions and area closures.

CA Yellowtail, Barracuda, and White Seabass Drift Gillnet Fishery (mesh size >3.5 in. and <14 in.)

The Category II CA yellowtail, barracuda, and white seabass drift gillnet fishery targets primarily yellowtail and white seabass, and secondarily barracuda, with target species typically determined by market demand on a short-term basis. Drift gillnets are up to 6,000 ft (1,829 m) long and are set at the surface. The mesh size depends on target species and is typically 6.0–6.5 in (15–16.5 cm). When targeting yellowtail and barracuda, the mesh size must be ≥3.5 in (9 cm); when targeting white seabass, the mesh size must be ≥6 in (15.2 cm). From June 16 to March 14 not more than 20 percent, by number, of a load of fish may be white seabass with a total length of 28 in (71 cm). A maximum of ten white seabass per load may be taken, if taken in gillnet or trammel nets with meshes from 3.5–6.0 in (9–15 cm) in length. The fishery operates year-round, primarily south of Point Conception with some effort around San Clemente Island and San Nicolas Island. This fishery is a limited entry fishery with various gear restrictions and area closures managed by the CDFG. Targeting tuna with this type of gear was effectively prohibited in April, 2004, under the Pacific HMS FMP.

CA Anchovy, Mackerel, Sardine Purse Seine Fishery

The Category II CA anchovy, mackerel, sardine purse seine fishery targets wetfish (anchovy, mackerel, and sardine), with the target species primarily driven by availability and market demand. The fishery uses purse seines, drum seines, and lampara nets using standard seining techniques. A typical purse seine net is 185 fathoms (1,110 ft; 338 m) long, 22 fathoms (132 ft; 40 m) deep, and 1,600 meshes deep with each mesh measures 1.25 in (3 cm). The fishery operates year-round predominantly in southern CA (including the Channel Islands) from San Pedro, San Diego, Oceanside, and Dana Point, then north to San Francisco. This fishery is a limited entry fishery, and the mackerel and sardine fisheries are quota fisheries. The fishery is managed in accordance with the Coastal Pelagic Species (CPS) FMP.

CA Tuna Purse Seine Fishery

The Category II CA tuna purse seine fishery targets yellowfin, skipjack, and bluefin tuna using purse seine nets similar to those used to target Coastal Pelagic Species (see the description under ''CA anchovy, mackerel, sardine purse seine fishery''). The fishery operates from May to October south of Point Conception to the U.S.-Mexico border and in the Southern California Bight. The fishery is managed under the Pacific HMS FMP. This fishery is considered an opportunist fishery, meaning that fishers only target tuna when certain oceanographic and market conditions exist to make the fishery viable. Effort in the fishery is highly variable, ranging from zero to ten participants annually over the past several years.

CA Squid Purse Seine Fishery

The Category II CA squid purse seine fishery targets market squid using several gear types. From 1997–2001, 98 percent of fishermen used purse (77 percent) or drum (21 percent) seine nets. Other types used were lampara, dip, and brail nets. The fishery uses lights (shielded and oriented downward, with a maximum of 30,000 watts) to aggregate spawning squid. The fishery operates year-round with the effort focusing north of Point Conception from April to September and south of Point Conception from October to March. El Nino events cause northern landings to increase, while La Nina events cause southern landings to increase.

The fishery is managed by the CDFG and is monitored under the CPS FMP and the Market Squid FMP. Commercial squid purse seine fishing is prohibited year-round from noon on Friday until noon on Sunday to allow a 2–day consecutive uninterrupted period of spawning. All vessels must be permitted and comply with a mandatory logbook program for fishing and lighting. Since 2001, a seasonal harvest guideline is set to limit further expansion of the fishery.

CA Pelagic Longline Fishery

The Category II CA pelagic longline fishery includes both shallow-set and deep-set gear targeting swordfish and bigeye, albacore, and yellowfin tuna. The fishery operates in waters outside of the U.S. Exclusive Economic Zone (EEZ) because the Pacific HMS FMP prohibits targeting swordfish with longlines within 200 nmi of shore. In 2004, the CA-based shallow-set longline fishery was closed due to anticipated levels of sea turtle interactions. The following is a general description of the shallow-set fishery as it operated prior to 2004 and the current deep-set longline fishery.

Prior to 2004, shallow-set longlines operated year-round primarily targeting swordfish with 15–45 mi (24–72 km) of mainline rigged with 72–ft (22–m) gangions at approximately 197 ft (60 m)

intervals. A shallow-set typically has 800–1,300 hooks with large squid or mackerel for bait. Most shallow-set fishing took place at night when swordfish are at the surface, using various colored lightsticks. A shallow-set mainline is deployed for 4–7 hours and left to drift unattached for 7–10 hours. At this time there is no CA-based shallow-set longline fishing due to anticipated levels of sea turtle interactions.

Deep-set longlines operate year-round primarily targeting tuna with 4–46.6 mi (7–75 km) mainline rigged with 25.6–36 ft (7.8–10.9 m) gangions with 15–16 branchlines set between floats. Deep-set longlines are set at dawn with an average 12 hour soak time. The deep-set sag of the mainline is between 328–1,050 ft (100–320 m) below the water's surface. A deep-set typically contains 270–1,900 hooks with double weighted leaders and sardine for bait. Deep-sets use a variety of hooks including size 38 tuna hooks, size 9 J-hooks, and size 16/0 circle hooks. A small scale deep-set longline fishery began in January 2005 and continues currently. One hundred percent observer coverage is required in the deep-set longline fishery.

OR Swordfish Floating Longline Fishery

The Category II OR swordfish floating (i.e., surface or pelagic) longline fishery targets swordfish using a buoyed mainline fitted with leaders and baited hooks. The mainline is fished near the surface and is suspended from buoys. Swordfish longlines may not exceed 1,000 fathoms (6,000 ft; 1,829 m) in length and must be attached at one end to the vessel when fishing. The gear is typically set in the evening and retrieved in the morning. Fishing could occur year-round; however, effort generally terminates by late fall. This fishery, like the ''CA pelagic longline'' fishery discussed above, is managed under the Pacific HMS FMP, which prohibits targeting swordfish with longlines within the EEZ. Shallow-set methods used for swordfish are also prohibited east of 150°W. long. While this fishery can operate outside the U.S. EEZ, it is a developmental fishery with virtually no participants. There were no active permit holders in this fishery from 2000–2005. As a result, NMFS is proposing to remove this fishery from the 2008 LOF. Please see ''Summary of Changes to the LOF for 2008'' for more information.

OR Blue Shark Floating Longline Fishery

The Category II OR blue shark floating (i.e., surface or pelagic) longline fishery targets blue sharks off the coast of OR using a buoyed mainline fitted with leaders and baited hooks. The mainline is fished near the surface and is suspended from buoys. Shark longlines must be marked at each terminal surface end with a pole and flag, an operating light, a radar reflector, and a buoy showing clear identification and gear owner. The gear is typically set in the evening and retrieved in the morning. The fishery occurs year-round, however, effort generally terminates in the fall. This fishery is managed under the Pacific HMS FMP, which prohibits targeting highly migratory species such as blue shark with longlines within the U.S. EEZ. While this fishery can operate outside the U.S. EEZ, the number of Oregon Developmental Fishery Permits for fishing blue shark using a floating longline is limited to 10. From 2000–2005, there were fewer than 5 permits issued annually for this fishery. As a result, NMFS is proposing to remove this fishery from the 2008 LOF. Please see ''Summary of Changes to the LOF for 2008'' for more information.

WA Puget Sound Regional Salmon Drift Gillnet

The Category II WA Puget Sound regional salmon drift gillnet fishery targets coho, pink, sockeye, chinook, and chum salmon in inland marine waters (state waters) south of the U.S.-Canada border and east of the Bonilla-Tatoosh line at the entrance to the Strait of Juan de Fuca. Drift gillnet gear consists of single web construction, not exceeding 300 fathoms (1,800; 549 m) in length, attached at one end of the vessel. The minimum mesh size varies from 5–7 in (13–18 cm) depending on the target species. While the depths fished vary, fishermen strive to keep the net off of the bottom. The drift times vary depending on the fishing area, tidal condition, and catch. This fishery is a limited entry fishery with seasonal openings, area closures, and gear restrictions. Regulations governing incidental take of marine mammals do not apply to tribal members exercising fishing treaty rights within this fishery.

AK Prince William Sound Salmon Drift Gillnet Fishery

The Category II AK Prince William Sound salmon drift gillnet fishery targets salmon using drift gillnet gear with soak times of 15 minutes to 3 hours. The gear is set both during the day and night, with 10–14 sets per day. The fishery operates from mid-May to the end of September in the Prince William Sound Fisheries Management Area, the Copper River, and the Bering Sea. The Prince William Sound Fisheries Management Area consists of 11 districts with six hatcheries contributing to the salmon fisheries. This drift gillnet fishery is managed by the Alaska Department of Fish and Game (ADFG) as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Peninsula/Aleutian Islands Salmon Drift Gillnet Fishery

The Category II AK Peninsula/Aleutian Islands salmon drift gillnet fishery targets salmon using drift gillnet gear with soak times of 2–5 hours. The gear is set during the day and night, with 3–8 sets per day. The fishery operates from mid-June to mid-September in two districts north of the Alaska Peninsula (Northern and Northwestern), and four districts south of the AK Peninsula (Unimake, Southwestern, Southcentral, and Southeastern). This drift gillnet fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Peninsula/Aleutian Islands Salmon Set Gillnet Fishery

The Category II AK Peninsula/Aleutian Islands salmon set gillnet fishery targets salmon using set gillnet with the gear set every 2 hours during the day and night. The gear is set with continuous soak times during the opener. Salmon may only be fished commercially during periods known as openers established by ADFG in-season. During some periods of the season fishing may be continuous with openers lasting days or even many weeks at a time. The ADFG posts weekly notices of fishing openers and announces the openers on regular radio channels a few days or a few hours before each opener. Fishing periods are often extended by Emergency Order during the last 24 hours of the opener.

This fishery generally operates from June 18 to mid-August in two districts north of the AK Peninsula (Northern and Northwestern), and four districts south of the AK Peninsula (Unimake, Southwestern, Southcentral, and Southeastern). Set gillnet fishing effort also occurs off Atka and Amelia Islands. This set gillnet fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Southeast Salmon Drift Gillnet Fishery

The Category II AK Southeast salmon drift gillnet fishery targets salmon using drift gillnet gear with soak times of 20 minutes to 3 hours. The gear is set during the day and night, with 6–20 sets set per day. This fishery generally

operates from June 18 to early October in five main fishing areas off Southeast AK, as well as at Annette Island, in terminal harvest areas (THA) adjacent to hatchery facilities, and for hatchery cost recovery. The majority of salmon are caught by drift gillnets in the five main fishing areas (81 percent in 2003) and the THAs (13 percent in 2003), with small contributions from Annette Island (4 percent in 2003), and for hatchery cost recovery (1.8 percent in 2003). This drift gillnet fishery is managed by ADFG as a limited entry fishery, with gear restrictions (mesh and net size) and area closures.

AK Cook Inlet Salmon Drift Gillnet Fishery

The Category II AK Cook Inlet salmon drift gillnet fishery targets salmon using drift gillnet gear with soak times of 15 minutes to 3 hours, or continuously. The gear is set during the day, with 6–18 sets per day. This fishery generally operates from June 25 to end of August in the Central District of the Upper Cook Inlet. Drift gillnet fishing effort for sockeye salmon peaks in mid to late July. Currently, drift gillnet fishing for salmon in the Cook Inlet occurs in the Central District area only for the two regular 12–hour openers on Mondays and Thursdays. This drift gillnet fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Cook Inlet Salmon Set Gillnet Fishery

The Category II AK Cook Inlet salmon set gillnet fishery targets salmon using set gillnet gear with continuous soak times during the opener. Fishing effort occurs during the day and night in the Upper Cook Inlet; while fishing effort occurs only during the day in the Lower Cook Inlet, except during fishery extensions. In the Upper Cook Inlet, the catch is picked from the net (i.e., the net is tended) each day during a slack tide; while the catch is picked from the net every 2–6 hours in the Lower Cook Inlet. The net becomes dry with low tide. The fishery generally operates from June 2 to mid-September in Cook Inlet. This set gillnet fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Yakutat Salmon Set Gillnet Fishery

The Category II AK Yakutat salmon set gillnet fishery targets salmon using set gillnet gear with continuous soak times during the opener, during the day and night. The catch is picked from the net every 2–4 hours each day or continuously during peak fishing times. The fishery generally operates from June 4 to the end of August. The Yakutat salmon set gillnet fishery consists of multiple set gillnet fisheries occurring in two fishing districts, the Yakutat District and the Yakataga District. As many as 25 different areas in the Yakutat and Yakataga Districts are open to commercial fishing each year. The Yakutat District fisheries primarily target sockeye and coho salmon, although all species of salmon are harvested. The Yakataga District fisheries target coho salmon. With a few exceptions, set gillnetting is confined to the intertidal area inside the mouths of rivers and streams, and to the ocean waters immediately adjacent to each. Due to the terminal nature of these fisheries, ADFG has been able to develop salmon escapement goals for most of the major, and several of the minor, fisheries. This set gillnet fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Kodiak Salmon Set Gillnet Fishery

The Category II AK Kodiak salmon set gillnet fishery targets salmon using set gillnet gear with continuous soak times during the opener. Fishing effort occurs during the day, with the catch is picked from the net 2 or more times each day. The majority of set gillnets are attached to a shore lead up to 80 fathoms (480 ft; 146 m) long in a straight line to a king buoy offshore, with numerous anchor lines and buoys holding the net in place. The last 25 fathoms (150 ft; 46 m) of the gillnet is usually formed into a fish trap, also called a hook. The fishery generally operates from June 9 to the end of September or early October. Many areas are open until early October, but most fishermen remove the nets by early September. As the runs progress in late July and change from sockeye to pink salmon, the ADFG often reduces the length of openers if escapement goals have not been met. Fishing effort begins to reduce in mid to late August as salmon runs begin to decline.

This fishery consists of 2 Districts, the Northwest District from Spruce Island to the south side of Uyak Bay, and the Alitak Bay District located on the southwestern corner of Kodiak island. In most years, the Northwest District is fished by approximately 100 permit holders and constitutes approximately 70 percent of the annual fishing effort, while the Alitak Bay District is fished by approximately 70 permit holders and constitutes approximately 30 percent of the annual fishing effort. Traditionally, the Northwest District is open for the majority of June and July, while effort in the Alitak Bay District typically occurs 5 to 7 days out of every 10 days during the fishing season. This set gillnet fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Bristol Bay Salmon Drift Gillnet Fishery

The Category II AK Bristol Bay salmon drift gillnet fishery targets salmon using drift gillnet gear with continuous soak times for part of the net, while other parts of the net are tended. Fishing effort occurs during the day and night, with a continuous number of sets per day. This fishery generally operates from June 17 to the end of August in Bristol Bay. Approximately 80 percent of the salmon catch in Bristol Bay is caught with drift gillnets. The Bristol Bay management area consists of five management districts including all coastal and inland waters from Cape Newenham to Cape Menshikof. There are eight major river systems in the area, and these form the largest commercial sockeye salmon fishery in the world. Although sockeye salmon is the most abundant salmon species that returns to Bristol Bay each year, chinook, chum, coho, and pink salmon returns are also important to the fishery. This drift gillnet fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Bristol Bay Salmon Set Gillnet Fishery

The Category II AK Bristol Bay salmon set gillnet fishery targets salmon using set gillnet gear with continuous soak times during the opener, but the net is dry during low tide. Fishing effort occurs during the day and night, with 2 or more continuous sets per day. This fishery generally operates from June 17 to the end of August or mid-September in the same areas in Bristol Bay as the AK Bristol Bay salmon drift gillnet fishery discussed above. Approximately 20 percent of the salmon catch in Bristol Bay is caught with set gillnets. This set gillnet fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Metlakatla/Annette Island Salmon Drift Gillnet Fishery

The Category II AK Metlakatla/Annette Island salmon drift gillnet fishery targets salmon using drift gillnet gear off Annette Island in Southeast AK. This drift gillnet fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures. The tribal portion of this

fishery is separate from the AK Southeast drift gillnet fishery only for regulation purposes. The fisheries are considered the same for LOF categorization purposes.

AK Southeast Salmon Purse Seine Fishery

The Category II AK Southeast salmon purse seine fishery targets salmon using purse seine gear with soak times of 20–45 minutes. Fishing effort occurs mostly in daylight hours, except at the peak of the season, with 6–20 sets per day. The fishery generally operates from the end of June to September. In 2003, purse seine fishing ran through November 12 in THAs. Regulations allow purse seine fishing to occur in certain fishing districts, and also in certain THAs, hatchery cost recovery areas, and the Annette Island Fishery Reserve. This purse seine fishery accounts for approximately 80 percent of the total salmon harvest in Southeast AK, and approximately 87 percent of the fish caught are pink salmon. This purse seine fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Cook Inlet Salmon Purse Seine Fishery

The Category II AK Cook Inlet salmon purse seine fishery targets salmon using purse seine gear in Cook Inlet from June 1 to October 31. Purse seines must be between 90 fathoms (540 ft; 165 m) and 250 fathoms (1,500 ft; 457 m) long, and 100 meshes and 325 meshes deep. Detachable or loose leads are not permitted. In Cook Inlet, purse seines may be used in the Southern District, Kamishak Bay District, Outer District, Eastern District, and Chinitna Bay Subdistrict east of a line from the crane on the south shore to the largest boulder on the landward end of Glacier Spit. This purse seine fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Kodiak Salmon Purse Seine Fishery

The Category II AK Kodiak salmon purse seine fishery targets salmon using purse seine gear from June 1 to October 31, with fishing periods open by regulation and emergency orders. Purse seine gear must have a mesh size of less than 7 in (18 cm). Purse seine gear must be between 100 fathoms (600 ft; 183 m) and 200 fathoms (1,200 ft; 366 m) long, and between 100 meshes and 325 meshes deep. At least 50 fathoms (300 ft; 91 m) of a purse seine must be 150 meshes in depth. One lead, no more than 100 fathoms (600 ft; 183 m) in length, may be used with each purse seine. The aggregate length of a seine and lead may not exceed 250 fathoms (1,500 ft; 457 m). Leads must be removed from the water within two hours after a season or fishing period closure. Overlapping panels of net web may not be used in seine leads.

This fishery occurs in the Kodiak Area, including all waters of AK south of Cape Douglas (58° 51.10'N. lat.), west of 150°W. long., north of 55° 30'N. lat., and north and east of the southern entrance of Imuya Bay. This purse seine fishery is managed by ADFG as a limited entry fishery with gear restrictions (mesh and net size) and area closures.

AK Bering Sea and Aleutian Islands (BSAI) Flatfish Trawl Fishery

The Category II AK BSAI flatfish trawl fishery targets flatfish using trawl gear in the U.S. EEZ of the eastern Bering Sea and the portion of the North Pacific Ocean adjacent to the Aleutian Islands, which is west of 170°W. long. up to the U.S.-Russian Convention Line of 1867. Management measures for the BSAI groundfish fisheries constrain fishing both temporally and spatially. This fishery is federally managed under the BSAI FMP. The authorized gear, fishing season, criteria for determining fishing seasons, and area restrictions by gear type are defined in the regulations implementing the BSAI FMP (50 CFR part 679).

AK Bering Sea and Aleutian Islands (BSAI) Pollock Trawl Fishery

The Category II AK BSAI pollock trawl fishery targets flatfish using trawl gear in the same location as the AK BSAI flatfish trawl fishery described above. The use of non-pelagic trawl gear in the directed fishery for pollock is prohibited. This fishery is federally managed under the BSAI FMP. Management measures for the BSAI groundfish fisheries constrain fishing both temporally and spatially. The gear authorized, fishing year, criteria for determining fishing seasons, and area restrictions by gear type are defined in the regulations implementing the BSAI FMP (50 CFR part 679).

AK Bering Sea and Aleutian Islands (BSAI) Pacific Cod Longline Fishery

The Category II AK BSAI Pacific cod longline fishery targets Pacific cod using longline gear in the same location as the AK BSAI flatfish trawl fishery described above. This fishery is federally managed under the BSAI FMP. Management measures for the BSAI groundfish fisheries constrain fishing both temporally and spatially. The gear authorized, fishing year, criteria for determining fishing seasons, and area restrictions by gear type are defined in the regulations implementing the BSAI FMP (50 CFR part 679).

AK Bering Sea Sablefish Pot Fishery

The Category II AK Bering Sea sablefish pot fishery targets sablefish using pot gear in the same location as the AK BSAI flatfish trawl fishery described above. This fishery is Federally managed under the BSAI FMP and is operated under Individual Fishing Quotas. Management measures for the BSAI groundfish fisheries constrain fishing both temporally and spatially. The gear authorized, fishing year, criteria for determining fishing seasons, and area restrictions by gear type are defined in the regulations implementing the BSAI FMP (50 CFR part 679).

Category I and II Commercial Fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean

Northeast Sink Gillnet Fishery

The Category I Northeast sink gillnet fishery targets Atlantic cod, haddock, pollock, yellowtail flounder, winter flounder, witch flounder, American plaice, windowpane flounder, spiny dogfish, monkfish, silver hake, red hake, white hake, ocean pout, skate spp, mackerel, redfish, and shad. This fishery uses sink gillnet gear, which is anchored gillnet (bottom-tending net) fished in the lower one-third of the water column. The dominant material is monofilament twine with stretched mesh sizes from 6–12 in (15–30.5 cm) and string lengths from 600–10,500 ft (183–3,200 m), depending on the target species. Large mesh (10–14 in [25–35.6 cm]) sink gillnets, either tied down or set upright without floats using a polyfoam core floatline, are used when targeting monkfish. The fishery operates from the U.S.-Canada border to Long Island, NY, at 72° 30′W. long. south to 36° 33.03′N. lat. (corresponding with the Virginia/North Carolina border) and east to the eastern edge of the EEZ, including the Gulf of Maine, Georges Bank, and Southern New England, and excluding Long Island Sound or other waters where gillnet fisheries are listed as Category III. Fishing effort occurs year-round, peaking from May to July primarily on continental shelf regions in depths from 30–750 ft (9–228.6 m), with some nets deeper than 800 ft (244 m).

This fishery is managed by the Northeast Multispecies (Groundfish) FMP. This fishery is also managed by the Atlantic Large Whale Take Reduction Plan (ALWTRP) and the

Harbor Porpoise Take Reduction Plan (HPTRP) to reduce the risk of entanglement of right, humpback, and fin whales, and harbor porpoises, respectively. The fishery is primarily managed by Total Allowable Catch (TAC) limits; individual trip limits (quotas); effort caps (limited number of days at sea per vessel); time and area closures; and gear restrictions.

Mid-Atlantic Gillnet Fishery

The Category I mid-Atlantic gillnet fishery targets monkfish, spiny dogfish, smooth dogfish, bluefish, weakfish, menhaden, spot, croaker, striped bass, large and small coastal sharks, Spanish mackerel, king mackerel, American shad, black drum, skate spp., yellow perch, white perch, herring, scup, kingfish, spotted seatrout, and butterfish. The fishery uses drift and sink gillnets, including nets set in a sink, stab, set, strike, or drift fashion, with some unanchored drift or sink nets used to target specific species. The dominant material is monofilament twine with stretched mesh sizes from 2.5–12 in (6.4–30.5 cm), and string lengths from 150–8,400 ft. (46–2,560 m). This fishery operates year-round west of a line drawn at 72° 30'W. long. south to 36° 33.03'N. lat. and east to the eastern edge of the EEZ and north of the North Carolina/South Carolina border, not including waters where Category II and Category III inshore gillnet fisheries operate in bays, estuaries, and rivers. At this time, these Category II and Category III fisheries include: the Chesapeake Bay inshore gillnet; North Carolina inshore gillnet; Delaware River inshore gillnet; Long Island Sound inshore gillnet; and Rhode Island, southern Massachusetts (to Monomy Island), and New York Bight (Raritan and Lower New York Bays) inshore gillnet. This fishery includes any residual large pelagic driftnet effort in the mid-Atlantic and any shark and dogfish gillnet effort in the mid-Atlantic zone described. The fishing effort is prosecuted right off the beach (6 ft [1.8 m]) or in nearshore coastal waters to offshore waters (250 ft [76 m]).

Gear in this fishery is managed by several Federal FMPs and Inter-State FMPs managed by the Atlantic States Marine Fisheries Commission (ASMFC), the ALWTRP, the HPTRP, and the Bottlenose Dolphin Take Reduction Team (BDTRT). Fisheries are primarily managed by TACs; individual trip limits (quotas); effort caps (limited number of days at sea per vessel); time and area closures; and gear restrictions and modifications.

Atlantic Ocean, Caribbean, Gulf of Mexico Large Pelagics Longline Fishery

The Category I Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline fishery targets swordfish, yellowfin tuna, bigeye tuna, bluefin tuna, albacore tuna, dolphin fish, wahoo, shortfin mako shark, and a variety of other shark species. The fishery uses a mainline of >700 lb (317.5 kg) test monofilament typically ranging from 10–45 mi (16–72 km) long. Bullet-shaped floats are suspended at regular intervals along the mainline and long sections of gear are marked by radio beacons. Long gangion lines of 200–400 lb (91–181 kg) test monofilament of typically 100–200 ft (30.5–61 m) are suspended from the mainline. Only certain sized hooks and baits are allowed based on fishing location. Hooks are typically fished at depths between 40–120 ft (12–36.6 m). Longlines targeting tuna are typically set at dawn are hauled near dusk, while longlines targeting swordfish are typically set at night and hauled in the morning. Gear remains in the water typically for 10–14 hours. Fishermen generally modify only select sections of longline gear to target dolphin or wahoo, with the remaining gear configured to target swordfish, tuna, and/or sharks.

This fishery operates year-round and occurs within and outside the U.S. EEZ throughout Atlantic, Caribbean and Gulf of Mexico waters. The fishery has historically been composed of five relatively distinct segments with different fishing practices and strategies, including: Gulf of Mexico yellowfin tuna fishery; South Atlantic-Florida east coast to Cape Hatteras swordfish fishery; Mid-Atlantic and New England swordfish and bigeye tuna fishery; U.S. distant water swordfish fishery; and Caribbean Islands tuna and swordfish fishery. In addition to geographical area, these segments have historically differed by percentage of various target and non-target species, gear characteristics, and deployment techniques.

This fishery is managed under the Consolidated Atlantic HMS FMP. The dolphin and wahoo portions of the fishery are managed under the South Atlantic FMP for Dolphin and Wahoo. Regulations under the MSA address the target fish species, as well as bycatch species protected under the ESA and/or the MMPA. A portion of this fishery is the subject of the Pelagic Longline Take Reduction Team (PLTRT), convened in 2005. NMFS is currently developing regulations to implement the Take Reduction Plan.

Northeast/Mid-Atlantic American Lobster Trap/Pot Fishery

The Category I Northeast/mid-Atlantic American lobster trap/pot fishery targets American lobster primarily with traps, while 2–3 percent of the target species is taken by mobile gear (trawls and dredges). The fishery operates in inshore and offshore waters from Maine to New Jersey and may extend as far south as Cape Hatteras. Approximately 80 percent of American lobster are harvested from state waters; therefore, the ASMFC has a primary regulatory role. The EEZ portion of the fishery operates under regulations from the Federal American Lobster FMP. Both the EEZ and state fishery are operating under Federal regulations from the ALWTRP.

Northeast Anchored Float Gillnet Fishery

The Category II Northeast anchored float gillnet fishery targets mackerel, herring (particularly for bait), shad, and menhaden using gillnet gear of any size anchored and fished in the upper two-thirds of the water column. The fishery operates from the U.S.-Canada border to Long Island, NY, at 72° 30′W. long south to 36° 33.03′N. lat. and east to the eastern edge of the EEZ, not including Long Island Sound or other waters where gillnet fisheries are listed as Category III. The fishery is managed under the Interstate FMPs for Atlantic Menhaden and Shad. A total closure of the American shad ocean intercept fishery was fully implemented in January, 2005.

Northeast Drift Gillnet Fishery

The Category II Northeast drift gillnet fishery targets species other than large pelagics, including shad, herring, mackerel, and menhaden. This fishery uses drift gillnet gear, which is gillnet gear not anchored to the bottom and is free-floating on both ends or free-flowing at one end and attached to the vessel at the other end. Mesh sizes are likely less than those used to target large pelagics. The fishery includes any residual large pelagic driftnet effort in New England and occurs at any depth in the water column from the U.S.-Canada border to Long Island, NY, at 72° 30'W. long. south to 36° 33.03 N. lat. and east to the eastern edge of the EEZ. The fishery is managed under the Interstate FMPs for Atlantic Menhaden and Shad. A total closure of the American shad ocean intercept fishery was fully implemented in January, 2005.

Chesapeake Bay Inshore Gillnet Fishery

The Category II Chesapeake Bay inshore gillnet fishery targets menhaden

and croaker using gillnet gear with mesh sizes ranging from 2.75–5 in (7–12.7 cm), depending on the target species. The fishery operates between the Chesapeake Bay/Bridge Tunnel and the mainland. The fishery is managed under the Interstate FMPs for Atlantic Menhaden and Atlantic Croaker.

Northeast Mid-Water Trawl (Including Pair Trawl) Fishery

The Category II Northeast mid-water trawl fisher targets Atlantic herring with bycatch of several finfish species, predominantly mackerel, spiny dogfish, and silver hake. This fishery uses primarily mid-water (pelagic) trawls (single and paired), which is trawl gear designed, capable, or used to fish for pelagic species with no portion designed to be operated in contact with the bottom. The fishery occurs primarily in Maine State waters, Jeffrey's Ledge, southern New England, and Georges Bank during the winter months when the target species continues its southerly migration from the Gulf of Maine/Georges Bank, into mid-Atlantic waters. The fishery is managed jointly by the Mid-Atlantic Fishery Management Council and the ASMFC as a migratory stock complex.

Mid-Atlantic Flynet Fishery

The following definition is proposed in the 2008 LOF. For the existing 2007 definition, see ''Fishery Name and Organization Changes and Clarifications'' for Atlantic, Gulf of Mexico and Caribbean fisheries below.

The Category II mid-Atlantic flynet fishery is a multispecies fishery composed of nearshore and offshore components that operate along the eastern coast of the mid-Atlantic United States. Flynets are high profile trawls similar to bottom otter trawls. These nets typically range from 80–120 ft (24–36.6 m) in headrope length, with wing mesh sizes of 16–64 in (41–163 cm), following a slow 3:1 taper to smaller mesh sizes in the body, extension, and codend sections of the net. The nearshore fishery operates from October to April inside of 30 fathoms (180 ft; 55 m) from North Carolina to New Jersey. This nearshore fishery targets Atlantic croaker, weakfish, butterfish, harvestfish, bluefish, menhaden, striped bass, kingfishes, and other finfish species. Flynet fishing is no longer permitted south of Cape Hatteras in order to protect weakfish stocks. The offshore component operates from November to April outside of 30 fathoms (180 ft; 55 m) from the Hudson Canyon off New York, south to Hatteras Canyon off North Carolina. These deeper water fisheries target bluefish, Atlantic mackerel, Loligo squid, black sea bass, and scup (72 FR 7382, February 15, 2007). Illex Squid are also targeted offshore (70–200 fathoms [420–1,200 ft; 128–366 m]) during summer months from May to September.

Northeast Bottom Trawl Fishery

The Category II Northeast bottom trawl fishery uses bottom trawl gear to target species included in the NE Multispecies FMP, Summer Flounder FMP, and Scup and Seabass FMP, including, but not limited to: Atlantic cod, haddock, pollock, yellowtail flounder, winter flounder, witch flounder, American plaice, Atlantic halibut, redfish, windowpane flounder, summer flounder, spiny dogfish, monkfish, silver hake, red hake, white hake, ocean pout, and skate spp. The fishery operates year-round, with a peak from May to July, from the Maine-Canada border through waters east of 72° 30′W. long., primarily on the continental shelf and throughout the Gulf of Maine, Georges Bank, and Southern New England. The fishery is primarily managed by TACs, individual trip limits (quotas), effort caps (limited number of days at sea per vessel), time and area closures, and gear restrictions.

Virginia Pound Net Fishery

The Category II Virginia pound net fishery targets weakfish, spot, and croaker using stationary gear in nearshore coastal and estuarine waters off Virginia. Pound net gear includes a large mesh lead posted perpendicular to the shoreline and extending outward to the corral, or ''heart,'' where the catch accumulates. This fishery includes all pound net effort in Virginia State waters, including waters inside the Chesapeake Bay. The fishery is managed under Interstate FMPs for Atlantic Croaker and Spot, and is subject to BDTRP implementing regulations.

Atlantic Mixed Species Trap/Pot Fishery

The Category II Atlantic mixed species trap/pot fishery's targets species including, but not limited to, hagfish, shrimp, conch/whelk, red crab, Jonah crab, rock crab, black sea bass, scup, tautog, cod, haddock, Pollock, redfish (ocean perch) white hake, spot, skate, catfish, stone crab, and American eel. The fishery includes all trap/pot operations for species other than American lobster and blue crab from the Maine-Canada border south through the waters east of the fishery management demarcation line between the Atlantic Ocean and the Gulf of Mexico (50 CFR 600.105), but does not include the following Category I, II, and III trap/pot fisheries: Northeast/Mid-Atlantic American lobster trap/pot; Atlantic blue crab trap/pot; Florida spiny lobster trap/pot; Southeastern U.S. Atlantic, Gulf of Mexico stone crab trap/pot; U.S. Mid-Atlantic eel trap/pot fisheries; and the Southeastern U.S. Atlantic, Gulf of Mexico golden crab fishery (68 FR 1421, January 10, 2003). The fishery is managed under various Interstate FMPs.

Atlantic Blue Crab Trap/Pot Fishery

The Category II Atlantic blue crab trap/pot fishery targets blue crab using pots baited with fish or poultry typically set in rows in shallow water. The pot position is marked by either a floating or sinking buoy line attached to a surface buoy. The fishery occurs year-round from the south shore of Long Island at 72° 30′W. long. in the Atlantic and east of the fishery management demarcation line between the Atlantic Ocean and the Gulf of Mexico (50 CFR 600.105), including state waters. The fishery is managed under state FMPs, and is subject to BDTRP and ALWTRP implementing regulations.

Mid-Atlantic Bottom Trawl Fishery

The Category II mid-Atlantic bottom trawl fishery uses bottom trawl gear to target species including, but not limited to, bluefish, croaker, monkfish, summer flounder (fluke), winter flounder, silver hake (whiting), spiny dogfish, smooth dogfish, scup, and black sea bass. The fishery occurs year-round from Cape Cod, MA, to Cape Hatteras, NC, in waters west of 72° 30′W. long. and north of a line extending due east from the North Carolina/South Carolina border. The gear is managed by several state and Federal FMPs that range from Massachusetts to North Carolina.

Mid-Atlantic Mid-Water Trawl (Including Pair Trawl) Fishery

The Category II mid-Atlantic mid-water trawl fishery targets Atlantic mackerel, *Loligo* squid, *Illex* squid, and Atlantic butterfish using mainly mid-trawl gear, with some bottom trawls. The fishery is dominated by small-mesh otter trawls, but *Loligo* squid are also taken by inshore pound nets and fish traps in spring and summer. The fishery for *Illex* occurs offshore, mainly in continental shelf and slope waters during summer months (June to September), from southern New England to Cape Hatteras, NC. The fishery for *Loligo* occurs mostly offshore near the edge of the continental shelf during fall and winter months (October to March), and inshore during spring and summer (April to September) in southern New England and mid-Atlantic waters. The fishery for Atlantic

mackerel occurs primarily in southern New England and the mid-Atlantic from January to March, and in the Gulf of Maine during summer and fall (May to December). Atlantic butterfish are mainly caught as bycatch in the directed squid and mackerel fisheries due to their northerly inshore migration in summer months and southerly offshore migration in winter months. The fishery is managed by the Federal Squid, Mackerel, Butterfish FMP. The *Illex* and *Loligo* fisheries are managed by moratorium permits, gear and area restrictions, quotas, and trip limits. The Atlantic mackerel and Atlantic butterfish fisheries are managed by an annual quota system.

Mid-Atlantic Haul/Beach Seine Fishery

The Category II mid-Atlantic haul/beach seine fishery targets striped bass, mullet, spot, weakfish, sea trout, bluefish, kingfish, and harvestfish using seines with one end secured (e.g., swipe nets and long seines) and seines secured at both ends or those anchored to the beach and hauled up on the beach. The beach seine system also uses a bunt and a wash net that are attached to the beach and extend into the surf. The beach seines soak for less than 2 hours. The fishery occurs in waters west of 72° 30′W. long. and north of a line extending due east from the North Carolina-South Carolina border. Fishing on the Outer Banks, NC, occurs primarily in the spring (April to June) and fall (October to December). The fishery is managed under the Interstate FMPs for Bluefish and for Atlantic Striped Bass of the Atlantic Coast from Maine through North Carolina, and is subject to BDTRP implementing regulations.

Mid-Atlantic Menhaden Purse Seine Fishery

The Category II mid-Atlantic menhaden purse seine fishery targets menhaden and thread herring using purse seine gear. Most sets occur within 3 mi (4.8 km) of shore with the majority of the effort occurring off North Carolina from November to January, and moving northward during warmer months to southern New England. The fishery is managed under the Interstate FMP for Atlantic Menhaden.

Southeastern U.S. Atlantic Shark Gillnet Fishery

The Category II Southeastern U.S. Atlantic shark gillnet fishery targets large and small coastal sharks (blacktip, blacknose, finetooth, bonnethead, and sharpnose) using gillnets set in a sink, stab, set, strike, or drift fashion. Mesh size is typically greater than 5 in (13 cm), but may be as small as 2.87 in (7.3 cm) when targeting small coastal sharks. Drift gillnets most commonly use a mesh size of 5 in (13 cm) and average 10.2 hours from setting the gear through completion of haulback; sink gillnets most frequently use a mesh size of 7 in (18 cm) soaking for approximately 2.7 hours; and strike gillnets use the largest mesh size of 9 in (23 cm) soaking for approximately 0.8 hours. This fishery has traditionally operated in coastal waters off Florida and Georgia.

This fishery is managed under the Consolidated Atlantic HMS FMP, the ALWTRP, and the BDTRP, and is subject to ESA biological opinion requirements. Regulations implemented under the MSA address managed target species, as well as bycatch species, including some protected under the ESA and MMPA (e.g., sea turtles, smalltooth sawfish, and right whales). Under the ALWTRP, various restrictions are in place during right whale calving season from November 15 through April 15.

Southeast Atlantic Gillnet Fishery

The Category II Southeast Atlantic gillnet fishery targets finfish including, but not limited to, king mackerel, Spanish mackerel, whiting, bluefish, pompano, spot, croaker, little tunny, bonita, jack crevalle, cobia, and striped mullet. This fishery does not include gillnet effort targeting sharks as part of the ''Southeastern U.S. Atlantic shark gillnet'' fishery. This fishery uses gillnets set in sink, stab, set, or strike fashion. The fishery operates in waters south of a line extending due east from the North Carolina-South Carolina border and south and east of the fishery management council demarcation line between the Atlantic Ocean and the Gulf of Mexico. The majority of fishing effort occurs in Federal waters since South Carolina, Georgia, and Florida prohibit the use of gillnets, with limited exceptions, in state waters.

Fishing for king mackerel, Spanish mackerel, cobia, cero, and little tunny in Federal waters is managed under the Coastal Migratory Pelagic Resources (CMPR) FMP. None of the other target species are Federally managed under the MSA. In state waters, state and ASMFC Interstate FMPs apply. The fishery is also subject to BDTRP implementing regulations.

North Carolina Inshore Gillnet Fishery

The Category II North Carolina inshore gillnet fishery targets species including, but not limited to, southern flounder, weakfish, bluefish, Atlantic croaker, striped mullet, spotted seatrout, Spanish mackerel, striped bass, spot, red drum, black drum, and shad. This fishery includes any fishing effort using any type of gillnet gear, including set (float and sink), drift, and runaround gillnet for any target species inshore of the COLREGS lines in North Carolina. This fishery is managed under state and ASMFC interstate FMPs, applying net and mesh size regulations, and seasonal area closures in the Pamlico Sound Gillnet Restricted Area (PSGNRA). This fishery is subject to BDTRP implementing regulations.

Gulf of Mexico Gillnet Fishery

The Category II Gulf of Mexico gillnet fishery targets a wide variety of target species, including, but not limited to: black drum, sheepshead, weakfish, mullet, spot, croaker, king mackerel, Spanish mackerel, Florida pompano, flounder shark, menhaden, bluefish, blue runner, ladyfish, spotted seatrout, croaker, kingfish, and red drum. This fishery operates year-round using any type of gillnet, including strike and straight gillnets, in waters north of the U.S.-Mexico border and west of the fishery management council demarcation line between the Atlantic Ocean and the Gulf of Mexico. Gillnet gear is prohibited in Texas and Florida State waters, but fixed and runaround gillnets are currently used in Louisiana, Mississippi, and Alabama, with highly variable fishing effort.

Fishing for king mackerel, Spanish mackerel, cobia, cero, little tunny, dolphin, and bluefish are managed under the CMPR FMP. In the Gulf of Mexico, CMPR FMP species are the only Federally managed species for which gillnet gear is authorized, and only run-around gillnetting for these species is allowed. In state waters, state and Gulf States Marine Fisheries Commission (GSMFC) Interstate FMPs apply.

North Carolina Long Haul Seine Fishery

The Category II North Carolina long haul seine fishery targets species including, but not limited to, weakfish, spot, croaker, menhaden, bluefish, spotted seatrout, and hogfish using multi-filament seines consisting of a 1,000–2,000 yard (3,000–6,000 ft) net pulled by two boats for 1–2 nmi (2–4 km). Fish are encircled and concentrated by pulling the net around a fixed stake. The fishery includes fishing with long haul seine gear to target any species in waters off North Carolina, including estuarine waters in Pamlico and Core Sounds and their tributaries. The fishery occurs from February to November, with peak effort occurring from June to October. The fishery is managed under ASMFC interstate FMPs and the BDTRP.

North Carolina Roe Mullet Stop Net Fishery

The Category II North Carolina roe mullet stop net fishery targets striped mullet from October to November using a stationary, multi-filament anchored net extended perpendicular to the beach. Once the catch accumulates near the end of the stop net, a beach haul seine is used to capture fish and bring them ashore. The stop net is traditionally left in the water for 1–5 days, but can be left as long as 15 days. This fishery is unique to Bogue Banks, NC. This fishery is managed under the NC Striped Mullet FMP and the BDTRP.

Gulf of Mexico Menhaden Purse Seine Fishery

The Category II Gulf of Mexico menhaden purse seine fishery targets menhaden and thread herring using purse seine gear in bays, sounds, and nearshore coastal waters along the Gulf of Mexico coast. The majority of the fishing effort is concentrated off Louisiana and Mississippi, with lesser effort in Alabama and Texas State waters. Florida prohibits the use of purse seines in state waters. The fishery is managed under the GSMFC Interstate Gulf Menhaden FMP.

Summary of Changes to the LOF for 2008

The following summarizes changes to the LOF for 2008 in fishery classification, fisheries listed in the LOF, the number of participants in a particular fishery, and the species and/or stocks that are incidentally killed or seriously injured in a particular fishery. The classifications and definitions of U.S. commercial fisheries for 2008 are identical to those provided in the LOF for 2007 with the following exceptions.

Commercial Fisheries in the Pacific Ocean

Fishery Classification

NMFS proposes to elevate the ''CA yellowtail, barracuda, and white seabass drift gillnet (mesh size >3.5 inches and <14 inches)'' fishery (proposed to be changed to ''CA yellowtail, barracuda, and white seabass drift gillnet (mesh size ≥3.5 inches and <14 inches)'' fishery in this proposed rule) from a Category II fishery to a Category I fishery based upon observer documented interactions with the CA stock of long-beaked common dolphins in 2003 and 2004. The estimated annual mortality of long-beaked common dolphins in this fishery is 9 dolphins. The PBR for the CA stock of long-beaked common dolphin is 11 animals (draft U.S. Pacific SAR for 2007). Therefore, the estimated annual serious injury and mortality in this fishery is approximately 82 percent of the stock's PBR. Category I classification is necessary because the mean serious injury and mortality of the CA stock of long-beaked common dolphins in this fishery exceeds 50 percent of its PBR. NMFS also proposes to remove the superscript ''2'' (i.e., a Category II fishery classification based on analogy with another fishery) from this fishery and add a superscript ''1'' (which represents which stocks are driving a fishery's classification) after long-beaked common dolphin in Table 1, as bycatch of the CA stock of long-beaked common dolphin is driving the proposed reclassification to Category I.

Removal of Fisheries from the LOF

NMFS proposes to remove the Category II ''OR blue shark floating longline'' fishery and the Category II ''OR swordfish floating longline'' fishery from the LOF. The Pacific HMS FMP regulations (50 CFR 660.712(a)) and ESA regulations (50 CFR 223.206(d)(9)) prohibit the use of longline gear to target HMS species in the U.S. Pacific EEZ and prohibit the use of shallow-set longline gear outside the U.S. Pacific EEZ. As a result, the State of Oregon is no longer issuing developmental permits for these fisheries.

Fishery Name and Organizational Changes and Clarifications

NMFS proposes to modify the name of the Category III ''CA set and drift gillnet fisheries that use a stretched mesh size of 3.5 in or less'' to the ''CA set gillnet fishery (mesh size <3.5 inches)''. This definition better describes the fishery and is consistent with the California Fish and Game Code regulating state commercial fisheries in marine waters.

NMFS proposes to modify the name of the Category II (proposed for elevation to a Category I in this proposed rule) ''CA yellowtail, barracuda, and white seabass drift gillnet (mesh size >3.5 inches and <14 inches)'' fishery to ''CA yellowtail, barracuda, and white seabass drift gillnet (mesh size ≥3.5 inches and <14 inches)'' fishery. This change is consistent with the minimum mesh size allowed in this fishery, 3.5 in (8.9 cm), as defined in California's Fish and Game Code.

NMFS received comments on the 2007 LOF regarding take of humpback and gray whales in Category III trap/pot fisheries on the Pacific Coast, which prompted NMFS to review the various west coast pot and trap fisheries. Reports to the Marine Mammal Stranding Network in the Pacific Northwest (OR and WA) indicate that gray whale entanglements in commercial crab gear occurs in both states; however, no takes of humpback whales in crab gear have been reported in the Northwest Region from 2001 to present. The 2005 Alaska SAR for the Eastern North Pacific stock of gray whale estimated the total fisheries incidental serious injury and mortality for this stock at less than 10 percent of the stock's PBR level. The crab fisheries in Oregon and Washington are both state regulated limited entry fisheries and both states have recently enacted regulations to reduce and limit the number of pots used by fishery participants. NMFS anticipates that incidental serious injury and mortality of gray and humpback whales in OR and WA crab fisheries is unlikely to increase; therefore, NMFS is not recommending reclassification of the crab pot fishery at this time. NMFS will continue to analyze information from the remaining pot fisheries along the west coast for potential recategorization of certain west coast trap/pot fisheries in future LOFs.

Number of Vessels/Persons

NMFS proposes to update the estimated number of vessels or persons in the Category III ''CA abalone'' fishery from 111 to zero. The State of California closed the commercial abalone fishery in 1997 due to declines in all five species of abalone. The State of California is currently involved in a fishery development process that may allow a limited red abalone fishery at San Miguel Island, CA. NMFS will continue to monitor this fishery and update the LOF as appropriate.

NMFS proposes to update the estimated number of vessels or persons in the Category III ''CA set and drift gillnet fisheries that use a stretched mesh size of 3.5 in or less'' (proposed to be changed to the ''CA set gillnet (mesh size <3.5 inches)'' fishery in this proposed rule) from 341 to 304, based upon the number of permits issued in the herring fishery and the number of vessels that use this gear to target other fish species. The number of active vessels in this fishery varies yearly.

NMFS proposes to update the estimated number of vessels or persons in the Category II ''CA anchovy, mackerel, and sardine purse seine'' fishery from 100 to 63.

NMFS proposes to update the estimated number of vessels or persons in the Category II ''CA squid purse seine'' fishery from 65 to 71.

NMFS proposes to update the estimated number of vessels or persons

in the Category III ''Hawaii inshore gillnet'' fishery from 35 to 5.

List of Species That are Incidentally Injured or Killed

NMFS proposes to add the Hawaiian stocks of striped dolphin and Bryde's whale to the list of marine mammal species and stocks incidentally injured or killed in the ''Hawaii swordfish, tuna, billfish, mahi mahi, wahoo, oceanic sharks longline/set line'' fishery based on observed serious injury and mortalities in the HI-based longline fishery. A Bryde's whale was observed injured in 2005 and a striped dolphin was observed killed in 2006.

NMFS proposes to remove the Gulf of Alaska, Aleutian Islands, and Bering Sea transient stock of killer whales from the Category II ''AK Bering Sea and Aleutian Islands Pacific cod longline'' fishery and the Category III ''AK Bering Sea and Aleutian Islands Greenland turbot longline'' fishery. Genetic analyses of tissue samples collected by observers over the past few years have indicated that the mortalities incidental to these two fisheries were resident killer whales (2006 Final SARs [72 FR 12774, March 19, 2007]). Genetic analyses indicated that the mortalities incidental to the ''Bering Sea and Aleutian Islands pollack trawl'' fishery were transient killer whales (2006 Final SARs [72 FR 12774, March 19, 2007]). Therefore, the transient stock of killer whales remains on the list of species or stocks incidentally killed or injured in the pollack trawl fishery.

Commercial Fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean

Addition of Fisheries to the LOF

NMFS proposes to add the ''Georgia cannonball jellyfish trawl'' fishery as a Category III fishery. This is an experimental mid-water trawl fishery targeting cannonball jellyfish and operating in state and Federal waters off of Georgia between February and April. Participation in this fishery requires a permit and the use of a turtle excluder device (TED). Eight vessels were issued permits each year between 2004–2006. However, the number of active vessels decreased from 8 in 2004 to 1 in 2006, and the Georgia Department of Natural Resources (DNR) expects participation in this experimental fishery to remain low. The Georgia DNR conducts bycatch assessments in experimental fisheries permitted by the state. Less than 5 percent of the fishery has been assessed for the last several years combined. No marine mammal species or stocks have been observed incidentally seriously injured or killed in this fishery (Pers. Comm., Julie Califf, Georgia DNR; Atlantic States Marine Fisheries Commission, 2006).

Removal of Fisheries from the LOF

NMFS proposes to remove the Category III ''U.S.-mid Atlantic hand seine'' fishery from the LOF. This fishery was added to the LOF in 1996 based on historical information and was placed in Category III by analogy to other hand seine fisheries (60 FR 31681, June 16, 1995). No marine mammal stocks have been documented as seriously injured or killed in this fishery. No new information on this fishery has been identified since its addition in 1996, and therefore NMFS proposed to remove it from the LOF.

Fishery Name and Organizational Changes and Clarifications

Southeast Atlantic Gillnet Fishery

NMFS proposes to remove shad from the list of target species associated with the Category II ''Southeast Atlantic gillnet'' fishery. A total closure of the ocean intercept fishery for American shad was implemented January 1, 2005, under Amendment 1 to the Interstate FMP for Shad and River Herring. Remaining gillnet effort targeting shad and river herring in inshore rivers and bays is included in the Category III ''Southeast Atlantic inshore gillnet'' fishery.

Mid-Atlantic Gillnet Fishery

NMFS proposes to clarify the boundaries and excluded fisheries in the Category I ''mid-Atlantic gillnet'' fishery. Currently, the boundaries for the mid-Atlantic gillnet fishery are defined as including ''fishing for any target species using any type of gillnet gear west of a line drawn at 72° 30'W. long. south to 36° 33.03'N. lat. and east to the eastern edge of the EEZ and north of the North Carolina-South Carolina border'' (71 FR 70346, December 4, 2006). NMFS proposes to clarify this boundary definition through the addition of the following language, ''North Carolina-South Carolina border, but not including waters where gillnet fisheries are listed as Category II and Category III. At this time, these Category II and Category III fisheries include: the Chesapeake Bay inshore gillnet; North Carolina inshore gillnet; Delaware River inshore gillnet; Long Island Sound inshore gillnet; and Rhode Island, southern Massachusetts (to Monomy Island), and New York Bight (Raritan and Lower New York Bays) inshore gillnet''.

Atlantic Mixed Species Trap/Pot Fishery

NMFS proposes to clarify the boundaries and excluded fisheries in the Category II ''Atlantic mixed species trap/pot'' fishery. Currently, the boundaries are defined as extending throughout the U.S. Atlantic waters from Maine to Florida (68 FR 1420, January 10, 2003). NMFS proposes to clarify this boundary definition, as well as those fisheries not included in the definition, by adding the following, ''The Atlantic mixed species trap/pot fishery (Category II) includes all trap/pot operations for species from the Maine-Canada border down through the waters east of the fishery management demarcation line between the Atlantic Ocean and the Gulf of Mexico (50 CFR 600.105), but does not include the following Category I, II, and III trap/pot fisheries: Northeast/Mid-Atlantic American lobster trap/pot; Atlantic blue crab trap/pot; Florida spiny lobster trap/pot; Southeastern U.S. Atlantic, Gulf of Mexico stone crab trap/pot; U.S. Mid-Atlantic eel trap/pot fisheries; and the Southeastern U.S. Atlantic, Gulf of Mexico golden crab fishery (68 FR 1421, January 10, 2003)''.

NMFS also proposes to expand the list of fish species targeted by the Category II ''Atlantic mixed species trap/pot'' fishery. NMFS added this Category II fishery to the 2003 LOF to encompass the ''Northeast trap/pot'', the ''mid-Atlantic mixed species trap/pot'', the ''U.S. mid-Atlantic and Southeast U.S. Atlantic black sea bass trap/pot'' fisheries and any other trap/pot fisheries otherwise not identified in the LOF, based on the use of similar gear and the potential for marine mammal entanglements. In the final 2007 LOF (72 FR 14474, March 28, 2007), NMFS expanded the target fish species in the Atlantic mixed species trap/pot fishery to include, but not be limited to: hagfish, shrimp, conch/whelk, red crab, Jonah crab, rock crab, black sea bass, scup, tautog, cod, haddock, pollock, redfish (ocean perch), white hake, spot, skate, catfish and American eel (not included in the LOF's ''U.S. Mid-Atlantic eel trap/pot'' fishery description). NMFS has recently become aware that this fishery is targeting an additional species, cunner. Therefore, NMFS proposes to expand the list of species associated with this fishery to also include cunner.

Mid-Atlantic Flynet Fishery

NMFS believes that at this time, changes to the current Category II ''mid-Atlantic flynet'' fishery definition are warranted for maintaining consistency

with the North Carolina definitions of the ''flynet fishery'' and other Federal definitions for this fishery (CFR 50 CFR 697.2; 72 FR 7382, February 15, 2007). NMFS proposes to clarify this fishery definition by replacing the current definition provided in the LOF in 2007 (71 FR 70345, December 4, 2006) with the following language: ''The flynet fishery is a multispecies fishery composed of nearshore and offshore components that operate along the eastern coast of the mid-Atlantic United States. Flynets are high profile trawls similar to bottom otter trawls. These nets typically range from 80–120 ft (24–36.6 m) in headrope length, with wing mesh sizes of 16–64 in (41–163 cm), following a slow 3:1 taper to smaller mesh sizes in the body, extension, and codend sections of the net. The nearshore fishery operates from October to April inside of 30 fathoms (180 ft–55 m) from North Carolina to New Jersey. This nearshore fishery targets Atlantic croaker, weakfish, butterfish, harvestfish, bluefish, menhaden, striped bass, kingfishes, and other finfish species. Flynet fishing is no longer permitted south of Cape Hatteras in order to protect weakfish stocks. The offshore component operates from November to April outside of 30 fathoms (180 ft; 55 m) from the Hudson Canyon off New York, south to Hatteras Canyon off North Carolina. These deeper water fisheries target bluefish, Atlantic mackerel, *Loligo* squid, black sea bass, and scup (72 FR 7382, February 15, 2007). *Illex* squid are also targeted offshore (70–200 fathoms [420–1,200 ft; 128–366 m]) during summer months from May to September.''

NMFS acknowledges that concerns have been raised over the possible colloquial nature of this fishery and will continue working with mid-Atlantic states and NMFS regional Fisheries Science Centers to resolve these concerns. Through this proposed 2008 LOF, NMFS also solicits additional public comments, or information, concerning characteristics associated with the ''Flynet Fishery'' from New Jersey to North Carolina.

List of Species That are Incidentally Seriously Injured or Killed

NMFS proposes to add the Northern Gulf of Mexico continental shelf and Eastern Gulf of Mexico coastal stocks of bottlenose dolphins to the list of marine mammal species and stocks incidentally injured or killed in the ''Southeastern U.S. Atlantic, Gulf of Mexico, shark bottom longline/hook-and-line'' fishery. Three interactions with bottlenose dolphins have been documented through the Commercial Shark Fishery Observer Program, which monitored the fishery between 1994 and 2004. Two of the interactions involved ''hooked'' dolphins released alive (1999 and 2002), and one interaction resulted in a mortality (2003) [Pers. Comm., G. Burgess and A. Morgan; Burgess and Morgan, 2003A; Burgess and Morgan, 2003B). Based on the spatial information provided by the observer program, NMFS determined that the dolphins were likely part of the Gulf of Mexico coastal and continental shelf stocks. Although bycatch estimates for the shark bottom longline fishery have not been extrapolated for marine mammal stocks, NMFS believes that interactions with bottlenose dolphins are rare. This fishery is currently observed with an annual target of 3.9 percent coverage. No bottlenose dolphins have been observed injured or killed within the last five years. However, the fishery still operates in the same general areas and uses the same type of gear; therefore, NMFS believes the fishery continues to present a low level of risk for interactions.

NMFS proposes to change the name of the bottlenose dolphin stocks incidentally seriously injured or killed in the ''Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline'' and ''Gulf of Mexico butterfish trawl'' fisheries from ''Bottlenose dolphin, Northern Gulf of Mexico outer continental shelf'' to ''Bottlenose dolphin, Northern Gulf of Mexico oceanic'', and from ''Bottlenose dolphin, Northern Gulf of Mexico continental shelf edge and slope'' to ''Bottlenose dolphin, Northern Gulf of Mexico continental shelf''. The names of these stocks were changed in the 2003 and 2005 SARs and the LOF should have also been updated at that time. This proposal corrects that oversight.

NMFS proposes to change the name of the humpback whale stock incidentally killed/injured from ''Western North Atlantic (WNA)'' to ''Gulf of Maine'' for the ''Northeast sink gillnet'' (Category I), ''Northeast/mid-Atlantic American lobster trap/pot'' (Category I), ''Northeast anchored float gillnet'' (Category II), and ''Gulf of Maine, U.S. mid-Atlantic tuna, shark, swordfish hook-and-line/harpoon'' (Category III) fisheries to reflect the interactions taking place between these fisheries and humpback whales from the Gulf of Maine feeding stock. During 2002, the Gulf of Maine stock was classified as a separate feeding stock based on research conducted along the Nova Scotian Shelf that showed a strong fidelity by individual whales to this region. The reclassification was based on the assumption that, were this subpopulation wiped out, repopulation by immigration from adjacent areas would not occur on any reasonable timescale (U.S. Atlantic and Gulf of Mexico Stock Assessments, 2005; 71 FR 26340, May 4, 2006). Subsequent support included genetic analyses conducted by Pasb l et al. in 1995. During the Comprehensive Assessment of North Atlantic Humpback Whales, the International Whaling Commission also acknowledged that evidence existed for treating the Gulf of Maine as a separate stock for the purpose of management (IWC 2002).

List of Fisheries

The following two tables list U.S. commercial fisheries according to their assigned categories under section 118 of the MMPA. The estimated number of vessels/participants is expressed in terms of the number of active participants in the fishery, when possible. If this information is not available, the estimated number of vessels or persons licensed for a particular fishery is provided. If no recent information is available on the number of participants in a fishery, the number from the most recent LOF is used.

The tables also list the marine mammal species and stocks incidentally killed or injured in each fishery based on observer data, logbook data, stranding reports, and fisher reports. This list includes all species or stocks known to experience mortality or injury in a given fishery, but also includes species or stocks for which there are anecdotal records of interaction. Additionally, species identified by logbook entries may not be verified. Bycatch of species or stocks identified is not necessarily driving a fishery's classification in a given Category. NMFS has designated those stocks driving a fishery's classification (i.e., the fishery is classified based on serious injuries and mortalities of a marine mammal stock greater than 50 percent [Category I], or greater than 1 percent and less than 50 percent [Category II], of a stock's PBR) by a ''1'' after the stock's name.

There are several fisheries classified in Category II that have no recently documented interactions with marine mammals, or interactions that did not result in a serious injury or mortality. Justification for classifying these fisheries, which are greater than 1 percent of a stock's PBR level, is by analogy to other gear types that are known to cause mortality or serious injury of marine mammals, as discussed in the final LOF for 1996 (60 FR 67063, December 28, 1995), and according to factors listed in the definition of a

''Category II fishery'' in 50 CFR 229.2. NMFS has designated those fisheries originally listed by analogy in Tables 1 and 2 by a ''2'' after the fishery's name.

Table 1 lists commercial fisheries in the Pacific Ocean (including Alaska); Table 2 lists commercial fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean.

TABLE 1 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
Category I		
GILLNET FISHERIES:		
CA angel shark/halibut and other species set gillnet (>3.5 in. mesh)	58	California sea lion, U.S. Harbor seal, CA Harbor porpoise, Central CA[1] Long-beaked common dolphin, CA Northern elephant seal, CA breeding Sea otter, CA Short-beaked common dolphin, CA/OR/WA
CA yellowtail, barracuda, and white seabass drift gillnet fishery (mesh size ≥3.5 inches and <14 inches)	24	California sea lion, U.S. Long-beaked common dolphin, CA[1] Short-beaked common dolphin, CA/OR/WA
CA/OR thresher shark/swordfish drift gillnet (≥14 in. mesh)	85	California sea lion, U.S. Dall's porpoise, CA/OR/WA Fin whale, CA/OR/WA Gray whale, Eastern North Pacific Humpback whale, Eastern North Pacific Long-beaked common dolphin, CA Northern elephant seal, CA breeding Northern right-whale dolphin, CA/OR/WA Pacific white-sided dolphin, CA/OR/WA Risso's dolphin, CA/OR/WA Short-beaked common dolphin, CA/OR/WA Short-finned pilot whale, CA/OR/WA[1] Sperm whale, CA/OR/WA
LONGLINE/SET LINE FISHERIES:		
HI swordfish, tuna, billfish, mahi mahi, wahoo, oceanic sharks longline/set line	140	Blainville's beaked whale, HI Bottlenose dolphin, HI False killer whale, HI[1] Humpback whale, Central North Pacific Pantropical spotted dolphin, HI Risso's dolphin, HI Short-finned pilot whale, HI Spinner dolphin, HI Sperm whale, HI
Category II		
GILLNET FISHERIES:		
AK Bristol Bay salmon drift gillnet[2]	1,903	Beluga whale, Bristol Bay Gray whale, Eastern North Pacific Harbor seal, Bering Sea Northern fur seal, Eastern Pacific Pacific white-sided dolphin, North Pacific Spotted seal, AK Steller sea lion, Western U.S.[1]
AK Bristol Bay salmon set gillnet[2]	1,014	Beluga whale, Bristol Bay Gray whale, Eastern North Pacific Harbor seal, Bering Sea Northern fur seal, Eastern Pacific Spotted seal, AK

TABLE 1 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
AK Cook Inlet salmon set gillnet	745	Beluga whale, Cook Inlet Dall's porpoise, AK Harbor porpoise, GOA Harbor seal, GOA Humpback whale, Central North Pacific[1] Steller sea lion, Western U.S.
AK Cook Inlet salmon drift gillnet	576	Beluga whale, Cook Inlet Dall's porpoise, AK Harbor porpoise, GOA[1] Harbor seal, GOA Steller sea lion, Western U.S.
AK Kodiak salmon set gillnet	188	Harbor porpoise, GOA[1] Harbor seal, GOA Sea otter, Southwest AK Steller sea lion, Western U.S.
AK Metlakatla/Annette Island salmon drift gillnet[2]	60	None documented
AK Peninsula/Aleutian Islands salmon drift gillnet[2]	164	Dall's porpoise, AK Harbor porpoise, GOA Harbor seal, GOA Northern fur seal, Eastern Pacific
AK Peninsula/Aleutian Islands salmon set gillnet[2]	116	Harbor porpoise, Bering Sea Steller sea lion, Western U.S.
AK Prince William Sound salmon drift gillnet	541	Dall's porpoise, AK Harbor porpoise, GOA[1] Harbor seal, GOA Northern fur seal, Eastern Pacific Pacific white-sided dolphin, North Pacific Sea Otter, South Central AK Steller sea lion, Western U.S.[1]
AK Southeast salmon drift gillnet	481	Dall's porpoise, AK Harbor porpoise, Southeast AK Harbor seal, Southeast AK Humpback whale, Central North Pacific[1] Pacific white-sided dolphin, North Pacific Steller sea lion, Eastern U.S.
AK Yakutat salmon set gillnet[2]	170	Gray whale, Eastern North Pacific Harbor seal, Southeast AK Humpback whale, Central North Pacific (Southeast AK)
WA Puget Sound Region salmon drift gillnet (includes all inland waters south of US-Canada border and eastward of the Bonilla-Tatoosh line-Treaty Indian fishing is excluded)	210	Dall's porpoise, CA/OR/WA Harbor porpoise, inland WA[1] Harbor seal, WA inland
PURSE SEINE FISHERIES:		
AK Southeast salmon purse seine	416	Humpback whale, Central North Pacific[1]
AK Cook Inlet salmon purse seine	82	Humpback whale, Central North Pacific[1]
AK Kodiak salmon purse seine	370	Humpback whale, Central North Pacific[1]
CA anchovy, mackerel, sardine purse seine	63	Bottlenose dolphin, CA/OR/WA offshore[1] California sea lion, U.S. Harbor seal, CA
CA squid purse seine	71	Common dolphin, unknown Short-finned pilot whale, CA/OR/WA[1]
CA tuna purse seine2	10	None documented
TRAWL FISHERIES:		

TABLE 1 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
AK Bering Sea, Aleutian Islands flatfish trawl	26	Bearded seal, AK Harbor porpoise, Bering Sea Harbor seal, Bering Sea Killer whale, AK resident[1] Northern fur seal, Eastern North Pacific Spotted seal, AK Steller sea lion, Western U.S.[1] Walrus, AK
AK Bering Sea, Aleutian Islands pollock trawl	120	Dall's porpoise, AK Harbor seal, AK Humpback whale, Central North Pacific[1] Humpback whale, Western North Pacific[1] Killer whale, Eastern North Pacific, GOA, Aleutian Islands, and Bering Sea transient[1] Minke whale, AK Ribbon seal, AK Spotted seal, AK Steller sea lion, Western U.S.[1]
LONGLINE/SET LINE FISHERIES:		
AK Bering Sea, Aleutian Islands Pacific cod longline	114	Killer whale, AK resident[1] Ribbon seal, AK Steller sea lion, Western U.S.
CA pelagic longline[2]	6	California sea lion, U.S. Risso's dolphin, CA/OR/WA
POT, RING NET, AND TRAP FISHERIES:		
AK Bering Sea sablefish pot	6	Humpback whale, Central North Pacific[1] Humpback whale, Western North Pacific[1]
Category III		
GILLNET FISHERIES:		
AK Kuskokwim, Yukon, Norton Sound, Kotzebue salmon gillnet	1,922	Harbor porpoise, Bering Sea
AK miscellaneous finfish set gillnet	3	Steller sea lion, Western U.S.
AK Prince William Sound salmon set gillnet	30	Harbor seal, GOA Steller sea lion, Western U.S.
AK roe herring and food/bait herring gillnet	2,034	None documented
CA set gillnet (mesh size <3.5 inches)	304	None documented
Hawaii inshore gillnet	5	Bottlenose dolphin, HI Spinner dolphin, HI
WA Grays Harbor salmon drift gillnet (excluding treaty Tribal fishing)	24	Harbor seal, OR/WA coast
WA, OR herring, smelt, shad, sturgeon, bottom fish, mullet, perch, rockfish gillnet	913	None documented
WA, OR lower Columbia River (includes tributaries) drift gillnet	110	California sea lion, U.S. Harbor seal, OR/WA coast
WA Willapa Bay drift gillnet	82	Harbor seal, OR/WA coast Northern elephant seal, CA breeding
PURSE SEINE, BEACH SEINE, ROUND HAUL AND THROW NET FISHERIES:		
AK Metlakatla salmon purse seine	10	None documented
AK miscellaneous finfish beach seine	1	None documented

TABLE 1 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
AK miscellaneous finfish purse seine	3	None documented
AK octopus/squid purse seine	2	None documented
AK roe herring and food/bait herring beach seine	8	None documented
AK roe herring and food/bait herring purse seine	624	None documented
AK salmon beach seine	34	None documented
AK salmon purse seine (except Southeast Alaska, which is in Category II	953	Harbor seal, GOA
WA, OR sardine purse seine	42	None documented
HI Kona crab loop net	42	None documented
HI opelu/akule net	12	None documented
HI inshore purse seine	23	None documented
HI throw net, cast net	14	None documented
WA (all species) beach seine or drag seine	235	None documented
WA, OR herring, smelt, squid purse seine or lampara	130	None documented
WA salmon purse seine	440	None documented
WA salmon reef net	53	None documented
DIP NET FISHERIES:		
CA squid dip net	115	None documented
WA, OR smelt, herring dip net	119	None documented
MARINE AQUACULTURE FISHERIES:		
CA marine shellfish aquaculture	unknown	None documented
CA salmon enhancement rearing pen	>1	None documented
CA white seabass enhancement net pens	13	California sea lion, U.S.
HI offshore pen culture	2	None documented
OR salmon ranch	1	None documented
WA, OR salmon net pens	14	California sea lion, U.S. Harbor seal, WA inland waters
TROLL FISHERIES:		
AK North Pacific halibut, AK bottom fish, WA, OR, CA albacore, groundfish, bottom fish, CA halibut non-salmonid troll fisheries	1,530 (330 AK)	None documented
AK salmon troll	2,335	Steller sea lion, Eastern U.S. Steller sea lion, Western U.S.
American Samoa tuna troll	< 50	None documented
CA/OR/WA salmon troll	4,300	None documented
Commonwealth of the Northern Mariana Islands tuna troll	88	None documented
Guam tuna troll	401	None documented
HI trolling, rod and reel	1,321	None documented

TABLE 1 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
LONGLINE/SET LINE FISHERIES:		
AK Bering Sea, Aleutian Islands Greenland turbot longline	12	Killer whale, AK resident
AK Bering Sea, Aleutian Islands rockfish longline	17	None documented
AK Bering Sea, Aleutian Islands sablefish longline	63	None documented
AK Gulf of Alaska halibut longline	1,302	None documented
AK Gulf of Alaska Pacific cod longline	440	None documented
AK Gulf of Alaska rockfish longline	421	None documented
AK Gulf of Alaska sablefish longline	412	Sperm whale, North Pacific Steller sea lion, Eastern U.S.
AK halibut longline/set line (State and Federal waters)	3,079	Steller sea lion, Western U.S.
AK octopus/squid longline	7	None documented
AK state-managed waters groundfish longline/setline (including sablefish, rockfish, and miscellaneous finfish)	731	None documented
American Samoa longline	60	None documented
WA, OR, CA groundfish, bottomfish longline/set line	367	None documented
WA, OR North Pacific halibut longline/set line	350	None documented
TRAWL FISHERIES:		
AK Bering Sea, Aleutian Islands Atka mackerel trawl	8	Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands Pacific cod trawl	87	Harbor seal, Bering Sea Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands rockfish trawl	9	None documented
AK Gulf of Alaska flatfish trawl	52	None documented
AK Gulf of Alaska Pacific cod trawl	101	Steller sea lion, Western U.S.
AK Gulf of Alaska pollock trawl	83	Fin whale, Northeast Pacific Northern elephant seal, North Pacific Steller sea lion, Western U.S.
AK Gulf of Alaska rockfish trawl	45	None documented
AK food/bait herring trawl	3	None documented
AK miscellaneous finfish otter or beam trawl	6	None documented
AK shrimp otter trawl and beam trawl (statewide and Cook Inlet)	58	None documented
AK state-managed waters of Cook Inlet, Kachemak Bay, Prince William Sound, Southeast AK groundfish trawl	2	None documented
CA halibut bottom trawl	53	None documented

TABLE 1 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
WA, OR, CA groundfish trawl	585	California sea lion, U.S. Dall's porpoise, CA/OR/WA Harbor seal, OR/WA coast Northern fur seal, Eastern Pacific Pacific white-sided dolphin, CA/OR/WA Steller sea lion, Eastern U.S.
WA, OR, CA shrimp trawl	300	None documented
POT, RING NET, AND TRAP FISHERIES:		
AK Aleutian Islands sablefish pot	8	None documented
AK Bering Sea, Aleutian Islands Pacific cod pot	76	None documented
AK Bering Sea, Aleutian Islands crab pot	329	None documented
AK Gulf of Alaska crab pot	unknown	None documented
AK Gulf of Alaska Pacific cod pot	154	Harbor seal, GOA
AK Southeast Alaska crab pot	unknown	Humpback whale, Central North Pacific (Southeast AK)
AK Southeast Alaska shrimp pot	unknown	Humpback whale, Central North Pacific (Southeast AK)
AK octopus/squid pot	72	None documented
AK snail pot	2	None documented
CA lobster, prawn, shrimp, rock crab, fish pot	608	Gray whale, Eastern North Pacific Harbor seal, CA Humpback whale, Eastern North Pacific Sea otter, CA
OR, CA hagfish pot or trap	25	None documented
WA, OR, CA crab pot	1,478	Gray whale, Eastern North Pacific Humpback whale, Eastern North Pacific
WA, OR, CA sablefish pot	176	None documented
WA, OR shrimp pot/trap	254	None documented
HI crab trap	22	None documented
HI fish trap	19	None documented
HI lobster trap	0	Hawaiian monk seal
HI shrimp trap	5	None documented
HANDLINE AND JIG FISHERIES:		
AK miscellaneous finfish handline and mechanical jig	100	None documented
AK North Pacific halibut handline and mechanical jig	93	None documented
AK octopus/squid handline	2	None documented
American Samoa bottomfish	<50	None documented
Commonwealth of the Northern Mariana Islands bottomfish	<50	None documented
Guam bottomfish	200	None documented
HI aku boat, pole and line	4	None documented

TABLE 1 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
HI Main Hawaiian Islands, Northwest Hawaiian Islands deep sea bottomfish	300	Hawaiian monk seal
HI inshore handline	307	None documented
HI tuna handline	298	Hawaiian monk seal
WA groundfish, bottomfish jig	679	None documented
Western Pacific squid jig	6	None documented
HARPOON FISHERIES:		
CA swordfish harpoon	30	None documented
POUND NET/WEIR FISHERIES:		
AK herring spawn on kelp pound net	452	None documented
AK Southeast herring roe/food/bait pound net	3	None documented
WA herring brush weir	1	None documented
BAIT PENS:		
WA/OR/CA bait pens	13	California sea lion, U.S.
DREDGE FISHERIES:		
Coastwide scallop dredge	108 (12 AK)	None documented
DIVE, HAND/MECHANICAL COLLECTION FISHERIES:		
AK abalone	1	None documented
AK clam	156	None documented
WA herring spawn on kelp	4	None documented
AK dungeness crab	3	None documented
AK herring spawn on kelp	363	None documented
AK urchin and other fish/shellfish	471	None documented
CA abalone	0	None documented
CA sea urchin	583	None documented
HI black coral diving	1	None documented
HI fish pond	N/A	None documented
HI handpick	37	None documented
HI lobster diving	19	None documented
HI squiding, spear	91	None documented
WA, CA kelp	4	None documented
WA/OR sea urchin, other clam, octopus, oyster, sea cucumber, scallop, ghost shrimp hand, dive, or mechanical collection	637	None documented
WA shellfish aquaculture	684	None documented
COMMERCIAL PASSENGER FISHING VESSEL (CHARTER BOAT) FISHERIES:		

TABLE 1 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
AK, WA, OR, CA commercial passenger fishing vessel	>7,000 (1,107 AK)	Killer whale, stock unknown Steller sea lion, Eastern U.S. Steller sea lion, Western U.S.
HI charter vessel	114	None documented
LIVE FINFISH/SHELLFISH FISHERIES:		
CA finfish and shellfish live trap/hook-and-line	93	None documented

List of Abbreviations and Symbols Used in Table 1: AK - Alaska; CA - California; GOA - Gulf of Alaska; HI - Hawaii; OR - Oregon; WA - Washington

[1]Fishery classified based on serious injuries and mortalities of this stock, which are greater than 1 percent of the stock's PBR.

[1]Fishery classified based on serious injuries and mortalities of this stock, which are greater than 1 percent of the stock's PBR.

[2]Fishery classified by analogy.

TABLE 2 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE ATLANTICOCEAN, GULF OF MEXICO, AND CARIBBEAN

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
Category I		
GILLNET FISHERIES:		
Mid-Atlantic gillnet	>670	Bottlenose dolphin, WNA coastal[1] Bottlenose dolphin, WNA offshore Common dolphin, WNA Gray seal, WNA Harbor porpoise, GME/BF[1] Harbor seal, WNA Harp seal, WNA Humpback whale, Gulf of Maine[1] Long-finned pilot whale, WNA Minke whale, Canadian east coast Short-finned pilot whale, WNA White-sided dolphin, WNA
Northeast sink gillnet	341	Bottlenose dolphin, WNA offshore Common dolphin, WNA Fin whale, WNA Gray seal, WNA Harbor porpoise, GME/BF[1] Harbor seal, WNA Harp seal, WNA Hooded seal, WNA Humpback whale, Gulf of Maine[1] Minke whale, Canadian east coast[1] North Atlantic right whale, WNA[1] Risso's dolphin, WNA White-sided dolphin, WNA
LONGLINE FISHERIES:		

TABLE 2 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE ATLANTICOCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline	94	Atlantic spotted dolphin, Northern GMX Atlantic spotted dolphin, WNA Bottlenose dolphin, Northern GMX oceanic Bottlenose dolphin, Northern GMX continental shelf Bottlenose dolphin, WNA offshore Common dolphin, WNA Cuvier's beaked whale, WNA Long-finned pilot whale, WNA[1] Mesoplodon beaked whale, WNA Northern bottlenose whale, WNA Pantropical spotted dolphin, Northern GMX Pantropical spotted dolphin, WNA Pygmy sperm whale, WNA[1] Risso's dolphin, Northern GMX Risso's dolphin, WNA Short-finned pilot whale, Northern GMX Short-finned pilot whale, WNA[1]
TRAP/POT FISHERIES:		
Northeast/Mid-Atlantic American lobster trap/pot	13,000	Fin whale, WNA Harbor seal, WNA Humpback whale, Gulf of Maine[1] Minke whale, Canadian east coast[1] North Atlantic right whale, WNA[1]
Category II		
GILLNET FISHERIES:		
Chesapeake Bay inshore gillnet[2]	45	None documented
Gulf of Mexico gillnet[2]	724	Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, GMX bay, sound, and estuarine Bottlenose dolphin, Northern GMX coastal Bottlenose dolphin, Western GMX coastal
North Carolina inshore gillnet	94	Bottlenose dolphin, WNA coastal[1]
Northeast anchored float gillnet[2]	133	Harbor seal, WNA Humpback whale, Gulf of Maine White-sided dolphin, WNA
Northeast drift gillnet[2]	unknown	None documented
Southeast Atlantic gillnet[2]	779	Bottlenose dolphin, WNA coastal
Southeastern U.S. Atlantic shark gillnet	30	Atlantic spotted dolphin, WNA Bottlenose dolphin, WNA coastal[1] North Atlantic right whale, WNA
TRAWL FISHERIES:		
Mid-Atlantic mid-water trawl (including pair trawl)	620	Bottlenose dolphin, WNA offshore Common dolphin, WNA Long-finned pilot whale, WNA Risso's dolphin, WNA Short-finned pilot whale, WNA White-sided dolphin, WNA[1]
Mid-Atlantic bottom trawl	>1,000	Common dolphin, WNA[1] Long-finned pilot whale, WNA[1] Short-finned pilot whale, WNA[1]
Mid-Atlantic flynet[2]	21	None documented

TABLE 2 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE ATLANTICOCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
Northeast mid-water trawl (including pair trawl)	17	Harbor seal, WNA Long-finned pilot whale, WNA[1] Short-finned pilot whale, WNA[1] White-sided dolphin, WNA
Northeast bottom trawl	1,052	Common dolphin, WNA Harbor porpoise, GME/BF Harp seal, WNA Long-finned pilot whale, WNA Short-finned pilot whale, WNA White-sided dolphin, WNA[1]
TRAP/POT FISHERIES:		
Atlantic blue crab trap/pot	>16,000	Bottlenose dolphin, WNA coastal[1] West Indian manatee, FL[1]
Atlantic mixed species trap/pot[2]	unknown	Fin whale, WNA Humpback whale, Gulf of Maine
PURSE SEINE FISHERIES:		
Gulf of Mexico menhaden purse seine	50	Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, GMX bay, sound, estuarine Bottlenose dolphin, Northern GMX coastal[1] Bottlenose dolphin, Western GMX coastal
Mid-Atlantic menhaden purse seine[2]	22	Bottlenose dolphin, WNA coastal
HAUL/BEACH SEINE FISHERIES:		
Mid-Atlantic haul/beach seine	25	Bottlenose dolphin, WNA coastal[1]
North Carolina long haul seine	33	Bottlenose dolphin, WNA coastal[1]
STOP NET FISHERIES:		
North Carolina roe mullet stop net	13	Bottlenose dolphin, WNA coastal[1]
POUND NET FISHERIES:		
Virginia pound net	187	Bottlenose dolphin, WNA coastal[1]
Category III		
GILLNET FISHERIES:		
Caribbean gillnet	>991	Dwarf sperm whale, WNA West Indian manatee, Antillean
Delaware River inshore gillnet	60	None documented
Long Island Sound inshore gillnet	20	None documented
Rhode Island, southern Massachusetts (to Monomoy Island), and New York Bight (Raritan and Lower New York Bays) inshore gillnet	32	None documented
Southeast Atlantic inshore gillnet	unknown	None documented
TRAWL FISHERIES:		
Atlantic shellfish bottom trawl	972	None documented
Gulf of Mexico butterfish trawl	2	Bottlenose dolphin, Northern GMX oceanic Bottlenose dolphin, Northern GMX continental shelf
Gulf of Mexico mixed species trawl	20	None documented

TABLE 2 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE ATLANTICOCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
Georgia cannonball jellyfish trawl	1	None documented
Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl	>18,000	Bottlenose dolphin, WNA coastal Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, Western GMX coastal Bottlenose dolphin, GMX bay, sound, estuarine West Indian Manatee, FL
MARINE AQUACULTURE FISHERIES:		
Finfish aquaculture	48	Harbor seal, WNA
Shellfish aquaculture	unknown	None documented
PURSE SEINE FISHERIES:		
Gulf of Maine Atlantic herring purse seine	30	Harbor seal, WNA Gray seal, WNA
Gulf of Maine menhaden purse seine	50	None documented
Florida west coast sardine purse seine	10	Bottlenose dolphin, Eastern GMX coastal
U.S. Atlantic tuna purse seine	5	Long-finned pilot whale, WNA Short-finned pilot whale, WNA
LONGLINE/HOOK-AND-LINE FISHERIES:		
Northeast/Mid-Atlantic bottom longline/hook-and-line	46	None documented
Gulf of Maine, U.S. Mid-Atlantic tuna, shark swordfish hook-and-line/harpoon	26,223	Humpback whale, Gulf of Maine
Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean snapper-grouper and other reef fish bottom longline/hook-and-line	>5,000	None documented
Southeastern U.S. Atlantic, Gulf of Mexico shark bottom longline/hook-and-line	<125	Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, Northern GMX continental shelf
Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean pelagic hook-and-line/harpoon	1,446	None documented
TRAP/POT FISHERIES		
Caribbean mixed species trap/pot	>501	None documented
Caribbean spiny lobster trap/pot	>197	None documented
Florida spiny lobster trap/pot	2,145	Bottlenose dolphin, Eastern GMX coastal
Gulf of Mexico blue crab trap/pot	4,113	Bottlenose dolphin, Western GMX coastal Bottlenose dolphin, Northern GMX coastal Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, GMX bay, sound, estuarine West Indian manatee, FL
Gulf of Mexico mixed species trap/pot	unknown	None documented
Southeastern U.S. Atlantic, Gulf of Mexico golden crab trap/pot	10	None documented
Southeastern U.S. Atlantic, Gulf of Mexico stone crab trap/pot	4,453	None documented
U.S. Mid-Atlantic eel trap/pot	>700	None documented
STOP SEINE/WEIR/POUND NET FISHERIES:		

TABLE 2 - LIST OF FISHERIES COMMERCIAL FISHERIES IN THE ATLANTICOCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Fishery Description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
Gulf of Maine herring and Atlantic mackerel stop seine/weir	50	Gray seal, Northwest North Atlantic Harbor porpoise, GME/BF Harbor seal, WNA Minke whale, Canadian east coast White-sided dolphin, WNA
U.S. Mid-Atlantic crab stop seine/weir	2,600	None documented
U.S. Mid-Atlantic mixed species stop seine/weir/pound net (except the North Carolina roe mullet stop net)	751	None documented
DREDGE FISHERIES:		
Gulf of Maine mussel	>50	None documented
Gulf of Maine, U.S. Mid-Atlantic sea scallop dredge	233	None documented
U.S. Mid-Atlantic/Gulf of Mexico oyster	7,000	None documented
U.S. Mid-Atlantic offshore surf clam and quahog dredge	100	None documented
HAUL/BEACH SEINE FISHERIES:		
Caribbean haul/beach seine	15	West Indian manatee, Antillean
Gulf of Mexico haul/beach seine	unknown	None documented
Southeastern U.S. Atlantic, haul/beach seine	25	None documented
DIVE, HAND/MECHANICAL COLLECTION FISHERIES:		
Atlantic Ocean, Gulf of Mexico, Caribbean shellfish dive, hand/mechanical collection	20,000	None documented
Gulf of Maine urchin dive, hand/mechanical collection	>50	None documented
Gulf of Mexico, Southeast Atlantic, Mid-Atlantic, and Caribbean cast net	unknown	None documented
COMMERCIAL PASSENGER FISHING VESSEL (CHARTER BOAT) FISHERIES:		
Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel	4,000	Bottlenose dolphin, Eastern GMX coastal Bottlenose dolphin, Northern GMX coastal Bottlenose dolphin, Western GMX coastal Bottlenose dolphin, WNA coastal

List of Abbreviations and Symbols Used in Table 2: FL - Florida; GA - Georgia; GME/BF - Gulf of Maine/Bay of Fundy; GMX - Gulf of Mexico; NC - North Carolina; SC - South Carolina; TX - Texas; WNA - Western North Atlantic

[1] - Fishery classified based on serious injuries and mortalities of this stock, which are greater than 1 percent of the stock's PBR.

[2] - Fishery classified by analogy.

Classification

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule would not have a significant economic impact on a substantial number of small entities. The factual basis leading to the certification is repeated below.

Under existing regulations, all fishers participating in Category I or II fisheries must register under the MMPA, obtain an Authorization Certificate, and pay a fee of $25 (with the exception of those in regions with a registration process integrated with existing state and Federal permitting processes). Additionally, fishers may be subject to a Take Reduction Plan (TRP) and requested to carry an observer. The Authorization Certificate authorizes the taking of marine mammals incidental to commercial fishing operations. NMFS has estimated that approximately 42,000 fishing vessels, most of which are small entities, operate in Category I or II fisheries, and therefore, are required to register. However, registration has been integrated with existing state or Federal registration programs for the majority of these fisheries so these fishers do not need to register separately under the MMPA. Currently, approximately 350 fishers register directly with NMFS under the MMPA authorization program.

Though this proposed rule will affect approximately 350 small entities, the $25 registration fee, with respect to anticipated revenues, is not considered a significant economic impact. If a vessel is requested to carry an observer,

fishers will not incur any direct economic costs associated with carrying that observer. Potential indirect costs to individual fishers required to take observers may include: lost space on deck for catch, lost bunk space, and lost fishing time due to time needed to process bycatch data. However, effective monitoring will rotate observers among a limited number of vessels in a fishery at any given time and each vessel within an observed fishery has an equal probability of being requested to accommodate an observer. Therefore, the potential indirect costs to individual fishers are expected to be minimal since observer coverage would only be required for a small percentage of an individual's total annual fishing time. In addition, section 118 of the MMPA states that an observer will not be placed on a vessel if the facilities for quartering an observer or performing observer functions are inadequate or unsafe, thereby exempting vessels too small to accommodate an observer from this requirement. As a result of this certification, an initial regulatory flexibility analysis is not required and was not prepared. In the event that reclassification of a fishery to Category I or II results in a TRP, economic analyses of the effects of that plan will be summarized in subsequent rulemaking actions.

This proposed rule contains collection-of-information requirements subject to the Paperwork Reduction Act. The collection of information for the registration of fishers under the MMPA has been approved by the Office of Management and Budget (OMB) under OMB control number 0648–0293 (0.15 hours per report for new registrants and 0.09 hours per report for renewals). The requirement for reporting marine mammal injuries or mortalities has been approved by OMB under OMB control number 0648–0292 (0.15 hours per report). These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these reporting burden estimates or any other aspect of the collections of information, including suggestions for reducing burden, to NMFS and OMB (see **ADDRESSES** and **SUPPLEMENTARY INFORMATION**).

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866.

An environmental assessment (EA) was prepared under the National Environmental Policy Act (NEPA) for regulations to implement section 118 of the MMPA in June 1995. NMFS revised that EA relative to classifying U.S. commercial fisheries on the LOF in December 2005. Both the 1995 EA and the 2005 EA concluded that implementation of MMPA section 118 regulations would not have a significant impact on the human environment. This proposed rule would not make any significant change in the management of reclassified fisheries, and therefore, this proposed rule is not expected to change the analysis or conclusion of the 2005 EA. If NMFS takes a management action, for example, through the development of a TRP, NMFS will first prepare an environmental document, as required under NEPA, specific to that action.

This proposed rule will not affect species listed as threatened or endangered under the Endangered Species Act (ESA) or their associated critical habitat. The impacts of numerous fisheries have been analyzed in various biological opinions, and this proposed rule will not affect the conclusions of those opinions. The classification of fisheries on the LOF is not considered to be a management action that would adversely affect threatened or endangered species. If NMFS takes a management action, for example, through the development of a TRP, NMFS would conduct consultation under ESA section 7 for that action.

This proposed rule will have no adverse impacts on marine mammals and may have a positive impact on marine mammals by improving knowledge of marine mammals and the fisheries interacting with marine mammals through information collected from observer programs, stranding and sighting data, or take reduction teams.

This proposed rule will not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

References

Atlantic States Marine Fisheries Commission. 2006. Draft Report. Characterization of Georgia Commercial and Recreational Fisheries by Gear Type: The Potential for Interaction with Sea Turtles.

Burgess, G. and A. Morgan. 2003A. Final Report NA97FF0041. Renewal of an observer program to monitor the directed commercial shark fishery in the Gulf of Mexico and South Atlantic.

Burgess, G. and A. Morgan. 2003B. Final Report NA16FM1598, National Marine Fisheries Service Award. Renewal of an observer program to monitor the directed commercial shark fishery in the Gulf of Mexico and South Atlantic: 2002(2) and 2003(1) fishing seasons.

Burgess, G. and A. Morgan. 2007. Personal Communication.

Califf, J. 2007. Personal Communication.

Dated: June 21, 2007.

Samuel D. Rauch III,

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

[FR Doc. E7–12556 Filed 6–27–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 070607119–7119–01]

RIN 0648–AV11

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications

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

ACTION: Proposed rule.

SUMMARY: NMFS proposes a regulation to implement the annual harvest guideline for Pacific sardine in the U.S. exclusive economic zone (EEZ) off the Pacific coast for the fishing season of January 1, 2007, through December 31, 2007. This harvest guideline has been calculated according to the regulations implementing the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP) and establishes allowable harvest levels for Pacific sardine off the Pacific coast.

DATES: Comments must be received by July 30, 2007.

ADDRESSES: Submit comments on this proposed rule, identified by 0648–AV11, by any of the following methods:

- E-mail: *0648–AV11.SWR@noaa.gov*. Include the identifier ''0648–AV11'' in the subject line of the message.
- Federal e-Rulemaking portal: *http://www.regulations.gov*. Following the instructions for submitting comments.

• Mail: Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213.

• Fax: (562) 980–4047.

Copies of the report *Assessment of Pacific Sardine Stock for U.S. Management in 2007* may be obtained from the Southwest Regional Office (see **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: Joshua Lindsay, Southwest Region, NMFS, (562) 980–4034.

SUPPLEMENTARY INFORMATION: The CPS FMP, which was implemented by publication of the final rule in the **Federal Register** on December 15, 1999 (64 FR 69888), divides management unit species into two categories: actively managed and monitored. Harvest guidelines for actively managed species (Pacific sardine and Pacific mackerel) are based on formulas applied to current biomass estimates. Biomass estimates are not calculated for species that are only monitored (jack mackerel, northern anchovy, and market squid).,/P≤

During public meetings each year, the biomass for each actively managed species within the CPS FMP is presented to the Pacific Fishery Management Council's (Council) CPS Management Team (Team) and the Council's CPS Advisory Subpanel (Subpanel). At that time, the biomass, the harvest guideline (HG), and the status of the fisheries are reviewed and discussed. This information is then presented to the Council along with recommendations and comments from the Team and Subpanel. Following review by the Council and after hearing public comments, the Council makes its recommendation to NOAA's National Marine Fisheries Service (NMFS). The annual HG is published in the **Federal Register** as close as practicable to the start of the fishing season.

Public meetings of the Team, Subpanel and CPS Subcommitee of the Scientific and Statistical Committee (SSC) were held in October 2006. During these meetings the current stock assessment update for Pacific sardine, which included a preliminary biomass estimate and HG, was presented and reviewed in accordance with the procedures of the FMP. In November, the Council held a public meeting in San Diego, California (71 FR 62998) during which time the Council reviewed the current stock assessment, biomass numbers and proposed harvest guideline. Following the Team and Subpanel reports and hearing public comments, the Council adopted the Team's recommended harvest guideline for the 2007 Pacific sardine fishing season (January 1, 2007 through December 31, 2007) of 152,564 metric tons (mt). Although this HG is 28 percent higher than the HG for 2006, it is over 50,000 mt greater than the largest recent harvest by U.S. west coast fisheries. The Council also adopted the Subpanel recommendation of an incidental catch allowance for Pacific sardine of up to 45 percent by weight in other CPS fisheries in the event that the coastwide harvest of Pacific sardine exceeds a seasonal allocation prior to the next scheduled reallocation.

The size of the sardine population was estimated using the Age-Structured-Assessment-Program (ASAP) stock assessment model. ASAP was recommended as the most appropriate framework for conducting future Pacific sardine assessments by the stock assessment review (STAR) panel which met in June of 2004 at the Southwest Fisheries Science Center in La Jolla, California. The ASAP model uses a forward-projection that evaluates the relationship between the species' population dynamics and associated fishery operations. Information on the fishery and the stock assessment are found in the report *Assessment of Pacific Sardine Stock for U.S. Management in 2007* (see **ADDRESSES**).

The formula in the FMP uses the following factors to determine the harvest guideline:

1. *Biomass.* The estimated July 1, 2006, stock biomass of Pacific sardine age one and above 1,319,072 metric tons (mt).

2. *Cutoff.* This is the biomass level below which no commercial fishery is allowed. The FMP established this level at 150,000 mt.

3. *Distribution.* The portion of the Pacific sardine biomass estimated in the EEZ off the Pacific coast is 87 percent and is based on the average historical larval distribution obtained from scientific cruises and the distribution of the resource according to the logbooks of aerial fish-spotters.

4. *Fraction.* The harvest fraction is the percentage of the biomass above 150,000 mt that may be harvested. The fraction used varies (5–15 percent) with current ocean temperatures; a higher fraction for warmer ocean temperatures and a lower fraction for cooler temperatures. Warmer ocean temperatures favor the production of Pacific sardine. For 2007, the fraction used was 15 percent, based on three seasons of sea surface temperature at Scripps Pier, California.

Based on the estimated biomass of 1,319,072 mt and the formula in the FMP, a harvest guideline of 152,564 mt was determined.

The Pacific sardine HG is apportioned based on the following allocation scheme established by Amendment 11 (71 FR 36999) to the CPS FMP: 35 percent (53,397 mt) is allocated coastwide on January 1; 40 percent (61,025 mt), plus any portion not harvested from the initial allocation is reallocated coastwide on July 1; and on September 15 the remaining 25 percent (38,141 mt), plus any portion not harvested from earlier allocations is released.

If the total harvest guideline or these apportionment levels for Pacific sardine are reached at any time, the Pacific sardine fishery shall be closed until either it re-opens per the allocation scheme or the beginning of the next fishing season. The Regional Administrator shall publish in the **Federal Register**, through appropriate rulemaking procedures, the date of the closure of the directed fishery for Pacific sardine.

Classification

These proposed specifications are issued under the authority of, and NMFS has preliminarily determined that it is in accordance with, the Magnuson-Stevens Fishery Conservation and Management Act, the FMP, and the regulations implementing the FMP.

These proposed specifications are exempt from review under Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as follows:

The purpose of this proposed rule is to implement the 2007 harvest guideline for Pacific sardine in the U.S. EEZ off the Pacific coast. The CPS FMP and its implementing regulations require NMFS to set an annual harvest guideline for the Pacific sardine fishery based on the formula in the FMP. The harvest guideline is derived by a formula applied to the current biomass estimate.

The HG is apportioned based on the following allocation scheme: 35% of the harvest guideline is allocated coastwide on January 1; 40% of the harvest guideline, plus any portion not harvested from the initial allocation is then reallocated coastwide on July 1; and on September 15 the remaining 25%, plus any portion not harvested from earlier allocations will be released. If the total harvest guideline or these apportionment levels for Pacific sardine are reached at any time, the Pacific sardine fishery is closed until either it re-opens per the allocation scheme or the beginning of the next fishing season. There is no limit on the amount of catch that any single vessel can take during

an allocation period or the year; the harvest guideline and seasonal allocations are available until fully utilized by the entire CPS fleet.

The harvest guideline would apply to approximately 86 small fishing vessels (105 permits) coastwide that fish for Pacific sardine within U.S. waters; 61 permits in the Federal CPS limited entry fishery off California (south of 39 N. lat.), and a combined 44 permits in Oregon and Washington's state Pacific sardine fisheries. This proposed rule has an equal effect on all of these small entities and therefore will impact a substantial number of these small entities in the same manner. These vessels are considered small business entities by the U.S. Small Business Administration since the vessels do not have annual receipts in excess of $4.0 million. Therefore, there would be no economic impacts resulting from disproportionality between small and large business entities under the proposed action.

The profitability of these vessels as a result of this proposed rule is based on the average Pacific sardine ex-vessel price per mt. NMFS used average Pacific sardine ex-vessel price per mt to conduct a profitability analysis because cost data for the harvesting operations of CPS finfish vessels was unavailable.

For the 2006 fishing year, the harvest guideline was set at 118,937 mt with an estimated ex-vessel value of approximately $15 million. Around 90,000 mt (49,000 in California and 41,000 in Oregon and Washington) of this harvest guideline was actually harvested during the 2006 fishing season valued at an estimated $10 million.

The proposed harvest guideline for the 2007 Pacific sardine fishing season (January 1, 2007 through December 31, 2007) is 152,564 metric tons (mt). This HG is 28 percent higher than the HG for 2006, but is over 50,000 mt greater than the largest recent harvest by U.S. west coast fisheries. If the fleet were to take the entire 2007 harvest guideline, and assuming no change in the coastwide average ex-vessel price per mt of $116, the potential revenue to the fleet would be approximately $18 million. Whether this occurs depends greatly on market forces within the fishery and on the regional availability of the resource to the fleets and the fleets ability to find pure schools of Pacific sardine. A change in the market and/or the potential lack of availability of the resource to the fleets could cause a reduction in the amount of Pacific sardine that is harvested, in turn, reducing the total revenue to the fleet.

NMFS does not anticipate a drop in profitability based on this rule due to the fact that it allows fishermen to harvest more than last year. Based on the disproportionality and profitability analysis above, this rule if adopted, will not have a significant economic impact on a substantial number of these small entities.

As a result, an Initial Regulatory Flexibility Analysis is not required and none has been prepared.

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

Dated: June 22, 2007.

Samuel D. Rauch III,

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

[FR Doc. E7–12566 Filed 6–27–07; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 72, No. 124

Thursday, June 28, 2007

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2007–0062]

Notice of Request for Extension of Approval of an Information Collection; Transportation of Animals on Foreign Air Carriers

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with provisions of the Animal Welfare Act regulations for the humane transportation of animals in commerce.

DATES: We will consider all comments that we receive on or before August 27, 2007.

ADDRESSES: You may submit comments by either of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov,* select ''Animal and Plant Health Inspection Service'' from the agency drop-down menu, then click ''Submit.'' In the Docket ID column, select APHIS–2007–0062 to submit or view public comments and to view supporting and related materials available electronically. Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link.

Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. APHIS–2007–0062, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2007–0062.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For information on an information collection associated with regulations for the humane transportation of animals in commerce, contact Dr. Jerry DePoyster, Senior Veterinary Medical Officer, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737–1234; (301) 734–7586. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

SUPPLEMENTARY INFORMATION:

Title: Transportation of Animals on Foreign Air Carriers.

OMB Number: 0579–0247.

Type of Request: Extension of approval of an information collection.

Abstract: The regulations contained in 9 CFR chapter I, subchapter A, part 3, provide standards for the humane handling, care, treatment, and transportation, by regulated entities, of animals covered by the Animal Welfare Act (AWA, 7 U.S.C. 2131 *et seq.*). The regulations in part 3 are divided into six subparts, each of which contains facility and operating standards, animal health and husbandry standards, and transportation standards for a specific category of animals and consist of the following: Subpart A-dogs and cats; subpart B-guinea pigs and hamsters; subpart C-rabbits; subpart D-nonhuman primates; subpart E-marine mammals; and subpart F-warmblooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals. Transportation standards for dogs and cats are contained in §§ 3.13 through 3.19; for guinea pigs and hamsters, in §§ 3.35 through 3.41; for rabbits, in §§ 3.60 through 3.66; for nonhuman primates, in §§ 3.86 through 3.92; for marine mammals, in §§ 3.112 through 3.118; and for all other warmblooded animals, in §§ 3.136 through 3.142.

Foreign air carriers, as well as domestic carriers, transporting animals covered under the AWA to or from any point within the United States, its territories, possessions, or the District of Columbia must comply with the transportation standards and are required to register as a carrier with the Animal and Plant Health Inspection Service and keep and maintain records pertaining to animal transport. These records may include a copy of the consignor's written guarantee of payment for transportation for C.O.D. shipments, a shipping document, an animal health certificate executed and issued by a licensed veterinarian, and, if needed, an acclimation statement indicating that the animal being transported can withstand temperatures colder or warmer than the minimums or maximums specified in the regulations. In addition, depending on the species, the standards may require that instructions for the administration of drugs, medication, other special care, food, and water, as well as other shipping documents, be attached to the outside of the animal's primary enclosure.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(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 our estimate of the burden of the information collection, 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 information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.162037 hours per response.

Respondents: Foreign air carriers transporting animals covered under the Animal Welfare Act.

Estimated annual number of respondents: 20.

Estimated annual number of responses per respondent: 54.

Estimated annual number of responses: 1,080.

Estimated total annual burden on respondents: 175 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 25th day of June 2007.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E7–12547 Filed 6–27–07; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Farm Service Agency

Notice of Request for Extension of a Currently Approved Information Collection

AGENCIES: Rural Housing Service, Farm Service Agency, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the subject agencies' intention to request an extension for a currently approved information collection in support of the programs for 7 CFR part 1806, subpart A, ''Real Property Insurance.'' This renewal does not involve any revisions to the program regulations.

DATES: Comments on this notice must be received on or before August 27, 2007 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Cathy Quayle, Senior Loan Officer, USDA, FSA, Farm Loan Programs, Loan Making Division, 1400 Independence Avenue, SW., Stop 0522, Washington, DC 20250–0522, telephone (202) 690–4018. Electronic mail: *Cathy.Quayle@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: 7 CFR, Part 1806–A—Real Property Insurance.

OMB Number: 0575–0087.

Expiration Date of Approval: November 30, 2007.

Type of Request: Extension of a currently approved information collection.

Abstract: This regulation governs the servicing of property insurance on buildings and land securing the interest of the Farm Service Agency (FSA) in connection with an FSA Farm Loan Program Loan and the Multi-Family Housing Program of the Rural Housing Service (RHS). The information collections pertain primarily to the verification of insurance on property securing Agency loans. This information collection is submitted by FSA or RHS borrowers to Agency offices. It is necessary to protect the government from losses due to weather, natural disasters, or fire and ensure that loan applicants meet hazard insurance requirements:

Estimate of Respondent Burden: Public reporting for this collection of information is estimated to average .47 minutes per response.

Respondents: Individuals or households, businesses or other for profit organizations and farms.

Estimated Number of Respondents: 4,550.

Estimated Number of Responses per Respondent: 1.17.

Estimate Number of Responses: 5,330.

Estimated Total Annual Burden on Respondents: 2,275.

Copies of this information collection can be obtained from: Renita Bolden, Regulations and Paperwork Management Branch, Support Services Division at (202) 692–0035.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of subject agencies, including whether the information will have practical utility; (b) the accuracy of agencies estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the 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. Comments may be sent to Renita Bolden, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: June 20, 2007.

Russell T. Davis,

Administrator, Rural Housing Service.

Dated: June 14, 2007.

Teresa C. Lasseter,

Administrator, Farm Service Agency.

[FR Doc. 07–3164 Filed 6–27–07; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF AGRICULTURE

Forest Service

Little Slate Project; Nez Perce National Forest, Idaho County, ID

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA, Forest Service, Nez Perce National Forest will prepare an environmental impact statement (EIS) to document analysis and disclose the environmental impacts of implementing watershed improvement activities and timber harvest and within the Little Slate project area. Actions include: Construction of temporary roads, road reconstruction, road decommissioning of existing roads that are no longer needed, trail relocation and watershed, riparian and soil restoration. Individuals interested in actions of this nature are encouraged to submit comments and become involved in the planning process.

DATES: Comments concerning the scope of the analysis should be received at the address below on or before July 20, 2007. The draft environmental impact statement is expected to be released for public comment in November 2007 and the final environmental impact statement is expected to be completed in May 2008.

ADDRESSES: Send written comments to Jane Cottrell, Forest Supervisor, 1005 Highway 13, Grangeville, ID 83530, or via facsimile to 208–983–4099. Comments may be sent via e-mail to *comments-northern-nezperce-salmon-*

river@fs.fed.us. The subject line must contain the name ''Little Slate Project'', for which you are submitting comments or address with ATTN: Little Slate on written correspondence.

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 Time, Monday through Friday.

All comments, including names and addresses, when provided, are placed in the record and are available for public inspection and copying.

FOR FURTHER INFORMATION CONTACT: Jennie Fischer, Team Leader, Nez Perce National Forest, 1005 Highway 13, Grangeville, ID 83530, or phone (208) 983–4048.

SUPPLEMENTARY INFORMATION: The Little Slate project area is located on the Nez Perce National Forest in northern Idaho within Idaho County. The project area lies approximately 14 air miles northeast of Riggins, Idaho and 25 air miles south of Grangeville, Idaho. The project area encompasses approximately 35,000 acres and includes Upper and Middle Little Slate Creek, Boulder Creek, Van Buren, Turnbull, and Rubie Creek subwatersheds, which are tributaries to Slate Creek, which flows directly into the Lower Salmon River. The project area also includes small portions of John Day, Allison Creek and White Sand Creek.

Purpose and Need for Action

There is a need to improve watershed conditions, manage and restore forest vegetation, and reduce hazardous fuels. Components of this project include: Timber harvest, fuels reduction, watershed and soil restoration, mine reclamation and access management (roads and trail).

The actions proposed for implementation would treat vegetation, including the use of timber harvest, through the following activities:

Forest vegetation would be treated using a combination of methods on approximately 4,104 acres. This combination would result in some regeneration (clearcut) harvest (2,165 acres), shelterwood harvest (649 acres), and commercial thinning (1290 acres). Ground based logging systems would be used and post-harvest activity fuels treated. Approximately 17.4 miles of temporary road would be constructed to access the timber harvest areas described above, and decommissioned following activities. Approximately 4.9 miles of road reconstruction would occur on the #643 road for hauling. Approximately 72 miles of existing roads would be reconditioned (deferred maintenance activities) and for watershed improvement prior to use for the activities. A combination of slashing and burning on approximately 860 acres would be used to enhance Whitebark pine regeneration in four high elevation areas. Broadcast burning 1,329 acres following harvest activities and allow backing of fire into riparian area within lodgepole pine areas. Re-develop a Forest Service rock source would provide material for this project and others across the forest (1 acre).

As part of this project, activities would be implemented to meet Forest Plan requirements for upward trend in fish habitat and water quality. The amount of watershed restoration work required to produce an upward trend has not yet been determined. These following activities would maintain or improve watershed conditions in the subwatersheds in the project area.

Reducing water quality impacts on existing roads, including those planned for use under this project through road reconditioning. Reduce impacts from Trails, #88, #303, #308 through relocation (2.85 miles), new construction (2.9 miles) and decommissioned (3.2 miles). Reduce impacts and maintain Trail #133. Decommission approximately 47 miles of existing road using techniques ranging from abandonment, or re-contouring. Restore soil productivity and watershed function on approximately 30 acres of previously impacted areas. Improve channel morphology, floodplain function and instream habitat through riparian restoration on approximately 2.5 miles of Little Slate Creek. Planting riparian areas with native grasses, forbs and woody species where needed to promote bank stability and/or streamside shade. Approximately 20–50 acres would be treated to stabilize and reduce gully and surface erosion a result of historic grazing on sensitive soils near Nut Basin point. Channel stabilization (5 sites) where channel headcutting is occurring, in riparian areas with historic mining activity. Mine rehabilitation to reduce erosion and water quality impacts at 10 inactive placer sites. Improving upstream passage for fish and other aquatic species at 6 road crossing sites identified as being full or partial barriers. Improving or removing road crossing (15 stream crossings) that may be undersized to accommodate a 100-yr streamflows, including associated bedload and debris; and prevent diversion of streamflow out of the channel and down the road in the event of blockage.

Forest Plan Amendment

It is likely that a Forest Plan amendment would be needed to allow implementation of timber harvest and fuel reduction activities in some areas with past ground disturbance. This amendment would also be applied forest-wide.

Past activities have caused detrimental soil disturbance in some areas proposed for timber harvest. The proposed amendment would state, ''Where detrimental soil conditions from past activities affect 15 percent or less of the activity area, a cumulative minimum of 85 percent of the activity area shall not be detrimentally compacted, displaced, or puddled upon completion of activities'' and ''Where detrimental soil conditions from past activities affect more than 15 percent of the activity area, the cumulative detrimental soil disturbance from project implementation and past activities shall not exceed the conditions prior to the planned activity and shall provide a net improvement in soil quality.'' This would provide consistency with Regional soil quality guidelines.

Scoping Process

This Notice of Intent initiates the scoping process in compliance with the National Environmental Policy Act and its implementing regulations (40 CFR part 1500). As part of the scoping period, the Forest Service solicits public comment on the nature and scope of the environmental, social, and economic issues related to the rulemaking that should be analyzed in depth in the Draft Environmental Impact Statement. A scoping letter outlining these actions described here is being mailed to over 400 interested individuals and organizations. In addition, the Salmon River Ranger District will post notices within the project area this summer along roads and trails solicit comments on the proposal. The Draft Environmental Impact Statement will be mailed to all those who responded during the scoping period.

Preliminary Issues

The Interdisciplinary Team has identified preliminary issues associated with potential effects on the proposed activities: On threatened and endangered wildlife species and habitat; on old growth; on soil productivity; on threatened, endangered and sensitive fish and fish habitat; on the consistency with the anticipated total Maximum Daily Load (TMDL) for the 303(d) listed streams in the Lower Salmon River, on Inventoried Roadless Area or unroaded

areas; on Riparian Habitat Conservation Area; and on changes to public access on roads and trails, including recreational and mining claim access.

Possible Alternatives

The NEPA implementing regulations require that an Environmental Impact Statement evaluate alternatives. possible alternatives to be considered in the Draft Environmental Impact Statement include: No activities in Inventory Roadless Areas and decommissioning of the end of #2002 Road from the junction of the #2002C Road.

Additional alternatives may arise from public comments, analysis or new information.

Decision To Be Made

The decisions to be made in response to this analysis include (1) Are vegetation management and restoration activities needed and if so where, what activities, when and how would they be implemented? (2) What transportation systems (road and trail) are necessary in the analysis area and how will they be managed? (3) Are the fish habitat and water quality improvement activities for Forest Plan upward trend requirements needed and if so where, when and how would they be implemented? (4) What mitigation is needed to assure forest management activities are consistent with the Nez Perce Forest Plan and environmental law? (5) is the amendment, for soils, to the Nez Perce Forest Plan necessary to implement the proposed actions and other future activities? (6) What implementation and effectives monitoring is needed?

Estimate Dates

The responsible official for this project is the Nez Perce Forest Supervisor. Comments to this notice should be sent to the address and contacts identified above and should be submitted within 30 days of publication of this notice in the **Federal Register.** A Draft Environmental Impact Statement (EIS) is expected to be available in November 2007 and a Final EIS in May 2008. Should an action alternative be selected, implementation would be initiated in the spring of 2009. Implementation of any or all of the actions authorized with this decision may occur utilizing the stewardship contracting authorities granted in Section 347 of the 1999 Interior Appropriations Bill.

Comments Requested

The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register.**

Reviewers should provide their comments during the comment period. Timely comments will enable the agency to analyze and respond to them at one time and to use them in the preparation of the Environmental Impact Statement, thus avoiding undue delay in the decision-making process. Furthermore, the more specific and substantive the comments, the better for reviewers and the agency alike. Reviewers have an obligation to ''structure their participation in the National Environmental Policy Act process so that it is meaningful and alerts the agency to the reviewer's position and contentions.'' *Vermont Yankee Nuclear Power Corp.* v. *NRDC, 435 U.S. 519, 552 (1978). Dept. of Transportation* v. *Public Citizen, 541 U.S. 752, 764 (2004).* Environmental concerns that could have been raised at the draft stage may therefore be forfeited if not raised until after completion of the Final Environmental Impact Statement. Comments on the draft should be specific and should address the adequacy of the draft and the merits of the alternatives discussed (40 CFR 1503.3).

Dated: June 22, 2007.

Jane L. Cottrell,

Forest Supervisor, Nez Perce National Forest.

[FR Doc. 07–3158 Filed 6–27–07; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Change of Address

The office of the Foreign–Trade Zones (FTZ) Board staff has moved within the Herbert Clark Hoover Building (Main Commerce Building). Submissions to the FTZ Board should hereafter be directed to the address below:

Foreign–Trade-Zones Board,

U.S. Department of Commerce,

1401 Constitution Ave. NW.,

Room 2111,

Washington, DC 20230.

Dated: June 22, 2007.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E7–12567 Filed 6–27–07; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB02

Atlantic Coastal Fisheries Cooperative Management Act Provisions; Application for Exempted Fishing Permits (EFPs)

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

ACTION: Notification of a request for EFPs to conduct experimental fishing; request for comments.

SUMMARY: This request for the continuation of an EFP involves the non-destructive collection of size frequency and population data on legal and sublegal lobsters as part of an ongoing research project to monitor the offshore lobster fishery in Lobster Management Area 3. Continuation of this EFP, until December 31, 2008, would not involve the authorization of any additional trap gear in the area. A maximum of seven participating commercial fishing vessels will continue the collection of data on the composition of lobsters in four general offshore study areas in a collaborative effort with the Atlantic Offshore Lobstermen's Association (AOLA). Continuation of this EFP would authorize each participating commercial fishing vessel to continue to utilize one modified juvenile lobster collector trap to collect population data. The lobster trap modifications are to the escape vents, and trap entrance head. Therefore, this modified trap would impact its environment no differently than the regular lobster trap it replaces and will add no additional traps to the area. After data is collected on lobsters in the trap, all sub-legal lobsters will be immediately returned to the sea. The EFP waives the American lobster escape vent requirement for a maximum of one trap per vessel for a maximum of seven vessels in the program.

The Director, State, Federal and Constituent Programs Office, Northeast Region, NMFS (Office Director) has made a preliminary determination that the subject EFP application contains all the required information and warrants further consideration. The Office Director has also made a preliminary determination that continuation of the activities authorized under the EFPs would be consistent with the goals and objectives of Federal management of the American lobster resource. However, further review and consultation may be

necessary before a final determination is made to issue EFPs. NMFS announces that the Office Director proposes to renew the subject EFPs, and, therefore, invites comments on the renewal of EFPs for this research.

DATES: Comments on this lobster EFP notification for offshore lobster monitoring and data collection must be received on or before July 13, 2007.

ADDRESSES: Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930–2298. Mark the outside of the envelope ''Comments—Lobster EFP Proposal''. Comments also may be sent via facsimile (fax) to 978–281–9117. Comments on the Lobster EFP Proposal may be submitted by e-mail. The mailbox address for providing e-mail comments is *LobsterJune07@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: ''Comments—Lobster EFP Proposal''.

FOR FURTHER INFORMATION CONTACT: Bob Ross, Fishery Management Specialist, (978) 281–9234, fax (978)–281–9117.

SUPPLEMENTARY INFORMATION:

Background

The regulations that govern exempted fishing, at 50 CFR 600.745(b) and 697.22 allow the Regional Administrator to authorize for limited testing, public display, data collection, exploration, health and safety, environmental clean-up, and/or hazardous removal purposes, and the targeting or incidental harvest of managed species that would otherwise be prohibited. An EFP to authorize such activity may be issued, provided there is adequate opportunity for the public to comment on the EFP application, the conservation goals and objectives of Federal management of the American lobster resource are not compromised, and issuance of the EFP is beneficial to the management of the species.

The American lobster fishery is the most valuable fishery in the northeastern United States. In 2005, approximately 87 million pounds (39,712 metric tons (mt)) of American lobster were landed with an ex-vessel value of approximately 414 million dollars. American lobster experience very high fishing mortality rates throughout their range, from Canada to Cape Hatteras. Operating under the Atlantic States Marine Fisheries Commission's interstate management process, American lobster are managed in state waters under Amendment 3 to the American Lobster Interstate Fishery Management Plan (Amendment 3). In Federal waters of the Exclusive Economic Zone (EEZ), lobster is managed under Federal regulations at 50 CFR part 697. Amendment 3, and compatible Federal regulations established a framework for area management, which includes industry participation in the development of a management program which suits the needs of each lobster management area while meeting targets established in the Interstate Fisheries Management Program. The industry, through area management teams, with the support of state agencies, have played a vital role in advancing the area management program.

To facilitate the development of effective management tools, extensive monitoring and detailed abundance and size frequency data on the composition of lobsters throughout the range of the resource are necessary. The need for additional monitoring and detailed abundance and size frequency data on the offshore fishery, as proposed by this EFP, is critical due to the lack of consistent statistical coverage of the offshore lobster fishery. This proposed EFP will continue a project involved in extensive monitoring and detailed population information of American lobster in four offshore study areas using modified lobster trap gear that would otherwise be prohibited.

Proposed EFP

Each of seven commercial fishing vessels involved in this monitoring and data collection program would collect detailed abundance and size frequency data on the composition of all lobsters collected from one modified juvenile lobster trap in a string of approximately 40 lobster traps, including data on sub-legal, and egg bearing females in addition to legal lobsters. This EFP would not involve the authorization of any additional lobster trap gear in the area. Vessels would collect data from each of four general study areas: The Mid-Atlantic—Chesapeake 50 Fathom Edge; the Southern—Hudson Canyon Area; the Middle—Veatch Canyon Area; and the Northern—Georges Bank and Gulf of Maine Area. The participating vessels may retain on deck sub-legal lobsters, and egg bearing female lobsters, in addition to legal lobsters, for the purpose of collecting the required abundance and size frequency data specified by this project. Data collected would include size, sex, shell disease index, and the total number of legals, sub-legals, berried females, and v-notched females. All sub-legals, berried females, and v-notched female lobsters would be returned to the sea as quickly as possible after data collection. Pursuant to 50 CFR 600.745(b)(3)(v), the Regional Administrator may attach terms and conditions to the EFP consistent with the purpose of the exempted fishing.

This EFP requests the inclusion of a maximum of one modified lobster trap per vessel, designated as a juvenile lobster collector trap, in the string of approximately 40 traps. This modified lobster trap would have a smaller entrance head, no escape vents and would be made of a smaller mesh than the traditional offshore trap to catch and retain a high percentage of juvenile lobsters in the 30–65 mm carapace length range. The smaller entrance head would exclude large lobsters from this trap and decrease the probability of cannibalism within the trap. The modifications to the trap are to the escape vents, and trap entrance head, not to the trap's size or configuration, therefore this modified trap would impact its environment no differently than the regular lobster trap it replaces. Renewal of this EFP will add no additional traps to the areas. Due to modifications to the escape vent, the EFP proposed to waive the American lobster escape vent requirement specified at 50 CFR 697.21(c) for a maximum of one trap per vessel for a maximum of seven vessels in the program. With the exception of the one modified juvenile lobster collector trap, all traps fished by a maximum of seven participating vessels would comply with all applicable lobster regulations specified at 50 CFR part 697.

All monitoring and data collection would be conducted by seven federally permitted commercial fishing vessels, during the course of regular commercial fishing operations. There would not be observers or researchers onboard the participating vessels.

This project, including the lobster handling protocols, was initially developed in consultation with NMFS and University of New Hampshire scientists. To the greatest extent practicable, these handling protocols are designed to avoid unnecessary adverse environmental impact on lobsters involved in this project, while achieving the data collection objectives of this project.

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

Dated: June 22, 2007.

James P. Burgess,

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

[FR Doc. E7–12415 Filed 6–27–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA97

Marine Mammals; File Nos. 782–1889, 358–1888, 881–1893, 881–1890, 434–1892, 1049–1886, 1034–1887, 715–1884, 715–1885, 1118–1881, and 1119–1882

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

ACTION: Notice; issuance of permits.

SUMMARY: Notice is hereby given that permits to conduct research on Steller sea lions (*Eumetopias jubatus*) have been issued to the following individuals and institutions: The National Marine Mammal Laboratory (NMML), NMFS, Seattle, WA (File No. 782–1889); Alaska Department of Fish and Game (ADF&G), Division of Wildlife Conservation, Juneau, AK (File No. 358–1888); The Alaska SeaLife Center (ASLC), Seward, AK (File No. 881–1890); the Oregon Department of Fish and Wildlife (ODFW), Corvallis, OR (File No. 434–1892); Kate Wynne, University of Alaska Fairbanks, Kodiak, AK (File No. 1049–1886); Dr. Markus Horning, Oregon State University, Hatfield Marine Science Center, Newport, OR (File No. 1034–1887); and the North Pacific Universities Marine Mammal Research Consortium (NPUMMRC), University of British Columbia, Vancouver, B.C. (File No. 715–1885).

Notice is hereby given that permits to conduct research on northern fur seals (*Callorhinus ursinus*) have been issued to the following individuals and institutions: the ASLC, Seward, AK (File No. 881–1893); the NPUMMRC, University of British Columbia, Vancouver, B.C. (File No. 715–1884); the Aleut Community of St. Paul Island, Tribal Government, Ecosystem Conservation Office, St. Paul Island, AK (File No. 1118–1881); and the Aleut Community of St. George Island, St. George Traditional Council, St. George Island, AK (File No. 1119–1882).

ADDRESSES: The permits and related documents are available for review upon written request or by appointment in the following office(s):

All Files: Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; *http://www.nmfs.noaa.gov/pr/permits/review.htm*;

File Nos. 782–1889 and 434–1892: Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426;

All Files except 434–1892: Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907)586–7221; fax (907)586–7249; and

File Nos 782–1889 and 434–1892: Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

FOR FURTHER INFORMATION CONTACT: Tammy Adams, Amy Sloan, Kate Swails, or Jaclyn Daly, (301)713–2289.

SUPPLEMENTARY INFORMATION: On February 15, 2007, notice was published in the **Federal Register** (72 FR 7420) that requests for scientific research permits to take the species identified above had been submitted by the above-named individuals and institutions. The requested permits have been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*), as applicable.

All Files: All permits are valid through August 1, 2009 and contain requirements for coordination and monitoring of research as well as mitigation measures deemed appropriate by NMFS. These permits can not be amended or extended. No permits authorize intentional capture of adult female Steller sea lions, or use of remotely delivered drugs for capture of Steller sea lions.

File No. 782–1889: The permit issued to NMML authorizes activities to measure Steller sea lion population status, vital rates, foraging behavior, and condition in North Pacific Ocean areas including California, Washington, Oregon, and Alaska. The permit includes incidental harassment of harbor seals (Phoca vitulina richardsi), northern fur seals, and California sea lions (*Zalophus californianus*).

File No. 358–1888: The permit issued to ADF&G authorizes activities to investigate the various hypotheses for the decline or lack of recovery of Steller sea lions in Alaska. The permit includes incidental harassment of harbor seals, northern fur seals, and California sea lions.

File No. 881–1893: The permit issued to ASLC authorizes activities to characterize the movements, foraging behavior and habitat-associations of northern fur seal pups during their first winter at sea in Alaska.

File No. 881–1890: The permit issued to ASLC authorizes activities to conduct population monitoring and studies on health, nutrition, and foraging behavior of free ranging Steller sea lions in the Gulf of Alaska and the Aleutian Islands, and on temporarily captive Steller sea lions at the ASLC.

File No. 434–1892: The permit issued to ODFW authorizes activities to assess status and monitor trend in Steller sea lion abundance, ecology, and vital rates in the southern extent of the Steller sea lion eastern DPS throughout California, Oregon, and Washington. The permit also authorizes incidental harassment of harbor seals and California sea lions.

File No. 1049–1886: The permit issued to Kate Wynne authorizes activities to continue studies on the abundance, distribution, and diet of the western Distinct Population Segment (DPS) of Steller sea lions in the western and central Gulf of Alaska.

File No. 1034–1887: The permit issued to Dr. Horning authorizes activities to study condition and health status of juvenile Steller sea lions in the western DPS using remote imaging systems for 3–D photogrammetry at locations in Alaska and Oregon to census animals and monitor body mass, condition, and health trends. The permit also authorizes incidental harassment of California sea lions, harbor seals, and northern elephant seals (*Mirounga angustirostris*).

File No. 715–1884: The permit issued to NPUMMRC authorizes activities to continue to study the distribution, life history, physiology, and foraging and behavioral ecology of northern fur seals on the Pribilof Islands and Bogoslof Island in Alaska.

File No. 715–1885: The permit issued to NPUMMRC authorizes activities to continue a long-term research program to test various hypotheses for the decline of Steller sea lions in Alaska, including a study to assess pain and distress associated with hot-branding of Steller sea lions. The permit also authorizes incidental harassment of Northern fur seals, California sea lions, harbor seals, Northern elephant seals, and Killer whales (*Orcinus orca*).

File No. 1118–1881: The permit issued to the Aleut Community of St. Paul Island authorizes activities to fulfill their Biosampling, Disentanglement, and Island Sentinel program responsibilities as established under the co-management agreement

between NMFS and the Aleut Community. The permit also authorize incidental harassment of Steller sea lions and harbor seals.

File No. 1119–1882: The permit issued to the Aleut Community of St. George Island authorizes activities to fulfill their Biosampling, Disentanglement, and Island Sentinel program responsibilities as established under the co-management agreement between NMFS and the Aleut Community. The permit also authorizes incidental harassment of Steller sea lions and harbor seals.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a Programmatic Environmental Impact Statement (PEIS) for Steller Sea Lion and Northern Fur Seal Research was prepared to evaluate the potential environmental impacts of awarding grants and issuing permits to facilitate research on these species. Information about the PEIS is available at *http://www.nmfs.noaa.gov/pr/permits/eis/steller.htm*.

Issuance of the permits for research on Steller sea lions, as required by the ESA, was based on a finding that such permits: (1) were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: June 21, 2007.

Carrie W. Hubard,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E7–12558 Filed 6–27–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA34

Notice of Availability of Draft Stock Assessment Reports

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

ACTION: Notice of availability; request for comments.

SUMMARY: NMFS reviewed the Alaska, Atlantic, and Pacific regional marine mammal stock assessment reports (SARs) in accordance with the Marine Mammal Protection Act (MMPA). SARs for marine mammals in the Alaska, Atlantic, and Pacific regions were revised according to new information. NMFS solicits public comments on draft 2007 SARs.

DATES: Comments must be received by September 26, 2007.

ADDRESSES: The 2007 draft stock assessment reports are available in electronic form via the Internet at *http://www.nmfs.noaa.gov/pr/sars/*.

Copies of the Alaska Regional SARs may be requested from Robyn Angliss, Alaska Fisheries Science Center, NMFS, 7600 Sand Point Way, NE BIN 15700, Seattle, WA 98115–0070.

Copies of the Atlantic and Gulf of Mexico Regional SARs may be requested from Gordon Waring, Northeast Fisheries Science Center, 166 Water St., Woods Hole, MA 02543.

Copies of the Pacific Regional SARs may be requested from Jim Carretta, Southwest Fisheries Science Center, 8604 La Jolla Shores Drive, La Jolla, CA 92037–1508.

Send comments or requests for copies of reports to: Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3226, Attn: Stock Assessments. Comments may also be sent via facsimile (fax) to 301–427–2526 or via email to *mmsar.2007@noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Tom Eagle, Office of Protected Resources, 301–713–2322, ext. 105, e-mail *Tom.Eagle@noaa.gov*; Robyn Angliss 206- 526–4032, e-mail *Robyn.Angliss@noaa.gov*, regarding Alaska regional stock assessments; Gordon Waring, 508–495–2311, e-mail *Gordon.Waring@noaa.gov*, regarding Atlantic regional stock assessments; or Jim Carretta, 858–546–7171, e-mail *Jim.Carretta@noaa.gov*, regarding Pacific regional stock assessments.

SUPPLEMENTARY INFORMATION:

Background

Section 117 of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) requires NMFS and the U.S. Fish and Wildlife Service (FWS) to prepare stock assessments for each stock of marine mammals occurring in waters under the jurisdiction of the United States. These reports must contain information regarding the distribution and abundance of the stock, population growth rates and trends, estimates of annual human-caused mortality and serious injury from all sources, descriptions of the fisheries with which the stock interacts, and the status of the stock. Initial reports were completed in 1995.

The MMPA requires NMFS and FWS to review the SARs at least annually for strategic stocks and stocks for which significant new information is available, and at least once every 3 years for non-strategic stocks. NMFS and the FWS are required to revise a SAR if the status of the stock has changed or can be more accurately determined. NMFS, in conjunction with the Alaska, Atlantic, and Pacific Scientific Review Groups (SRGs), reviewed the status of marine mammal stocks as required and revised reports in the Alaska, Atlantic, and Pacific regions to incorporate new information. NMFS solicits public comments on the draft 2007 SARs.

Alaska Reports

Twelve reports (11 strategic stocks and one non-strategic stock) were revised, and 24 reports were not revised. Most revisions included updates of abundance and mortality estimates and did not indicate a change in status of the affected stocks. The abundance of AT1 killer whales was reduced from eight to seven whales because one animal has not been seen in recent years and is presumed to have died.

The ''Status of Stock'' section of the gray whale, western North Pacific stock, was updated to show that the best available scientific information indicates the stock is within its Optimum Sustainable Population levels. The gray whale stock was estimated to be between 71 percent and 102 percent of its current carrying capacity in 2002.

The ''Habitat Concerns'' sections of the reports for Steller sea lions, western U.S. stock, and northern fur seals, Eastern Pacific stock, were expanded. Threats to the Steller sea lion stock were presented in a draft recovery plan released for public review and comment in May 2006 (71 FR 29919, May 24, 2006), and a summary of these threats was included in the revised SAR. For northern fur seals, the SAR was updated to include recent information, including the overlap in sizes of fish taken by fur seals and by commercial fishing.

Atlantic Reports

Fifty-six reports (16 strategic and 40 non-strategic) were revised in the Atlantic region, including all reports for marine mammals in the Gulf of Mexico. Two reports were not revised. Most updates were to include new abundance and mortality estimates and did not change the status of the affected stocks. The status of harbor porpoise, Gulf of Maine/Bay of Fundy stock, was updated to be strategic because human-caused mortality and serious injury have increased and PBR has decreased since the last mortality and abundance estimates were completed.

Pacific Reports

Twenty-nine reports (9 strategic and 20 non-strategic) were revised in the Pacific region. Thirty-two reports were not revised. Most revisions included updates of mortality or abundance estimates and did not result in a change in status of the affected stocks.

A new stock of false killer whales (Palmyra Atoll) has been added to this year's reports to reflect the availability of new genetic information for this species in the Pacific Islands Region. Both the Hawaii and Palmyra Atoll false killer whale stocks are included in a single report, labeled the ''Pacific Islands Region Stock Complex''. The reasons for combining stocks into one species report are to consolidate general text about the species and present all stock-specific abundance and mortality information on false killer whales within waters under the jurisdiction of the United States in a single report.

The status of two stocks (California/Oregon/Washington short-finned pilot whales and California long-beaked common dolphins) has changed from ''not strategic'' to ''strategic''. The change resulted from new estimates of abundance, which have decreased for both stocks since the last revision, and updates of incidental fishery mortality levels, which increased for long-beaked common dolphins.

The name of the stock previously referred to as ''East North Pacific Humpback Whale'' has been changed to ''California/Oregon/Washington Humpback Whale''. Recent genetics information confirms that the stock is demographically independent from other aggregations of humpback whales in the Eastern North Pacific Ocean; therefore, the feeding aggregation is appropriately identified as a separate stock. The new stock identity did not substantially modify the PBR of the stock because, in accordance with NMFS' guidelines for preparing SARs, the PBR had been estimated by using the abundance of whales in this aggregation. However, the revised abundance estimate is slightly higher, which resulted in a slight increase in PBR.

Dated: June 22, 2007.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E7–12561 Filed 6–27–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–T–2007–0020]

Notice of the Removal of the Paper Search Collection of Registered Marks That Include Design Elements from Trademark Search Library in Arlington, VA

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: The United States Patent and Trademark Office (''USPTO'') hereby provides notice of the microfilming and removal of the paper search collection of trademark registrations that include design elements from the USPTO's Trademark Search Facility in Arlington, Virginia.

DATES: Removal of the paper search collection of trademark registrations that include design elements shall be effected beginning no sooner than sixty (60) days from the date of this Notice.

FOR FURTHER INFORMATION CONTACT: Cynthia C. Lynch, Office of the Commissioner for Trademarks, 571–272–8742.

SUPPLEMENTARY INFORMATION:

Background

Under 35 U.S.C. 41(i), the USPTO must maintain a collection of United States trademark registrations for use by the public in paper, microform, or electronic form. No such obligation exists with regard to trademark application files. The provision authorizing an electronic search collection of registered marks was added by section 4804(d)(1) of the American Inventors Protection Act of 1999 (''AIPA''), Title IV, Subtitle B, of Public Law 106–113, 113 Stat. 1501, 1501A–589. Section 4804(d)(2) of the AIPA requires that the USPTO not cease to maintain for use by the public its paper or microform collections of, *inter alia,* United States trademark registrations, except pursuant to notice and opportunity for public comment, and except where the USPTO Director has first submitted a report to the Committees of the Judiciary of the Senate and the House of Representatives detailing a plan to do so. The report must certify that the implementation of the plan will not negatively impact the public, and must include a ''description of the mechanisms in place to ensure the integrity of such collections and the data contained therein, as well as to ensure prompt public access to the most current available information.'' *Id.* By letters dated June 7, 2007, the USPTO submitted the requisite certification and report concerning its paper search collection of trademarks including design elements. The report and certification are currently available on the USPTO Web site at *http://www.uspto.gov/main/newsandnotices.htm* and *http://www.uspto.gov/web/trademarks/reports/reportcongress20070604.htm.*

The USPTO currently maintains a searchable electronic database of registered marks and marks in pending applications, as well as text and images of marks in abandoned, cancelled and expired records dating back to 1984. Government insignia protected by U.S. law or by Article 6ter of the Paris Convention, and insignia that various federally and state recognized Native American tribes have identified as their official tribal insignia are also included. Trademark examining attorneys have relied exclusively on the electronic database since before 1990. The database available on the USPTO premises is called X-Search, and is accessible to the public at the USPTO's Public Search Facility in Alexandria, Virginia. On the USPTO Web site, the database is referred to as the Trademark Electronic Search System (''TESS'').

Marks that include design elements are searchable by design codes. A different design coding system is used with the electronic search systems than has been used with the paper collection of trademark registrations. The paper design coding system organizes design marks according to specific designations (such as ''trees,'' ''grotesque humans'' or ''circles''). Since 2001, these paper search designations (''PSD'') have been used to code registrations, but have not been used to code pending applications.

The electronic design coding system is based on the International Classification of the Figurative Elements of Marks (''Vienna Classification''). The Vienna Classification arises out of a multilateral treaty administered by the World Intellectual Property Organization. It is a numerical classification index that codifies figurative design elements into categories. Each design element in a specific section is assigned a six-digit number. Design marks are coded by identifying the significant design elements and assigning the appropriate codes. The design codes cover all the possible designs that can appear in a trademark, and are used to search design marks. The Vienna Classification codes are applied to incoming applications and have been assigned to existing registrations.

The USPTO provides a Design Search Code Manual on its Web site, which contains guidance about the scope of the specific codes of the Vienna Classification, cross-references directing the user to related codes, and other explanatory notes and guidelines. The USPTO has recently made significant enhancements to the Design Search Code Manual, including adding new design codes to refine searchability, identifying and re-coding all the current applications or registrations affected by the new design codes, and increasing and improving the examples given for the numerical design codes.

In response to previous USPTO proposals to eliminate its paper search collection of registered marks that include design elements, some members of the public expressed the view that the ability to search both the paper collection and the electronic database provides better, more accurate search results, because if a design coding error is made under the Vienna Classification, the design mark is likely to be found by a paper search using the PSD. The USPTO considered this concern and developed a plan to address it.

In a June 23, 2006, **Federal Register** Notice (71 FR 36065), the USPTO requested comments on its plan to remove the paper search collection of registered marks that include design elements from the USPTO's search facility in Arlington, Virginia, and replace the collection with an enhanced electronic search system and a microform collection of the paper search collection. The Notice announced the USPTO's plan to develop a new design code field for its TESS and X-Search databases, which will mirror the PSD. Under the announced plan, while the USPTO will maintain the Vienna Classification now used in TESS and X-Search, the USPTO will also code new registrations according to the PSD. This dual coding will permit electronic searching of registered design marks using the Vienna Classification, the PSD, or both. The Notice further stated the USPTO's plan that, upon completion of the development of the new design code system, the USPTO would microfilm the existing paper search collection of registered design marks, then remove the paper collection. The Notice provided that the new design code system would not be applied to the backfile, i.e., to applications filed or registrations issued before the date on which the system is implemented.

Comments and Responses

In response to the June 23, 2006 Notice, the USPTO received a total of nine (9) comments from four intellectual property organizations, three attorneys and law firms, and two individuals. One comment agreed with the plan and complimented the USPTO on its use of technology to offer reliable services to the public. Many comments either voiced no objection to or voiced support for the removal of the paper records, but requested that steps be taken to verify the accuracy of the electronic capture of the records and ensure that implementation of the USPTO's plan would not negatively impact the public. Other comments opposed the removal of the paper search collection. Several comments included suggestions for improving the searchability of marks featuring designs of various types (*e.g.*, three-dimensional design marks, marks featuring colors and shades of color). These suggestions have been referred to the relevant departments of the USPTO involving database search systems. However, as those suggestions do not directly relate to the proposed removal of the paper search collection, no direct response is provided herein. Responses to substantively relevant comments appear below.

Comment 1: Microfilm Access

Some comments expressed concern over the need for sufficient access to microfilm equipment for review of the microform collection, once it is completed.

Response: The Public Search Facility in Alexandria, Virginia (''PSF'') contains ten microfilm reader workstations that enable users to view reels of microfilmed records. Use of such readers is available on a first-come, first-served basis. Usage of these workstations is monitored by PSF staff, and the levels of use suggest that no lack of access problems exist or are likely to arise. However, the PSF has arranged that in the event the use of such readers increases, and reaches certain threshold levels, the PSF will install more readers to meet the demand.

The paper collection has been maintained at a USPTO search facility in Arlington, Virginia, in a separate location from the PSF at the USPTO's main offices in Alexandria, Virginia, where most of the facilities and equipment for public searching are located. Once this microfilming project is complete, and the microfilmed records are relocated to the PSF in Alexandria, all trademark searching may be done in one location.

Comment 2: Design Coding Error Rate

Several comments expressed concerns about design coding errors under the Vienna Classification system in the USPTO's electronic database, and voiced reservations about relying solely on the design coding in the electronic databases.

Response: As an initial matter, the USPTO's plan allows for the same redundant search capabilities as are currently available, with the significant improvement that for future registrations, they will be available through the electronic database to all members of the public, not just those on the premises of the USPTO. The USPTO's plan includes the replication of the PSD in the electronic database for all newly issued registrations. Thus, these records will be coded under both the USPTO version of the Vienna Classification system and the PSD system. The USPTO intends that the coding of all newly issued registrations with the PSD system will be done by the same personnel who have previously coded the paper records. With the continuity of the same staff using the same coding system, the introduction of an electronic format should not negatively impact the accuracy of the coding. Use of the same records found on paper but now on microfilm will provide searchers equivalent resources to those they already use. In addition, all records will continue to be coded under the Vienna Classification as well, providing a second design coding scheme which public searchers may use as part of a dual search strategy. Should an error have occurred with respect to the coding of an image in one system, it is unlikely that the same error would be made in the other system. Thus, search results will have the same level of accuracy as currently produced in a dual search of both electronic and paper records.

Moreover, recent USPTO efforts to improve design coding under the existing Vienna Classification system have improved the quality and searchability of the electronic database. Within the USPTO's Trademark Services Division, the work of all contracted specially trained design coders has been subject to 100% quality review by Federal employees for the past several years. The contracted workers receive training relating to design coding issues. In addition, the USPTO has created eighty (80) new design search codes to allow for greater specificity in identifying and coding designs, has identified all the active applications and registrations affected by the new design codes, and has updated the electronic databases accordingly. The new version of the Design Code Manual featuring these new codes was made available on the USPTO's Web site on January 6, 2007.

In addition, the USPTO has continued to seek input from applicants whose marks contain design elements, informing them of the design codes applied to their marks and offering the applicants the opportunity to submit corrections or additions to the coding. Specifically, each applicant for a mark that includes design elements receives a notice from the USPTO explaining design coding, explicitly identifying the Vienna Classification design codes assigned to the applicant's mark, and providing detailed instructions on how to request supplements or revisions to the assigned codes. Since November 2005, the USPTO has sent approximately 82,000 such notices. Beginning in July 2007, the USPTO will seek similar input from registrants whose existing registrations are for marks that include design elements. The USPTO reviews proposed corrections from any source that pertain to design codes assigned to live registrations or applications, has designated internal and external e-mailboxes for this purpose, and makes changes where necessary. A notice announcing the procedure for submitting proposed corrections was previously published in the USPTO's Official Gazette and is posted on the USPTO Web site.

Internal review of the quality of the USPTO's design coding indicates that the efforts to improve quality have succeeded. A recent USPTO study reflects a relatively low error rate in design coding under the Vienna Classification system. In the USPTO's May 7, 2003, report concerning the paper public search collections, the USPTO cited a 19% design coding error rate among a random sample of 1009 applications filed between January 2001 and March 2002. To reevaluate the quality of design coding in the wake of the many improvement initiatives undertaken by the USPTO, in 2006, the USPTO conducted recurring random searches of new applications featuring design-coded marks. Review of the accuracy of the codes applied to the marks revealed that only 4.5% of records contained errors relating to significant elements of a mark that would negatively impact the ability to retrieve such a mark during a search for confusingly similar marks. Thus, the USPTO's ongoing efforts have significantly reduced the error rate in design coding.

By the end of 2007, the USPTO will implement an additional quality enhancement to its design coding under its Vienna Classification system. Under the new procedure, upon acceptance of a registrant's section 8 affidavit, the registration file will be referred to the USPTO's design coders, who will review, and revise if necessary, the Vienna Classification design codes assigned to the registration. Upon completion of the review and any revision, the USPTO will notify the registrant of the Vienna Classification codes currently assigned to the registered mark, and provide information about how to request the addition or correction of these design codes.

Comment 3: Uncoded Backfile

Several comments expressed concerns that the plan to code only future electronic records with the PSD system would result in a hindered ability to accurately search the historic records of the backfile.

Response: While the USPTO plans to apply the PSD system only prospectively to electronic records of registered marks, the historic copies of earlier registrations will be retained in microfilm under their originally assigned PSD. Thus, a searcher who wishes to search the backfile records using the PSD will be able to do so through the microfilm collection. The searcher can then also search the electronic database for the more recent registrations coded using the PSD system. Through this process, the search results will be identical to those that would have been retrieved in a search of the paper records. The USPTO notes that no legal obligation compels coding the entire backfile with the new PSD system in the electronic database. The USPTO has determined that the substantial costs and burdens associated with a voluntary undertaking of this nature would outweigh any benefit of providing the service, particularly where the backfile can be searched with the equivalent of the PSD system through the microfilm records.

Comment 4: Requesting Coding Corrections

One comment noted that the USPTO began sending notices to applicants inviting them to correct or add to the design code entries assigned by the Office. The commenter recommended that the USPTO initiate a quality check invitation to owners of all ''live'' registrations to assist the Office in its quality control.

Response: Beginning in July 2007, the filing receipts for post-registration filings submitted via the Trademark Electronic Application System (''TEAS'') will notify registrants of the opportunity to request additions to or corrections of the Vienna Classification design codes assigned to their registrations. By the end of 2007, the USPTO intends to implement a new procedure whereby, upon acceptance of a registrant's § 8 affidavit, the registration file will be referred to the USPTO's design coders, who will review, and revise if necessary, the design codes assigned to the registration. Upon completion of the review and any revision, the USPTO will notify the registrant of the Vienna Classification codes currently assigned to the registered mark, and provide information about how to request the addition or correction of design codes.

Currently, the USPTO reviews all proposed corrections from any source, regarding pending applications or registered marks, either sent electronically to the USPTO at *TMDesignCodeComments@uspto.gov* or received at 1–800–786–9199. A notice announcing such was published in the Official Gazette on October 19, 2004, and is posted on the USPTO's Web site.

Comment 5: Accuracy of Microfilming

One comment expressed concern over the accuracy of the USPTO's microfilming efforts, citing an allegation that approximately 10,000 drawings may have been missed and not microfilmed in a previous paper record microfilming project.

Response: The quality and accuracy of the microfilming effort will be overseen by the staff of the PSF. The PSF conducted two microfilming projects in 2006, one of the abandoned trademark application drawing pages and the other of the pending trademark application drawing pages. PSF staff members with trademark expertise have overseen both projects, and quality review inspections have been conducted during each project. Care was taken to ensure that the quality of the contents of the reels was excellent, and film quality has been found to be exceptionally high.

With respect to comprehensiveness of image capture, the comment appears to refer to an incident in one of the projects, where shoes of drawings that had not been removed during the initial retrieval were located. Specifically, 34 out of approximately 8,000 total shoes with approximately 270 drawings per shoe had not been removed initially. However, the oversight was identified while the microfilming project was still in progress, and these drawings were microfilmed and inserted into the correct order. Retrieval and filming of the missing records resulted in no impact on the final product. Thus, although these records were initially overlooked, this oversight was identified and corrected before completion of the project, ensuring

thorough and accurate results for the project.

In order to ensure that the upcoming microfilming project is complete and accurate, the PSF will employ a comprehensive quality review procedure while the project is in progress. The quality review should ensure that all records are microfilmed. Moreover, there will be a significant ''grace period'' before destruction of the paper records, during which they will be available to the PSF if needed to correct the microfilm.

Comment 6: Marks Under Paris Convention or Native American Tribal Insignia

Several comments referred to the alleged inadequacy of the electronic records with respect to the protected notifications under Article 6ter of the Paris Convention and the notified Native American tribal insignia.

Response: As a threshold matter, the USPTO notes that these comments refer to records that are not registered trademarks, and therefore do not fall within the scope of the paper search collection at issue. Nonetheless, in response to the concern expressed in these comments, the USPTO has undertaken efforts to ensure that its electronic database for such records is complete. A project is nearly finished to load missing images into the Office's image data server to make them available for viewing on X-Search and TESS, and significant progress on the project has already been made. The USPTO notes that the missing images identified by the project were also missing from the paper search collection. Thus far, over 125 missing images have been loaded into the Office's image data server. No paper copies of protected notifications or insignia will be eliminated until the project is complete.

Comment 7: Archiving the Paper Record Annotations

One commenter expressed concern that handwritten annotations made to the paper records of word marks, which may provide assistance in locating intentionally altered spellings or misspellings, have not been reviewed for potential incorporation into the pseudo-mark field in the electronic database.

Response: The USPTO created the pseudo-mark field to improve the accuracy of searches in its electronic databases, but the USPTO notes that no statutory obligation compels the maintenance of this feature. The pseudo-mark field shows the literal equivalent of a pictorial representation of wording in a design mark, and/or spellings that are similar or phonetically equivalent to wording in a word mark. The assignment of pseudo-marks to electronic records is performed by the Trademark Office within the USPTO. PSF staff members regularly make recommendations for pseudo-mark assignments, which may reflect the type of information in the handwritten annotations to the paper records. Moreover, members of the public may also suggest the addition of pseudo-marks. As with the design codes, the USPTO has sought and applied public input regarding the pseudo-mark data in the USPTO database. For example, since April 4, 2006, the USPTO has notified applicants whose marks include a pseudo-mark, to allow them the opportunity to correct or add to the pseudo-mark field. The USPTO has sent approximately 83,600 such notices.

Although the pseudo-mark field provides a useful tool for searching, the USPTO is not required to provide this feature. Thus, a decision not to review an extensive number of documents for potential additions to the pseudo-mark field does not negatively impact the public. The USPTO has determined that the burden associated with this type of nonessential review of each page in the paper search collection, for consideration of all the handwritten notations, is too great. Nonetheless, because the microfilmed records will accurately capture the handwritten notations made on the paper records, the full scope of these notations will be archived for future reference.

Additional Information

As set forth above and in the June 23, 2006 **Federal Register** Notice, the purpose of the new design coding system is to replicate the ability to search the paper collection using the PSD. Since 2001, no design coding with the PSD has been done for incoming applications in the paper search collection. Rather, design coding with the PSD has only been applied to registrations. Accordingly, in order to replicate the benefits of redundant searching currently available with the paper search collection, the new design coding system need only be applied to new registrations, not to incoming applications. Therefore, the USPTO clarifies that the new system using the PSD will only be applied to registered marks. This suffices to ensure that no negative impact on existing search capabilities will result from the cessation of maintenance of the current paper search collection of registered marks including design elements.

Notice

Accordingly, the USPTO hereby gives notice that upon the completion of development and testing of its new redundant design coding system, but no earlier than sixty (60) days from the date of this Notice, the USPTO will: (1) Begin coding with the new coding system all new registrations of marks that include design elements; (2) stop adding design coded registrations to the paper search collection; and (3) begin microfilming the paper search collection of registered marks that include design elements. When microfilming is complete, the USPTO will remove the paper search collection of registered marks that include design elements. The microform collection will be available to the public in the Public Search Facility at 600 Dulany Street, Alexandria, Virginia. This will ensure that all information currently available in the paper search collection remains available to the public.

Dated: June 22, 2007.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E7–12498 Filed 6–27–07; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 07–06]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 07–06 with attached transmittal and policy justification.

C.R. Choate,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

DEFENSE SECURITY COOPERATION AGENCY

WASHINGTON, DC 20301-2800

JUN 1 8 2007

In reply refer to:
I-06/012354

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 07-06, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to United Arab Emirates for defense articles and services estimated to cost $201 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

JEFFREY B. KOHLER
LIEUTENANT GENERAL, USAF
DIRECTOR

Enclosures:
1. **Transmittal**
2. **Policy Justification**

Same ltr to:

House	Senate
Committee on Foreign Affairs	Committee on Foreign Relations
Committee on Armed Services	Committee on Armed Services
Committee on Appropriations	Committee on Appropriations

Transmittal No. 07-06

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) **Prospective Purchaser**: United Arab Emirates

(ii) **Total Estimated Value**:

Major Defense Equipment*	$ 1 million
Other	$200 million
TOTAL	$201 million

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase**: United States pilot proficiency training programs and munitions, services and support for F-16 aircraft which includes: 105,000 20mm cartridges, aircraft modifications kits, maintenance, participation in joint training Continental United States (CONUS) pilot proficiency training program, Introduction to Fighter Fundamentals training, F-5B transition and continuation training, fighter follow-on preparation training, participation in joint training exercises, fuel and fueling services, supply support, flight training, spare/repair parts, support equipment, program support, publications, documentation, personnel training, training equipment, contractor technical and logistics personnel services and other related program requirements necessary to sustain a long-term CONUS training program.

(iv) **Military Department**: Air Force (TBI)

(v) **Prior Related Cases, if any**: none

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid**: none

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold**: none

(viii) **Date Report Delivered to Congress**: JUN 18 2007

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

United Arab Emirates – Pilot Training Program with Cartridges, Services, and Support

The Government of United Arab Emirates (UAE) has requested a possible sale of United States pilot proficiency training programs and munitions, services and support for F-16 aircraft which includes: 105,000 20mm cartridges, aircraft modifications kits, maintenance, participation in joint training Continental United States (CONUS) pilot proficiency training program, Introduction to Fighter Fundamentals training, F-5B transition and continuation training, fighter follow-on preparation training, participation in joint training exercises, fuel and fueling services, supply support, flight training, spare/repair parts, support equipment, program support, publications, documentation, personnel training, training equipment, contractor technical and logistics personnel services and other related program requirements necessary to sustain a long-term CONUS training program. The estimated cost is $201 million.

This proposed sale will contribute to the foreign policy and national security of the U.S. by helping to improve the security of a friendly country that has been and continues to be an important force for political stability and economic progress in the Middle East.

The pilot training will take place at Alliance International Airport, Fort Worth, Texas. It will enable the UAE to develop mission ready and experienced pilots through CONUS training by providing a "capstone" course that takes experienced pilots and significantly improves their tactical proficiency. Introduction to Fighter Fundamentals (IFF) is a pre-cursor to F-16 Block 60-transition training that UAE pilots will receive in Tucson.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The principal contractors will be: Alliance Aviation Center of Excellence at Fort Worth, Texas, and Lockheed Martin Simulation, Training and Support also at Fort Worth, Texas. There are no known offset agreements proposed in connection with this potential sale.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. 07–3165 Filed 6–27–07; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0090]

Federal Acquisition Regulation; Information Collection; Rights in Data and Copyrights; Correction

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice; correction.

SUMMARY: This notice is issued to correct the annual recordkeeping burden published for Information Collection Number 9000–0090, Rights in Data and Copyrights, in the **Federal Register** at 72 FR 28687, May 22, 2007.

FOR FURTHER INFORMATION CONTACT: Ernest Woodson, Contract Policy Division, GSA (202) 501–3775.

Correction

In the **Federal Register** of May 22, 2007, in FR Doc. 07–2524, on page 28688, in the second column, correct paragraph C. to read as follows:

C. Annual Recordkeeping Burden

The annual recordkeeping burden is estimated as follows:

Recordkeepers: 9,000.

Hours Per Recordkeeper: 2.

Total Recordkeeping Burden Hours: 18,000.

Dated: June 22, 2007.

Diedra Wingate,

Supervisor, Regulatory Secretariat.

[FR Doc. 07–3154 Filed 6–27–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

Office of the Secretary

[DOD–2007–OS–0067]

Privacy Act of 1974; Systems of Records

AGENCY: Defense Finance and Accounting Service, DOD.

ACTION: Notice to amend a system of records.

SUMMARY: The Defense Finance and Accounting Service (DFAS) is proposing to amend a system of records notice to its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552A), as amended.

DATES: This action will be effective without further notice on July 30, 2007 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the FOIA/PA Program Manager, Corporate Communications and Legislative Liaison, Defense Finance and Accounting Service—Denver, 6760 E. Irvington Place, Denver, CO 80279–8000.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Krabbenhoft at (303) 676–6045.

SUPPLEMENTARY INFORMATION: The Defense Finance and Accounting Service notices for systems of records subject to the Privacy Act of 1074 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: June 21, 2007.

C.R. Choate,

Alternative OSD Federal Register Liaison Officer, Department of Defense.

T7333

SYSTEM NAME:

Travel Payment System (September 19, 2005, 70 FR 54906).

CHANGES:

SYSTEM LOCATION:

Delete entry and replace with ''Defense Finance and Accounting Service—Indianapolis, 8899 East 56th Street, Indianapolis, IN 46249–0160.

Defense Finance and Accounting Service—Columbus, 3990 East Broad Street, Columbus, OH 43213–1152.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''DoD civilian personnel; active duty, former, and retired military members; Army and Air National Guard personnel; Air Force Academy nominees, applicants, and cadets; dependents of military personnel; and all in receipt of competent government travel orders.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Add to entry ''Individual's name, Social Security Number (SSN), bank routing number, bank account number.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''5 U.S.C. Section 301; Departmental Regulations; 37 U.S.C. Section 404, Travel and transportation allowances: general; DOD Directive 5154.29, DoD Pay and Allowances Policy and Procedures; Department of Defense Financial Management Regulation (DoDFMR) 7000.14–R, Volume 9; and E.O. 9397(SSN).''

* * * * *

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Delete entry and replace with ''Paper records in file folders and electronic storage media''.

* * * * *

SAFEGUARDS:

Delete ''Centers'' and replace with ''sites''.

* * * * *

RETENTION AND DISPOSAL:

Add to entry ''Records are destroyed by degaussing, burning, or shredding.''

SYSTEM MANAGER(S)AND ADDRESS:

Delete entry and replace with ''System Managers, Defense Finance and Accounting Service (DFAS)—Indianapolis, Travel Pay Systems, 8899 East 56th Street, Indianapolis, Indiana 46249–1460.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 6760 East Irvington Place, Denver, CO 80279–8000.

Individuals should furnish full name, Social Security Number (SSN), current address, and telephone number.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves in this system of records should address written inquiries to the Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications

and Legislative Liaison, 6760 East Irvington Place, Denver, CO 80279–8000.

Individuals should furnish full name, Social Security Number (SSN), current address, and telephone number.''

* * * * *

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''Individual, Department of Defense Military Components such as Army, Air Force, Reserves, National Guard, and Air Force Academy.''

* * * * *

T7333

SYSTEM NAME:

Travel Payment System.

SYSTEM LOCATION:

Defense Finance and Accounting Service—Indianapolis, 8899 East 56th Street, Indianapolis, IN 46249–0160.

Defense Finance and Accounting Service—Columbus, 3990 East Broad Street, Columbus, OH 43213–1152

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DoD civilian personnel; active duty, former, and retired military members; Army and Air National Guard personnel; Air Force Academy nominees, applicants, and cadets; dependents of military personnel; and all in receipt of competent government travel orders.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, Social Security Number (SSN), bank routing number, bank account number, travel vouchers and subvouchers, travel allowance payment lists, travel voucher or subvoucher continuation sheets, vouchers and claims for dependent travel, dislocation or trailer allowances, certificate of non-availability of government quarters and mess, multiple travel payments list, travel payment card, requests for fiscal information concerning transportation requests, bills of lading, meal tickets, public vouchers for fees and claim for reimbursement for expenditures on official business, claim for fees and mileage of witness, certifications for travel under classified orders, travel card envelopes, and statements of adverse effect utilization of government facilities.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. Section 301; Departmental Regulations; 37 U.S.C. Section 404, Travel and transportation allowances: general; DOD Directive 5154.29, DoD Pay and Allowances Policy and Procedures; Department of Defense Financial Management Regulation (DoDFMR) 7000.14–R, Volume 9; and E.O. 9397 (SSN).

PURPOSE(S):

To provide a basis for reimbursing individuals for expenses incident to travel for official Government business purposes and to account for such payments.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Internal Revenue Service to provide information concerning the pay of travel allowances which are subject to federal income tax.

The 'Blanket Routine Uses' published at the beginning of the DFAS compilation of systems of records notices apply to this system.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures pursuant to 5 U.S.C. 552a(b)(12) may be made from this system to 'consumer reporting agencies' as defined in the Fair Credit Reporting Act, 15 U.S.C. 1681a(f) or the Federal Claims Collection Act of 1966, 31 U.S.C. 3701(a)(3). The purpose of the disclosure is to aid in the collection of outstanding debts owed to the Federal Government; typically, to provide an incentive for debtors to repay delinquent Federal Government debts by making these debts part of their credit records. The disclosure is limited to information necessary to establish the identity of the individual, including name, address, and taxpayer identification number (Social Security Number); the amount, status, and history of the claim; and the agency or program under which the claim arose for the sole purpose of allowing the consumer reporting agency to prepare a commercial credit report.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DEPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

Retrieved by individual's name and/or Social Security Number (SSN).

SAFEGUARDS:

Records are accessed by person(s) responsible for servicing the record, and who are authorized to use the record system in the performance of their official duties. All individuals are properly screened and cleared for need-to-know. Additionally, at some sites, records are in office buildings protected by guards and controlled by screening of personnel and registering of visitors.

RETENTION AND DISPOSAL:

Records may be temporary in nature and destroyed when superseded, obsolete, no longer needed, or cut off at the end of the fiscal year and destroyed 6 years and 3 months after cutoff. Records are destroyed by degaussing, burning, or shredding.

SYSTEM MANAGER(S) AND ADDRESS:

Systems Manager, Defense Finance and Accounting Service (DFAS)—Indianapolis, Travel Pay Systems, 8899 East 56th Street, Indianapolis, Indiana 46249–1460.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 6760 East Irvington Place, Denver, CO 80279–8000.

Individuals should furnish full name, Social Security Number (SSN), current address, and telephone number.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves in this system of records should address written inquiries to the Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 6760 East Irvington Place, Denver, CO 80279–8000.

Individuals should furnish full name, Social Security Number(SSN), current address, and telephone number.

CONTESTING RECORD PROCEDURES:

The DFAS rules for accessing records, for contesting contents and appealing initial agency determinations are published in DFAS Regulation 5400.11-R; 32 CFR part 324; or may be obtained from the Freedom of Information/Privacy Act Program Manager, Office of Corporate Communications, 6760 E. Irvington Place, Denver, CO 80279–8000.

RECORD SOURCE CATEGORIES:

Individual, Department of Defense Military Components such as Army, Air

Force, Reserves, National Guard, and Air Force Academy.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E7–12512 Filed 6–27–07; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, 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 August 27, 2007.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

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: June 22, 2007.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: New.

Title: Random Assignment Evaluation of Principles-Based Professional Development to Improve Reading Comprehension for English Language Learners.

Frequency: On Occasion; annually.

Affected Public: Individuals or household; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 158.

Burden Hours: 218.

Abstract: This study involves the implementation of a professional development program for 4th and 5th grade teachers who teach English language learners (ELLs) and assesses whether the proposed high-quality professional development model will have measurable impacts on teacher and student outcomes. The target population for the intervention is 4th and 5th grade teachers in four jurisdictions (state education agencies) of the Pacific Region who teach self-contained classes. A rigorous cluster random assignment research design, in which schools are randomly assigned to program and control groups, will be used to evaluate the impact of a principles-based professional development program and report on outcomes at the teacher, classroom, and student level.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3368. 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., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* 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. E7–12554 Filed 6–27–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 30, 2007.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the

need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: June 22, 2007.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services,Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Revisions.

Title: Part D Discretionary Grant Application—Individuals with Disabilities Education Act.

Frequency: Annually.

Affected Public: State, Local, or Tribal Governments.

Reporting and Recordkeeping Hour Burden:

Responses: 1,200.

Burden Hours: 30,000.

Abstract: This collection is being revised to (1) describe additional burden associated only with the Paperwork Waiver Demonstration Program and the Multi-Year Individualized Education Program Demonstration Program, two priorities to be completed under the Part D, Technical Assistance and Demonstration Program authorized under Public Law 108–446; and (2) to request approval for use of EDGAR selection criteria in both these programs that differ, in part, from those approved for use in the Model Demonstration Program. The Department's Office of Special Education Programs allowed burden hours in the previous submission of this package to cover these unique requirements; but feels it is necessary for the public to be aware of the actual activities reflected in that burden.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1890–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 3400. 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., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* 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. E7–12555 Filed 6–27–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA No. 84.282B and 84.282C]

Charter Schools Program (CSP)

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Correction; Notice inviting applications for new awards for fiscal year (FY) 2007.

SUMMARY: On June 20, 2007, we published in the **Federal Register** (72 FR 33986) a notice inviting applications for new awards for two fiscal year (FY) 2007 competitions under the Charter Schools Program (CFDA 84.282B and CFDA 84.282C). That notice incorrectly included Alaska, Missouri, and New Hampshire in the list of States that currently have approved applications under the CSP. Non-State educational agency (Non-SEA) eligible applicants in States that currently have approved applications under the CSP are ineligible to apply under these competitions and must contact the SEA for information related to the State's CSP subgrant competition. Because Alaska, Missouri, and New Hampshire do not currently have approved applications under the CSP, non-SEA eligible applicants from these three states are, in fact, eligible to apply directly to the Department for CSP grants under these competitions.

For these reasons, we are removing Alaska, Missouri, and New Hampshire from the list of States that currently have approved applications under the CSP. The *Note* on page 33986, in the third column, under III. *Eligibility Information*, 1. *Eligible Applicants: Planning and Initial Implementation (CFDA No. 84.282B)* is corrected to read as follows:

Note: *Eligible applicant* is defined in section 5210(3) of the ESEA. The following States currently have approved applications under the CSP: Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Wisconsin. In these States, non-SEA eligible applicants interested in participating in the CSP should contact the SEA for information related to the State's CSP subgrant competition.

FOR FURTHER INFORMATION CONTACT: Erin Pfeltz, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W255, Washington, DC 20202–5970. Telephone: (202) 205–3525 or by e-mail: *erin.pfeltz@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document and a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the program contact person listed in this section.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: June 25, 2007.

Morgan S. Brown,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. E7–12544 Filed 6–27–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; Overview Information; National Institute on Disability and Rehabilitation Research (NIDRR)—Disability Rehabilitation Research Projects and Centers Program—Rehabilitation Research and Training Centers (RRTCs)—RRTC on Vocational Rehabilitation (VR); Notice Inviting Applications for New Awards for Fiscal Year (FY) 2007

Catalog of Federal Domestic Assistance (CFDA) Number: 84.133B–3.

Dates:

Applications Available: June 28, 2007.

Deadline for Transmittal of Applications: August 17, 2007.

Date of Pre-Application Meeting: July 16, 2007.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the RRTC program is to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended, through advanced research, training of rehabilitation personnel, and providing technical assistance to rehabilitation service providers, individuals with disabilities, and the family members or other authorized representatives of individuals with disabilities.

Priority: This priority is from the notice of final priority for the Disability and Rehabilitation Research Projects and Centers program, RRTC program, published elsewhere in this issue of the **Federal Register**.

Absolute Priority: For FY 2007, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Rehabilitation Research and Training Center (RRTC) on Vocational Rehabilitation (VR).

Note: This program is in concert with President George W. Bush's New Freedom Initiative (NFI) and NIDRR's Final Long-Range Plan for FY 2005–2009 (Plan). The NFI can be accessed on the Internet at the following site: *http://www.whitehouse.gov/infocus/newfreedom*.

The Plan is comprehensive and integrates many issues relating to disability and rehabilitation research topics. The Plan, which was published in the **Federal Register** on February 15, 2006 (71 FR 8165), can be accessed on the Internet at the following site: *http://www.ed.gov/about/offices/list/osers/nidrr/policy.html*.

Through the implementation of the Plan, NIDRR seeks to—(1) Improve the quality and utility of disability and rehabilitation research; (2) Foster an exchange of expertise, information, and training to facilitate the advancement of knowledge and understanding of the unique needs of traditionally underserved populations; (3) Determine best strategies and programs to improve rehabilitation outcomes for underserved populations; (4) Identify research gaps; (5) Identify mechanisms of integrating research and practice; and (6) Disseminate findings.

Program Authority: 29 U.S.C. 762(g) and 764(b)(2).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, and 97. (b) The regulations for this program in 34 CFR part 350. (c) The notice of final priority for this program, published elsewhere in this issue of the **Federal Register**.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $650,000.

Maximum Award: We will reject any application that proposes a budget exceeding $650,000 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**.

Note: The maximum amount includes direct and indirect costs. The maximum allowable indirect cost rate is 15 percent.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations; IHEs; and Indian tribes and tribal organizations.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). 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: Education Publications Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. 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.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov*.

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA Number 84.133B–3.

Individuals with disabilities can obtain a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Alternative Format* in section VIII in 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. We recommend that you limit Part III to the equivalent of no more than 75 pages, using the following standards:

- A ''page'' is 8.5'' × 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. Single spacing may be used for titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

The suggested 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, or the letters of support. However, the page limit does apply to all of the application narrative (Part III).

The application package will provide instructions for completing all components to be included in the application. Each application must include a cover sheet (Standard Form 424); budget requirements (ED Form 524) and budget narrative justification;

other required forms; an abstract, Human Subjects narrative, Part III narrative; resumes of staff; and other related materials, if applicable.

3. *Submission Dates and Times:*

Applications Available: June 28, 2007.

Deadline for Transmittal of Applications: August 17, 2007.

Pre-Application Meeting: Interested parties are invited to participate in a pre-application meeting to discuss the priority and to receive information and technical assistance through individual consultation. The pre-application meeting will be held on July 16, 2007. Interested parties may participate in this meeting by conference call with NIDRR staff from the Office of Special Education and Rehabilitative Services between 1 p.m. and 3 p.m., Washington, DC time. On the same day, NIDRR staff also will be available from 3:30 p.m. to 4:30 p.m., by telephone, to provide information and technical assistance through individual consultation. For further information or to make arrangements to participate on the conference call or for an individual consultation, contact Donna Nangle, U.S. Department of Education, Potomac Center Plaza, room 6030, 550 12th Street, SW., Washington, DC 20202. Telephone: (202) 245–7462 or by e-mail: *Donna.Nangle@ed.gov*.

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. 6. *Other Submission Requirements* in 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 in 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 program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *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.*

To comply with the President's Management Agenda, we are participating as a partner in the Governmentwide Grants.gov Apply site. Rehabilitation Research and Training Centers, CFDA number 84.133B–3, 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 Rehabilitation Research and Training Centers 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 84.133, not 84.133B).

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 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not consider your application if it is date and time stamped by the Grants.gov system later than 4:30 p.m., Washington, DC time, on the application deadline date. 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 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 at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf*.
- To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*). You also must provide on your application the same D–U–N–S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.
- 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: 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. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).
- If you submit your application electronically, you must attach any narrative sections of your application as

files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph 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 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 p.m., Washington, DC time, on the application deadline date, please contact the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** 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 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 applicable following address:

By mail through the U.S. Postal Service:
U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.133B–3), 400 Maryland Avenue, SW.,Washington, DC 20202–4260
or
By mail through a commercial carrier:
U.S. Department of Education, Application Control Center, Stop 4260, Attention: (CFDA Number 84.133B–3), 7100 Old Landover Road,Landover, MD 20785–1506.

Regardless of which address you use, 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 84.133B–3), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 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 350.54 and are listed in the application package.

2. *Review and Selection Process:* Additional factors we consider in determining the merits of an application are as follows—

The Secretary is interested in outcomes-oriented research or development projects that use rigorous scientific methodologies. To address this interest applicants are encouraged to articulate goals, objectives, and expected outcomes for the proposed research or development activities. Proposals should describe how results and planned outputs are expected to contribute to advances in knowledge, improvements in policy and practice, and eventually to public benefits for individuals with disabilities. Applicants should propose projects that are optimally designed to be consistent with these goals. We encourage applicants to include in their application a description of how results will measure progress towards achievement of anticipated outcomes, the mechanisms that will be used to evaluate outcomes associated with specific problems or issues, and how the proposed activities will support new intervention approaches and strategies, including a discussion of measures of effectiveness. Submission of the information identified in this section V. *Review and Selection Process* is voluntary, except

where required by the selection criteria listed in the application package.

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 Notice (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 in this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in 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:* 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 in 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c).

Note: NIDRR will provide information by letter to grantees on how and when to submit the report.

4. *Performance Measures:* To evaluate the overall success of its research program, NIDRR assesses the quality of its funded projects through review of grantee performance and products. Each year, NIDRR examines, through expert review, a portion of its grantees to determine:

- The percentage of newly awarded NIDRR projects that are multi-site, collaborative controlled studies of interventions and programs.
- The number of accomplishments (e.g., new or improved tools, methods, discoveries, standards, interventions, programs, or devices) developed or tested with NIDRR funding that have been judged by expert panels to be of high quality and to advance the field.
- The percentage of grantee research and development that has appropriate study design, meets rigorous standards of scientific and/or engineering methods, and builds on and contributes to knowledge in the field.
- The average number of publications per award based on NIDRR-funded research and development activities in refereed journals.
- The percentage of new grants that include studies funded by NIDRR that assess the effectiveness of interventions, programs, and devices using rigorous and appropriate methods.

NIDRR uses information submitted by grantees as part of their Annual Performance Reports (APRs) for these reviews. NIDRR also determines, using information submitted as part of the APR, the number of publications in refereed journals that are based on NIDRR-funded research and development activities.

Department of Education program performance reports, which include information on NIDRR programs, are available on the Department's Web site: *http://www.ed.gov/about/offices/list/opepd/sas/index.html.*

Updates on the Government Performance and Results Act of 1993 (GPRA) indicators, revisions and methods appear on the NIDRR Program Review Web site: *http://www.neweditions.net/pr/commonfiles/pmconcepts.html.*

Grantees should consult these sites, on a regular basis, to obtain details and explanations on how NIDRR programs contribute to the advancement of the Department's long-term and annual performance goals.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 6029, Potomac Center Plaza, Washington, DC 20202. Telephone: (202) 245–7462 or by e-mail: *donna.nangle@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Alternative Format: Individuals with disabilities can obtain this document and a copy of the application package in an alternative 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, Potomac Center Plaza, 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: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: June 25, 2007.

John H. Hager,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E7–12543 Filed 6–27–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Institute on Disability and Rehabilitation Research—Disability and Rehabilitation Research Projects and Centers Program—Rehabilitation Research and Training Centers (RRTCs)

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of final priority for a RRTC on Vocational Rehabilitation.

SUMMARY: The Assistant Secretary for Special Education and Rehabilitative Services announces a priority on vocational rehabilitation under the Disability and Rehabilitation Research Projects and Centers Program administered by the National Institute on Disability and Rehabilitation Research (NIDRR). The Assistant Secretary may use this priority for competitions in fiscal year (FY) 2007 and later years. We take this action to focus research attention on areas of national need. We intend this priority to improve rehabilitation services and outcomes for individuals with disabilities.

DATES: *Effective Date:* This priority is effective July 30, 2007.

FOR FURTHER INFORMATION CONTACT: Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 6030, Potomac Center Plaza, Washington, DC 20202–2700. Telephone: (202) 245–7462 or via Internet: *donna.nangle@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative

format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Rehabilitation Research and Training Centers (RRTCs)

RRTCs conduct coordinated and integrated advanced programs of research targeted toward the production of new knowledge to improve rehabilitation methodology and service delivery systems, alleviate or stabilize disability conditions, or promote maximum social and economic independence for persons with disabilities. Additional information on the RRTC program can be found at: *http://www.ed.gov/rschstat/research/pubs/res-program.html#RRTC.*

General Requirements of RRTCs

RRTCs must—

- Carry out coordinated advanced programs of rehabilitation research;
- Provide training, including graduate, pre-service, and in-service training, to help rehabilitation personnel more effectively provide rehabilitation services to individuals with disabilities;
- Provide technical assistance to individuals with disabilities, their representatives, providers, and other interested parties;
- Demonstrate in their applications how they will address, in whole or in part, the needs of individuals with disabilities from minority backgrounds;
- Disseminate informational materials to individuals with disabilities, their representatives, providers, and other interested parties; and
- Serve as centers of national excellence in rehabilitation research for individuals with disabilities, their representatives, providers, and other interested parties.

We published a notice of proposed priority (NPP) for NIDRR's Disability and Rehabilitation Research Projects and Centers Program, RRTC program, in the **Federal Register** on March 27, 2007 (72 FR 14263). The NPP included a background statement that described our rationale for the priority proposed in that notice.

There are differences between the NPP and this notice of final priority (NFP) as discussed in the following section.

Analysis of Comments and Changes

In response to our invitation in the NPP, eleven parties submitted comments on the proposed priority. An analysis of the comments and of any changes in the priority since publication of the NPP follows.

Generally, we do not address technical and other minor changes, or suggested changes the law does not authorize us to make under the applicable statutory authority. In addition, we do not address general comments that raised concerns not directly related to the proposed priority.

Comments: None.

Discussion: Upon internal review of the NPP, NIDRR wishes to further clarify the focus of research related to ''best practices'' activities to be conducted under this priority. In the NPP, NIDRR proposed that an RRTC funded under the priority must contribute to several outcomes, including increased knowledge of ''best practices'' for prioritizing and providing services to individuals with the most significant disabilities. In the NPP, we proposed specifically that the research to be conducted to contribute to this outcome must focus on the ''extent to which individuals with the most significant disabilities are given priority for services by their respective State Vocational Rehabilitation (VR) programs.'' We are revising this language to specifically reflect section 101(a)(5)(A) of the Rehabilitation Act, and related regulations under 34 CFR 361.36 to clarify that NIDRR and RSA are specifically interested in research on best practices for administering and implementing an order of selection in serving individuals with the most significant disabilities.

Changes: NIDRR has revised the priority to clarify that the focus of best practices research to be conducted under paragraph (d) of the priority must be on the administration and implementation of an order of selection in serving individuals with the most significant disabilities.

Comment: One commenter noted that a relatively low percentage of consumers of State VR programs who are blind or have low vision, and whose cases have been closed with an employment outcome, obtain competitive employment. Based on this finding, the commenter recommends that paragraph (e) of the priority be amended to include a focus on individuals who are blind or have low vision.

Discussion: As described in the NPP, NIDRR and RSA have chosen to focus their research resources on individuals with developmental disabilities (DD) and individuals with mental illness (MI) because historically these individuals have had very low employment outcome rates. Individuals with MI have the lowest annual closure rate in the VR system. Individuals with DD also have low rates of closure relative to other subpopulations. These low closure rates, combined with the fact that individuals with DD and MI comprise about half of VR clients nationally, provide the strategic rationale for the proposed focus of paragraph (e).

Changes: None.

Comment: Three commenters noted that the findings of the RRTC should be incorporated into training and ongoing educational requirements of VR personnel, and disseminated to individuals with disabilities. These commenters suggest that paragraph (f) of the priority be amended to include a requirement for a direct VR program delivery impact strategy.

Discussion: We agree with this commenter's observation that the proposed priority unduly restricts dissemination efforts to ''State and Federal administrators of the VR program,'' and that applicants should disseminate the results of their research widely throughout the VR service delivery system as well as to individuals with disabilities. It is beyond the scope of this grant, however, to ensure that research findings are formally incorporated into training and education requirements of VR staff.

Changes: NIDRR has revised paragraph (f) of the priority to require the RRTC to disseminate research results and provide training and technical assistance to all VR program personnel, as well as individuals with disabilities.

Comment: Four commenters suggested that the priority be amended to incorporate specific research topics related to services provided to youth in transition from school to employment settings.

Discussion: NIDRR and RSA have made a strategic decision to focus the work of this RRTC on the State-level structures and systems for providing employment services to individuals with disabilities. As described in the *Background* section in the NPP, the goal of this RRTC is to produce information that will properly contextualize future employment interventions and intervention studies. This new knowledge will help determine the real world applicability of those interventions, and the results of research on them. NIDRR and RSA believe that new knowledge will include information about many State-level systems that serve individuals transitioning from school to postsecondary work activity and agree that this important area could benefit from additional research-based knowledge. NIDRR and RSA believe that

an applicant could propose research on transition-related service delivery structures under paragraphs (b) and (c) of the priority. However, we have no basis for requiring that all applicants focus their research in this manner.

Changes: None.

Comment: Four commenters suggested that the term ''home-based employment'' utilized in paragraph (c) of the priority be broadened to include self-employment and entrepreneurship.

Discussion: NIDRR and RSA are specifically interested in the extent to which State VR systems use home-based employment options to provide VR services. Under paragraph (c) the priority allows applicants to propose research that examines a wide variety of VR program characteristics. The list of characteristics in paragraph (c) was not intended to be exhaustive. Accordingly, an applicant could propose to focus research on the broader categories of self-employment and entrepreneurship. However, NIDRR has no basis for requiring that all applicants focus on self-employment or entrepreneurship in responding to the priority.

Changes: None.

Comment: Referring specifically to paragraph (a) of the priority, three commenters suggested that NIDRR require applicants to explore the interaction between State procurement policies and choice provisions that are spelled out in the Rehabilitation Act.

Discussion: To the extent that research literature on this topic exists, applicants may propose to include it in their literature review and synthesis. Applicants may also propose to examine this topic under paragraphs (b), (c), (d), and (e) of the priority. However, NIDRR has no basis for requiring that all applicants focus on the interaction between state procurement policies and the choice provisions described in section 102(d) of the Rehabilitation Act.

Changes: None.

Comment: Three commenters recommended that paragraph (b) of the priority be expanded to require research on specific disability employment service topics such as interagency agreements, VR connections to One-Stop Centers, VR connections to apprenticeship programs, policies related to needs-based financing of postsecondary education, and VR connections to programs for military veterans.

Discussion: The priority allows applicants to propose studies examining these specific characteristics of disability employment services, as well as many others. However, NIDRR has no basis for requiring that all applicants focus on these factors in responding to the priority.

Changes: None.

Comment: Three commenters recommended that paragraph (c) of the priority be expanded to require research on specific VR program characteristics such as extended evaluations and trial work experiences, VR agreements with agencies providing long-term services and employment supports, characteristics of individuals denied VR services, and different types of purchase-of-service agreements.

Discussion: In paragraph (c), we described the characteristics we thought applicants should examine in their studies, but as noted previously the list of characteristics was not intended to be exhaustive. Accordingly, under paragraph (c), an applicant could propose to examine the characteristics suggested by the commenters, as well as many others. However, NIDRR has no basis for requiring that all applicants focus on the additional characteristics recommended by the commenters.

Changes: None.

Comment: One commenter asked whether best-practices research on serving people with MI and DD, under paragraph (e) of the priority, could focus on services provided by non-VR agencies.

Discussion: Under paragraph (e) of the priority, best practices research must be coordinated with and informed by research conducted under paragraphs (b) and (c) of the priority. Under paragraph (b), the RRTC must research the role of community non-governmental organizations and government entities in the delivery of services to individuals with disabilities. Accordingly, an applicant's research could include best practices from non-VR service providers. NIDRR and RSA are ultimately interested in application of these best-practices findings within the VR system, regardless of their source.

Changes: None.

Comment: One commenter asked whether NIDRR would consider applications that propose randomized controlled intervention designs.

Discussion: As described in the *Background* section of the NPP, and clearly outlined in the proposed priority, the purpose of this RRTC is to conduct research that is largely descriptive, in order to provide the contextual basis for future interventions and intervention studies. A randomized-controlled trial would not produce information that fulfills this purpose. NIDRR will not consider proposals that are not responsive to paragraphs (a) through (f).

Changes: None.

Comment: One commenter asked NIDRR to define the term ''best practices'' that is used in the priority.

Discussion: Generally, the term ''best practices'' refers to the notion that there are methods or processes that are more closely associated with achieving a desired goal than others. The goal identified in paragraph (d) is the prioritization of services to those with the most significant disabilities. The goal identified in paragraph (e) of the priority is achieving a high rate of placing or retaining individuals from specific disability subpopulations in jobs. NIDRR and RSA are specifically interested in research that will help identify current practices, interventions, or service-delivery structures that are associated with achieving these goals.

Changes: NIDRR has revised the priority to include the following definition of best practices: ''For purposes of this priority, best practices are defined as current practices, interventions, or service-delivery structures that are associated with achievement of a particular goal.''

Comment: One commenter asked whether NIDRR would consider systemic change strategies that enhance the adoption of evidence-based research, as a best practice for serving individuals with MI or DD.

Discussion: NIDRR requires that best practices research under paragraphs (d) and (e) be coordinated with research activities under paragraphs (b) and (c). Paragraphs (b) and (c) require research on the structural and systemic characteristics of the States' disability employment services networks, and the States' VR programs, respectively. To the extent that successful systemic change strategies currently exist within these employment service-delivery structures, applicants are free to examine them in their research on best practices under paragraphs (d) and (e).

Changes: None.

Comment: One commenter suggested that NIDRR require applicants to identify specific strategies for collaboration with the Helen Keller National Center under paragraph (d) of the priority, given the unique employment challenges of individuals who are deaf-blind.

Discussion: While the priority requires a RRTC to conduct research to help determine best practices for prioritizing and providing services to individuals with the most significant disabilities, it does not require the RRTC to address the needs of any particular disability group in meeting this requirement. Accordingly, applicants may propose to collaborate with any

organizations that they believe will help achieve the desired outcomes under this priority. However, NIDRR has no basis for requiring that all applicants collaborate with the Helen Keller National Center or any other particular organization.

Changes: None.

Comment: One commenter noted that the statutory definition of ''individual with a significant disability'' includes language that restricts this population to those with multiple VR service needs. The commenter notes that this definition precludes prioritization of VR services for people with significant disabilities who only need one VR service. The commenter recommends that NIDRR remove language from the priority that refers to ''significant'' disability, so that the statutory definition of significant disability does not limit research on the VR prioritization process to those who fit that definition.

Discussion: Title I of the Rehabilitation Act requires State agencies to give priority to those individuals with the most significant disabilities if it cannot serve all eligible individuals. Through this priority, NIDRR seeks to sponsor research that is directly relevant to the VR State agencies and requirements that govern the operation of the VR program. Making the change suggested by the commenter would not further this goal.

Changes: None.

Note: This notice does not solicit applications. In any year in which we choose to use this priority, we invite applications through a notice in the **Federal Register**. When inviting applications we designate the priority as absolute, competitive preference, or invitational. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by either (1) Awarding additional points, depending on how well or the extent to which the application meets the competitive preference priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the competitive preference priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the invitational priority. However, we do not give an application that meets the invitational priority a competitive or absolute preference over other applications (34 CFR 75.105(c)(1)).

Note: This NFP is in concert with President George W. Bush's New Freedom Initiative (NFI) and the Plan. The NFI can be accessed on the Internet at the following site: *http://www.whitehouse.gov/infocus/newfreedom.*

The Plan, which was published in the **Federal Register** on February 15, 2006 (71 FR 8165), can be accessed on the Internet at the following site: *http://www.ed.gov/about/offices/list/osers/nidrr/policy.html.*

Through the implementation of the NFI and the Plan, NIDRR seeks to—(1) Improve the quality and utility of disability and rehabilitation research; (2) Foster an exchange of expertise, information, and training to facilitate the advancement of knowledge and understanding of the unique needs of traditionally underserved populations; (3) Determine best strategies and programs to improve rehabilitation outcomes for underserved populations; (4) Identify research gaps; (5) Identify mechanisms of integrating research and practice; and (6) Disseminate findings.

Priority

Rehabilitation Research and Training Center (RRTC) on Vocational Rehabilitation (VR)

The Assistant Secretary for Special Education and Rehabilitative Services establishes a priority for the funding of a Rehabilitation Research and Training Center (RRTC) on Vocational Rehabilitation (VR) Services. The RRTC must conduct research on the complex employment service delivery structures for individuals with disabilities, investigate ''best practices'' in certain critical areas, and provide training and technical assistance in order to improve VR services and employment outcomes among individuals with disabilities. For purposes of this priority, best practices are defined as current practices, interventions, or service-delivery structures that are associated with achievement of a particular goal. Under this priority, the RRTC must contribute to the following outcomes:

(a) A foundation of available knowledge about the VR program's characteristics and outcomes. The RRTC must contribute to this outcome by conducting a literature review and creating a synthesis of previous research on the system-level characteristics of the VR program, and outcomes associated with those characteristics. This review and synthesis will inform the subsequent research, training, and evaluation efforts of the RRTC.

(b) Increased knowledge about the broad constellation of Federal and State policies and programs through which employment services are delivered to individuals with disabilities, and the characteristics of individuals with disabilities who are receiving those services. The RRTC must contribute to this outcome by researching and providing a detailed State-by-State description of the larger employment services network and the role of the VR program within it. This research must identify and describe key characteristics of Federal, State and local government entities and community non-governmental organizations that either directly deliver or directly purchase employment services for individuals with disabilities.

(c) Increased knowledge of the structure and operations of VR service delivery practices at the State level. The RRTC must contribute to this outcome by researching and providing a detailed description of the key characteristics of each State's VR system. These characteristics should include, but not be limited to, VR service delivery structure and practices, patterns of resource allocation, patterns of internal and external provision of services, the extent to which the VR agency uses cooperative agreements with other agencies to deliver services, operational definitions of ''individuals with the most significant disabilities,'' characteristics of clients, employment outcomes and settings, the level of integration of work settings, the extent of use of home-based employment, and means of addressing transportation barriers. This research must describe elements internal to each State's VR agency or agencies, and provide a base upon which future researchers can analyze the operational consequences and outcomes of different internal arrangements and agency decisions.

(d) Increased knowledge of ''best practices'' for prioritizing and providing services to individuals with the most significant disabilities, when the State VR agency cannot serve all eligible individuals. The RRTC must contribute to this outcome by conducting research on the administration and implementation of an order of selection in serving individuals with the most significant disabilities by their respective State VR programs, and identifying best practices among State VR programs for ensuring that individuals with the most significant disabilities receive services on a priority basis. Collection and analysis of data for this research must be coordinated with and informed by research on the disability employment service and VR structures described in paragraphs (b) and (c) of this priority. This

coordination will allow best practices findings to be properly contextualized, and therefore more likely to be successfully applied in other States or agencies.

(e) Increased knowledge of ''best practices'' for helping individuals with developmental disabilities (DD) and individuals with mental illness (MI) obtain and retain employment. The RRTC must contribute to this outcome by conducting research to determine best practices for placing or retaining individuals with DD or MI in jobs. Collection and analysis of data for this best practices research must be coordinated with and informed by research on the disability employment service and VR structures described in paragraphs (b) and (c) of this priority. This coordination will allow best practices findings to be properly contextualized, and therefore more likely to be successfully applied in other States or agencies.

(f) Enhancement of the knowledge base of: (1) State and Federal VR program personnel, (2) personnel of other employment programs for individuals with disabilities, and (3) individuals with disabilities, by disseminating research results and providing training and technical assistance based on the new knowledge about the disability employment service structures described in paragraphs (b) and (c) of this priority, and best practices knowledge described in paragraphs (d) and (e) of this priority.

In addition, this RRTC must:

- Collaborate with RSA's technical assistance mechanisms to effectively disseminate best practices materials developed in the research component of this RRTC.
- Coordinate its research, dissemination, training, and technical assistance efforts with grantees in NIDRR's Employment domain, as appropriate.

Executive Order 12866

This notice of final priority has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the notice of proposed priority are those resulting from statutory requirements and those we have determined as necessary for administering these programs effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this notice of final priority, we have determined that the benefits of the final priority justify the costs.

Summary of Potential Costs and Benefits

The potential costs associated with this final priority are minimal while the benefits are significant.

The benefits of the Rehabilitation Research and Training Centers have been well established over the years in that similar projects have been completed successfully. This final priority will generate new knowledge and technologies through research, development, dissemination, utilization, and technical assistance projects.

Another benefit of this final priority is that the establishment of a new RRTC conducting research projects will support the President's NFI and will improve the lives of persons with disabilities. This RRTC will generate, disseminate, and promote the use of new information that will improve the options for individuals with disabilities to perform regular activities in the community.*Applicable Program Regulations:* 34 CFR part 350.

Electronic Access to This Document

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To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

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(Catalog of Federal Domestic Assistance Number 84.133B, Rehabilitation Research and Training Centers Program)

Program Authority: 29 U.S.C. 762(g) and 764(b)(2).

Dated: June 25, 2007.

John H. Hager,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E7–12549 Filed 6–27–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Interagency Committee on Disability Research

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of public meetings and request for written comments.

SUMMARY: This notice describes the schedule and agenda of a forthcoming meeting of the Interagency Committee on Disability Research (ICDR). Notice of this meeting is intended to inform members of the general public of their opportunity to attend the meeting and provide comment.

DATES: The meeting will take place on August 14, 2007.

ADDRESSES: The meeting will be held from 10 a.m. to 3 p.m. at the Holiday Inn on the Hill, 415 New Jersey Avenue, NW., Washington, DC 20001. Telephone: (202) 638–1616.

SUPPLEMENTARY INFORMATION: During the public meeting and through the submission of written comments, we encourage individuals with disabilities, including persons who represent service providers, service provider organizations, disability and rehabilitation research and policy groups, and representatives of advocacy organizations with specialized knowledge and experience, to suggest specific ways to improve future research for individuals with disabilities. We are also interested in hearing from individuals concerning how well the existing Federal research programs are responding to the changing needs of individuals with disabilities. We are interested in comments covering a wide range of research areas, including, but not limited to, the following:

- Rehabilitation, employment and community integration of military service members with disabilities, with a specific interest in input from the military community, including active duty service members and their families, service providers, retirees, and other stakeholders about research issues related to the continuum of care;
- Employment of people with disabilities;
- Health disparities;
- Access to and development of assistive technology and universally designed technologies; and
- Transition of youths with disabilities to postsecondary education, employment and independent living.

Your input will be used by the ICDR in its deliberations; however, we cannot respond individually to your comments.

The meetings will be open and accessible to the general public.

Background

The ICDR, authorized by the Rehabilitation Act of 1973, as amended, promotes coordination and cooperation among Federal departments and agencies conducting disability and rehabilitation research programs. Representatives of 16 Federal agencies, including 59 institutes and offices within those agencies, participate in the ICDR. The mandate of the ICDR includes three goals: Identify emerging issues and topic areas in disability and rehabilitation that would benefit from coordinated research planning, program development, and federal funding efforts; assess gaps and duplication in existing research programs, activities, and plans across agencies; and seek to coordinate existing or planned research, programs, activities, or projects among federal agencies. According to statute (Rehabilitation Act of 1973, as amended): ''After receiving input from individuals with disabilities and the individuals' representatives, the Committee shall identify, assess, and seek to coordinate all Federal programs, activities, and projects, and plans for such programs, activities, and projects with respect to the conduct of research related to rehabilitation of individuals with disabilities.''

The ICDR maintains a public Web site at *http://www.icdr.us,* which contains additional information about the ICDR. This public Web site also provides a comment form for collection of comments regarding the Federal research agenda in disability and rehabilitation research. The purpose of this public meeting and request for written comments is to ensure that individuals who may not have access to the Internet and the ICDR public Web site also have an opportunity to submit comments.

The Director of the National Institute on Disability and Rehabilitation Research, Office of Special Education and Rehabilitative Services, Department of Education is Chair of the ICDR. The Director announces a public meeting in 2007 and invites written comments with respect to the Federal disability and rehabilitation research agenda. Representatives of the ICDR will be present at the meeting to hear your comments. Your comments will be used by the ICDR in its deliberations; however we will not respond individually to your comments.

FOR FURTHER INFORMATION CONTACT: Constance Pledger, Executive Director ICDR, U.S. Department of Education, 550 12th Street, SW., room 6039, Potomac Center Plaza (PCP), Washington, DC 20202–2700. Telephone: (202) 245–7480. Fax: (202) 245–7630. Internet: *connie.pledger@ed.gov.*

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals who need accommodations for a disability in order to attend the meeting (i.e., interpreting services, assistive listening devices, material in alternative format) should notify Constance Pledger at (202) 245–7480 or TDD users may call FRS at 1–800–877–8339 ten business days in advance of the meeting. The meeting location is accessible to individuals with disabilities.

Participants: Individuals who wish to present comments at the public meeting must reserve time on the agenda by contacting the individual identified under Reservations and Additional Meeting Information. Reservations for presenting comments will be accepted on a first-come, first-served basis. Given the expected number of individuals interested in presenting comments at the meeting, reservations should be made as soon as possible.

Format: Participants will be allowed approximately five minutes to present their comments, depending upon the number of individuals who reserve time on the agenda. Prior to the meeting, participants must submit written copies of their comments, and other written or electronic versions of any relevant supporting information. Walk-ins must bring two written copies of their comments.

Reservations and Additional Meeting Information: All individuals attending the public meeting, including those presenting comments, must make reservations by July 31, 2007 by contacting: Constance Pledger, Executive Director ICDR.

If time permits, individuals who have not registered in advance may be allowed to make comments.

Assistance to Individuals with Disabilities at the Public Meeting: The meeting room and proceedings will be accessible to individuals with disabilities. In addition, when making reservations, anyone presenting comments or attending the meetings who needs special accommodations, such as sign language interpreters, Brailled agenda, computer-assisted real-time (CART) reporting, should inform Constance Pledger, Executive Director ICDR, of his or her specific accessibility needs. You must make requests for accommodations on or before July 31, 2007. Although we will attempt to meet a request we receive after that date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

Due Dates: We request your registration to attend along with written and e-mail comments to be provided no later than July 31, 2007.

Submit all comments to: Constance Pledger, Executive Director ICDR, U.S. Department of Education, 550 12th Street, SW., room 6039, PCP, Washington, DC 20202–2700. Telephone: (202) 245–7480. Fax: (202) 245–7630. Internet: *Connie.Pledger@ed.gov.*

Individuals who use a telecommunications device for the deaf (TDD) may call the FRS at 1–800–877–8339.

Individuals with disabilities may obtain a copy of this notice in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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Dated: June 22, 2007.

John H. Hager,

Assistant Secretary for Special Education andRehabilitative Services.

[FR Doc. E7–12503 Filed 6–27–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Energy Employees Occupational Illness Compensation Program Act of 2000; Revision to List of Covered Facilities

AGENCY: Department of Energy.

ACTION: Notice of revision of listing of covered facilities.

SUMMARY: Periodically, the Department of Energy (''Department'' or ''DOE'') publishes a list of facilities covered under the Energy Employees Occupational Illness Compensation Program Act of 2000 (''Act''), Title 36 of Public Law 106–398 (66 FR 4003; 66 FR 31218). This Notice revises the previous lists because it has been found that some designated atomic weapons employers (AWE) should not have been so designated. Previous lists were published on November 30, 2005, August 23, 2004, July 21, 2003, December 27, 2002, June 11, 2001, and January 17, 2001.

FOR FURTHER INFORMATION CONTACT: Patricia R. Worthington, PhD, Director, Office of Health and Safety (HS–10), (301) 903–5392.

ADDRESSES: The Department welcomes comments on this Notice. Comments should be addressed to: Patricia R. Worthington, PhD, Director, Office of Health and Safety (HS–10), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

SUPPLEMENTARY INFORMATION:

Purpose

The Act establishes a program to provide compensation to certain employees who developed illnesses as a result of their employment with DOE, its predecessor Agencies, and certain of its contractors and subcontractors. Section 3621 defines an AWE as an entity, other than the United States, that (a) Processed or produced, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining and milling; and (b) is designated by the Secretary of Energy as an AWE for the purposes of the compensation program. Section 3621 goes on to define an AWE facility as a facility, owned by an AWE, that is or was used to process or produce, for use by the United States, material that emitted radiation and was used in the production of an atomic weapon, excluding uranium mining or milling.

It has recently come to the attention of the Department that a number of entities previously designated as AWEs failed the basic definitional test for an AWE because the designated entities were Agencies of the U.S. Government. Since the definition of an AWE specifically excludes the United States, these previously made designations are invalid. To make it clear that these entities are not covered under the Act, this Notice formally removes the following entities from the list.

- Naval Research Laboratory, previously designated as an AWE in the District of Columbia.
- Philadelphia Navy Yard, previously designated as an AWE in Philadelphia, Pennsylvania.
- Watertown Arsenal (Building 421), previously designated as an AWE in Watertown, Massachusetts.

Issued in Washington, DC, on June 14, 2007.

Glenn S. Podonsky,

Chief Health, Safety and Security Officer,Office of Health, Safety and Security.

[FR Doc. E7–12511 Filed 6–27–07; 8:45 am]

BILLING CODE 6450–50–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[IC07–549B–001, FERC 549B]

Commission Information Collection Activities, ProposedCollection; Comment Request; Extension

June 20, 2007.

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission) has submitted the information collection described below to the Office of Management and Budget (OMB) for review and extension of this information collection requirement. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission did not receive any comments in response to an earlier **Federal Register** notice of March 19, 2007 (72 FR 12786–12787) and has made a notation in its submission to OMB.

DATES: Comments on the collection of information are due by July 28, 2007.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to OMB should be filed electronically, c/o *oira_submission@omb.eop.gov* and include the OMB Control No. as a point of reference. The Desk Officer may be reached by telephone at 202–395–4650. A copy of the comments should also be sent to the Federal Energy Regulatory Commission, Office of the Executive Director, ED–34, Attention: Michael Miller, 888 First Street, NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those persons filing electronically do not need to make a paper filing. For paper filings an original and 14 copies, of such comments should be submitted to the Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and should refer to Docket No. IC07–549B–001.

Documents filed electronically via the Internet must be prepared in WordPerfect, MS Word, Portable Document Format, or ASCII format. To file the document, access the Commission's Web site at *http://www.ferc.gov* and click on ''Make an E-Filing,'' and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments. User assistance for electronic filings is available at 202–502–8258 or by e-mail to *efiling@ferc.gov.* Comments should not be submitted to this e-mail address.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the ''*eLibrary*'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For user assistance, contact *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov.*

SUPPLEMENTARY INFORMATION:

Description

The information collection submitted for OMB review contains the following:

1. *Collection of Information:* FERC 549B ''Gas Pipeline Rates: Capacity Information''.
2. *Sponsor:* Federal Energy Regulatory Commission.
3. *Control No.:* 1902–0169.

The Commission is now requesting that OMB approve and extend the expiration date for an additional three years with no changes to the existing collection. The information filed with the Commission is mandatory.

4. *Necessity of the Collection of Information:* Submission of the

information is necessary for the Commission to carry out its responsibilities in implementing the statutory provisions of sections 4, 5, and 16 of the NGA, 15 U.S.C. 717c–717o, Public Law 75–688, 52 Stat. 822 and 830 and Title III of the NGPA, 15 U.S.C. 3301–3432, Public Law 95–621.

Capacity Reports

On April 4, 1992, in Order No. 636, the Commission established a capacity release mechanism under which shippers could release firm transportation and storage capacity on either a short or long term basis to other shippers wanting to obtain capacity. Pipelines posted available firm and interruptible capacity information on their electronic bulletin boards (EBBs) to inform potential shippers. On September 11, 1992, in Order No. 636–A, the Commission determined, through staff audits, that the efficiency of the capacity release mechanism could be enhanced by standardizing the content and format of capacity release information and the methods by which shippers access this information, posted to EBBs.

On April 4, 1995, through Order 577 (RM95–5–000), the Commission amended §284.243(h) of its regulations to allow shippers the ability to release capacity without having to comply with the Commission's advance posting and bidding requirements.

To create greater substitution between different forms of capacity and to enhance competition across the pipeline grid, on February 25, 2000, in Order No. 637 RM98–10–000), the Commission revised its capacity release regulations regarding scheduling, segmentation and flexible point rights, penalties, and reporting requirements. This resulted in more reliable capacity information availability and price data that shippers needed to make informed decisions in a competitive market as well as to improve shipper's and the Commission's availability to monitor marketplace behavior.

Index of Customers

In Order 581, issued September 28, 1995, the Commission established the Index of Customers (IOC) information requirement. The Index of Customers had two functions, first, for analyzing capacity held on pipelines and second, for providing capacity information to the market. The Index of Customers information aids the capacity release system by enabling shippers to identify and locate those holding capacity rights that the shippers may want to acquire. The information was required to be posted on the pipeline's EBB and filed on electronic media with the Commission. This first Index contained, for all firm customers under contract as of the first day of the calendar quarter, the full legal name of the shipper, the rate schedule number for which service is contracted, the contract effective and expiration dates, and the contract quantities.

In Order 637, the Commission required the following additional information: the receipt and delivery points held under contract and the zones or segments in which the capacity is held; the common transaction point codes; the contract number; a shipper identification number, such as DUNS; an indication whether the contract includes negotiated rates; the names of any agents or asset managers that control capacity in a pipeline rate zone; and any affiliate relationship between the pipeline and the holder of capacity. The Index is now provided through a quarterly filing on electronic media to the Commission and is posted on pipelines' Internet Web sites.

5. *Respondent Description:* The respondent universe currently comprises 103 companies (on average) subject to the Commission's jurisdiction. Capacity reports: 179,838 hours/2080 work hours per year × $122,137 = $10,560,035; Index of Customers (IOC): 1,236 hours/2080 work hours per year × $122,137 = $72,578 Total Costs = $10,632,613. The estimated annual cost per respondent is: Capacity Reports: $102,525; Index of Customers: $705.

6. *Estimated Burden:* 181,074 total hours, 103 respondents (average), 6 (Capacity Reports), 4 (Index of Customers) responses per respondent, and 291 (Capacity Reports), 3 (Index of Customers) hours per response (rounded off and average time)

7. *Estimated Cost Burden to respondents:* 181,074 hours/2080 hours per years × $122,137 per year = $10,560,035. The cost per respondent is equal to $102,525; Index of Customers: $705.

Statutory Authority: Statutory provisions of sections 4, 5 and 16 Natural Gas Act, 15 U.S.C. 717c–717o.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12469 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP07–413–001]

Columbia Gas Transmission Corporation; Notice of Compliance Filing

June 20, 2007.

Take notice that on June 18, 2007, Columbia Gas Transmission Corporation (Columbia) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, with an effective date of August 1, 2007:

Seventh Revised Sheet No. 538
First Revised Sheet No. 538A
Third Revised Sheet No. 540

Columbia states that it is making this filing in compliance with the Commission's Order in this docket, issued June 5, 2007.

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 in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12472 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP07–412–001]

Columbia Gulf Transmission Company; Notice of Compliance Filing

June 20, 2007.

Take notice that on June 18, 2007, Columbia Gulf Transmission Company (Columbia Gulf) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, First Revised Sheet No. 333A and First Revised Sheet No. 333C, with an effective date of August 1, 2007.

Columbia Gulf states that it is making this filing in compliance with the Commission's Order in this docket issued June 5, 2007.

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 in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12471 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP07–490–000]

Great Lakes Gas Transmission, Limited Partnership; Notice of Proposed Changes in FERC Gas Tariff

June 20, 2007.

Take notice that on June 15, 2007, Great Lakes Gas Transmission Limited Partnership (Great Lakes) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the tariff sheets listed on Appendix A to the filing, to become effective August 1, 2007.

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 and 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 in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12476 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–81–034]

Kinder Morgan Interstate Gas Transmission LLC; Notice of Compliance Filing

June 20, 2007.

Take notice that on June 15, 2007, Kinder Morgan Interstate Gas Transmission LLC (KMIGT) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1–A, the following tariff sheets, to be effective June 1, 2007:

Sixteenth Revised Sheet No. 4G
Tenth Revised Sheet No. 4G.01
Fifth Revised Sheet No. 4J
Sixth Revised Sheet No. 4K
Second Revised Sheet No. 4K.01
Ninth Revised Sheet No. 4L
Second Revised Sheet No. 4M

KMIGT states that the tariff sheets are being filed in compliance with the Commission's December 31, 1996, ''Order Accepting Tariff Filing Subject to Conditions'', in Docket No. RP97–81 (77 FERC ¶ 61,350) and the Commission's Letter Orders dated March 28, 1997 and November 30, 2000 in Docket Nos. RP97–81–001 and RP01–70–000, respectively.

KMIGT states that a copy of this filing has been served upon all parties to this proceeding, its customers and affected state commissions.

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 in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12470 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP07–492–000]

Natural Gas Pipeline Company; Notice of Petition for Temporary Waiver of Tariff Provisions

June 20, 2007.

Take notice that on June 15, 2007, Natural Gas Pipeline Company of America (Natural) tendered for filing a Petition For Temporary Waiver of Tariff Provisions and Request for Expedited Action.

Natural states that the purpose of this filing is to seek a temporary waiver of certain tariff provisions in order to expand opposite leg secondary point rights, so as to offset the impact of an expected outage of Natural's Amarillo Mainline during the months of July through September 2007 that will remove from service a pipeline valve section of Segment 14, extending from the east side of the Mississippi River to Natural's Compressor Station 10 in Henry County, Illinois.

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 and 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 date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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.

Intervention and Protest Date: 5 p.m. Eastern Time June 26, 2007.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12475 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP07–491–000]

Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

June 20, 2007.

Take notice that on June 15, 2007, Northern Natural Gas Company (Northern) tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets, with an effective date of August 1, 2007:

2nd Revised Sheet No. 54B 21
Revised Sheet No. 61 21
Revised Sheet No. 62
1 Revised 24 Revised Sheet No. 63
1 Revised 23 Revised Sheet No. 64

Northern states that the filing is being made in accordance with the provisions for adjusting fuel percentages in the event of the abandonment of compression contained in Sheet No. 54 of its tariff.

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 and 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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12473 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP07–446–001]

Northern Natural Gas Company; Notice of Compliance Filing

June 20, 2007.

Take notice that on June 15, 2007, Northern Natural Gas Company

(Northern), tendered for filing in its FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets, effective June 11, 2007:

1 Revised 2 Revised Sheet No. 206A
Substitute 6 Revised Sheet No. 251
Substitute 13 Revised Sheet No. 252

Northern states that it is filing the above-referenced tariff sheets to comply with the Commission Order in Docket No. RP07–446–000, issued on June 8, 2007.

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 in accordance with the provisions of section 154.210 of the Commission's regulations (18 CFR 154.210). 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 email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12478 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL03–37–007]

Town of Norwood, Massachusetts v. National Grid USA, New England Electric System, New England Power Company, Massachusetts Electric Company, The Narragansett Electric Company; Notice of Compliance Filing

June 21, 2007.

Take notice that on June 14, 2007, New England Power Company filed a compliance filing, pursuant to the Commission's Order on Remand issued May 17, 2007, *Town of Norwood, Massachusetts* v. *National Grid USA, et al.*, 119 FERC ¶ 61,148 (2007).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on July 5, 2007.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12484 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–200–027]

Rockies Express Pipeline LLC; Notice of Tariff and Negotiated Rate Filing

June 20, 2007.

Take notice that on June 18, 2007, Rockies Express Pipeline LLC (REX) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Twenty-Second Revised Sheet No. 22, to be effective June 19, 2007.

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 and 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 in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12474 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL07–74–000]

Intermountain Rural Electric Association, Complainant v. Public Service Company of Colorado, Respondent; Notice of Complaint

June 21, 2007.

Take notice that on June 20, 2007, pursuant to Rule 218 of the Federal Energy Regulatory Commission's (Commission) Rules and Practice and Procedure and sections 206 and 306 of the Federal Power Act, 16 U.S.C. 824e and 825e, Intermountain Rural Electric Association (Complainant) filed a formal complaint against the Public Service Company of Colorado (Respondent), alleging that it believes (1) That it is being charged unjust and unreasonable rates for distribution losses under the provisions of the Second Restated and Amended Power Purchase Agreement (PPA), Second Revised Rate Schedule No. 51, *Xcel Energy Services, Inc.*, Docket No. ER05–1248–000; and (2) the Respondent has unilaterally increased the distribution loss percentage without filing with or the approval of the Commission.

The Complainant is requesting the Commission to order the Respondent to (1) Refund, with interest, all amounts unlawfully charged by the Respondent to the Complainant under its PPA; (2) confirm to the Respondent may not modify the distribution loss percentage, or any other aspect of the PPA, without filing for and obtaining the Commission's acceptance under section 205 of the Federal Power Act, U.S.C. 824d, and under section 5 of the Rate Schedule A of the PPA, Second Revised Sheet No. 20, the Respondent cannot make any such filing with the Commission that would result in an increase to the Complainant's base rates to become effective prior to January 1, 2009.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on July 10, 2007.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12480 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 21, 2007.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER01–1305–014.

Applicants: Westar Generating, Inc.

Description: Westar Generating, Inc submits its compliance filing in accordance with Article IV, Informational Filing of the Settlement Agreement.

Filed Date: 06/18/2007.

Accession Number: 20070619–0139.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER05–231–006.

Applicants: PSEG Power Connecticut, LLC.

Description: Compliance filing of the Settling Parties and Alternative Request for Rehearing of FERC's 5/18/07 Order re PSEG Power Connecticut LLC.

Filed Date: 06/18/2007.

Accession Number: 20070620–0129.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–478–001.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator Inc submits proposed revisions to its Open Access Transmission and Energy Markets Tariff to comply with specific directives set forth in FERC's 5/17/07 Order.

Filed Date: 06/18/2007.

Accession Number: 20070620–0128.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–648–001.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corp submits its filing in compliance with FERC's 5/18/07 Order conditionally accepting tariff amendments etc.

Filed Date: 06/18/2007.

Accession Number: 20070620–0119.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–777–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1422 with the Village of Deshler.

Filed Date: 06/18/2007.

Accession Number: 20070620–0107.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–778–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1416 with the Village of Arcadia.

Filed Date: 06/18/2007.

Accession Number: 20070620–0108.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–779–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits

an Amendment to the Interconnection & Local Delivery Service Agreement 1423 with the Village of Greenwich.

Filed Date: 06/18/2007.

Accession Number: 20070620–0114.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–780–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1417 with the Village of Bloomdale.

Filed Date: 06/18/2007.

Accession Number: 20070620–0116.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–781–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1418 with the City of Bryan.

Filed Date: 06/18/2007.

Accession Number: 20070620–0105.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–785–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1424 with the Village of Plymouth.

Filed Date: 06/18/2007.

Accession Number: 20070620–0111.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–786–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1427 with the City of St Clairsville.

Filed Date: 06/18/2007.

Accession Number: 20070620–0110.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–787–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1424 with the Village of Ohio City.

Filed Date: 06/18/2007.

Accession Number: 20070620–0106.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–789–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1429 with the Village of Sycamore.

Filed Date: 06/18/2007.

Accession Number: 20070620–0112.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–790–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1428 with the Village of Shiloh.

Filed Date: 06/18/2007.

Accession Number: 20070620–0117.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–791–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1430 with the City of Wapakoneta.

Filed Date: 06/18/2007.

Accession Number: 20070620–0115.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–797–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1431 with the Village of Wharton.

Filed Date: 06/18/2007.

Accession Number: 20070620–0109.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–798–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1420 with the City of Clyde.

Filed Date: 06/18/2007.

Accession Number: 20070620–0113.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–800–001.

Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp as designated agent for AEP Operating Companies submits an Amendment to the Interconnection & Local Delivery Service Agreement 1419 w/ the Village of Carey.

Filed Date: 06/18/2007.

Accession Number: 20070620–0121.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–878–001.

Applicants: Atlantic City Electric Company.

Description: Atlantic City Electric Co submits an executed Interconnection Agreement with the City of Vineland, New Jersey.

Filed Date: 06/18/2007.

Accession Number: 20070620–0120.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–912–001.

Applicants: Potomac Electric Power Company.

Description: Answer of PEPCO to Motion for Partial Summary Disposition, Protest, and Expression of Support.

Filed Date: 06/20/2007.

Accession Number: 20070620–5049.

Comment Date: 5 p.m. Eastern Time on Wednesday, July 11, 2007.

Docket Numbers: ER07–914–001.

Applicants: Delmarva Power & Light Company.

Description: Motion for Leave to Answer and Answer of Delmarva Power and Light Company.

Filed Date: 06/20/2007.

Accession Number: 20070620–5050.

Comment Date: 5 p.m. Eastern Time on Wednesday, July 11, 2007.

Docket Numbers: ER07–974–001.

Applicants: Wisconsin Electric Power Company.

Description: Errata to WDSA between Wisconsin Electric Power Company and City of Norway, Michigan.

Filed Date: 06/12/2007.

Accession Number: 20070612–5048.

Comment Date: 5 p.m. Eastern Time on Tuesday, July 03, 2007.

Docket Numbers: ER07–1047–000.

Applicants: New York State Electric and Gas Corporation.

Description: New York State Electric & Gas Corp submits this supplement to FERC Rate Schedule 200—Facilities Agreement w/ the New York Power Authority pursuant to section 205 of the Federal Power Act etc.

Filed Date: 06/18/2007.

Accession Number: 20070620–0118.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–1048–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits its revised rate sheets to Grand Crossing E Street Wholesale Distribution Load Interconnection Facility Agreement etc.
Filed Date: 06/19/2007.
Accession Number: 20070620–0127.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 10, 2007.

Take notice that the Commission received the following electric securities filings

Docket Numbers: ES07–41–000.
Applicants: Duquesne Light Company.
Description: Request for Permission to Issue short term debt of Duquesne Light Company under ES07–41.
Filed Date: 06/20/2007.
Accession Number: 20070620–5054.
Comment Date: 5 p.m. Eastern Time on Wednesday, July 11, 2007.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and § 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,
Secretary.

[FR Doc. E7–12467 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 20, 2007.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC07–104–000.
Applicants: Granite Ridge I SPE LLC; Granite Ridge Energy, LLC; Merrill Lynch Credit Products, LLC; Electron Holdings, LLC; Cargill Financial Services International; King Street Capital, L.P.; KSCH Energy V Limited; TPG Credit Opportunities Fund, L.P.
Description: Granite Ridge I SPE LLC *et al.* submit an application for order authorizing the Disposition of Jurisdictional Facilities under section 203 of the FPA.
Filed Date: 6/14/2007.
Accession Number: 20070618–0132.
Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: EC07–105–000.
Applicants: Phelps Dodge Corporation; Phelps Dodge Energy Services, LLC; Phelps Dodge Power Marketing, LLC.
Description: Phelps Dodge Corporation *et al.* submit a joint application for authorization to transfer ownership interest in exempt wholesale generators and on 6/15/07 submit an errata to this filing.
Filed Date: 6/14/2007; 6/15/2007.
Accession Number: 20070618–0130.
Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: EC07–106–000.
Applicants: Williams Power Company, Inc.; Bear Energy LP.
Description: Williams Power Co, Inc and Bear Energy LP submits joint application for authorization of the disposition of jurisdictional facilities.
Filed Date: 6/14/2007.
Accession Number: 20070618–0134.
Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: EC07–107–000.
Applicants: Reliant Energy Power Supply, LLC; Reliant Energy Solutions East, LLC; Merrill Lynch Commodities, Inc.
Description: Reliant Energy Power Supply, LLC, Reliant Energy Solutions East, LLC and Merrill Lynch Commodities, Inc submit an application for authorization for an indirect transfer of control over certain jurisdictional facilities.
Filed Date: 6/15/2007.
Accession Number: 20070619–0199.
Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Docket Numbers: EC07–108–000.
Applicants: Acadia Power Partners, LLC; Calpine Acadia Holdings, LLC; Acadia Power Holdings, LLC.
Description: Joint application for approval of Acadia Power Partners, LLC, Calpine Acadia Holdings, LLC and Acadia Power Holdings, LLC on the indirect transfer of its existing interest.
Filed Date: 6/15/2007.
Accession Number: 20070619–0198.
Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG07–58–000.
Applicants: Forward Energy LLC.
Description: Forward Energy LLC submits a Notice of Self-Certification of Exempt Wholesale Generator Status pursuant to Sections 3.66.1 and 366.7(a) of the Commission's Regulations.
Filed Date: 6/12/2007.
Accession Number: 20070614–0108.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 03, 2007.

Docket Numbers: EG07–59–000.
Applicants: Kleen Energy Systems, LLC.
Description: Kleen Energy Systems, LLC as the Owner of the Kleen Energy Generating Facility submits a notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 6/15/2007.
Accession Number: 20070615–5015.
Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Docket Numbers: EG07–60–000.
Applicants: Hopewell Cogeneration Ltd Partnership.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Hopewell Cogeneration Limited Partnership.
Filed Date: 6/15/2007.

Accession Number: 20070615–5052.
Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER00–980–015.
Applicants: Bangor Hydro-Electric Company.
Description: Bangor Hydro-Electric Co submits an informational filing showing the implementation of their formula rate for the charges that became effective 6/1/07.
Filed Date: 6/15/2007.
Accession Number: 20070619–0141.
Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Docket Numbers: ER00–1053–020.
Applicants: Maine Public Service Company.
Description: Maine Public Service Company submits this informational filing setting forth the changed open access transmission tariff charges effective 6/1/07 together with back-up materials etc.
Filed Date: 06/15/2007.
Accession Number: 20070619–0135.
Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Docket Numbers: ER03–198–008.
Applicants: Pacific Gas & Electric Company.
Description: Pacific Gas & Electric Company (PG&E) submits a notice of change in status due to execution and CPUC approval of a multi-year tolling agreement between Mirant Delta, LLC (Mirant) and PG&E.
Filed Date: 6/14/2007.
Accession Number: 20070614–5029.
Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: ER04–944–003.
Applicants: Reliant Energy Wholesale Generation, LLC.
Description: Reliant Energy Wholesale Generation LLC submits its triennial market power analysis and revisions to its market-based rate tariff to remove sheets codifying FERC's previously effective market behavior rules.
Filed Date: 6/15/2007.
Accession Number: 20070619–0137.
Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Docket Numbers: ER05–17–008.
Applicants: Trans-Electric NTD Path 15, LLC.
Description: Trans-Elec NTD Path 15, LLC submits revisions to its Transmission Owner Tariff, including the Transmission Revenue Requirement contained in accordance w/FERC's order on initial decision.
Filed Date: 6/12/2007.
Accession Number: 20070614–0092.
Comment Date: 5 p.m. Eastern Time on Tuesday, July 03, 2007.

Docket Numbers: ER06–1088–002.
Applicants: Entergy Services, Inc.
Description: Entergy Services Inc submits its compliance refund report.
Filed Date: 6/14/2007.
Accession Number: 20070618–0127.
Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: ER06–1552–003.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator Inc submits its proposed revisions to its Open Access Transmission and Energy Markets Tariff etc.
Filed Date: 6/18/2007.
Accession Number: 20070619–0160
Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–284–003.
Applicants: San Diego Gas & Electric Company.
Description: San Diego Gas & Electric Company submits its compliance filing.
Filed Date: 6/15/2007.
Accession Number: 20070619–0138.
Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Docket Numbers: ER07–478–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator Inc submits proposed revisions to its Open Access Transmission and Energy Markets Tariff to comply with specific directives set forth in FERC's 5/17/07 Order.
Filed Date: 6/18/2007.
Accession Number: 20070620–0128.
Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–583–002.
Applicants: Commonwealth Edison Company.
Description: Commonwealth Edison Company of Indiana Inc submits its compliance filing.
Filed Date: 6/15/2007.
Accession Number: 20070619–0136.
Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Docket Numbers: ER07–1013–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection LLC submits an executed interconnection service agreement among PJM, FirstEnergy Nuclear Operating Company et al and notices of cancellation for an interim interconnection services.
Filed Date: 6/5/2007.
Accession Number: 20070607–0201.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 26, 2007.

Docket Numbers: ER07–1033–000.
Applicants: New York Independent System Operator, Inc.
Description: New York Independent System Operator Inc submits proposed revisions to its Market Administration and Control Area Services Tariff to revised methodology by which the NYISO included start–up costs etc.
Filed Date: 6/13/2007.
Accession Number: 20070615–0300.
Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: ER07–1034–000.
Applicants: California Independent System Operator Corporation
Description: Southern California Edison submits an unexecuted Large Generation Interconnection Agreement with Green Borders Geothermal LLC.
Filed Date: 6/14/2007.
Accession Number: 20070615–0305.
Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: ER07–1035–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits a notice regarding the revised transmission Access Charges effective 3/1/07.
Filed Date: 6/14/2007.
Accession Number: 20070618–0124.
Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: ER07–1036–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection LLC submits revisions to its Credit Policy Attachment Q of its Open Access Transmission Tariff, FERC Electric, Sixth Revised Volume 1.
Filed Date: 6/14/2007.
Accession Number: 20070618–0123.
Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: ER07–1037–000.
Applicants: Duke Energy Indiana, Inc.
Description: Duke Energy Indiana Inc submits a Power Coordination Agreement designated as Rate Schedule 269 with Indiana Municipal Power Agency dated 4/26/07.
Filed Date: 6/14/2007.
Accession Number: 20070618–0122.
Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: ER07–1038–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits

an amendment to the ISO Tariff 2007 Reference Price Amendment.

Filed Date: 6/14/2007.

Accession Number: 20070618–0125.

Comment Date: 5 p.m. Eastern Time on Thursday, July 5, 2007.

Docket Numbers: ER07–1039–000.

Applicants: Central Maine Power.

Description: Central Maine Power Company submits an executed Form of Local Service agreement for point–to–point service and executed Service Agreement for Local Network Transmission Service.

Filed Date: 6/15/2007.

Accession Number: 20070618–0126.

Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Docket Numbers: ER07–1041–000.

Applicants: Avista Corporation.

Description: Avista Corporation submits Second Revised Sheet 6 et al to its FERC Rate Schedule 323.

Filed Date: 6/18/2007.

Accession Number: 20070619–0157.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–1042–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits revised rate sheets to the Interconnection Facilities Agreement with Gas Recovery Systems Inc, Service Agreement 118 etc.

Filed Date: 6/18/2007.

Accession Number: 20070619–0158.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–1043–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits a Small Generator Interconnection Agreement and a Service Agreement for Wholesale Distribution Service with Cambrian Energy Woodville LLC.

Filed Date: 6/18/2007.

Accession Number: 20070619–0159.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Docket Numbers: ER07–1045–000.

Applicants: Kentucky Utilities Company.

Description: E.ON US, LLC submits a Letter Agreement between Kentucky Utilities Co and twelve existing KU wholesale municipal customers which receive power from the Southeastern Power Administration.

Filed Date: 6/15/2007.

Accession Number: 20070619–0134.

Comment Date: 5 p.m. Eastern Time on Friday, July 6, 2007.

Docket Numbers: ER07–1046–000.

Applicants: Dresden Energy, LLC.

Description: Dresden Energy, LLC submits a Notice of Cancellation of a revised tariff sheet to terminate its market–based rate tariff, designated as FERC Electric Tariff, Original Volume 1.

Filed Date: 6/18/2007.

Accession Number: 20070619–0143.

Comment Date: 5 p.m. Eastern Time on Monday, July 9, 2007.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12468 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12447–001]

Fort Dodge Hydroelectric Development Co; Notice of Availability of Environmental Assessment

June 21, 2007.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47879), the Office of Energy Projects has reviewed the application for an original license for the Fort Dodge Mill Dam Hydroelectric Project (project), to be located on the Des Moines River in Webster County, Iowa, and has prepared an Environmental Assessment (EA). In the EA, Commission staff analyzed the potential environmental effects of licensing the project and conclude that issuing a license for the project, with appropriate environmental measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the EA is on file with the Commission and is available for public inspection. The EA 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, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

Any comments should be filed within 30 days from the issuance date of this notice, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1–A, Washington, DC 20426. Please affix ''Fort Dodge Mill Dam Hydroelectric Project No. 12447–001'' to all comments. Comments may be filed electronically via Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''eFiling'' link. For further

information, contact Patrick Murphy at (202) 502–8755.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12479 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12778–001]

Fall Creek Hydro, LLC; Notice of Application Accepted for Filing and Soliciting Comments, Protests, and Motions To Intervene

June 21, 2007.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 12778–001.

c. *Date filed:* March 12, 2007.

d. *Applicant:* Fall Creek Hydro, LLC.

e. *Name and Location of Project:* The proposed Fall Creek Hydroelectric Project would be located on Fall Creek in Lane County, Oregon. The existing Fall Creek Dam is administered by the U.S. Army Corps of Engineers.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

g. *Applicant contact:* Mr. Brent Smith, Northwest Power Services, Inc., 975 South State Highway, Logan, UT 84321, (208) 745–0834.

h. *FERC Contact:* Tom Papsidero, (202) 502–6002.

i. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. 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. Please include the project number (P–12778–001) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person 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.

j. *Description of Existing Facilities and Proposed Project:* The proposed project, utilizing the existing U.S. Army Corps of Engineers' Fall Creek Dam and reservoir would consist of: (1) A proposed intake structure, (2) a proposed 650-foot-long, 144-inch-diameter steel penstock, (3) a proposed powerhouse containing three generator units with an installed capacity of 10.0 megawatts, (4) a 1.0-mile-long, 15 kV transmission line, and (5) appurtenant facilities. The project would have an annual generation of 18.7 GWh.

k. *Location of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, 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 inspection and reproduction at the address in item g above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. *Competing Preliminary Permit:* Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

n. *Competing Development Application:* Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

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, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. *Proposed Scope of Studies under Permit:* A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. *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.

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 ''e-filing'' link. The Commission strongly encourages electronic filing.

r. *Filing and Service of Responsive Documents:* Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original

and the number of copies provided by the Commission's regulations 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, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. *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.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12481 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. DI07–10–000]

David and John Baxter; Notice of Declaration of Intention and Soliciting Comments, Protests, and/or Motions to Intervene

June 21, 2007.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Declaration of Intention.

b. *Docket No.:* DI07–10–000.

c. *Date Filed:* June 4, 2007.

d. *Applicant:* David and John Baxter.

e. *Name of Project:* Baxter Ranch Hydropower Project.

f. *Location:* The proposed Baxter Ranch Hydropower Project will be located on Birch Creek, near Big Pine, in Inyo County, California, affecting T. 10 S., R. 34 E, sec. 19, Mt. Diablo Meridian.

g. *Filed Pursuant to:* Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant Contact:* Rachel Weksler, 363 Academy Avenue, Bishop, CA 93514; telephone: (760) 873–4211.

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:* July 23, 2007.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and/or interventions may be filed electronically via the Internet in lieu of paper. Any questions, please contact the Secretary's Office. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing link.

Please include the docket number (DI07–10–000) on any comments, protests, and/or motions filed.

k. *Description of Project:* The proposed run-of-river Baxter Ranch Hydropower Project will include: (1) A 67-foot-long conduit from Birch Creek to the powerhouse, including a 25-foot-long sand trap; (2) A 16-foot-square powerhouse containing an impulse turbine and a 30-kW generator; (3) a 65-foot-long tailrace to Birch Creek; and (4) appurtenant facilities. The proposed project will provide power to ranch facilities, including a honey house and irrigation facilities. The project will not be connected to an interstate grid, and will not occupy any tribal or federal lands

When a Declaration of Intention 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 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, select ''Docket#'' and follow the instructions. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659.

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.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12482 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 9074–051]

Warrensburg Hydro Power Limited Partnership; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

June 21, 2007.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Request for temporary variance of the reservoir elevation requirement.

b. *Project No.:* 9074–051.

c. *Date Filed:* June 18, 2007.

d. *Applicant:* Warrensburg Hydro Power Limited Partnership.

e. *Name of Project:* Warrensburg Hydroelectric Project.

f. *Location:* Schroon River, in Warren County, New York.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Daniel McCarty, Boralex Hydro Operations, Inc., 39 Hudson Falls Road, South Glens Falls, New York 12803, (518) 747–0930.

i. *FERC Contact:* Thomas LoVullo at (202) 502–8900, or *thomas.lovullo@ferc.gov.*

j. *Deadline for filing comments, motions to intervene and protests:* July 16, 2007.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–9074) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* Warrensburg Hydro Power Limited Partnership (licensee) is requesting a temporary variance of the reservoir elevation requirement stipulated in the Warrensburg Hydroelectric Project license to complete maintenance work. The south abutment or berm wall area of the project exhibits leakage that began shortly after the completion of the project in 1988. Based on continual leakage monitoring programs, numerous leakage mitigation measures have taken place over the years. The mitigation measures appear to have managed or controlled the situation; however, undesirable leakage continues. Based on the findings of two independent engineering assessments, the integrity of the south berm wall is not believed to be compromised in its current condition. Nevertheless, based on recommendations, the licensee would like to proceed in implementing a plan (begun in 2005) to correct the leakage situation. The work activities would require the reservoir to be drawn down as similarly done in 2005 and 2006. The proposed schedule indicates the draw down to commence on July 31 and the construction work to occur over a four to six week period.

l. *Location of the Application:* The filing 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, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://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/docsfiling/esubscription.asp* to be notified vial e-mail or 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. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(I)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12483 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12678–002]

ORPC Alaska, LLC; Notice of Surrender of Preliminary Permit

June 20, 2007.

Take notice that ORPC Alaska, LLC, permittee for the proposed Resurrection Bay OCGen™ Power Project, has requested that its preliminary permit be terminated. The permit was issued on April 16, 2007, and would have expired on March 31, 2010.[1] The project would have been located in Resurrection Bay in the Gulf of Alaska between Aialik Peninsula and Resurrection Peninsula, near the City of Seward in Kenai Peninsula Borough, Alaska.

The permittee filed the request on May 29, 2007, and the preliminary permit for Project No. 12678 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday, part-day holiday that affects the Commission, or legal holiday as described in section 18 CFR 385.2007, in which case the effective date is the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR Part 4, may be filed on the next business day.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–12477 Filed 6–27–07; 8:45 am]

BILLING CODE 6717–01–P

[1] 119 FERC ¶ 62,042.

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8332–9; Docket ID No. EPA–HQ–ORD–2007–0517]

Integrated Science Assessment for Particulate Matter

AGENCY: Environmental Protection Agency.

ACTION: Notice; call for information.

SUMMARY: The U.S. Environmental Protection Agency (EPA), Office of Research and Development National Center for Environmental Assessment (NCEA) is preparing an Integrated Science Assessment (ISA) as part of the review of the National Ambient Air Quality Standards (NAAQS) for particulate matter (PM). This ISA is intended to update and revise, where appropriate, the scientific assessment presented in the Air Quality Criteria for Particulate Matter (PM), EPA/600/P–99/002aF–bF, published in October 2004. Interested parties are invited to assist the EPA in developing and refining the scientific information base for PM by submitting research studies that have been published, accepted for publication, or presented at a public scientific meeting.

DATES: All communications and information should be submitted by August 27, 2007.

ADDRESSES: Information may be submitted electronically, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions as provided in the section of this notice entitled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: For details on submitting research information from the public, contact the Office of Environmental Information (OEI) Docket; telephone: 202–566–1752; facsimile: 202–566–1753; or e-mail: *ORD.Docket@epa.gov.* For technical information, contact Lori White, PhD, NCEA; telephone: 919–541–3146; facsimile: 919–541–1818; or e-mail: *white.lori@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Information About the Project

Section 108(a) of the Clean Air Act (CAA) directs the Administrator to identify certain pollutants which ''in his judgment, may reasonably be anticipated to endanger public health and welfare'' and whose ''presence * * * in the ambient air results from numerous or diverse mobile or stationary sources'' and to issue air quality criteria for them. These air quality criteria are to ''accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air. * * *'' Under section 109 of the CAA, EPA establishes National Ambient Air Quality Standards (NAAQS) for each pollutant for which EPA has issued criteria. Section 109(d) requires periodic review and, if appropriate, revision of existing air quality criteria to reflect advances in scientific knowledge on the effects of the pollutant on public health and welfare. EPA is then to revise the NAAQS, if appropriate, based on the revised air quality criteria.

Particulate matter is one of six principal (or ''criteria'') pollutants for which EPA has established NAAQS. Periodically, EPA reviews the scientific basis for these standards by preparing an Integrated Science Assessment (ISA), historically referred to as an Air Quality Criteria Document (AQCD). The ISA and supplementary annexes are the scientific bases for the additional technical and policy assessments that form the basis for EPA decisions on the adequacy of a current NAAQS and the appropriateness of new or revised standards. Early steps in this process include announcing the beginning of this periodic NAAQS review and the development of the ISA and requesting that the public submit scientific literature that they want to bring to the attention of the Agency as it begins this process. The Clean Air Scientific Advisory Committee (CASAC), an independent science advisory committee whose function is mandated by section 109(d)(2) of the CAA, is charged with independent expert scientific review of EPA's draft ISAs. As the process proceeds, the public will have opportunities to review and comment on the draft PM ISA. These opportunities will also be announced in the **Federal Register**. Since completion of the 2004 Air Quality Criteria for PM, EPA has continued to follow the scientific research on PM exposure and its effects on health and the environment. On July 21, 2006, EPA published a Provisional Assessment of Recent Studies on Health Effects of Particulate Matter Exposure (EPA/600/R–06/063) which presents findings of EPA's survey and provisional assessment of studies relevant to assessing the health effects of PM that were published too recently to be included in the 2004 PM AQCD. (71 FR 41409–10)

The Agency is interested in obtaining additional new information relevant to this review of the NAAQS for PM. We are especially interested in information concerning: (a) Toxicological studies of effects of controlled exposure to PM on laboratory animals, humans, and in vitro systems; (b) epidemiologic (observational) studies of health effects associated with ambient exposures of human populations to PM; and (c) ecological studies of the effects on agricultural crops and natural terrestrial and/or aquatic ecosystems of ambient exposures to PM. EPA also seeks recent information in other areas of PM research such as chemistry and physics, sources and emissions, analytical methodology, transport and transformation in the environment, and ambient concentrations. This and other selected literature relevant to a review of the NAAQS for PM will be assessed in the forthcoming PM ISA. One or more drafts of the PM ISA are expected to be made available by EPA for public comment and CASAC review during 2008 and 2009. Other opportunities for submission of new peer-reviewed, published (or in-press) papers will be possible as part of public comment on the additional draft documents that will be reviewed by CASAC. As part of this review of the PM NAAQS, EPA is also sponsoring a workshop entitled, ''Workshop to Discuss Policy-Relevant Science to Inform EPA's Integrated Plan for the Review of the Primary Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS)'' to highlight significant new and emerging PM research, and to make recommendations to the Agency regarding the design and scope of the review for the primary (health-based) PM standards to ensure that it addresses key policy-relevant issues and considers the new science that is relevant to informing our understanding of these issues. (72 FR 34003–04).

II. How To Submit Information to the Docket at www.regulations.gov.

Submit your materials, identified by Docket ID No. EPA–HQ–ORD–2007–0517 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting information.
- *E-mail: ORD.Docket@epa.gov.*
- *Fax:* 202–566–1753.
- *Mail:* Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, Room 3334 EPA West Building, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center 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. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

If you provide information by mail or hand delivery, please submit three copies of the materials. For attachments, provide an index, number pages consecutively, and submit an unbound original and three copies.

Instructions: Direct your materials to Docket ID No. EPA–HQ–ORD–2007–0517. It is EPA's policy to include all submitted materials in the public docket without change and to make the information available online at *http://www.regulations.gov,* including any personal information provided, unless it 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 within the submitted materials. If you submit information directly to EPA by e-mail without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the information that is placed in the public docket and made available on the Internet. If you submit materials electronically, 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 submitted material due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your submission. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: 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 materials, such as copyrighted material, are 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 OEI Docket in the EPA Headquarters Docket Center.

Dated: June 22, 2007.

Peter W. Preuss,

Director,National Center for Environmental Assessment.

[FR Doc. E7–12569 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8332–7]

Science Advisory Board Staff Office; Request for Nominations for Science Advisory Board Panels on Uncertainty Analysis and Expert Elicitation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces the formation of SAB Panels to address issues related to uncertainty analysis and expert elicitation and is soliciting nominations for members of the Panels.

DATES: Nominations should be submitted by July 19, 2007 per the instructions below.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information regarding this announcement may contact Dr. Angela Nugent, Designated Federal Officer, via telephone at: (202) 343–9981 or e-mail at: *nugent.angela@epa.gov.* The SAB mailing address is: U.S. EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. General information about the SAB as well as any updates concerning this request for nominations may be found on the SAB Web site at: *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION: There has been a recent increase in interest in the use of uncertainty analysis and expert elicitation as tools to be used in regulatory analyses and in support of EPA decision-making. At the request of EPA's Office of Air and Radiation and Office of the Science Advisor, the SAB plans to form several expert panels, as needed, to provide technical advice to EPA through the chartered SAB regarding the Agency's ongoing work in uncertainty analyses and expert elicitation. The SAB is a chartered Federal Advisory Committee, established by 42 U.S.C. 4365, to provide independent scientific and technical advice, consultation, and recommendations to the EPA Administrator on the technical bases for EPA policies and actions. The SAB expert panels to be formed to address scientific issues related to uncertainty analysis and expert elicitation will comply with the provisions of the Federal Advisory Committee Act (FACA) and all appropriate SAB procedural policies.

Several specific reports have called for increased attention to quantitative uncertainty analysis and expert elicitation. In 2002, the National Research Council (NRC) published a Report to Congress, titled ''Estimating the Health-Risk-Reduction Benefits of Proposed Air Pollution Regulations.'' One of the recommendations of the NRC was that ''EPA should begin to move the assessment of uncertainties from its ancillary analyses into the primary analysis by conducting probabilistic, multiple-source uncertainty analyses. This shift will require specification of probability distributions for major sources of uncertainty. These distributions should be based on available data and expert judgment.'' More recently, the Office of Management and Budget (OMB) suggested using expert elicitation as a tool in addressing Circular A–4 requirements (OMB, 2004) for probabilistic uncertainty analysis and also discussed its use in a Proposed Risk Assessment Bulletin (OMB, 2006). Provisions for expert elicitation were also included in EPA's recently revised cancer guidelines (2005). EPA's experience conducting expert elicitations has been limited, with the majority of experience in the Office of Air and Radiation.

The SAB Staff Office has received requests for advice from the SAB on four new advisory activities related to implementation of methods related to uncertainty analysis and expert elicitation. These four activities are summarized below.

EPA's Office of Air and Radiation has requested SAB review of a draft document, ''Hierarchy of Methods Report,'' that catalogues quantitative and qualitative methods available for characterizing uncertainty in risk assessments and regulatory impact analyses. The document provides guidance for selecting methods, given the type of uncertainty being addressed, the quantity and type of available evidence or data, and the ability to gather additional data. The document summarizes data requirements associated with different methods, resource needs, experience and acceptability, and other considerations on their use to support regulatory decisions. The Office of Air and

Radiation requests SAB review of the characterization of methods described in the report, including the applicability, limitations and resource needs and the soundness of the approaches outlined on how to select specific approaches to characterizing uncertainty for risk assessments and regulatory impact analyses.

The Office of Air and Radiation has requested SAB advice on a draft ''Influence Analysis Report,'' designed to help improve EPA analyses by identifying the sources of greatest impact on overall uncertainty. The Office of Air and Radiation requests advice on the methodological approach for developing the ''Influence Analysis Report'' to ensure that the office follows best practices for conducting influence analyses and adequately covers the issues contributing to uncertainty in analyses related to the benefits of air pollution-related environmental protection.

EPA's Office of the Science Advisor has requested SAB review of an ''Expert Elicitation (EE) Task Force White Paper.'' The White Paper discusses the potential utility of using expert elicitation to support EPA regulatory and non-regulatory analyses and decision-making, provides recommendations for expert elicitation ''good practices,'' and describes steps for a broader application across EPA. The Office of the Science Advisor has asked the SAB to provide advice regarding the potential usefulness of expert elicitation, how to strengthen the scientific basis for its use, and the implications for possible implementation at EPA.

EPA's Office of Air and Radiation has requested SAB review of an expert elicitation conducted to estimate the benefits of reduced premature mortalities associated with exposures to fine particles in the air. This expert elicitation was conducted in support of regulatory analyses for an upcoming proposed rulemaking (the Regulatory Impact Analysis of the Particulate Matter National Ambient Air Quality Standards). The Office of Air and Radiation has asked the SAB to review the design, implementation, and results of the expert elicitation and EPA's interpretation of those results within the particulate matter Regulatory Impact Analysis. The Agency seeks SAB advice on whether the interpretation and application of the results of the elicitation in the Regulatory Impact Analysis are consistent with the recommendations from the NRC and whether the results are presented in a valid, clear, and concise manner for use by a wide variety of audiences, including scientists, policy analysts, decision-makers, and the public.

Availability of the Review Materials: The EPA draft documents to be reviewed by the SAB Panel will be made available by the Office of Air and Radiation and Office of the Science Advisor. For questions and information concerning the review materials of the documents being developed by the Office of Air and Radiation, please contact Dr. Lisa Connor, at (919) 541–5060, or *connor.lisa@epa.gov*. For questions and information concerning the review materials of the documents being developed by the Office of the Science Advisor, please contact Dr. Robert Hetes, at (919) 541–1589, or *hetes.robert@epa.gov*.

Request for Nominations: The SAB Staff Office is requesting nominations for nationally and internationally recognized non-EPA scientists with expertise and experience related to uncertainty analysis or expert elicitation in the following fields: Statistics, mathematics, biostatistics, cognitive psychology, decision analysis, environmental economics, human health sciences, ecological science, epidemiology, policy analysis, risk assessment, and risk communication.

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate qualified individuals to add expertise to the SAB Uncertainty and Expert Elicitation Expert Panels in the areas of expertise described above. Nominations should be submitted in electronic format through the SAB Web site at the following URL: *http://www.epa.gov/sab*; or directly via the Form for Nominating Individuals to Panels of the EPA Science Advisory Board link found at URL: *http://www.epa.gov/sab/panels/paneltopics.html*. Please follow the instructions for submitting nominations carefully. To be considered, nominations should include all of the information required on the associated forms. Anyone unable to submit nominations using the electronic form and who has any questions concerning the nomination process may contact Dr. Angela Nugent, DFO, as indicated above in this notice. Nominations should be submitted in time to arrive no later than July 19, 2007.

For nominees to be considered, please include: Contact information; a curriculum vitae; a biosketch of no more than two paragraphs (containing information on the nominee's current position, educational background, areas of expertise and research activities, service on other advisory committees and professional societies; the candidate's special expertise related to the panel being formed; and sources of recent grant and/or contract support).

The EPA SAB Staff Office will acknowledge receipt of nominations. The names and biosketches of qualified nominees identified by respondents to the **Federal Register** notice and additional experts identified by the SAB Staff will be posted on the SAB Web site at: *http://www.epa.gov/sab.* Public comments on this ''Short List'' of candidates will be accepted for 21 calendar days. The public will be requested to provide relevant information or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates.

For the EPA SAB Staff Office, a balanced subcommittee or review panel includes candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. To establish individual expert panels for the advisory activities described above, the SAB Staff Office will consider public comments on the ''Short List'' of candidates, information provided by the candidates themselves, and background information independently gathered by the SAB Staff Office. Specific criteria to be used for Panel membership include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) absence of an appearance of a lack of impartiality; and (e) skills working in committees, subcommittees and advisory panels; and, for the Panel as a whole, (f) diversity of, and balance among, scientific expertise, viewpoints, etc.

The SAB Staff Office's evaluation of an absence of financial conflicts of interest will include a review of the ''Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency'' (EPA Form 3110-48). This confidential form allows Government officials to determine whether there is a statutory conflict between that person's public responsibilities (which includes membership on an EPA Federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded from the following URL address: *http://www.epa.gov/sab/pdf/epaform3110–48.pdf.*

The approved policy under which the EPA SAB Office selects subcommittees and review panels is described in the following document: Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board (EPA–SAB–EC–02–010), which is posted on the SAB Web site at: *http://www.epa.gov/sab/pdf/ec02010.pdf.*

Dated: June 22, 2007.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E7–12538 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8332–8]

Science Advisory Board Staff Office; Notification of Public Meetings of the Science Advisory Board Hypoxia Advisory Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA's Science Advisory Board (SAB) Staff Office is announcing two public teleconferences of the SAB Hypoxia Advisory Panel to discuss revisions to its draft advisory report concerning the hypoxic zone in the Gulf of Mexico.

DATES: The teleconferences will be held on July 30, 2007 from 2 p.m. to 5 p.m. (Eastern time) and August 1, 2007 from 2 p.m. to 5 p.m. (Eastern time).

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding the public meeting may contact Dr. Holly Stallworth, Designated Federal Officer (DFO), U.S. EPA Science Advisory Board Staff Office by telephone/voice mail at (202) 343–9867, or via e-mail at: *stallworth.holly@epa.gov.* The SAB mailing address is: US EPA, Science Advisory Board (1400F), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. General information about the SAB, as well as any updates concerning the meetings announced in this notice, may be found in the SAB Web Site at: *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Background: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the SAB Hypoxia Advisory Panel will hold public meetings to develop a report that details advances in the state of the science regarding hypoxia in the Northern Gulf of Mexico. The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice to the EPA Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

EPA participates with other Federal agencies, states and tribes in the Mississippi River/Gulf of Mexico Watershed Nutrient Task Force. In 2001, the Task Force released the Action Plan for Reducing, Mitigating and Controlling Hypoxia in the Northern Gulf of Mexico (or Action Plan available at: *http://www.epa.gov/msbasin/taskforce/actionplan.htm).* The Action Plan was informed by the science described in 2000 in An Integrated Assessment of Hypoxia in the Northern Gulf of Mexico (or Integrated Assessment available at: *http://www.noaa.gov/products/hypox_finalfront.pdf*) developed by the National Science and Technology Council, Committee on Environment and Natural Resources. Six technical reports provided the scientific foundation for the Integrated Assessment and are available at: *http://www.nos.noaa.gov/products/pub_hypox.html.* Given the passage of 6 years, EPA's Office of Water has requested that the SAB develop a report that evaluates the updated science regarding the causes and extent of hypoxia in the Gulf of Mexico, as well as the scientific basis of possible management options in the Mississippi River Basin.

In response to EPA's request, the SAB Staff Office formed the SAB Hypoxia Advisory Panel. Background on the Panel formation process was provided in a **Federal Register** notice published on February 17, 2006 (71 FR 8578–8580). The SAB Hypoxia Advisory Panel has previously held several face-to-face meetings (71 FR 45543–45544, 71 FR 66329–66330, 72 FR 5968–5969 and 72 FR 17158–17159) and teleconferences (71 FR 55786–55787, 71 FR 59107, 71 FR 77743–77744 and 72 FR 11359–11360). Information about the SAB Hypoxia Advisory Panel is available on the SAB Web site at: *http://www.epa.gov/sab.*

Availability of Meeting Materials: Materials in support of these meetings will be placed on the SAB Web Site at: *http://www.epa.gov/sab/* in advance of the meeting.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the SAB to consider during the advisory process. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to five minutes per speaker, with no more than a total of one hour for all speakers. Interested parties should contact Dr. Stallworth, DFO, at the contact information noted above, no later than July 23, 2007, to be placed on the public speaker list for the July 30 or August 1 meetings. *Written Statements:* Written statements should be received in the SAB Staff Office no later than July 23, 2007 so that the information may be made available to the SAB for their consideration prior to this meeting. Written statements should be supplied to the DFO in the following formats: one hard copy with original signature, and one electronic copy via e-mail at: *stallworth.holly@epa.gov* (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format).

Meeting Access: For information on access or services for individuals with disabilities, please contact Dr. Stallworth at (202) 343–9867 or *stallworth.holly@epa.gov.* To request accommodation of a disability, please contact Dr. Stallworth, preferably at least 10 days prior to the teleconference to give EPA as much time as possible to process your request.

Dated: June 22, 2007.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E7–12568 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket # EPA–RO4–SFUND–2007–0489; FRL–8332–5]

Anaconda/Milgo; Miami, Dade County, FL; Notice of Amended Settlement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Amended Settlement.

SUMMARY: In the **Federal Register** notice dated April 9, 2007 (72 FR 17551), EPA posted a Notice of Settlement under Section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), concerning the Anaconda/Milgo Superfund Site located in Miami, Dade County, Florida. In the body of the settlement one of the settling PRPs, Dade Metals Corporation, was mistakenly not listed as one of the

settling parties. EPA has amended the settlement to add Dade Metals Corporation. The past cost portion of the settlement remains unchanged.

DATES: The Agency will consider public comments only on the amended portion of the settlement until July 30, 2007. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate.

ADDRESSES: Copies of the amended portion of the settlement are available from Ms. Paula V. Batchelor. Submit your comments, identified by Docket ID No. EPA–RO4–SFUND–2007–0489 or Site name Anaconda/Milgo Superfund Site by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: Batchelor.Paula@epa.gov.*
- *Fax:* 404/562–8842/Attn Paula V. Batchelor.

Mail: Ms. Paula V. Batchelor, U.S. EPA Region 4, SD–SEIMB, 61 Forsyth Street, SW., Atlanta, Georgia 30303. ''In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.''

Instructions: Direct your comments to Docket ID No. EPA–R04–SFUND–2007–0489. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the U.S. EPA Region 4 office located at 61 Forsyth Street, SW., Atlanta, Georgia 30303. Regional office is open from 7 a.m. until 6:30 p.m. Monday through Friday, excluding legal holidays.

Written comments may be submitted to Ms. Batchelor within 30 calendar days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: Paula V. Batchelor at 404/562–8887.

Dated: June 15, 2007.

De'Lyntoneus Moore,

Acting Chief, Superfund Enforcement & Information Management Branch, Superfund Division.

[FR Doc. E7–12586 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8332–3]

Clean Water Act Section 303(d): Availability of 52 Total Maximum Daily Loads (TMDLs)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: This notice announces the availability of the administrative record file for comment on 52 TMDLs and the calculations for these TMDLs prepared by EPA Region 6 for waters listed in the state of Arkansas under section 303(d) of the Clean Water Act (CWA). These TMDLs were completed in response to the lawsuit styled *Sierra Club, et al.* v. *Browner, et al.,* No. LR–C–99–114.

DATES: Comments must be submitted in writing to EPA on or before July 30, 2007.

ADDRESSES: Comments on the 52 TMDLs should be sent to Ms. Diane Smith, Environmental Protection Specialist, Water Quality Protection Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Ave., Dallas, TX 75202–2733, facsimile (214) 665–7373, or e-mail: *smith.diane@epa.gov.* For further information, contact Diane Smith at (214) 665–2145. Documents from the administrative record file for these TMDLs are available for public inspection at this address as well. Documents from the administrative record file may be viewed at *http://www.epa.gov/region6/6wq/npdes/tmdl/index.htm,* or obtained by calling (214) 665–2145 or writing Ms. Smith at the above address. Please contact Ms. Smith to schedule an inspection.

FOR FURTHER INFORMATION CONTACT: Diane Smith at (214) 665–2145.

SUPPLEMENTARY INFORMATION: In 1999, five Arkansas environmental groups, the Sierra Club, Federation of Fly Fishers, Crooked Creek Coalition, Arkansas Fly Fishers, and Save our Streams (plaintiffs), filed a lawsuit in Federal Court against the EPA, styled *Sierra Club, et al.* v. *Browner, et al.*, No. LR–C–99–114. Among other claims, plaintiffs alleged that EPA failed to establish Arkansas TMDLs in a timely manner. EPA proposes these TMDLs pursuant to a consent decree entered in this lawsuit.

EPA Seeks Comments on 52 TMDLs

By this notice EPA is seeking comment on the following 52 TMDLs for waters located within the state of Arkansas:

Segment-reach	Waterbody name	Pollutant
08040205–005	Deep Bayou	Fecal coliform and E. coli.
08040205–013	Bayou Bartholomew	Fecal coliform and E. coli.
08040205–901	Bearhouse Creek	Fecal coliform and E. coli.
08040205–902	Harding Creek	Fecal coliform and E. coli.
08040205–903	Melton's Creek	Fecal coliform and E. coli.

Segment-reach	Waterbody name	Pollutant
08040205–904	Jacks Bayou	Fecal coliform and E. coli.
08040205–905	Cross Bayou	Fecal coliform and E. coli.
08040205–907	Chemin-A-Haut Creek	Fecal coliform and E. coli.
11010012–003	Cooper Creek	Fecal coliform and E. coli.
11010012–008	Strawberry River	Fecal coliform and E. coli.
11010012–010	Little Strawberry River	Fecal coliform and E. coli.
11010012–011	Strawberry River	Fecal coliform and E. coli.
11010012–014	Reeds Creek	Fecal coliform and E. coli.
11010012–015	Mill Creek	Fecal coliform and E. coli.
11010012–016	Caney Creek	Fecal coliform and E. coli.
11010009–902	Data Creek	Fecal coliform and E. coli.
11010014–004	Overflow Creek	Fecal coliform and E. coli.
11010014–006	Overflow Creek	Fecal coliform and E. coli.
11010014–007	Little Red River	Fecal coliform and E. coli.
11010014–008	Little Red River	Fecal coliform and E. coli.
11010014–009	Ten Mile Creek	Fecal coliform and E. coli.
11010014–010	Little Red River	Fecal coliform and E. coli.
11010014–012	Little Red River	Fecal coliform and E. coli.
11010014–027	Middle Fork Little Red River	Fecal coliform and E. coli.
11010014–028	Middle Fork Little Red River	Fecal coliform and E. coli.
11010014–038	South Fork Little Red River	Fecal coliform and E. coli.

EPA requests that the public provide to EPA any water quality related data and information that may be relevant to the calculations for these 52 TMDLs. EPA will review all data and information submitted during the public comment period and revise the TMDLs and determinations where appropriate. EPA will then forward the TMDLs to the Arkansas Department of Environmental Quality (ADEQ). The ADEQ will incorporate the TMDLs into its current water quality management plan.

Dated: June 20, 2007.

Miguel I. Flores,

Director, Water Quality Protection Division, EPA Region 6.

[FR Doc. E7–12576 Filed 6–27–07; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

[PBS-N01]

Notice of Availability to Distribute a Final Environmental Impact Statement for the Construction of a New Border Station Facility in Derby Line, Vermont

AGENCY: Public Buildings Service, GSA.

ACTION: Notice of Availability.

SUMMARY: The General Services Administration (GSA) announces its intent to distribute a Final Environmental Impact Statement (Final EIS) under the National Environmental Policy Act (NEPA) of 1969, as amended, 42 USC 4321-4347 (NEPA) to assess the potential impacts of the construction of a New Border Station Facility in Derby Line, Vermont (the ''Proposed Action''). At the request of Customs andBorder Protection (CBP), the GSA is proposing to construct a new border station facility which meets their needs, and the design requirements of the GSA.

The existing facilities are undersized and obsolete, and consequently incapable of providing the level of security now required. The Proposed Action has been defined and includes: (a) identification of land requirements, including acquisition of adjoining land; (b) demolition of existing government structures at the border station; (c) construction of a main administration building and ancillary support buildings; and (d) consequent potential alterations to secondary roads.

Studied alternatives have identified alternative locations for the components of the border station including the main administration and ancillary support buildings, the associated roadway network and parking. A No Action alternative has also been studied and evaluates the consequences of not constructing the new border station facility. This alternative has been included to provide a basis for comparison to the action alternatives described above as required by NEPA regulations (40 CFR 1002.14(d)).

DATES: July 30, 2007.

FOR FURTHER INFORMATION CONTACT

David M. Drevinsky P.E., PMP, Regional Environmental Quality Advocate (REQA), U.S. General Services Administration, 10 Causeway Street, Room 975, Boston, MA 02222. Fax: (617) 565-5967. Phone: (617) 565–6596. E-mail: *david.drevinsky@gsa.gov*.

DISTRIBUTION:

GSA will distribute ten reading copies of the Final EIS at the Daily Memorial Library, Goodrich Memorial Library and Haskell Free Library located on 101 Jr. High Drive in Derby Line, 202 Main Street in Newport and 96 Caswell Avenue in Derby Line; respectively.

Dated: June 13, 2007.

Glenn C. Rotondo,

Assistant Regional Administrator, Public Buildings Service, New England Region

[FR Doc. E7–12552 Filed 6–27–07; 8:45 am]

BILLING CODE 6820–A8–S

GENERAL SERVICES ADMINISTRATION

Revised Notice of Intent to Prepare an Environmental Impact Statement

AGENCY: General Services Administration (GSA), National Capital Region.

ACTION: Notice.

SUMMARY: Pursuant to the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321–4347, the Council on Environmental Quality Regulations (40 CFR parts 1500-1508), GSA Order PBS P 1095.1F (Environmental considerations in decision-making, dated October 19, 1999), and the GSA Public Buildings Service NEPA Desk Guide, GSA is revising its June 7, 2005, notice of intent announcing the preparation of an Environmental Impact Statement (EIS) for the redevelopment of the St. Elizabeths West Campus (St. Elizabeths) in Southeast Washington, DC. The initial notice of intent defined the purpose of the proposed action as ''develop[ing] secure office space in the District of Columbia to accommodate substantial Federal operations.'' Since that notice was issued, GSA has

identified a specific tenant for this site. Accordingly, the primary purpose of the proposed action is now defined as ''developing secure office space in the District of Columbia to house the consolidated headquarters of the Department of Homeland Security (DHS) and its Components, including the United States Coast Guard, in accordance with the DHS National Capital Region housing plan.'' GSA has initiated consultation under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, for the proposed redevelopment.

FOR FURTHER INFORMATION CONTACT: Denise Decker, NEPA Lead, General Services Administration, National Capital Region, at (202) 205–5821.

SUPPLEMENTARY INFORMATION: The notice of intent is as follows:

Revised Notice of Intent To Prepare an Environmental Impact Statement for the Redevelopment of the St. Elizabeths West Campus in Southeast Washington, DC, to house the Headquarters of the Department of Homeland Security and its Components, including the United States Coast Guard, in accordance with the DHS National Capital Region housing plan.

The General Services Administration is preparing an Environmental Impact Statement (EIS) to analyze the potential impacts resulting from redevelopment of the St. Elizabeths West Campus (St. Elizabeths) in Southeast Washington, DC. GSA is also preparing a master plan for the redevelopment of the St. Elizabeths West Campus (''the site'' or the ''West Campus'') for Federal use. The primary purpose for this proposed action is to develop secure office space in the District of Columbia to accommodate the headquarters of the Department of Homeland Security and its Components, including the United States Coast Guard, in accordance with the DHS National Capital Region housing plan.

Background

In June 2005, GSA issued the initial notice of intent to prepare an EIS for the proposed Master Plan for the redevelopment of the St. Elizabeths West Campus. The initial notice of intent defined the purpose of the proposed action as ''develop[ing] secure office space in the District of Columbia to accommodate substantial Federal operations.'' At that time, GSA had only identified potential tenants for the site. Therefore, GSA considered a wide range of potential development densities in the initial stages of its master planning for this site.

In late calendar year 2005, DHS approached GSA and requested assistance in meeting DHS' housing needs in the National Capital Region, including the need for a new Coast Guard headquarters. GSA has reviewed DHS' space needs and has determined that (i) DHS headquarters and its components are scattered in over 60 buildings throughout the National Capital Region, which adversely impacts critical communication, coordination, and cooperation across components particularly in responding to significant natural disasters or terrorist threats; (ii) the DHS housing plan requires certain core elements of its organization, including the Coast Guard, to be located on a single campus, for reasons of both efficiency and organizational effectiveness; (iii) DHS has an immediate need for the consolidation of these core elements; (iv) DHS requires the highest level of secure Federal office space for its headquarters campus, including buffer zones around the perimeter of such facility; and (v) DHS headquarters is required by statute (4 USC §§ 71-72) to be located within the District of Columbia.

Based on these findings, there is a need to establish a secure campus within the District of Columbia to house the consolidated headquarters and components of DHS, including the Coast Guard headquarters, consistent with DHS' housing plan. Therefore, GSA is redefining the purpose of this proposed action as follows: The primary purpose of this proposed action is to develop secure office space in the District of Columbia to accommodate the headquarters of the Department of Homeland Security and its Components, including the United States Coast Guard, in accordance with the DHS housing plan.

In addition, based on an analysis of alternative locations, as well as consideration of applicable legislation regarding relocation of the Coast Guard headquarters, GSA has determined that the only reasonable alternatives for meeting the DHS space needs are alternatives involving the redevelopment of the St. Elizabeths West Campus.

Alternatives Under Consideration

Based on a comprehensive review of its housing needs and organizational mission, DHS has determined that its headquarters and components require a single campus, within the District of Columbia, that includes 4.5 million gross square feet of office space plus parking for a total of approximately 6.4 million gross square feet. In the EIS, GSA will consider a range of alternatives for consolidating DHS headquarters at St. Elizabeths consistent with DHS' operational requirements. Four alternatives previously under consideration, two at 1.4 million gross square feet of office space and two at 3.0 million gross square feet of office space, will no longer be considered.

Consistent with the requirements of Section 110 of the National Historic Preservation Act, GSA will consider alternatives to minimize harm to the St. Elizabeths West Campus, which has been designated as a National Historic Landmark (NHL). GSA specifically invites comments on potential alternatives that accommodate DHS space needs and organizational requirements, while minimizing harm to the contributing elements of the NHL.

In addition, as required by NEPA, GSA is studying the no action alternative. Under the No Action alternative, GSA would not consolidate the DHS headquarters and its components at St. Elizabeths, and would not redevelop the St. Elizabeths West Campus. GSA would only perform the needed maintenance to keep the historic buildings and property on the West Campus from further deterioration until it determines the feasibility of retaining the property or disposing of it through the Federal real property disposal process. As part of the EIS, GSA will study the impacts of the alternatives on the human environment.

Scoping Process

In accordance with NEPA, GSA is reinitiating the scoping process to assess significant issues related to the proposed redevelopment of St. Elizabeths for the consolidation of DHS headquarters and its components. Scoping will be accomplished through correspondence to potentially interested persons, agencies, and organizations, and meetings with agencies having an interest in the St. Elizabeths redevelopment plan. It is important that Federal, regional, and local agencies, and interested individuals and groups take this opportunity to identify environmental concerns that should be addressed in the Draft EIS. It is not necessary to resubmit previous comments as part of this process.

GSA is also using this reinitiated NEPA process to continue consultation with the public under Section 106 of the National Historic Preservation Act (36 CFR Part 800 [Protection of Historic Properties]). GSA welcomes comments from the public to ensure that it takes into account the effects of its action on historic and cultural resources.

Written Comments: Agencies and the public are encouraged to provide written comments on the scoping issues.

Written comments regarding the environmental analysis for the redevelopment of the St. Elizabeths must be submitted no later than 30 days after publication of this notice in the **Federal Register**. Comments may be submitted by regular mail to the following address: General Services Administration, National Capital Region, Attention: Denise Decker, NEPA Lead, 301 7th Street, SW, Room 7600, Washington, DC 20407. Comments also may be submitted by facsimile or e-mail: Fax (202) 708—7671; *denise.decker@gsa.gov*.

Dated: June 11, 2007.

Bart Bush,

Assistant Regional Administrator, Public Buildings Service.

[FR Doc. E7–12596 Filed 6–27–07; 8:45 am]

BILLING CODE 6820–23–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Bilingual/Bicultural Demonstration Grant Program

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science, Office of Minority Health.

ACTION: Notice.

Announcement Type: Competitive, Initial Announcement of Availability of Funds.

Catalog of Federal Domestic Assistance Number: Bilingual/Bicultural Demonstration Grant Program—93.105.

DATES: To receive consideration, applications must be received by the Office of Grants Management, Office of Public Health and Science (OPHS), Department of Health and Human Services (DHHS) c/o WilDon Solutions, Office of Grants Management Operations Center, Attention Office of Minority Health Bilingual/Bicultural Demonstration Grant Program, no later than 5 p.m. Eastern Time on July 30, 2007. The application due date requirement in this announcement supercedes the instructions in the OPHS–1 form.

ADDRESSES: Application kits may be obtained electronically by accessing Grants.gov at *http://www.grants.gov* or GrantSolutions at *http://www.GrantSolutions.gov.* To obtain a hard copy of the application kit, contact WilDon Solutions at 1–888–203–6161. Applicants may fax a written request to WilDon Solutions at (703) 351–1138 or e-mail the request to *OPHSgrantinfo@teamwildon.com.* Applications must be prepared using Form OPHS–1 ''Grant Application,'' which is included in the application kit.

FOR FURTHER INFORMATION CONTACT: WilDon Solutions, Office of Grants Management Operations Center, 1515 Wilson Blvd., Third Floor Suite 310, Arlington, VA 22209 at 1–888–203–6161, e-mail *OPHSgrantinfo@teamwildon.com,* or fax 703–351–1138.

SUMMARY: This announcement is made by the United States Department of Health and Human Services (HHS or Department), Office of Minority Health (OMH) located within the Office of Public Health and Science (OPHS), and working in a ''One-Department'' approach collaboratively with participating HHS agencies and program (entities). OMH is authorized to conduct the Bilingual/Bicultural Demonstration Grant Program (hereafter referred to as the Bilingual/Bicultural Program) under 42 U.S.C. 300u–6, section 1707 of the Public Health Service Act, as amended. The mission of the OMH is to improve the health of racial and ethnic minority populations through the development of policies and programs that address disparities and gaps. OMH serves as the focal point within the HHS for leadership, policy development and coordination, service demonstrations, information exchange, coalition and partnership building, and related efforts to address the health of racial and ethnic minorities. OMH activities are implemented in an effort to address Healthy People 2010, a comprehensive set of disease prevention and health promotion objectives for the Nation to achieve over the first decade of the 21st century (*http://www.healthypeople.gov*). This funding announcement is also made in support of the OMH National Partnership for Action initiative. The mission of the National Partnership for Action is to work with individuals and organizations across the country to create a Nation free of health disparities with quality health outcomes for all by achieving the following five objectives: increasing awareness of health disparities; strengthening leadership at all levels for addressing health disparities; enhancing patient-provider communication; improving cultural and linguistic competency in delivering health services; and better coordinating and utilizing research and outcome evaluations.

The Bilingual/Bicultural Program was developed in response to a congressional mandate to develop the capacity of health care professionals to address the cultural and linguistic barriers to health delivery and increase access to health care for limited English-proficient (LEP) populations, particularly those who are racial ethnic minorities. OMH is committed to working with faith- and community-based organizations to improve and enhance access to quality and comprehensive health services for LEP, particularly racial/ethnic minority, populations. The OMH intends to demonstrate the merit of projects partnering community-based, minority-serving organizations and health care facilities in a collaborative effort to address cultural and linguistic barriers to effective health care service delivery, and to increase access to quality and comprehensive health care for LEP and racial/ethnic minority populations living in the United States.

The Bilingual/Bicultural Program seeks to improve the health status of LEP populations, particularly racial and ethnic minorities who face cultural and linguistic barriers to health services by: reducing barriers to care; increasing access to quality care; supporting and increasing national, state and local efforts to expand the pool of health care professionals, paraprofessionals, and students who are from diverse communities to provide linguistically and culturally competent services; conducting and disseminating research to connect cultural competency behaviors to specific health outcomes; and assessing the impact of cultural and linguistic training models.

As cited in the National Healthcare Disparities Report, clear communication is an important component of effective health care delivery. It is vital for providers to understand patients' health care needs and for patients to understand providers' diagnoses and treatment recommendations. Communication barriers can relate to language, culture, and health literacy.[1] About 47 million Americans, or 18 percent of the population, spoke a language other than English at home in 2000, up from 32 million in 1990.[2] Census data convey a sense of the growing portion of the United States population that is likely to experience LEP.[3] The 2000 Census reported that 4.4 million households are linguistically isolated, meaning that no person in the household speaks English ''very well.'' This is a significant increase from 1990, when 2.9 million households were

[1] National Healthcare Disparities Report, U.S. Department of Health and Human Services, Agency for Health Care Research and Quality (AHRQ), Rockville, MD, December 2006.

[2] Ibid.

[3] What a Difference an Interpreter Can Make. Health Care Experiences of Uninsured with Limited English Proficiency, April 2002.

linguistically isolated.[4] In responding to the need to ensure that all people entering the health care system receive equitable and effective treatment in a culturally and linguistically appropriate manner, the OMH published the National Standards on Culturally and Linguistically Appropriate Services (CLAS) in Health Care for voluntary adoption by health care organizations.[5] CLAS consists of 14 standards that are organized by three themes—Culturally Competent Care (Standards 1–3), Language Access Services (Standards 4–7), and Organizational Supports for Cultural Competence (Standards 8–14). The standards are intended to be inclusive of all cultures and not limited to any particular population group or sets of groups, to contribute to the elimination of racial and ethnic health disparities, and to improve the health of all Americans.

Eliminating the disproportionate health care disparities is an HHS priority, and the second goal of Healthy People 2010. The risk of many diseases and health conditions are reduced through preventative actions. A culture of wellness diminishes debilitating and costly health problems. Individual health care is built on a foundation of responsibility for personal wellness, which includes participating in regular physical activity, eating a healthful diet, taking advantage of medical screenings, and making healthy choices to avoid risky behaviors. Background information on health issue areas in which significant racial/ethnic disparities are documented may be found in Section VIII of this announcement.

It is intended that the Bilingual/Bicultural Program will result in: increased patient knowledge on how best to access care and engagement in a continuum of care; increased client/patient and health provider knowledge on health disparities, and culturally and linguistically appropriate health care services; and increased utilization of preventive health care and treatment services.

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Section I. Funding Opportunity Description

Authority: The program is authorized under 42 U.S.C. 300u–6, section 1707 of the Public Health Service Act, as amended.

1. *Purpose:* The purpose of the Bilingual/Bicultural Program is to improve the health status of LEP populations, particularly racial and ethnic minorities (see definitions of LEP individuals and minority populations in Section VIII.3 of this announcement) by eliminating disparities. Through this FY 2007 announcement, OMH is continuing to build communication bridges and reduce the linguistic, cultural and social barriers LEP populations, particularly racial/ethnic minorities, encounter when accessing health services by supporting programs that focus on: improving and expanding the linguistic and cultural competence capacity and ability of health care professionals and paraprofessionals working in such communities, and improving the accessibility and utilization of health care services among the targeted populations.

This program is intended to ascertain the effectiveness of partnerships between community-based, minority serving organizations and health care facilities in addressing:cultural and linguistic barriers to effective health care service delivery; andaccess to quality and comprehensive health care for LEP populations, particularly racial and ethnic minorities, living in the United States.

2. *OMH Expectations:* It is intended that the Bilingual/Bicultural Program will result in:Increased patient knowledge on how best to access care and engagement in a continuum of care;Increased client/patient and health provider knowledge on health disparities, and culturally and linguistically appropriate health care services; and/orIncreased utilization of preventive health care and treatment services.

3. *Applicant Project Results:* Applicants must identify 3 of the 5 following anticipated project results that are consistent with the Bilingual/Bicultural Program overall and OMH expectations:

Strengthening leadership at all levels for addressing health disparities;
Improving patient-provider interaction;
Improving cultural and linguistic competency; and
Improving coordination and utilization of research and outcome evaluations.

The outcomes of these projects will be used to develop other national efforts to address health disparities among similar populations.

4. *Project Requirements:* Each applicant under the Bilingual/Bicultural Program must:

Implement the project using a collaborative partnership arrangement between a community-based, minority-serving organization and a health care facility. The partnership must have the capacity to plan, implement, and coordinate activities that focus on reducing cultural and linguistic barriers to health care for LEP populations, particularly racial and ethnic minorities who face such barriers.

Carry out activities to reduce barriers to care and improve access to health care for the LEP populations, particularly racial/ethnic minorities. In addition, carry out one additional activity relevant to one of the following:

—Supporting and increasing national, state and local efforts to expand the pool of health care professionals, paraprofessionals, and students who are from diverse communities to provide linguistically and culturally competent services;
—Conducting and disseminating research to connect cultural competency behaviors to specific health outcomes; or
—Assessing the impact of cultural and linguistic training models.

Address at least 1, but no more than 3, of the identified health areas (see Section 5 below).

5. *Health Areas To Be Addressed:* The activities and interventions

[4] U.S. Census Bureau, 2003, 9–10.

[5] National Standards for Culturally and Linguistically Appropriate Services in Health Care Final Report, U.S. Department of Health and Human Services, Office of Public Health and Science, Office of Minority Health, Washington, DC, March 2001.

implemented under the Bilingual/Bicultural Program may target 1 but no more than 3 of the following ten (10) priority health areas:

Adult Immunization.
Asthma.
Cancer.
Diabetes.
Heart Disease and Stoke.
Hepatitis B.
HIV.
Infant Mortality.
Mental Health.
Obesity and Overweight.

Section II. Award Information

Estimated Funds Available for Competition: $2,300,000 in FY 2007 (Grant awards are subject to the availability of funds.)

Anticipated Number of Awards: 12 to 15.

Range of Awards: $150,000 to $175,000 per year.

Anticipated Start Date: September 1, 2007.

Period of Performance: 3 Years (September 1, 2007 to August 31, 2010).

Budget Period Length: 12 months.

Type of Award: Grant.

Type of Application Accepted: New, Competing Continuation.

Section III. Eligibility Information

1. Eligible Applicants

To qualify for funding, an applicant must be a:

Private nonprofit, community-based, minority-serving organization which addresses health and human services for LEP populations, particularly racial and ethnic minorities who face cultural and linguistic barriers to health services (see definitions of LEP individuals and minority populations in Section VIII.3.)

Public (local or tribal government) community-based organization which addresses health and human services; or

Tribal entity which addresses health and human services.

All applicants must have an established infrastructure with three years or more experience in addressing health and human services. In addition, all applicants must provide services to a targeted community and have an established partnership consisting of at least two discrete organizations that includes: A community-based, minority-serving organization (the applicant); anda health care facility (e.g., community health center, migrant health center, health department, or medical center).

The partnership must be documented through a single, signed Memorandum of Agreement (MOA) between the community-based, minority-serving organization (the applicant) and the health care facility (the partner). Each member of the partnership must have a specific, significant role in conducting the proposed project. The MOA must specify in detail the roles and resources that each entity will bring to the project, and the terms of the agreement. The MOA must cover the entire project period. The MOA must be signed by individuals with the authority to obligate the organization (e.g., president, chief executive officer, executive director).

Other entities that meet the definition of a private non-profit community-based, minority-serving organization and the above criteria that are eligible to apply are:

Faith-based organizations.
Tribal organizations.
Local affiliates of national, state-wide, or regional organizations.

National, state-wide, and regional organizations, universities and other institutes of higher education may not apply for these grants. As the focus of the program is at the local, grassroots level, OMH is looking for entities that have ties to local communities. National, state-wide, and regional organizations operate on a broader scale and are not as likely to effectively access the targeted population in the specific, local neighborhood and communities.

The organization submitting the application will:

Serve as the lead agency for the project, responsible for its implementation and management; and

Serve as the fiscal agent for the Federal grant awarded.

2. Cost Sharing or Matching

Matching funds are not required for this program.

3. Other

Organizations applying for funds under the Bilingual/Bicultural Program must submit documentation of nonprofit status with their applications. If documentation is not provided, the application will be considered non-responsive and will not be entered into the review process. The organization will be notified that the application did not meet the submission requirements.

Any of the following serves as acceptable proof of nonprofit status:

A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in section 501(c)(3) of the IRS Code.

A copy of a currently valid IRS tax exemption certificate.

A statement from a State taxing body, State Attorney General, or other appropriate State official certifying that the applicant organization has a nonprofit status and that none of the net earnings accrue to any private shareholders or individuals.

A certified copy of the organization's certificate of incorporation or similar document that clearly establishes nonprofit status.

For local, nonprofit affiliates of state or national organizations, a statement signed by the parent organization indicating that the applicant organization is a local nonprofit affiliate must be provided in addition to any one of the above acceptable proof of nonprofit status.

If funding is requested in an amount greater than the ceiling of the award range, the application will be considered non-responsive and will not be entered into the review process. The application will be returned with notification that it did not meet the submission requirements.

Applications that are not complete or that do not conform to or address the criteria of this announcement will be considered non-responsive and will not be entered into the review process. The application will be returned with notification that it did not meet the submission requirements.

An organization may submit no more than one application to the Bilingual/Bicultural Program. Organizations submitting more than one proposal for this grant program will be deemed ineligible. The multiple proposals from the same organization will be returned without comment.

Organizations are not eligible to receive funding from more than one OMH grant program to carry out the same project and/or activities.

Section IV. Application and Submission Information

1. Address To Request Application Package

Application kits for the Bilingual/Bicultural Demonstration Grant Program may be obtained by accessing Grants.gov at *http://www.grants.gov* or the GrantSolutions system at *http://www.grantsolutions.gov*. To obtain a hard copy of the application kit for this grant program, contact WilDon Solutions at 1–888–203–6161. Applicants may also fax a written request to WilDon Solutions at (703) 351–1138 or e-mail the request to *OPHSgrantinfo@teamwildon.com*. Applications must be prepared using Form OPHS–1, which can be obtained at the Web sites noted above.

2. Content and Form of Application Submission

A. Application and Submission

Applicants must use Grant Application Form OPHS–1 and complete the Face Page/Cover Page (SF 424), Checklist, and Budget Information Forms for Non-Construction Programs (SF 424A). In addition, the application must contain a project narrative. The project narrative (including summary and appendices) is limited to 75 pages double-spaced. For those organizations that previously received funding under the OMH-funded Bilingual/Bicultural Service Demonstration Program, in addition to the project narrative, you must attach a report on that program and its results. This report is limited to 15 pages double-spaced, which do not count against the page limitation.

The narrative description of the project must contain the following, in the order presented:

Table of Contents

Project Summary (Overview): Describe key aspects of the Background, Objectives, Program Plan, and Evaluation Plan. The summary is limited to 3 pages.

Background:

Statement of Need: Identify which of the health issue areas (up to 3) are being addressed. Describe and document (with data) demographic information on the targeted local geographic area, and the significance or prevalence of the health problem(s) or issue(s) affecting the local target minority group(s). Describe the local minority group(s) targeted by the project (e.g., race/ethnicity, age, gender, educational level/income).

Experience: Describe the applicant organization's background, and the background/experience of the proposed partner organization(s). Provide a rationale for inclusion of the partner organization(s) in the project. Describe any similar projects implemented to work with the targeted population and the results of those projects. (For those institutions that previously received funding under the OMH-supported Bilingual/Bicultural Service Demonstration Program, you must attach a report on that specific project and its results.)

Discuss the applicant organization's experience (over the past three years) in managing health and human services-related projects/activities, especially those targeting the population to be served. Indicate where the project will be located within the applicant organization's structure and the reporting channels. Provide a chart of the proposed project's organizational structure, showing who will report to whom. Describe how the partner organization(s) will interface with the applicant organization.

Objectives: Provide objectives stated in measurable terms including baseline data, improvement targets, and time frames for achievement for the three-year project period. Explain how the stated objectives relate to the expected results of the project.

Program Plan: Provide a plan that clearly describes how the project will be carried out. Describe specific activities and strategies planned to achieve each objective. For each activity, describe how, when, where, by whom, and for whom the activity will be conducted. Include the role of the partner organization(s). Provide a description of the proposed program staff, including resumes and job descriptions for key staff, qualifications and responsibilities of each staff member, and percent of time each will commit to the project. Provide a description of duties for any proposed consultants. Describe any products to be developed by the project. Provide a time line for each of the three years of the project period.

Evaluation Plan: Delineate how program activities will be evaluated. The evaluation plan must clearly articulate how the project will be evaluated to determine if the intended results have been achieved. The evaluation plan must describe, for all funded activities:

—Specific problem(s) and factors causing or contributing to the problem(s) that will be addressed;
—Intended results (i.e., impacts and outcomes);
—How impacts and outcomes will be measured (i.e., what indicators or measures will be used to monitor and measure progress toward achieving project results);
—Methods for collecting and analyzing data on measures;
—Evaluation methods that will be used to assess impacts and outcomes;
—Evaluation expertise that will be available for this purpose;
—How results are expected to contribute to the objectives of the program as a whole, and relevant Healthy People 2010 goals and objectives; and
—The potential for replicating the evaluation methods for similar efforts.

Discuss plans and describe the vehicle (e.g., manual, CD) that will be used to document the steps which others may follow to replicate the proposed project in similar communities. Describe plans for disseminating project results to other communities.

Appendices: Include MOAs and other relevant information in this section. If required, attach a report on the project and outcomes supported under the Bilingual/Bicultural Service Demonstration Program (does not count against page limitation).

In addition to the project narrative, the application must contain a detailed budget justification which includes a narrative explanation and indicates the computation of expenditures for each year for which grant support is requested. The budget request must include funds for key project staff to attend an annual OMH grantee meeting. (The budget justification does not count toward the page limitation.)

B. Data Universal Numbering System Number (DUNS)

Applications must have a Dun & Bradstreet (D&B) Data Universal Numbering System number as the universal identifier when applying for Federal grants. The D&B number can be obtained by calling (866) 705–5711 or through the Web site at *http://www.dnb.com/us/*.

3. Submission Dates and Times

To be considered for review, applications must be received by the Office of Public Health and Science, Office of Grants Management, c/o WilDon Solutions, by 5 p.m. Eastern Time on July 30, 2007. Applications will be considered as meeting the deadline if they are received on or before the deadline date. The application due date requirement in this announcement supercedes the instructions in the OPHS–1 form.

Submission Mechanisms

The Office of Public Health and Science (OPHS) provides multiple mechanisms for the submission of applications, as described in the following sections. Applicants will receive notification via mail from the OPHS Office of Grants Management confirming the receipt of applications submitted using any of these mechanisms. Applications submitted to the OPHS Office of Grants Management after the deadlines described below will not be accepted for review. Applications which do not conform to the requirements of the grant announcement will not be accepted for review and will be returned to the applicant.

While applications are accepted in hard copy, the use of the electronic application submission capabilities provided by the Grants.gov and GrantSolutions.gov systems is encouraged. Applications may only be submitted electronically via the

electronic submission mechanisms specified below. Any applications submitted via any other means of electronic communication, including facsimile or electronic mail, will not be accepted for review.

In order to apply for new funding opportunities which are open to the public for competition, you may access the Grants.gov Web site portal. All OPHS funding opportunities and application kits are made available on Grants.gov. If your organization has/had a grantee business relationship with a grant program serviced by the OPHS Office of Grants Management, and you are applying as part of ongoing grantee related activities, please access GrantSolutions.gov.

Electronic grant application submissions must be submitted no later than 5 p.m. Eastern Time on the deadline date specified in the **DATES** section of the announcement using one of the electronic submission mechanisms specified below. All required hardcopy original signatures and mail-in items must be received by the OPHS Office of Grants Management, c/o WilDon Solutions, no later than 5 p.m. Eastern Time on the next business day after the deadline date specified in the **DATES** section of the announcement.

Applications will not be considered valid until all electronic application components, hardcopy original signatures, and mail-in items are received by the OPHS Office of Grants Management according to the deadlines specified above. Application submissions that do not adhere to the due date requirements will be considered late and will be deemed ineligible.

Applicants are encouraged to initiate electronic applications early in the application development process, and to submit early on the due date or before. This will aid in addressing any problems with submissions prior to the application deadline.

Electronic Submissions via the Grants.gov Web Site Portal

The Grants.gov Web site Portal provides organizations with the ability to submit applications for OPHS grant opportunities. Organizations must successfully complete the necessary registration processes in order to submit an application. Information about this system is available on the Grants.gov Web site, *http://www.grants.gov*.

In addition to electronically submitted materials, applicants may be required to submit hard copy signatures for certain Program related forms, or original materials as required by the announcement. It is imperative that the applicant review both the grant announcement, as well as the application guidance provided within the Grants.gov application package, to determine such requirements. Any required hard copy materials, or documents that require a signature, must be submitted separately via mail to the OPHS Office of Grants Management, c/o WilDon Solutions, and if required, must contain the original signature of an individual authorized to act for the applicant agency and the obligations imposed by the terms and conditions of the grant award. When submitting the required forms, do not send the entire application. Complete hard copy applications submitted after the electronic submission will not be considered for review.

Electronic applications submitted via the Grants.gov Web site Portal must contain all completed online forms required by the application kit, the Program Narrative, Budget Narrative and any appendices or exhibits. All required mail-in items must be received by the due date requirements specified above. Mail-in items may only include publications, resumes, or organizational documentation. When submitting the required forms, do not send the entire application. Complete hard copy applications submitted after the electronic submission will not be considered for review.

Upon completion of a successful electronic application submission via the Grants.gov Web site Portal, the applicant will be provided with a confirmation page from Grants.gov indicating the date and time (Eastern Time) of the electronic application submission, as well as the Grants.gov Receipt Number. It is critical that the applicants print and retain this confirmation for their records, as well as a copy of the entire application package.

All applications submitted via the Grants.gov Web site Portal will be validated by Grants.gov. Any applications deemed ''Invalid'' by the Grants.gov Web site Portal will not be transferred to the GrantSolutions system, and OPHS has no responsibility for any application that is not validated and transferred to OPHS from the Grants.gov Web site Portal. Grants.gov will notify the applicant regarding the application validation status. Once the application is successfully validated by the Grants.gov Web site Portal, applicants should immediately mail all required hard copy materials to the OPHS Office of Grants Management, c/o WilDon Solutions, to be received by the deadlines specified above. It is critical that the applicant clearly identify the Organization name and Grants.gov Application Receipt Number on all hard copy materials.

Once the application is validated by Grants.gov, it will be electronically transferred to the GrantSolutions system for processing. Upon receipt of both the electronic application from the Grants.gov Web site Portal, and the required hard copy mail-in items, applicants will receive notification via mail from the OPHS Office of Grants Management confirming the receipt of the application submitted using the Grants.gov Web site Portal.

Applicants should contact Grants.gov regarding any questions or concerns regarding the electronic application process conducted through the Grants.gov Web site Portal.

Electronic Submissions via the GrantSolutions System

OPHS is a managing partner of the GrantSolutions.gov system. GrantSolutions is a full life-cycle grants management system managed by the Administration for Children and Families, Department of Health and Human Services (HHS), and is designated by the Office of Management and Budget (OMB) as one of the three Government-wide grants management systems under the Grants Management Line of Business initiative (GMLoB). OPHS uses GrantSolutions for the electronic processing of all grant applications, as well as the electronic management of its entire Grant portfolio.

When submitting applications via the GrantSolutions system, applicants are required to submit a hard copy of the application face page (Standard Form 424) with the original signature of an individual authorized to act for the applicant agency and assume the obligations imposed by the terms and conditions of the grant award. If required, applicants will also need to submit a hard copy of the Standard Form LLL and/or certain Program related forms (e.g., Program Certifications) with the original signature of an individual authorized to act for the applicant agency. When submitting the required forms, do not send the entire application. Complete hard copy applications submitted after the electronic submission will not be considered for review.

Electronic applications submitted via the GrantSolutions system must contain all completed online forms required by the application kit, the Program Narrative, Budget Narrative and any appendices or exhibits. The applicant may identify specific mail-in items to be sent to the Office of Grants Management separate from the electronic submission;

however these mail-in items must be entered on the GrantSolutions Application Checklist at the time of electronic submission, and must be received by the due date requirements specified above. Mail-in items may only include publications, resumes, or organizational documentation. When submitting the required forms, do not send the entire application. Complete hard copy applications submitted after the electronic submission will not be considered for review.

Upon completion of a successful electronic application submission, the GrantSolutions system will provide the applicant with a confirmation page indicating the date and time (Eastern Time) of the electronic application submission. This confirmation page will also provide a listing of all items that constitute the final application submission including all electronic application components, required hard copy original signatures, and mail-in items, as well as the mailing address of the OPHS Office of Grants Management where all required hard copy materials must be submitted.

As items are received by the OPHS Office of Grants Management, the electronic application status will be updated to reflect the receipt of mail-in items. It is recommended that the applicant monitor the status of their application in the GrantSolutions system to ensure that all signatures and mail-in items are received.

Mailed or Hand-Delivered Hard Copy Applications

Applicants who submit applications in hard copy (via mail or hand-delivered) are required to submit an original and two copies of the application. The original application must be signed by an individual authorized to act for the applicant agency or organization and to assume for the organization the obligations imposed by the terms and conditions of the grant award. Mailed or hand-delivered applications will be considered as meeting the deadline if they are received by the OPHS Office of Grant Management, c/o WilDon Solutions, on or before 5 p.m. Eastern Time on the deadline date specified in the **DATES** section of the announcement. The application deadline date requirement specified in this announcement supersedes the instructions in the OPHS–1. Applications that do not meet the deadline will be returned to the applicant unread.

4. Intergovernmental Review

The Bilingual/Bicultural Service Demonstration Program is subject to the requirements of Executive Order 12372 which allows States the options of setting up a system for reviewing applications from within their States for assistance under certain Federal programs. The application kits available under the notice will contain a list of States which have chosen to set up a review system and will include a State Single Point of Contact (SPOC) in the State for review. The SPOC list is also available on the Internet at the following address: *http://www.whitehouse.gov/omb/grants/spoc.html.* Applicants (other than federally recognized Indian tribes) should contact their SPOC as early as possible to alert them to the prospective applications and receive any necessary instructions on the State process. The due date for State process recommendations is 60 days after the application deadlines established by the OPHS Grants Management Officer. The OMH does not guarantee that it will accommodate or explain its responses to State process recommendations received after that date. (See ''Intergovernmental Review of Federal Programs,'' Executive Order 12372, and 45 CFR Part 100 for a description of the review process and requirements.)

The Bilingual/Bicultural Program is subject to Public Health Systems Reporting Requirements. Under these requirements, community-based non-governmental applicants must prepare and submit a Public Health System Impact Statement (PHSIS). The PHSIS is intended to provide information to State and local officials to keep them apprised of proposed health services grant applications submitted by community-based organizations within their jurisdictions.

Community-based non-governmental applicants are required to submit, no later than the Federal due date for receipt of the application, the following information to the head of the appropriate State or local health agencies in the area(s) to be impacted: (a) A copy of the face page of the application (SF 424), and (b) a summary of the project (PHSIS), not to exceed one page, which provides: (1) A description of the population to be served, (2) a summary of the services to be provided, and (3) a description of the coordination planned with the appropriate State or local health agencies. Copies of the letter forwarding the PHSIS to these authorities must be contained in the application materials submitted to the OPHS.

5. Funding Restrictions

Budget Request: If funding is requested in an amount greater than the ceiling of the award range, the application will be considered non-responsive and will not be entered into the review process. The application will be returned with notification that it did not meet the submission requirements.

Grant funds may be used to cover costs of:

Personnel.

Consultants.

Equipment.

Supplies (including screening and outreach supplies).

Grant-related travel (domestic only), including attendance at an annual OMH grantee meeting.

Other grant-related costs.

Grant funds may not be used for:

Building alterations or renovations.

Construction.

Fund raising activities.

Job training.

Medical care, treatment or therapy.

Political education and lobbying.

Research studies involving human subjects.

Vocational rehabilitation.

Guidance for completing the budget can be found in the Program Guidelines, which are included with the complete application kits.

Section V. Application Review Information

1. Criteria

The technical review of the Bilingual/Bicultural Program applications will consider the following four generic factors listed, in descending order of weight.

A. Factor 1: Program Plan (40%)

Appropriateness and merit of proposed approach and specific activities for each objective.

Logic and sequencing of the planned approaches as they relate to the statement of need and to the objectives.

The degree to which the project design, proposed activities and products to be developed are culturally/linguistically appropriate.

Soundness of the established partnership and the role of the partnership member in the program.

Qualifications and appropriateness of proposed staff or requirements for ''to be hired'' staff and consultants.

Proposed staff level of effort.

Appropriateness of defined roles including staff reporting channels and that of any proposed consultants.

B. Factor 2: Evaluation Plan (25%)

The degree to which expected results are appropriate for the objectives of the

Bilingual/Bicultural Program overall, stated objectives of the proposed project and proposed activities.

Appropriateness of the proposed data collection plan (including demographic data to be collected on project participants), analysis and reporting procedures.

Suitability of process, outcome, and impact measures.

Clarity of the intent and plans to assess and document progress towards achieving objectives, planned activities, and intended outcomes.

Potential for the proposed project to impact the health status of the target population(s) relative to the health area(s) addressed.

Soundness of the plan to document the project for replication in similar communities.

Soundness of the plan to disseminate project results.

C. Factor 3: Background and Demonstrated Capability (20%)

Demonstrated knowledge of the problem at the local level.

Significance and prevalence of targeted health issues in the proposed community and target population(s).

Extent to which the applicant demonstrates access to the target community(ies), and whether it is well positioned and accepted within the community(ies) to be served.

Extent and documented outcome of past efforts and activities with the target population(s).

Applicant's capability to manage and evaluate the project as determined by:

The applicant organization's experience in managing project/activities involving the target population.

The applicant's organizational structure, proposed project organizational structure, and the manifestation of an established infrastructure with three years or more experience.

Clear lines of authority among the proposed staff within and between the partner organization(s).

If applicable, the extent and documented outcome(s) of activities conducted under the OMH-supported Bilingual/Bicultural Service Demonstration Grant Program included in the required progress report.

D. Factor 4: Objectives (15%)

Merit of the objectives.

Relevance to Healthy People 2010 and National Partnership for Action objectives.

Relevance to the Bilingual/Bicultural Program purpose and expectations, and to the stated problem to be addressed by the proposed project.

Degree to which the objectives are stated in measurable terms.

Attainability of the objectives in the stated time frames.

2. Review and Selection Process

Accepted Bilingual/Bicultural Program applications will be reviewed for technical merit in accordance with PHS policies. Applications will be evaluated by an Objective Review Committee (ORC). Committee members are chosen for their expertise in minority health, health disparities, and their understanding of the unique health problems and related issues confronted by the racial and ethnic minority populations in the United States. Funding decisions will be determined by the Deputy Assistant Secretary for Minority Health who will take under consideration:

The recommendations and ratings of the ORC.

Geographic distribution of applicants.

A balanced distribution of populations to be served.

The health areas to be addressed.

3. Anticipated Award Date September 1, 2007

Section VI: Award Administration Information

1. Award Notices

Successful applicants will receive a notification letter from the Deputy Assistant Secretary for Minority Health and a Notice of Grant Award (NGA), signed by the OPHS Grants Management Officer. The NGA shall be the only binding, authorizing document between the recipient and the Office of Minority Health. Unsuccessful applicants will receive notification from OPHS.

2. Administrative and National Policy Requirements

In accepting this award, the grantee stipulates that the award and any activities thereunder are subject to all provisions of 45 CFR parts 74 and 92, currently in effect or implemented during the period of the grant.

The DHHS Appropriations Act requires that, when issuing statements, press releases, requests for proposals, bid solicitations, and other documents describing projects or programs funded in whole or in part with Federal money, all grantees shall clearly state the percentage and dollar amount of the total costs of the program or project which will be financed with Federal money and the percentage and dollar amount of the total costs of the project or program that will be financed by non-governmental sources.

3. Reporting Requirements

A successful applicant under this notice will submit: (1) Semi-annual progress reports; (2) an annual Financial Status Report; and (3) a final progress report and Financial Status Report in the format established by the OMH, in accordance with provisions of the general regulations which apply under ''Monitoring and Reporting Program Performance,'' 45 CFR 74.51–74.52, with the exception of State and local governments to which 45 CFR part 92, subpart C reporting requirements apply.

Uniform Data Set: The Uniform Data Set (UDS) is a web-based system used by OMH grantees to electronically report progress data to OMH. It allows OMH to more clearly and systematically link grant activities to OMH-wide goals and objectives, and document programming impacts and results. All OMH grantees are required to report program information via the UDS (*http://www.dsgonline.com/omh/uds*). Training will be provided to all new grantees on the use of the UDS system during the annual grantee meeting.

Grantees will be informed of the progress report due dates and means of submission. Instructions and report format will be provided prior to the required due date. The AnnualFinancial Status Report is due no later than 90 days after the close of each budget period. The final progress report and Financial State Report are due 90 days after the end of the project period. Instructions and due dates will be provided prior to required submission.

Section VII. Agency Contacts

For application kits, submission of applications, and information on budget and business aspects of the application, please contact: WilDon Solutions, Office of Grants Management Operations Center, 1515 Wilson Boulevard, Third Floor Suite 310, Arlington, VA 22209 at 1–888–203–6161, e-mail *OPHSgrantinfo@teamwildon.com,* or fax 703–351–1138.

For questions related to the Bicultural/Bilingual Program or assistance in preparing a grant proposal, contact Ms. Sonsiere Cobb-Souza, Acting Director, Division of Program Operations, Office of Minority Health, Tower Building, Suite 600, 1101 Wootton Parkway, Rockville, MD 20852. Ms. Cobb-Souza can be reached by telephone at (240) 453–8444; or by e-mail at *sonsiere.cobb-souza@hhs.gov.*

For additional technical assistance, contact the OMH Regional Minority Health Consultant for your region listed in your grant application kit.

For health information, call the OMH Resource Center (OMHRC) at 1–800–444–6472.

Section VIII. Other Information

1. Background Information

Limited English proficiency is a barrier to quality health care for many Americans. As reported in the National Healthcare Disparities Report, 47 percent of individuals with limited English proficiency do not have a usual source of care. Quality health care requires that patients and providers communicate effectively. The ability of providers and patients to communicate clearly with one another can be compromised if they do not speak the same language. It is vital for providers to understand patients' health care needs and for patients to understand providers' diagnosis and treatment recommendations.[6] According to the Commonwealth Fund's 2001 Health Quality Survey, 33 percent of all Hispanics, 27 percent of all Asian Americans, and 23 percent of all African Americans report having difficulty communicating with their doctors, as compared with only 16 percent of white Americans.[7]

Although many aspects of health in the U.S. have improved, significant racial and ethnic disparities remain. The prevalence of overweight in 2003–04 was significantly higher among Hispanic and Black children than white children, and approximately 45 percent of Black and 37 percent of Hispanic adults were obese compared to 30 percent of whites.[8] American Indians/Alaska Natives are 2.2 times as likely to have diabetes than whites, and Blacks are 1.8 times as likely to have the disease.[9] The rates of hepatitis B have declined among all racial ethnic groups; however, rates were highest among non-Hispanic Blacks in 2004.[10] According to data from the CDC, 50 percent of adults and adolescents diagnosed with HIV/AIDS in 2004 were Black (13 percent of population), 18 percent were Hispanic (12.5 percent of population), and 1 percent were American Indian/Alaska Native (.7 percent of population). In 2005, 18.1 percent of Native American/Alaska Natives reported frequent mental distress (14 or more mentally unhealthy days) compared to 9.6 percent of whites.[11] Higher percentages of Blacks (11.8) and Hispanics (10.2) also reported frequent mental distress than whites. American Indians/Alaska Natives also had the highest prevalence of asthma in 2002, when 11.6 percent of that population reported having asthma compared to 7.6 percent of whites.[12]

In 2002, American Indian/Alaska Native women had the lowest cancer incidence rate, yet the third highest cancer death rate. Breast cancer was the leading cause of cancer death among Hispanic women. Black men and women had the highest cancer death rates for all cancers among all races.[13] Heart disease is the leading cause of death for men and women in the U.S.; the 2002 age-adjusted death rates for diseases of the heart were 30 percent higher among Blacks than whites. The mortality rates for infants of Black (13.6), American Indian/Alaska Native (8.7), and Puerto Rican (8.2) mothers all exceeded the rate for infants of white mothers (5.7) in 2003.[14] Influenza vaccination coverage among adults 50–64 years of age was about 30 percent lower for non-Hispanic Blacks and Hispanic persons than non-Hispanic white persons. Similarly, influenza vaccination rate among adults 65 years of age and over were about 30 percent lower for non-Hispanic Blacks and Hispanic persons than for non-Hispanic whites.[15]

2. Healthy People 2010

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of Healthy People 2010, a PHS-lead national activity announced in January 2000 to eliminate health disparities and improve years and quality of life. More information may be found on the Healthy People 2010 Web site: *http://www.healthypeople.gov* and copies of the document may be downloaded. Copies of the Healthy People 2010: Volumes I and II can be purchased by calling (202) 512–1800 (cost $70 for printed version; $20 for CD–ROM). Another reference is the Healthy People 2010 Final Report—2001.

For one free copy of the Healthy People 2010, contact: The National Center for Health Statistics, Division of Data Services, 3311 Toledo Road, Hyattsville, MD 20782, or by telephone at (301) 458–4636. Ask for HHS Publication No. (PHS) 99.1256. This document may also be downloaded from: *http://www.healthypeople.gov.*

3. Definitions

For purposes of this announcement, the following definitions apply:

Community-Based Organizations—Private, nonprofit organizations and public organizations (local and tribal governments) that are representative of communities or significant segments of communities where the control and decision-making powers are located at the community level.

Community-Based, Minority-Serving Organization—A community-based organization that has a demonstrated expertise and experience in serving racial/ethnic minority populations. (See definition of Minority Populations below.)

Cultural Competency—Having the capacity to function effectively as an individual and an organization within the context of the cultural beliefs, behaviors and needs presented by consumers and their communities.

Health Care Facility—A private non-profit or public facility that has an established record for providing comprehensive health care services to a targeted, racial/ethnic minority community. A health care facility may be a hospital, outpatient medical facility, community health center, migrant health center, or a mental health center. Facilities providing only screening and referral activities are not included in this definition.

Limited-English-Proficient (LEP) Individuals—Individuals (particularly Minority Populations as defined below) who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English. These individuals must communicate in their primary language in order to participate effectively in and benefit from any aid, service or benefit provided by the health provider.

Memorandum of Agreement (MOA)—A single document signed by authorized representatives of each community partnership member organization which details the roles and resources each

[6] National Healthcare Disparities Report, U.S. Department of Health and Human Services, Agency for Health Care Research and Quality (AHRQ), Rockville, MD, December 2006.

[7] Collins, Karen Scott, & others. Diverse Communities, Common Concerns: Assessing Health Care Quality for Minority Americans, The Commonwealth Fund, March 2002.

[8] 2004 Fact Sheet—Obesity Still a Major Problem, New Data Show, NCHS, Hyattsville, MD, 2006.

[9] American Diabetes Association, Web site, November 27, 2006 *http://www.diabetes.org/diabetes-statistics/prevalence.jsp.*

[10] Centers for Disease Control and Prevention. Hepatitis Surveillance Report No. 61. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2006.

[11] Health Related Quality of Life Survey, CDC, National Center for Chronic Disease Prevention and Health Promotion, 2006.

[12] Asthma Prevalence and Control Characteristics by Race/Ethnicity—United States, 2002, MMWR Weekly, February 27, 2004, CDC.

[13] United States Cancer Statistics: 1999–2002 Incidence and Mortality Web-based Report, U.S. Cancer Statistics Working Group, CDC and National Cancer Institute, Atlanta, GA, 2005.

[14] Health United States, 2006.

[15] Health, United States, National Center for Health Statistics (NCHS), Hyattsville, MD, November 2006.

entity will provide for the project and the terms of the agreement (must cover the entire project period).

Minority Populations—American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, Native Hawaiian or Other Pacific Islander (42 U.S.C. 300u–6, section 1707 of the Public Health Service Act, as amended).

Nonprofit Organizations—Corporations or associations, no part of whose net earnings may lawfully inure to the benefit of any private shareholder or individual. Proof of nonprofit status must be submitted by private nonprofit organizations with the application or, if previously filed with PHS, the applicant must state where and when the proof was submitted. (See III, 3. Other, for acceptable evidence of nonprofit status.)

Partnership—At least two discrete organizations and/or institutions that have a history of service to LEP racial/ethnic minority populations (see definition of LEP and Minority Populations above).

Sociocultural Barriers—Policies, practices, behaviors and beliefs that create obstacles to health care access and service delivery. Examples of sociocultural barriers include:

Cultural differences between individuals and institutions
Cultural differences of beliefs about health and illness
Customs and lifestyles
Cultural differences in languages or nonverbal communication styles

Dated: June 13, 2007.

Garth N. Graham,

Deputy Assistant Secretary for Minority Health.

[FR Doc. E7–12513 Filed 6–27–07; 8:45 am]

BILLING CODE 4150–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIV/AIDS Health Promotion and Education Program

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science, Office of Minority Health.

ACTION: Notice.

ANNOUNCEMENT TYPE: Competitive, Initial Announcement of Availability of Funds.

CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: HIV/AIDS Health Promotion and Education Program—93.004.

DATES: To receive consideration, applications must be received by the Office of Grants Management, Office of Public Health and Science (OPHS), Department of Health and Human Services (DHHS) c/o WilDon Solutions, Office of Grants Management Operations Center, attention Office of Minority Health HIV/AIDS Health Promotion and Education Program, no later than 5 p.m. Eastern Time on July 30, 2007. The application due date requirement in this announcement supercedes the instructions in the OPHS–1 form.

ADDRESSES: Application kits may be obtained electronically by accessing *Grants.gov* at *http://www.grants.gov* or GrantSolutions at *http://www.GrantSolutions.gov.* To obtain a hard copy of the application kit, contact WilDon Solutions at 1–888–203–6161. Applicants may fax a written request to WilDon Solutions at (703) 351–1138 or e-mail the request to *OPHSgrantinfo@teamwildon.com.* Applications must be prepared using Form OPHS–1 ''Grant Application,'' which is included in the application kit.

CONTACTS: For further information contact WilDon Solutions, Office of Grants Management Operations Center, 1515 Wilson Blvd., Third Floor Suite 310, Arlington, VA 22209, at 1–888–203–6161, e-mail *OPHSgrantinfo@teamwildon.com* or fax 703–351–1138.

SUMMARY: This announcement is made by the United States Department of Health and Human Services (HHS or Department), Office of Minority Health (OMH) located within the Office of Public Health and Science (OPHS), and working in a ''One-Department'' approach collaboratively with participating HHS agencies and programs (entities). As part of a continuing HHS effort to improve the health and well being of racial and ethnic minorities, the Department announces availability of FY 2007 funding for the HIV/AIDS Health Promotion and Education Program (hereafter referred to as the HIV/AIDS Program). OMH is authorized to conduct this program under 42 U.S.C. 300 u–6, section 1707 of the Public Health Service Act, as amended. The mission of the OMH is to improve the health of racial and ethnic minority populations through the development of policies and programs that address disparities and gaps. OMH serves as the focal point within the HHS for leadership, policy development and coordination, service demonstrations, information exchange, coalition and partnership building, and related efforts to address the health of racial and ethnic minorities. OMH activities are implemented in an effort to address *Healthy People 2010,* a comprehensive set of disease prevention and health promotion objectives for the Nation to achieve over the first decade of the 21st century (*http://www.healthypeople.gov*). This funding announcement is also made in support of the OMH National Partnership for Action initiative. The mission of the National Partnership for Action is to work with individuals and organizations across the country to create a Nation free of health disparities with quality health outcomes for all by achieving the following five objectives: Increasing awareness of health disparities, strengthening leadership at all levels for addressing health disparities; enhancing patient-provider communication; improving cultural and linguistic competency in delivering health services; and better coordinating and utilizing research and outcome evaluations.

Minority communities are currently at the center of the HIV/AIDS epidemic in this country. The Centers for Disease Control and Prevention (CDC) estimates that more than 1.1 million Americans were living with HIV/AIDS at the end of 2005.[1] The CDC also states that young people in the U.S. are at persistent risk for HIV infection. ''This risk is especially notable for youth of minority races and ethnicities.''[2] Multifaceted approaches to HIV/AIDS prevention which involve peers, school, faith-based, and community components are necessary to reduce the incidence of HIV/AIDS among young people.[3] Background information on racial/ethnic disparities in HIV/AIDS can be found in Section VIII of this announcement.

The HIV/AIDS Program is designed to support activities implemented by national minority serving organizations on college campuses in rural and urban communities that will increase awareness of HIV/AIDS risk factors, and positively alter the future course of HIV/AIDS among young adult minority populations. It is intended that this program will demonstrate that the involvement of national minority-serving organizations in partnership with institutions of higher education (particularly those with a history of serving minority populations, such as Historically Black Colleges and Universities—HBCUs, Hispanic Serving Institutions—HSIs, Tribal Colleges and Universities—TCUs, and other

[1] HIV/AIDS Surveillance Report; Cases of HIV Infection and AIDS in the United States, 2005; Volume 17.

[2] CDC HIV/AIDS Fact Sheet: HIV/AIDS Among Youth, June 2006.

[3] Ibid.

accredited minority-serving post-secondary institutions) can be vital in effectively reaching and educating young adult minority populations at risk for, affected by and/or infected with HIV/AIDS. The risk of many diseases and health conditions, including HIV/AIDS, are reduced through preventative actions. Under this program, support will be provided to projects that emphasize prevention, one of the HHS priorities.

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Section I. Funding Opportunity Description

1. Purpose

The purpose of the HIV/AIDS Health Promotion and Education Program is to improve the health status, relative to HIV/AIDS, of young adult high risk populations, particularly racial and ethnic minorities (see definition of minority populations in Section VIII.3 of this announcement) by eliminating disparities. Through this FY 2007 announcement, the OMH promotes partnerships between national minority-serving organizations and institutions of higher education, particularly those with a history of serving minority populations, such as Historically Black Colleges and Universities (HBCUs), Hispanic Serving Institutions (HSIs), Tribal Colleges and Universities (TCUs), and other accredited minority-serving post-secondary institutions. This program also promotes promising practices and model programs targeting unique minority communities.

2. OMH Expectations

It is intended that the HIV/AIDS Health Promotion and Education Program will result in:

Increased awareness of risk factors for HIV/AIDS, and knowledge of methods, such as abstinence, by which transmission of HIV/AIDs can be prevented;

Adoption of health promoting behaviors;

Reduction in high-risk behaviors;

Improved access to HIV/AIDS services for high-risk populations; and

Increased counseling and testing services for high-risk populations, connection to a continuum of care, and increased patient knowledge on how best to access such care.

3. Applicant Project Results

Applicants must identify at least 2 of the following project results that are consistent with the HIV/AIDS Program overall and OMH expectations. Project results should fall within the following general categories:

Increased awareness of health disparities, relative to HIV/AIDS among minorities;

Improved patient-provider interaction; and/or

Improved cultural, linguistic and literacy competency.

The outcomes of these projects will be used to develop other national efforts to address health disparities among racial and ethnic minority populations.

4. Project Requirements

Each applicant under the HIV/AIDS Health Promotion and Education Program must:

Implement the project through collaborative partnership arrangements between the applicant and at least two institutions of higher education, particularly those with a history of serving minority populations (one rural and one urban). The partnership must have the capacity to:

Develop, implement and conduct demonstration projects on college campuses and in high-risk minority communities, urban and/or rural;

Conduct outreach, screening, prevention information dissemination and education, and risk reduction-focused activities;

Plan and coordinate age-appropriate activities which reduce existing sociocultural, linguistic, and literacy barriers for individuals seeking and accepting HIV/AIDS services;

Identify problems such as gaps in services, or issues, such as access to health care;

Link to enabling services to ensure that participants followup with referrals and treatment; and

Identify existing resources in the targeted communities which will be linked to the proposed project.

5. Federal Involvement

Projects supported under the HIV/AIDS Program will be funded via a cooperative agreement mechanism. Cooperative agreements involve significant Federal interaction with the recipient organization in the implementation of program activities. For this program, this interaction includes, but is not limited to:

Oversight and clearance for the implementation, conduct and assessment of project activities.

Collaborative work with funding recipients to develop and implement evaluation strategies incorporating the required Uniform Data Set which is to be used to report program information.

Review and approval of assessment and evaluation instruments and/or plans.

Direction to funding recipients on the submission of project data to OMH.

Coordination and communication between funding recipients and other national organizations.

Serving in a liaison capacity between funding recipients and appropriate federal government agencies.

Planning and conducting an annual grantee meeting.

Section II. Award Information

Estimated Funds Available for Competition: $2,300,000 in FY 2007 (Grant awards are subject to the availability of funds.)

Anticipated Number of Awards: 10 to 12.

Range of Awards: $175,000 to $200,000 per year.

Anticipated Start Date: September 1, 2007.

Period of Performance: 3 Years (September 1, 2007 to August 31, 2010).

Budget Period Length: 12 months.

Type of Award: Cooperative Agreement.

Type of Application Accepted: New, Competing Continuation.

Section III. Eligibility Information

1. Eligible Applicants

To qualify for funding, an applicant must:

Be a private, nonprofit national minority-serving organization which addresses health and human services

and has a history of service to racial and ethnic minority populations. Examples of national minority-serving organizations that may apply include, but are not limited to:

Organizations representing community health organizations serving minority populations;

Organizations that focus on minority health, education, leadership development, and national partnerships; and

Organizations whose membership represents minority-focused health professionals.

Implement the project through a collaborative partnership arrangement with at least two institutions of higher education, particularly those with a history of serving minority populations (one rural, one urban). The collaboration must be documented through separate signed Memorandum of Agreement (MOA) between the applicant and each partnering institution of higher education. The partners must each have a specific, significant role in conducting the proposed project. The MOA must specify in detail the roles and resources that each entity will bring to the project, and the terms of the agreement. The MOA must cover the entire project period. The MOA must be signed by individuals with the authority to obligate the organization (e.g., president of college or university, chief executive officer, executive director).

Be an established national (defined by charter or bylaws to operate nationally), nonprofit organization (a non-governmental, nonprofit corporation or association whose net earnings in no part accrue to the benefit of private shareholders or individuals). Bylaws and/or charter must be furnished with the application.

Other entities that meet the definition of a private non-profit national minority-serving organization eligible to apply, such as national faith-based and/or national tribal organizations.

Because the intent of this program is to address the HIV/AIDS epidemic at the national level, only organizations with a national reach are eligible to apply.

The organization submitting the application will:

Serve as the lead agency for the project;

Be responsible for implementation and management; and

Serve as the fiscal agent for the Federal grant awarded.

2. Cost Sharing or Matching

Matching funds are not required for the HIV/AIDS Program.

3. Other

Organizations applying for funds under the HIV/AIDS Health Promotion and Education Program must submit documentation of nonprofit status and documentation of an established national nonprofit organization as defined by charter or bylaws to operate nationally with their applications. If documentation is not provided, the application will be considered non-responsive and will not be entered into the review process. The organization will be notified that the application did not meet the submission requirements.

Any of the following serves as acceptable proof of nonprofit status:

A reference to the applicant organization's listing in the Internal Revenue Service (IRS) most recent list of tax-exempt organizations described in section 501(c)(3) of the IRS Code.

A copy of a currently valid IRS tax exemption certificate.

A statement from a State taxing body, State Attorney General, or other appropriate State official certifying that the applicant organization has a nonprofit status and that none of the net earnings accrue to any private shareholders or individuals.

A certified copy of the organization's certificate of incorporation or similar document that clearly establishes nonprofit status.

If funding is requested in an amount greater than the ceiling of the award range, the application will be considered non-responsive and will not be entered into the review process. The application will be returned with notification that it did not meet the submission requirements.

Applications that are not complete or that do not conform to or address the criteria of this announcement will be considered non-responsive and will not be entered into the review process. The application will be returned with notification that it did not meet the submission requirements.

An organization may submit no more than one application to the HIV/AIDS Health Promotion and Education Program. Organizations submitting more than one proposal for this cooperative agreement program will be deemed ineligible. The multiple proposals from the same organization will be returned without comment.

Organizations are not eligible to receive funding from more than one OMH grant program to carry out the same project and/or activities.

Section IV. Application and Submission Information

1. Address To Request Application Kit

Application kits for the HIV/AIDS Health Promotion and Education Program may be obtained by accessing Grants.gov at *http://www.grants.gov* or the GrantsSolutions system at *http://www.grantsolutions.gov.* To obtain a hard copy of the application kit for this cooperative agreement program, contact WilDon Solutions at 1–888–203–6161.

Applicants may also fax a written request to WilDon Solutions at (703) 351–1138 or e-mail the request to *OPHSgrantinfo@teamwildon.com.* Applications must be prepared using Form OPHS–1, which can be obtained at the Web sites noted above.

2. Content and Form of Application Submission

A. Application and Submission

Applicants must use Grant Application Form OPHS–1 and complete the Face Page/Cover Page (SF 424), Checklist, and Budget Information Forms for Non-Construction Programs (SF 424A). In addition, the application must contain a project narrative. The project narrative (including summary and appendices) is limited to 75 pages double-spaced. For those institutions that previously received funding under the OMH-supported HIV/AIDS Health Promotion and Education Program, in addition to the project narrative, you must attach a report on that program and its results. This report is limited to 15 pages double-spaced, which do not count against the page limitation

The narrative description of the project must contain the following, in the order presented:

Table of Contents.

Project Summary (Overview): Briefly describe key aspects of the Background, Objectives, Program Plan, and Evaluation Plan. The summary is limited to 3 pages.

Background:

Statement of Need: Describe and document, with data, demographic information on the targeted local geographic area, and the significance or prevalence of HIV/AIDS health problem(s) or issue(s) affecting the local target minority group(s), especially young adult minority populations. Identify problems such as gaps in services, or issues such as access to HIV/AIDS health care, social and cultural barriers, or mental health concerns affecting the targeted communities to be addressed by the proposed project. Describe the minority group(s) targeted by the project (e.g.,

race/ethnicity, age, gender, educational level/income).

Experience: Describe the applicant organization's background, and the background/experience of all participating institutions of higher education, as well as any additional partners. Provide a rationale for their inclusion in the project. Describe any similar projects implemented to work with the targeted population(s) and the results of those projects. Document at least three years of experience working with the targeted minority populations, and the capacity to conduct HIV/AIDS programs and activities. (For those institutions that previously received funding under the OMH-supported HIV/AIDS Health Promotion and Education Program, you must attach a report on that specific project and its results.)

Discuss the applicant organization's experience in managing projects/activities, especially those targeting the high-risk population to be served. Indicate where the project will be located within the applicant organization's structure and the reporting channels. Provide a chart of the proposed project's organizational structure, showing who will report to whom. Describe how the partner institutions of higher education, as well as any additional partners, will interface with the applicant organization.

Objectives: Provide objectives stated in measurable terms including baseline data, improvement targets, and time frames for achievement for the three-year project period. Explain how the stated objectives relate to the expected results of the project.

Program Plan: Provide a plan which clearly describes how the project will be carried out. Describe specific activities and strategies planned to achieve each objective. For each activity, describe how, when, where, by whom, and for whom the activity will be conducted. Describe how outreach, counseling and testing, prevention information and education to reduce risk behaviors and promote the adoption of health promoting behaviors, and connecting to enabling services and to treatment will be accomplished. Include the role of each participating partner institution of higher education as well as any additional partners and/or collaborating agencies. Provide a description of the proposed program staff, including resumes and job descriptions for key staff, qualifications and responsibilities of each staff member, and percent of time each will commit to the project. Provide a description of duties for any proposed consultants. Describe any products to be developed by the project. Provide a time line for each year of the three-year project period.

Evaluation Plan: Delineate how program activities will be evaluated. The evaluation plan must clearly articulate how the project will be evaluated to determine if the intended results have been achieved. The evaluation plan must describe, for all funded activities:

—Intended results (i.e., impacts and outcomes);

—How impacts and outcomes will be measured (i.e., what indicators or measures will be used to monitor and measure progress toward achieving project results);

—Methods for collecting and analyzing data on measures;

—Evaluation methods that will be used to assess impacts and outcomes;

—Evaluation expertise that will be available for this purpose;

—How results are expected to contribute to: The objectives of the Program as a whole, and Healthy People 2010 goals and objectives; and

—The potential for replicating the evaluation methods for similar efforts by this or other applicants.

Discuss plans and describe the vehicle (e.g., manual, CD) that will be used to document the steps which others may follow to replicate the proposed project in similar communities. Describe plans for disseminating project results to other communities.

Appendices:

—Submit a Memorandum of Agreement between the applicant and each partnering institution of higher education with the application for funding.

—Include other relevant information in this section, such as documentation of non-profit status, and bylaws and/or charter to operate nationally must be furnished with the application.

If required, attach a report on the project and outcomes supported under the HIV/AIDS Health Promotion and Education Program (does not count against page limitation).

In addition to the project narrative, the application must contain a detailed budget justification which includes a narrative explanation and indicates the computation of expenditures for each year for which grant support is requested. The budget request must include funds for key project staff to attend an annual OMH grantee meeting. (The budget justification does not count toward the page limitation.)

B. Data Universal Numbering System Number (DUNS)

Applications must have a Dun & Bradstreet (D&B) Data Universal Numbering System number as the universal identifier when applying for Federal grants. The D&B number can be obtained by calling (866) 705–5711 or through the Web site at *http://www.dnb.com/us/.*

3. Submission Dates and Times

To be considered for review, applications must be received by the Office of Public Health and Science, Office of Grants Management, c/o WilDon Solutions, by 5 p.m. Eastern Time on July 30, 2007. Applications will be considered as meeting the deadline if they are received on or before the deadline date. The application due date requirement in this announcement supercedes the instructions in the OPHS–1 form.

Submission Mechanisms

The Office of Public Health and Science (OPHS) provides multiple mechanisms for the submission of applications, as described in the following sections. Applicants will receive notification via mail from the OPHS Office of Grants Management confirming the receipt of applications submitted using any of these mechanisms. Applications submitted to the OPHS Office of Grants Management after the deadlines described below will not be accepted for review. Applications which do not conform to the requirements of the grant announcement will not be accepted for review and will be returned to the applicant.

While applications are accepted in hard copy, the use of the electronic application submission capabilities provided by the Grants.gov and GrantSolutions.gov systems is encouraged. Applications may only be submitted electronically via the electronic submission mechanisms specified below. Any applications submitted via any other means of electronic communication, including facsimile or electronic mail, will not be accepted for review.

In order to apply for new funding opportunities which are open to the public for competition, you may access the Grants.gov Web site portal. All OPHS funding opportunities and application kits are made available on Grants.gov. If your organization has/had a grantee business relationship with a grant program serviced by the OPHS Office of Grants Management, and you are applying as part of ongoing grantee related activities, please access GrantSolutions.gov.

Electronic grant application submissions must be submitted no later than 5 p.m. Eastern Time on the deadline date specified in the **DATES** section of the announcement using one of the electronic submission mechanisms specified below. All required hardcopy original signatures and mail-in items must be received by the OPHS Office of Grants Management, c/o WilDon Solutions, no later than 5 p.m. Eastern Time on the next business day after the deadline date specified in the **DATES** section of the announcement.

Applications will not be considered valid until all electronic application components, hardcopy original signatures, and mail-in items are received by the OPHS Office of Grants Management according to the deadlines specified above. Application submissions that do not adhere to the due date requirements will be considered late and will be deemed ineligible.

Applicants are encouraged to initiate electronic applications early in the application development process, and to submit early on the due date or before. This will aid in addressing any problems with submissions prior to the application deadline.

Electronic Submissions via the Grants.gov Web Site Portal

The Grants.gov Web site Portal provides organizations with the ability to submit applications for OPHS grant opportunities. Organizations must successfully complete the necessary registration processes in order to submit an application. Information about this system is available on the Grants.gov Web site, *http://www.grants.gov.*

In addition to electronically submitted materials, applicants may be required to submit hard copy signatures for certain Program related forms, or original materials as required by the announcement. It is imperative that the applicant review both the grant announcement, as well as the application guidance provided within the Grants.gov application package, to determine such requirements. Any required hard copy materials, or documents that require a signature, must be submitted separately via mail to the OPHS Office of Grants Management, c/o WilDon Solutions, and if required, must contain the original signature of an individual authorized to act for the applicant agency and the obligations imposed by the terms and conditions of the grant award. When submitting the required forms, do not send the entire application. Complete hard copy applications submitted after the electronic submission will not be considered for review.

Electronic applications submitted via the Grants.gov Web site Portal must contain all completed online forms required by the application kit, the Program Narrative, Budget Narrative and any appendices or exhibits. All required mail-in items must received by the due date requirements specified above. Mail-In items may only include publications, resumes, or organizational documentation. When submitting the required forms, do not send the entire application. Complete hard copy applications submitted after the electronic submission will not be considered for review.

Upon completion of a successful electronic application submission via the Grants.gov Web site Portal, the applicant will be provided with a confirmation page from Grants.gov indicating the date and time (Eastern Time) of the electronic application submission, as well as the Grants.gov Receipt Number. It is critical that the applicant print and retain this confirmation for their records, as well as a copy of the entire application package.

All applications submitted via the Grants.gov Web site Portal will be validated by Grants.gov. Any applications deemed ''Invalid'' by the Grants.gov Web site Portal will not be transferred to the GrantSolutions system, and OPHS has no responsibility for any application that is not validated and transferred to OPHS from the Grants.gov Web site Portal. Grants.gov will notify the applicant regarding the application validation status. Once the application is successfully validated by the Grants.gov Web site Portal, applicants should immediately mail all required hard copy materials to the OPHS Office of Grants Management, c/o WilDon Solutions, to be received by the deadlines specified above. It is critical that the applicant clearly identify the Organization name and Grants.gov Application Receipt Number on all hard copy materials.

Once the application is validated by Grants.gov, it will be electronically transferred to the GrantSolutions system for processing. Upon receipt of both the electronic application from the Grants.gov Web site Portal, and the required hardcopy mail-in items, applicants will receive notification via mail from the OPHS Office of Grants Management confirming the receipt of the application submitted using the Grants.gov Web site Portal.

Applicants should contact Grants.gov regarding any questions or concerns regarding the electronic application process conducted through the Grants.gov Web site Portal.

Electronic Submissions via the GrantSolutions System

OPHS is a managing partner of the GrantSolutions.gov system. GrantSolutions is a full life-cycle grants management system managed by the Administration for Children and Families, Department of Health and Human Services (HHS), and is designated by the Office of Management and Budget (OMB) as one of the three Government-wide grants management systems under the Grants Management Line of Business initiative (GMLoB). OPHS uses GrantSolutions for the electronic processing of all grant applications, as well as the electronic management of its entire Grant portfolio.

When submitting applications via the GrantSolutions system, applicants are required to submit a hard copy of the application face page (Standard Form 424) with the original signature of an individual authorized to act for the applicant agency and assume the obligations imposed by the terms and conditions of the grant award. If required, applicants will also need to submit a hard copy of the Standard Form LLL and/or certain Program related forms (e.g., Program Certifications) with the original signature of an individual authorized to act for the applicant agency. When submitting the required forms, do not send the entire application. Complete hard copy applications submitted after the electronic submission will not be considered for review.

Electronic applications submitted via the GrantSolutions system must contain all completed online forms required by the application kit, the Program Narrative, Budget Narrative and any appendices or exhibits. The applicant may identify specific mail-in items to be sent to the Office of Grants Management separate from the electronic submission; however these mail-in items must be entered on the GrantSolutions Application Checklist at the time of electronic submission, and must be received by the due date requirements specified above.

Mail-in items may only include publications, resumes, or organizational documentation. When submitting the required forms, do not send the entire application. Complete hard copy applications submitted after the electronic submission will not be considered for review.

Upon completion of a successful electronic application submission, the GrantSolutions system will provide the

applicant with a confirmation page indicating the date and time (Eastern Time) of the electronic application submission. This confirmation page will also provide a listing of all items that constitute the final application submission including all electronic application components, required hardcopy original signatures, and mail-in items, as well as the mailing address of the OPHS Office of Grants Management where all required hard copy materials must be submitted.

As items are received by the OPHS Office of Grants Management, the electronic application status will be updated to reflect the receipt of mail-in items. It is recommended that the applicant monitor the status of their application in the GrantSolutions system to ensure that all signatures and mail-in items are received.

Mailed or Hand-Delivered Hard Copy Applications

Applicants who submit applications in hard copy (via mail or hand-delivered) are required to submit an original and two copies of the application. The original application must be signed by an individual authorized to act for the applicant agency or organization and to assume for the organization the obligations imposed by the terms and conditions of the grant award. Mailed or hand-delivered applications will be considered as meeting the deadline if they are received by the OPHS Office of Grant Management, c/o WilDon Solutions, on or before 5 p.m. Eastern Time on the deadline date specified in the **DATES** section of the announcement. The application deadline date requirement specified in this announcement supersedes the instructions in the OPHS–1. Applications that do not meet the deadline will be returned to the applicant unread.

4. Intergovernmental Review

The HIV/AIDS Program is subject to requirements of Executive Order 12372 which allows States the options of setting up a system for reviewing applications from within their States for assistance under certain Federal programs. The application kits available under this notice will contain a list of States which have chosen to set up a review system and will include a State Single Point of Contact (SPOC) in the State for review. The SPOC list is also available on the Internet at the following address: *http://www.whitehouse.gov/omb/grants/spoc.html.* Applicants (other than federally recognized Indian tribes) should contact their SPOC as early as possible to alert them to the prospective applications and receive any necessary instructions on the State process. The due date for State process recommendations is 60 days after the application deadlines established by the OPHS Grants Management Officer. The OMH does not guarantee that it will accommodate or explain its responses to State process recommendations received after that date. (See ''Intergovernmental Review of Federal Programs,'' Executive Order 12372, and 45 CFR Part 100 for a description of the review process and requirements.)

5. Funding Restrictions

Budget Request: If funding is requested in an amount greater than the ceiling of the award range, the application will be considered non-responsive and will not be entered into the review process. The application will be returned with notification that it did not meet the submission requirements.

Grant funds may be used to cover costs of:

Personnel.

Consultants.

Equipment.

Supplies (including screening and outreach supplies).

Grant-related travel (domestic only), including attendance at an annual OMH grantee meeting.

Other grant-related costs.

Grant funds may not be used for:

Building alterations or renovations.

Construction.

Fund raising activities.

Job training.

Medical care, treatment or therapy.

Political education and lobbying.

Research studies involving human subjects.

Vocational rehabilitation.

Tuition/support for a regular course of education leading to a degree, certificate, license or diploma.

Guidance for completing the budget can be found in the Program Guidelines, which are included with the complete application kit.

Section V. Application Review Information

1. Criteria

The technical review of the HIV/AIDS Health Promotion and Education Program applications will consider the following four generic factors listed, in descending order of weight.

A. Factor 1: Program Plan (40%)

Appropriateness and merit of proposed approach and specific activities for each objective.

Logic and sequencing of the planned approaches as they relate to the statement of need and to the objectives.

Soundness of established partnership and the roles of the partnership members in the program.

Qualifications and appropriateness of proposed staff or requirements for ''to be hired'' staff and consultants.

Proposed staff level of effort.

Appropriateness of defined roles including staff reporting channels and that of any proposed consultants.

B. Factor 2: Evaluation Plan (25%)

The degree to which intended results are appropriate for the objectives of the HIV/AIDS Program overall, stated objectives of the proposed project and proposed activities.

Appropriateness of the proposed methods for data collection (including demographic data to be collected on project participants), analysis and reporting.

Suitability of process, outcome, and impact measures.

Clarity of the intent and plans to assess and document progress towards achieving objectives, planned activities, and intended outcomes.

Potential for the proposed project to impact the health status of the target population(s) relative to the health areas addressed.

Soundness of the plan to document the project for replicability in similar communities.

Soundness of the plan to disseminate project results.

The potential for replicating the evaluation methods for similar efforts.

C. Factor 3: Background (20%)

Demonstrated knowledge of the problem at the national and local level.

Significance and prevalence of HIV/AIDS issues on the proposed campuses, in surrounding community(ies) and among the target population(s).

Extent to which the applicant demonstrates access to the target community(ies), and whether it is well positioned and accepted within the community(ies) to be served.

Extent and documented outcome of past efforts and activities with the target high-risk and/or HIV/AIDS minority population.

Applicant's capability to manage and evaluate the project as determined by:

The applicant organization's experience in managing HIV/AIDS-oriented project/activities involving the targeted young adult minority population.

The applicant's organizational structure and proposed project organizational structure.

Clear lines of authority among and between the proposed staff and the partnership organizations.

If applicable, the extent and documented outcome(s) of activities conducted under the OMH-supported HIV/AIDS Health Promotion and Education Program included in the required progress report.

D. Factor 4: Objectives (15%)

Merit of the objectives.

Relevance to Healthy People 2010 and National Partnership for Action objectives

Relevance to the HIV/AIDS Health Promotion and Education Program purpose and expectations, and to the stated problem to be addressed by the proposed project.

Degree to which the objectives are stated in measurable terms.

Attainability of the objectives in the stated time frames.

2. Review and Selection Process

Accepted HIV/AIDS Program applications will be reviewed for technical merit in accordance with PHS policies. Applications will be evaluated by an Objective Review Committee (ORC). Committee members are chosen for their expertise in minority health and health disparities, and their understanding of the unique health problems and related issues confronted by the racial and ethnic minority populations in the United States. Funding decisions will be determined by the Deputy Assistant Secretary for Minority Health who will take under consideration:

The recommendations and ratings of the ORC.

Geographic distribution of applicants.

A balanced distribution of populations to be served.

3. Anticipated Award Date

September 1, 2007.

Section VI. Award Administration Information

1. Award Notices

Successful applicants will receive a notification letter from the Deputy Assistant Secretary for Minority Health and a Notice of Grant Award (NGA), signed by the OPHS Grants Management Officer. The NGA shall be the only binding, authorizing document between the recipient and the Office of Minority Health. Unsuccessful applicants will receive notification from OPHS.

2. Administrative and National Policy Requirements

In accepting this award, the grantee stipulates that the award and any activities thereunder are subject to all provisions of 45 CFR parts 74 and 92, currently in effect or implemented during the period of the grant.

The DHHS Appropriations Act requires that, when issuing statements, press releases, requests for proposals, bid solicitations, and other documents describing projects or programs funded in whole or in part with Federal money, all grantees shall clearly state the percentage and dollar amount of the total costs of the program or project which will be financed with Federal money and the percentage and dollar amount of the total costs of the project or program that will be financed by non-governmental sources.

3. Reporting Requirements

A successful applicant under this notice will submit: (1) Semi-annual progress reports;(2) an Annual Financial Status Report; and (3) a final progress report and Financial Status Report in the format established by the OMH, in accordance with provisions of the general regulations which apply under ''Monitoring and Reporting Program Performance,'' 45 CFR 74.51–74.52, with the exception of State and local governments to which 45 CFR part 92, Subpart C reporting requirements apply.

Uniform Data Set: The Uniform Data Set (UDS) is a web-based system used by OMH grantees to electronically report progress data to OMH. It allows OMH to more clearly and systematically link grant activities to OMH-wide goals and objectives, and document programming impacts and results. All OMH grantees are required to report program information via the UDS (*http://www.dsgonline.com/omh/uds*). Training will be provided to all new grantees on the use of the UDS system during the annual grantee meeting.

Grantees will be informed of the progress report due dates and means of submission. Instructions and report format will be provided prior to the required due date. The Annual Financial Status Report is due no later than 90 days after the close of each budget period. The final progress report and Financial Status Report are due 90 days after the end of the project period. Instructions and due dates will be provided prior to required submission.

Section VII. Agency Contact(s)

For application kits, submission of applications, and information on budget and business aspects of the application, please contact: WilDon Solutions, Office of Grants Management Operations Center, 1515 Wilson Blvd., Third Floor, Suite 310, Arlington, VA 22209 at 1–888–203–6161, e-mail *OPHSgrantinfo@teamwildon.com*, or fax 703–351–1138.

For questions related to the HIV/AIDS Health Promotion and Education Program or assistance in preparing a grant proposal, contact Ms. Sonsiere Cobb-Souza, Acting Director, Division of Program Operations, Office of Minority Health, Tower Building, Suite 600, 1101 Wootton Parkway, Rockville, MD 20852. Ms. Cobb-Souza can be reached by telephone at (240) 453–8444; or by e-mail at *Sonsiere.Cobb-Souza@hhs.gov.*

For health information, call the OMH Resource Center (OMHRC) at 1–800–444–6472.

Section VIII. Other Information

1. Background

From 2001 to 2005, African Americans accounted for 48% of newly diagnosed cases of HIV/AIDS, despite the fact that they comprise only 13% of the U.S. population. Similarly, Hispanics, who comprise 14% of the U.S. population, accounted for nearly 17% of newly diagnosed cases. With respect to HIV/AIDS trends among youth age 15 to 24 years, scientists believe that HIV infection trends are an indicator of the future course of the HIV/AIDS epidemic, since infections among youth are fairly recent. Up until 2003 there were an estimated 9,789 deaths from HIV reported for youth aged 15 to 24. Although the death rate from AIDS for youth has declined 71% (from 1989 through 2003), the challenge of assisting youth living with AIDS have long-term implications in terms of disparities in care, preventing secondary transmission of HIV, and addressing their social and medical needs.[4]

2. Healthy People 2010

The Public Health Service (PHS) is committed to achieving the health promotion and disease prevention objectives of Healthy People 2010, a PHS-led national activity announced in January 2000 to eliminate health disparities and improve years and quality of life. More information may be found on the Healthy People 2010 Web site: *http://www.healthypeople.gov/* and copies of the documents may be downloaded. Copies of the Healthy People 2010: Volumes I and II can be purchased by calling (202) 512–1800 (cost $70.00 for printed version; $20.00 for CD–ROM). Another reference is the Healthy People 2010 Final Review—2001.

For one free copy of the Healthy People 2010, contact: The National Center for Health Statistics, Division of Data Services, 3311 Toledo Road,

[4] HIV Prevention in the Third Decade; Specific Populations, How Are they Affected?; Centers for Disease Control and Prevention; January 24, 2006.

Hyattsville, MD 20782, or by telephone at (301) 458–4636. Ask for HHS Publication No. (PHS) 99–1256. This document may also be downloaded from: *http://www.healthypeople.gov.*

2. Definitions

For purposes of this announcement, the following definitions apply:

Memorandum of Agreement (MOA)—A document signed by the applicant and an authorized representative of each participating institution of higher education, as well as any additional partnering entities. The MOA should detail the roles and resources each entity will provide for the project, the terms, and the duration of the agreement (must cover the entire project period).

Minority Populations—American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, and Native Hawaiian or Other Pacific Islander (42 U.S.C. 300u–6, section 1707 of the Public Health Service Act, as amended).

National Minority-Serving Organization—A national private non-profit organization whose mission focuses on health issues affecting minority communities nationwide and that has a history of service to racial/ethnic minority populations.

National Organizations—A national private, nonprofit organization which addresses health or human services.

Nonprofit Organizations—Corporations or associations, no part of whose net earnings may lawfully inure to the benefit of any private shareholder or individual. Proof of nonprofit status must be submitted by private nonprofit organizations with the application or, if previously filed with PHS, the applicant must state where and when the proof was submitted. (Section III, 3. Other, for acceptable evidence of non-profit status.)

Sociocultural Barriers—Policies, practices, behaviors and beliefs that create obstacles to health care access and service delivery. Examples of sociocultural barriers include:

Cultural differences between individuals and institutions.

Cultural differences of beliefs about health and illness.

Customs and lifestyles.

Cultural differences in languages or nonverbal communication styles.

Dated: June 13, 2007.

Garth N. Graham,

Deputy Assistant Secretary for Minority Health.

[FR Doc. E7–12530 Filed 6–27–07; 8:45 am]

BILLING CODE 4150–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Chronic Care Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 17th meeting of the American Health Information Community Chronic Care Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.).

DATES: July 17, 2007, from 1 p.m. to 4 p.m. Eastern Daylight Time.

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/chroniccare/.*

SUPPLEMENTARY INFORMATION: The Workgroup will discuss barriers to availability of care in the virtual setting.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/chroniccare/cc_instruct.html.*

Dated: June 20, 2007.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 07–3168 Filed 6–27–07; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Confidentiality, Privacy, and Security Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 12th meeting of the American Health Information Community Confidentiality, Privacy, and Security Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.).

DATES: July 26, 2007, from 1 p.m. to 5 p.m. [Eastern].

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090 (please bring photo ID for entry to a Federal building).

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/confidentiality/.*

SUPPLEMENTARY INFORMATION: The Workgroup Members will continue discussing the working hypothesis and evaluate the confidentiality, privacy, and security protections for participants in an electronic information exchange network at a local, state, regional, and nationwide level.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/cps_instruct.html.*

Dated: June 20, 2007.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 07–3169 Filed 6–27–07; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Population Health and Clinical Care Connections Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 17th meeting of the American Health Information Community Population Health and Clinical Care Connections Workgroup [formerly Biosurveillance Workgroup] in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.).

DATES: July 19, 2007, from 1 to 4 p.m. [Eastern time].

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090 (please bring photo ID for entry to a Federal building).

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/population/.*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on how to facilitate the flow of reliable health information among population health and clinical care systems necessary to protect and improve the public's health.

The meeting will be available via Web cast. For additional information, go to:

http://www.hhs.gov/healthit/ahic/population/pop_instruct.html.

Dated: June 20, 2007.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 07–3170 Filed 6–27–07; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Quality Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 10th meeting of the American Health Information Community Quality Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.).

DATES: July 18, 2007, from 1 p.m. to 4 p.m. [Eastern].

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090 (please bring photo ID for entry to a Federal building).

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/quality/.*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on how health information technology can provide the data needed for the development of quality measures that are useful to patients and others in the health care industry, automate the measurement and reporting of a comprehensive current and future set of quality measures, and accelerate the use of clinical decision support that can improve performance on those quality measures.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/quality/quality_instruct.html.*

Dated: June 20, 2007.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 07–3171 Filed 6–27–07; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Consumer Empowerment Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 18th meeting of the American Health Information Community Consumer Empowerment Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.).

DATES: July 11, 2007, from 1 p.m. to 4 p.m. [Eastern].

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/consumer/.*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on how to encourage the widespread adoption of a personal health record that is easy-to-use, portable, longitudinal, affordable, and consumer-centered.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/consumer/ce_instruct.html.*

Dated: June 20, 2007.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 07–3172 Filed 6–27–07; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Electronic Health Records Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 17th meeting of the American Health Information Community Electronic Health Records Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.).

DATES: July 10, 2007, from 1 p.m. to 4 p.m. [Eastern].

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/healthrecords/.*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on ways to achieve widespread adoption of certified EHRs, minimizing gaps in adoption among providers.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/heatlhrecords/ehr_instruct.html.*

Dated: June 20, 2007.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 07–3173 Filed 6–27–07; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Health Care Research and Quality, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare and Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) allow the proposed information collection project: ''Development of an Electronic System for Reporting Medication Errors and Adverse Drug Events in Primary Care Practice (MEADERS).'' In accordance with the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)), AHRQ invites the public to comment on this proposed information collection.

An earlier version of this proposed information collection notice was previously published in the **Federal Register** and a period of 90 days was allowed for public comment. At the request of OMB, AHRQ is publishing this notice to allow an additional 30 days for public comment. The original

30 day notice is available at *http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-574.pdf* .

DATES: Comments on this notice must be received by July 30, 2007.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, 540 Gaither Road, Room #5036, Rockville, MD 20850, or by e-mail at *doris.lefkowitz@ahrq.hhs.gov*.

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from AHRQ's Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ, Reports Clearance Officer, (301) 427–1477.

SUPPLEMENTARY INFORMATION:

Proposed Project

''Development of an Electronic system for Reporting Medication Errors and Adverse Drug Events in Primary Care Practice (MEADERS)''

AHRQ will develop and pilot test an electronic system for reporting medication errors and adverse drug events that occur in outpatient physician practices. The reporting system, MEADERS, is being developed in collaboration with the Food and Drug Administration (FDA) and data collected will closely mirror information included in paper-based physician reports to MedWatch. While the major purpose of this project is to determine the ability and willingness of busy clinicians to use the electronic reporting system and to investigate barriers and facilitators to its actual use in practice, the data collected on medication errors and adverse drug events will be reported back to practices for their use in improving the quality of care provided. The landmark Harvard Medical Practice Study, published in 1991, stated that 98,000 Americans die each year from medical errors. (Ref: Brennan TA, Leape LL, Laird NM, et al. Incidence of Adverse events and negligence in hospitalized patients: Results of the Harvard Medical Practice Study. N Engl J Med 1991; 324:370–376.)

Although the exact figure has been disputed, no one disputes the fact that too many Americans are injured unnecessarily by medical mistakes that could be avoided. (Ref: McDonald CJ, Weiner J, Hui SL. Deaths due to medical errors are exaggerated in the Institute of Medicine Report. JAMA. 2000; 284:93–95 and Leape LL. Institute of Medicine medical error figures are not exaggerated. JAMA. 2000; 28:95–97). Another study performed by the Department of Veterans Affairs suggests that in one out of every 10,000 hospitalizations, a patient dies due directly to a medical error. (Ref: Hayward RA, Hofer TP. Estimating hospital deaths due to medical errors: Preventability is in the eye of the reviewer. JAMA. 2001; 286:415–420).

In response to the growing concern over medical errors, the Agency for Healthcare Research and Quality (AHRQ) has published three important monographs outlining the problem of errors, (Ref: Institute of Medicine. *To Err Is Human: Building a Safer Health System.* Washington, DC: National Academy Press, 2000), their effects on the quality of care, (Ref: Institute of Medicine. *Crossing the Quality Chasm: A New System for the 21st Century.* Washington, DC: National Academy Press, 2001), and offering suggestions on improving patient safety. (Ref: Institute of Medicine. *Patient Safety: Achieving a New Standard for Care.* Washington, DC: National Academy Press, 2004). The first recommendation of this third monograph was to ''capture information on patient safety—including both adverse events and near misses—as a byproduct of care, and use this information to design even safer care delivery systems.'' One central theme to each of these monographs is that there simply is too much chaotic information flowing in the medical environment for a single provider to handle effectively. Therefore, solutions to the problem of medical errors should include some combination of health information technology and redesign of health care systems to enhance the prevalence of appropriate decisons (i.e., avoiding errors of omission) and reduce the occurrence of avoidable mistakes (i.e., avoiding errors of commission).

A recent conference sponsored by AHRQ highlighted interventions to improve medical decision-making and reduce medical errors. (Ref: *http://www.blsmeetings.net/PatientSafetyandHIT/* (Accessed August 11, 2005)). Most of the interventions presented were based in hospitals, where the most intensive and immediately life-threatening events occur. Yet the majority of medical decisions are made in outpatient practices and offices where there has been little error-reduction research performed. Further, most outpatient studies have been performed in academic medical centers which have capabilities, providers, and patients that may not typify the average U.S. medical practice. (Ref: Green LA, Fryer GE, Yawn BP, Lanier D, Dovey SM: The ecology of medical care revisited. *N Engl J Med 2001;* 344:2021–2025).

With the recent passing of the Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. 299b–21–b–26, now is an opportune time to evaluate a primary care error reporting system. In most primary care practices there is no mechanism in place to report medication errors as they occur, and adverse drug events observed in the primary care setting are currently under-reported to the FDA. (Ref: Uribe CL, Schweikhart SB, Pathak DS, Dow M, Marsh GB. Perceived barriers to medical-error reporting: An exploratory investigation. *J Healthcare Management.* 2002;47(4):263–79). We propose to develop and pilot test a computer-based error reporting system to better understand the ability of physicians to identify their own medication errors as well as adverse drug events, and their willingness to report them electronically. The fundamental objectives are to (1) evaluate the usefulness, ease of use, and actual use of the system in everyday clinical practices, and (2) identify provider and practice characteristics that predict uptake and use of this system in participating primary care practices. The data collected on medication errors and adverse drug events will be aggregated by practice and fed back to the practice for its use in improving the quailty of care provided.

Methods of Collection

A total of 45 physicians and their practice staff will participate in the pilot test of the reporting system in addition to completing baseline surveys of their practice and reporting on use and satisfaction with the reporting system. The reporting system will request information about the patient involved (to be encrypted), category of event (error, adverse drug event, drug-drug interaction), timing of event, specific medications involved, type of event (e.g., wrong drug prescribed, wrong dose, wrong patient), contributing factors, and evidence of patient harm. The surveys will capture data describing the practice and the patients it serves, the extent of the error reporting system's use, and an assessment of the users' overall satisfaction with the system. Practice and provider information will be collected at baseline along with characteristics that could be facilitators (such as an electronic medical record system) or barriers (such as lack of time and resources needed to report information) to implementation of the MEADERS system. Data collected on the system's use will include the number of clinicians who have used MEADERS at

least once, the number of times used overall, the time it takes to enter data into the electronic MEADERS, and the types of medication errors and adverse drug events that are being reported. A follow-up assessment will include clinicians' and managers' satisfaction with the system (e.g., ease of use, usefulness of the generated reports and individual feedback) and whether they intend to continue its use after the study period has concluded.

Although any clinician in the practice will be able to use the system, physicians are likely to be the primary users of the system. We estimate that physicians will account for about 80% of MEADERS use and Nurse Practitioners, Physician Assistants and Medical Assistants will make up the remainder (see Exhibit 1). The time for entering an event into the system is estimated to require no more than 8 minutes of a clinician's time.

Estimated Annual Respondent Burden

EXHIBIT 1.—ESTIMATE OF COST BURDEN TO RESPONDENTS

Data collection effort	Number of responses *	Estimated time per respondent in hours	Estimated total burden hours	Average hourly wage rate **	Estimated annual cost burden to respondents
Office Manager Baseline survey	45	0.25	11.25	$34.67	$390.04
Physician baseline survey	45	0.25	11.25	57.90	651.38
Physician opinion survey of system	45	0.25	11.25	57.90	651.38
Physician entry of medication error	216	0.134	28.94	57.90	1675.63
Nurse opinion survey of system	45	0.25	11.25	27.35	307.69
Nurse entry of medication error	18	0.134	2.4	27.35	65.64
PA/NP opinion survey of system	45	0.25	11.25	34.17	384.41
PA/NP entry of medication error	18	0.134	2.4	34.17	82.00
Medical assistant survey of system	45	0.25	11.25	12.58	141.53
Medical assistant entry of medication error	18	0.134	2.4	12.58	30.19
Office Manager opinion-survey of system	45	0.25	11.25	34.67	390.04
Total	585		114.89		4769.93

* Based on a six month trial period of MEADER reporting system.
** Based upon the mean of the average wages, National Compensation Survey: Occupation wages in the United States 2004, "U.S. Department of Labor, Bureau of Labor Statistics."

This information collection will not impose a cost burden on the respondent beyond that associated with their time to provide the required data. There will be no additional costs for capital equipment, software, computer services, etc.

Estimated Costs to the Federal Government

The total cost to the government for this activity is estimated to be $640,000.00.

Request for Comments

In accordance with the above-cited legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of health care research and information dissemination functions of AHRQ, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: June 21, 2007.

Carolyn M. Clancy,

Director.

[FR Doc. 07–3159 Filed 6–27–07; 8:45 am]

BILLING CODE 4160-90-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request the Office of Management and Budget (OMB) to allow the proposed information collection project: 2008–2009 Medical Expenditure Panel Survey—Insurance Component (MEPS–IC). In accordance with the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)), AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by August 27, 2007.

ADDRESSES: Written comments should be submitted to: William Carroll, Reports Clearance Officer, AHRQ, 540 Gaither Road, Room 5048, Rockville, MD 20850.

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477.

SUPPLEMENTARY INFORMATION:

Proposed Project

2008 and 2009 Medical Expenditure Panel Survey—Insurance Component (MEPS–IC).

The MEPS–IC, an annual survey of the characteristics of employer-sponsored health insurance, was first conducted by AHRQ in 1997 for the calendar year 1996. The survey has since been conducted annually for calendar years 1997 through 2006. AHRQ proposes to continue this annual survey of establishments for calendar years 2008 and 2009. The survey data

for calendar year 2008 will be collected in that year. Likewise, calendar year 2009 data will be collected in 2009. This is change from earlier MEPS–IC collections, when survey data for a calendar year were collected in the following year (i.e., 2005 survey data were collected in 2006). This changeover means that there will be no data collected for the year 2007. However, the data for 2008 and 2009 will now be released a year earlier than would have occurred under the former collection scheme.

This survey will be conducted for AHRQ by the Bureau of the Census using a sample comprised of an annual sample of employers selected from Census Bureau lists of private sector employers and governments.

Data to be collected from each employer will include a description of the business (e.g., size, industry) and descriptions of health insurance plans available, plan enrollments, total plan costs and costs to employees.

Data Confidentiality Provisions

All MEPS–IC data collected, both identifiable and non-identifiable, will be stored at the Census Bureau. Their confidentiality is protected under the U.S. Census Bureau confidentiality statute, Section 9 of Title 13, United States Code. In addition, because the Census sample lists are developed using Internal Revenue Service (IRS) Tax Information, the data also fall under the review of the IRS which conducts regular audits of the data collection storage and use (Title 26, United States Code).

The confidentiality provisions of the AHRQ statute at 42 U.S.C. 299c–3(c) apply to all data collected for research that is supported by AHRQ. All data products listed below must fully comply with the data confidentiality statute under which their raw data was collected as well as any additional confidentiality provisions that apply.

Data Products

Data will be produced in two forms: (1) Files containing employer information will be available for use by researchers at the Census Bureau's Research Data Centers (all research output is reviewed by Census employees and no identifiable data may leave the Center) and (2) a large compendium of tables of estimates, produced by Census and containing no identifiable data, will be made available on the AHRQ Web site. These tables will contain descriptive statistics, such as, numbers of establishments offering health insurance, average premiums, average contributions, total enrollments, numbers of self insured establishments and other related statistics for a large number of population subsets defined by firm size, state, industry and other establishment characteristics such as, age, profit/nonprofit status and union/nonunion status of the workforce.

The data are intended to be used for purposes such as:

- Generating National and State estimates of employer health care offerings;
- Producing estimates to support the Bureau of Economic Analysis and the Center for Medicare and Medicaid Services in their production of health care expenditure estimates for the National Health Accounts and the Gross Domestic Product;
- Producing National and State estimates of spending on employer-sponsored health insurance to study the results of National and State health care policies; and
- Supply data for modeling the demand for health insurance.

These data provide the basis for researchers to address important questions for employers and policymakers alike.

Method of Collection

The data will be collected using a combination of modes. The Census Bureau's first contact with employers will be made by telephone. This contact will provide information on the availability of health insurance from that employer and essential persons to contact. Based upon this information, Census will mail a questionnaire to the employer. In order to assure high response rates, Census will follow-up with a second mailing after an interval of approximately 30 working days, followed by a telephone call to collect data from those who have not responded by mail.

For larger respondents with high burdens, such as State employers and very large firms, Census may follow special procedures, as needed. These include performing personal visits and doing customized collection, such as accepting data in computerized formats and using special forms. The response rate for the most recent survey was approximately 79%.

ESTIMATED ANNUAL RESPONDENT BURDEN

Survey years	Annual number of respondents	Estimated time per respondent in hours	Estimated total annual burden hours	Estimated annual cost to the government
2008	33,262	.57	19,032	$9,650,000
2009	33,262	.57	19,032	9,950,000

Request for Comments

In accordance with the above cited legislation, comments on the AHRQ information collection proposal are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden (including hours and costs) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: June 21, 2007.

Carolyn M. Clancy,

Director.

[FR Doc. 07–3160 Filed 6–27–07; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–07–07BD]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Building Related Asthma Research in Public Schools—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The mission of the National Institute for Occupational Safety and Health (NIOSH) is to promote safety and health at work for all people through research and prevention. The Occupational Safety and Health Act, Public Law 91–596 (section 20[a][1]) authorizes the National Institute for Occupational Safety and Health (NIOSH) to conduct research to advance the health and safety of workers. NIOSH is conducting a longitudinal study among teachers and staff in public schools. The goals of this study are (1) To document the time course of changes in respiratory health, sick leave, and quality of life in relation to building remediation for water incursion and dampness problems and (2) to validate the reporting of building-related lower respiratory symptoms in school staff with bronchial hyper-responsiveness by the use of serial spirometry to look for building-related patterns of airflow variability.

The Centers for Disease Control and Prevention sponsored the Institute of Medicine to make an exhaustive review of the published literature relating exposures in damp buildings to health consequences. The committee findings, summarized in Damp Indoor Spaces and Health (Institute of Medicine of the National Academies of Science 2004), concluded that sufficient evidence exists for associating the presence of mold or other agents in damp buildings to nasal and throat symptoms, cough, wheeze, asthma symptoms in sensitized asthmatics, and hypersensitivity pneumonitis in susceptible persons. Identification of specific causal agents for these health outcomes in damp environments requires more investigation, and more research and demonstration projects are needed to evaluate interventions in damp buildings.

NIOSH is proposing to conduct an initial cross-sectional respiratory health survey in three schools. The study will then continue with two additional years of longitudinal follow-up, which will be used to assess respiratory health and environmental conditions in relation to time and intervention status in the three schools. NIOSH will study one school with no history of building leaks and good control of internal moisture sources, one school with previous building leaks and water damage but with subsequent renovation before the start of the study, and one school with current building leaks and dampness problems with renovation scheduled during the study. The questionnaire will be administered each year to approximately 255 respondents by an interviewer who will record the responses directly into a computer. It will include sections on the participant's medical history, work history, and home environment. All participants from the initial cross-sectional survey meeting an epidemiologic definition of asthma and reporting that the symptoms improve away from the school will be asked to perform spirometry and a methacholine challenge test, or if obstructed, a bronchodilator test, both of which are standard medical tests for asthma; NIOSH anticipates about 45 respondents for these tests. Of those 45, 20 participants who are positive for either test will also be asked to participate in the serial spirometry study, which will cover three weeks during the school term and an additional three weeks during the summer break. Participation in all surveys is completely voluntary. There are no costs to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total Burden (in hours)
Health questionnaire	255	1	1	255
Health questionnaire and lung function testing	25	1	2	50
Health questionnaire, lung function testing, serial spirometry	20	1	39	780
Total				1,085

Dated: June 22, 2007.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E7–12504 Filed 6–27–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[60 Day–07–0307]

Centers for Disease Control and Prevention; Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 or send comments to Maryam Daneshvar, Acting CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

The Gonococcal Isolate Surveillance Project (GISP) (OMB No. 0920–0307)—Extension—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The objectives of GISP are: (1) To monitor trends in antimicrobial susceptibility of strains of *Neisseria gonorrhoeae* in the United States and (2) to characterize resistant isolates. GISP provides critical surveillance for antimicrobial resistance, allowing for informed treatment recommendations. GISP was established in 1986 as a voluntary surveillance project and now involves 5 regional laboratories and 30 publicly funded sexually transmitted disease clinics around the country. The STD clinics submit up to 25 gonococcal isolates per month to the regional laboratories, which measure susceptibility to a panel of antibiotics. Limited demographic and clinical information corresponding to the isolates are submitted directly by the clinics to CDC.

During 1986–2006, GISP has demonstrated the ability to effectively achieve its objectives. The emergence of resistance in the United States to penicillin, tetracyclines, and now fluoroquinolones was identified through GISP and makes ongoing surveillance critical. Increased prevalence of fluoroquinolone-resistant *N. gonorrhoeae* (QRNG) as seen in GISP data has prompted the CDC to update the treatment recommendations for gonorrhea in the CDC's Sexually Transmitted Diseases Treatment Guidelines, 2006 and to release an MMWR article stating the CDC no longer recommended fluoroquinolones for treatment of gonococcal infections (CDC, MMWR, Vol. 56, No. 14, 332–336).

Under the GISP protocol, clinics are asked to provide 25 isolates per month. However, due to low volume at some sites, clinics submit an average of 20 isolates per clinic per month, providing an average of 121 isolates per laboratory per month. For Forms 1 and 2, a ''response'' is defined as the laboratory processing and data collection/processing associated with an individual gonococcal isolate from an individual patient. The estimated time for clinical personnel to abstract data for Form 1 is 11 minutes per response (20 isolates per clinic per month; the total number of responses per 30 clinics is 240). Based on previous laboratory experience in analyzing the gonococcal isolates, the estimated burden for each participating laboratory for Form 2 is 1 hour per response, which includes the time required for laboratory processing of the client's isolate, gathering and maintaining the data needed, and completing and reviewing the collection of information. We estimate 121 gonococcal isolates per laboratory each month (total number of responses per 5 laboratories is 1,452). For Form 3, a ''response'' is defined as the laboratory processing and recording of laboratory data for a set of 7 control strains. It takes approximately 12 minutes to process and record the laboratory data on Form 3 for one set of 7 control strains, of which there are 4 sets (total number of responses per 5 laboratories is 48). There is no cost to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Types of forms	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Clinic:				
Form 1	30	240	11/60	1,320
Laboratory:				
Form 2	5	1,452	1	7,260
Form 3	5	48	12/60	48
Total				8,628

Dated: June 22, 2007.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E7–12505 Filed 6–27–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Center for Environmental Health/Agency for Toxic Substances and Disease Registry

The Program Peer Review Subcommittee (PPRS) of the Board of Scientific Counselors (BSC), National Center for Environmental Health/Agency for Toxic Substances and Disease Registry (NCEH/ATSDR)

In accordance with section 10(a)(2) of the Federal AdvisoryCommittee Act (Pub. L. 92–463), Centers for Disease Control and Prevention (CDC), announces the following teleconference for the aforementioned subcommittee:

Time and Date: 3 p.m.–5 p.m., July 16, 2007 (Open).

Place: The teleconference will originate at NCEH/ATSDR in Atlanta, Georgia. To participate, dial 877/315–6535 and enter conference code 383520.

Purpose: Under the charge of the BSC, NCEH/ATSDR, the PPRS will provide the BSC, NCEH/ATSDR with advice and recommendations on NCEH/ATSDR Program Peer Review. They will serve the function of organizing, facilitating, and providing a long-term perspective to the conduct of NCEH/ATSDR Program Peer Review.

Matters To Be Discussed: Review and approve the previous Meeting Minutes; Discuss Preparedness and Emergency Response Peer Review; Identify a PPRS Member to participate on the Preparedness Review Workgroup, and areas of expertise needed for the Review; Identify Peer Reviewers, Partners, and Customers to participate on the Workgroup, and Draft the Peer Review Site Visit Agenda.

Agenda items are subject to change as priorities dictate.

Supplementary Information: This meeting is scheduled to begin at 3 p.m. Eastern Daylight Saving Time. Public comment period is scheduled for 4:15–4:25 p.m.

Contact Person for More Information: Sandra Malcom, Committee Management Specialist, Office of Science, NCEH/ATSDR, Mail Stop E–28, 1600 Clifton Road, NE., Atlanta, Georgia 30333, telephone 404/498–0622.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Diane Allen,

Acting Director, Management Analysis and Services Office,Centers for Disease Control and Prevention.

[FR Doc. E7–12507 Filed 6–27–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–67776, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 72 FR 19522–19528, dated April 18, 2007) is amended to reflect the reorganization of the Division of Nutrition and Physical Activity within the National Center for Chronic Disease Prevention and Health Promotion, Coordinating Center for Health Promotion, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows: Delete in its entirety the title and functional statements for the *Division of Nutrition and Physical Activity (CUCH), National Center for Chronic Disease Prevention and Health Promotion (CUC), Coordinating Center for Health Promotion (CU)*, and insert the following:

Division of Nutrition, Physical Activity, and Obesity Prevention (CUCH). (1) Provides national and international leadership to chronic disease prevention and maternal and child health in the areas of nutrition, physical activity, and obesity prevention; (2) implements surveillance and surveillance systems to track and analyze nutrition problems, physical inactivity, and related risk factors; (3) builds state capacity to collect and utilize surveillance data; (4) builds international, national, state, and local expertise and capacity in nutrition, physical activity, and obesity prevention through consultation and training; (5) provides technical assistance and other support to enable state and local health agencies to plan, implement, and evaluate nutrition, physical activity, and obesity prevention programs; (6) contributes to the science base by conducting epidemiologic and intervention studies related to nutrition, physical activity and obesity; (7) ensures that scientific and programmatic efforts span the arenas of policy, environment, communications, social, and behavioral interventions; (8) develops and disseminates new methods, guidelines, and criteria for effective nutrition, physical activity, and obesity prevention programs; (9) collaborates with appropriate Federal and state agencies, international/national/community organizations, and other CDC partners; (10) provides national leadership in health communications to promote nutrition and physical activity, and integrate health communications efforts with overall program efforts; and (11) facilitates the translation and dissemination of research findings into public health practice for optimal health impact.

Office of the Director (CUCH1). (1) Provides leadership and direction in establishing division priorities, strategies, programs, and policies; (2) plans and directs resources and activities in alignment with division goals and objectives; (3) mobilizes and coordinates partnerships and constituencies to build a national infrastructure for nutrition and physical activity promotion and obesity prevention; (4) educates healthcare professionals, businesses, communities, the general public, and key decision-makers about the importance of nutrition and physical activity in prevention obesity and their impact on chronic disease and public health; (5) facilitates cross-functional activities and operations throughout NCCDPHP and coordination with other NCs, constituencies, and Federal agencies; (6) monitors progress toward achieving division goals and objectives and assesses the impact of programs; (7) provides special training and capacity building activities in support of division programs; (8) provides administrative and management support for division activities; (9) provides leadership to the division and field of staff for health communication efforts to promote nutrition and physical activity and prevent obesity.

Nutrition Branch (CUCHC). (1) Plans, coordinates, and conducts surveillance activities in domestic and international settings to assess nutrition practices and behavioral risks in children, adolescents, and adults, with a particular focus on maternal and child health, optimal child growth and development, and prevention of chronic disease; (2) provides expertise, consultation and training to local, state,

and international officials and scientists to establish and maintain dietary surveillance systems related to maternal and child health, chronic disease nutrition, and risk factors; (3) analyzes, interprets, and disseminates data from surveys, surveillance activities, and epidemiologic studies related to maternal and child nutrition and nutrition factors affecting chronic disease; (4) designs, implements, and evaluates epidemiologic studies and intervention projects for domestic and international application to address micronutrient nutrition; (5) develops and disseminates nutrition guidelines and recommendations for maternal and child health, child growth and development, and prevention/reduction of chronic disease; (6) coordinates and collaborates with appropriate Federal agencies, national and international organizations, and other partners to strengthen and extend nutrition surveillance and epidemiology; and (7) conducts cross-functional nutrition-related activities throughout NCCDPHP.

Physical Activity and Health Branch (CUCHD). (1) Plans, coordinates, and conducts surveillance activities in domestic and international settings related to physical activity levels as well as factors associated with physical activity practices; (2) conducts epidemiologic research related to physical activity and its impact on health, obesity, and chronic disease; (3) provides leadership in the development of evidence-based guidelines and recommendations for physical activity; (4) provides technical expertise, consultation and training to state, local, and international officials related to physical activity; (5) disseminates findings from surveillance and epidemiologic research through publications in scientific literature; (6) coordinates and collaborates with appropriate Federal agencies, national and international organizations, and other partners to strengthen and extend surveillance and epidemiology related to physical activity and health and to enhance development of science-based guidelines and recommendations for physical activity; and (7) conducts cross-functional physical activity-related activities throughout NCCDHP.

Obesity Prevention and Control Branch (CUCHG). (1) Plans, coordinates, and conducts surveillance to assess levels of healthy weight, overweight, and obesity and associated factors and behaviors; (2) provides expertise, consultation and training to state, local, and international officials and scientists to establish and maintain surveillance systems related to healthy weight, overweight, and obesity; (3) analyzes, interprets, and disseminates data from surveys, surveillance activities, and epidemiologic studies related to obesity and overweight; (4) designs, implements, and evaluates epidemiologic studies and intervention projects; (5) develops and disseminates guidelines and recommendations; (6) coordinates and collaborates with appropriate Federal agencies, national and international organizations, and other partners to strengthen and extend surveillance and epidemiology; and (7) conducts cross-functional obesity-related activities throughout NCCDPHP.

Program Development and Evaluation Branch (CUCHH). (1) Provides programmatic leadership, technical expertise, and guidance for state-based nutrition, physical activity, and obesity prevention programs; (2) delivers technical assistance and consultation to states, communities, and the public in health promotion and chronic disease prevention; (3) identifies and promotes effective program management approaches and ensures performance-based distribution of public funds; (4) uses research findings, guidelines, and recommendations to develop strategies and interventions that support physical activity, good nutrition, and health weight; (5) conducts behavioral and communications research to understand knowledge, attitudes, and beliefs, and institute health-conscious behavior changes in populations; (6) conducts research to identify effective outreach strategies, particularly for underserved populations and those at highest risk of chronic disease; (7) obtains, analyzes, disseminates, and publishes data from state-based programs to develop operational strategies for translation of results into improved and promising practices; (8) monitors, tracks, and evaluates program interventions and activities for health impact; and (9) establishes and maintains collaborative relationships with external partners and groups, including research institutions, schools of public health, medical schools, state health departments, national and voluntary organizations, and others to ensure that the Division's efforts reflect state-of-the-art practices and methods.

Dated: June 20, 2007.

William H. Gimson,

Chief Operating Officer, Centers for Disease Control and Prevention (CDC).

[FR Doc. 07–3162 Filed 6–27–07; 8:45 am]

BILLING CODE 4163–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2007N–0241]

Agency Information Collection Activities; Proposed Collection; Comment Request; Institutional Review Boards

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the recordkeeping requirements for institutional review boards (IRBs).

DATES: Submit written or electronic comments on the collection of information by August 27, 2007.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of the Chief Information Officer (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each

proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Institutional Review Boards—21 CFR 56.115 (OMB Control Number 0910–0130)—Extension

When reviewing clinical research studies regulated by FDA, IRBs are required to create and maintain records describing their operations, and make the records available for FDA inspection when requested. These records include: Written procedures describing the structure and membership of the IRB and the methods that the IRB will use in performing its functions; the research protocols, informed consent documents, progress reports, and reports of injuries to subjects submitted by investigators to the IRB; minutes of meetings showing attendance, votes and decisions made by the IRB, the number of votes on each decision for, against, and abstaining, the basis for requiring changes in or disapproving research; records of continuing review activities; copies of all correspondence between investigators and the IRB; statement of significant new findings provided to subjects of the research; and a list of IRB members by name, showing each member's earned degrees, representative capacity, and experience in sufficient detail to describe each member's contributions to the IRB's deliberations, and any employment relationship between each member and the IRB's institution. This information is used by FDA in conducting audit inspections of IRBs to determine whether IRBs and clinical investigators are providing adequate protections to human subjects participating in clinical research.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency of Recordkeeping	Total Annual Records	Hours per Recordkeeper	Total Hours
56.115	5,000	14.6	73,000	100	7,300,000
Total					7,300,000

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

The recordkeeping requirement burden is based on the following: The burden for each of the paragraphs under 21 CFR 56.115 has been considered as one estimated burden. FDA estimates that there are approximately 5,000 IRBs. The IRBs meet on an average of 14.6 times annually. The agency estimates that approximately 100 hours of person-time per meeting are required to meet the requirements of the regulation.

Dated: June 21, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7–12496 Filed 6–27–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2006N–0430]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; General Licensing Provisions: Biologics License Application, Changes to an Approved Application, Labeling, Revocation and Suspension, Postmarketing Studies Status Reports, and Forms FDA 356h and 2567

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''General Licensing Provisions: Biologics License Application, Changes to an Approved Application, Labeling, Revocation and Suspension, Postmarketing Studies Status Reports, and Forms FDA 356h and 2567'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of the Chief Information Officer (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of February 2, 2007 (72 FR 5057), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0338. The approval expires on June 30, 2010. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets*.

Dated: June 21, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7–12497 Filed 6–27–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2007N–0015]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Adoption of Food and Drug Administration Food Code by Local, State and Tribal Governments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Adoption of FDA Food Code by Local, State and Tribal Governments'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of the Chief Information Officer (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857,301–827–4659.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of April 13, 2007 (72 FR 18659), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0448. The approval expires on June 30, 2010. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets*.

Dated: June 21, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7–12499 Filed 6–27–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2007N–0231]

Agency Information Collection Activities; Proposed Collection; Comment Request; Pre-market Approval of Medical Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection requirements for premarket approval of medical devices.

DATES: Submit written or electronic comments on the collection of information by August 27, 2007.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of the Chief Information Officer (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1472.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Pre-market Approval of Medical Devices—21 CFR Part 814 / FDAMA Sections 201; 202; 205; 208; 209 (OMB Control Number 0910–0231)—Extension

Section 515 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e) sets forth the requirements for pre-market approval of certain class III medical devices. Class III devices are either pre-amendments devices that have been classified into class III, or post-amendments devices which are not substantially equivalent to a pre-amendments device, or transitional devices. Class III devices are devices such as implants, life sustaining or life supporting devices, and /or devices which otherwise present a potentially unreasonable risk of illness or injury, and /or are of substantial importance in preventing impairment of human health. Most pre-market approval applications (PMAs) are for post-amendments class III devices.

Under section 515 of the act, an application must contain certain specific information, including full reports of all information concerning investigations showing whether the device is reasonably safe and effective. The application should also include a statement of components, ingredients, and properties of the principles of operation for such a device. In addition, the application should also include a full description of the methods used in, and the facilities and controls used for the manufacture and processing of the device and labeling specimens. The implementing regulations, contained in

part 814 (21 CFR part 814), further specifies the contents of a PMA for a class III medical device and the criteria FDA sets forth in approving, denying, or withdrawing approval of a PMA as well as supplements to PMAs. The purpose of this regulation is to establish an efficient and thorough procedure for FDA's review of PMAs and supplements to PMAs for certain class III (pre-market approval) medical devices. The regulations under part 814 facilitate the approval of PMAs and supplements to PMAs for devices that have been shown to be reasonably safe and effective and otherwise meet the statutory criteria for approval. The regulations also ensure the disapproval of PMAs and supplements to PMAs for devices that have not been shown to be reasonably safe and effective and that do not otherwise meet the statutory criteria for approval.

The Food and Drug Modernization Act of 1997 (FDAMA) (Public Law 105–115) was enacted on November 21, 1997, to implement revisions to the act by streamlining the process of bringing safe and effective drugs, medical devices, and other therapies to the U.S. market. Several provisions of this act affect the PMA process, such as section 515(d)(6) of the act. This section provided that PMA supplements were required for all device changes that affect safety and effectiveness of a device unless such changes are modifications to manufacturing procedures or method of manufacture. This type of manufacturing change now requires a 30-day notice, or where FDA finds such notice inadequate, a 135-day PMA supplement.

To make the PMA process more efficient, in the past several years FDA has done the following: (1) Made changes to the PMA program based on comments received; (2) complied with changes to the program mandated by FDAMA and Medical Device User Fee Modernization Act; and (3) worked toward completion of its PMA reinvention efforts.

Respondents to this information collection are persons filing a PMA application or a PMA supplement with FDA for approval of certain class III medical devices. Part 814 defines a person as any individual, partnership, corporation, association, scientific or academic establishment, government agency or organizational unit, or other legal entity. These respondents include entities meeting the definition of manufacturers such as manufacturers of commercial medical devices in distribution prior to May 28, 1976 (the enactment date of the Medical Device Amendments). In addition, hospitals that reuse single use devices (SUDs) are also included in the definition of manufacturers. It is expected that FDA will receive four PMA applications from hospitals that remanufacture SUDs annually. This figure has been included in table 1 of this document, as part of the reporting burden in § 814.15.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Part 800/ Section/FDAMA	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours Per Responses	Total Hours
814.15(b)	10	1	10	2	20
814.20	48	1	48	668	32,064
814.37(a-c) and (e)	48	1	48	167	8,016
814.39(a)	460	1	460	60	27,600
814.39(d)	70	1	70	6	420
814.39(f)	254	1	254	16	4,064
814.82(a)(9)	34	1	34	135	4,590
814.84(b)	34	1	34	10	340
Section 201 (FDAMA) Agreement Meeting	3	1	3	50	150
Section 202 (FDAMA) Expedited Reviews	7	1	7	10	70
Section 205 (FDAMA) Determination Meeting	5	1	5	50	250
Section 208 (FDAMA) Classification Panel Meetings	19	1	19	30	570
Section 209 (FDAMA) 100 day meeting	36	1	36	10	360
Totals	1,028	13	1,028	1,214	78,514

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Part 800	No. of Recordkeepers	Annual Frequency of Recordkeeping	Total Annual Records	Hours per Recordkeeper	Total Hours
842 (a) (5) & (6)	1,128	1	1,128	17	19,176

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The industry-wide burden estimate for PMAs is based on an FDA actual average fiscal year (FY) annual rate of receipt of 48 PMA original applications, 530 PMA supplements, and 254 30-day notices using FY 2002 through 2006 data. The burden data for PMAs is based on data provided by manufacturers by device type and cost element in an earlier study. The specific burden elements for which FDA has data are as follows:

- Clinical investigations—67 percent of total burden estimate;
- Submission of additional data or information to FDA during a PMA review—12 percent;
- Additional device development cost (e.g., testing)—10 percent; and
- PMA and PMA supplement preparation and submissions, and development of manufacturing and controls data— 11 percent.

Reporting Burden:

The reporting burden can be broken out by certain sections of the PMA regulation as follows:

§ 814.15—Research Conducted Outside the United States

Approximately 20 percent of the clinical studies submitted in support of a PMA application are conducted outside the United States. Each study should be performed in accordance with the ''Declaration of Helsinki'' or the laws and regulations of the country in which the study was conducted. If the study was conducted in accordance with the laws of the country, the PMA applicant is required to explain to FDA in detail the differences between the laws of the country and the ''Declaration of Helsinki''. Based on the number of PMAs received that contained studies from overseas, FDA estimates that the burden estimate necessary to meet this requirement is 20 hours.

§ 814.20 (a) through (c) and (e)—Application

The majority of the 32,064 hourly burden estimate is due in part to this requirement. Included in this requirement are the conduct of laboratory and clinical trials as well as the analysis, review, and physical preparation of the PMA application. FDA estimates that 48 manufacturers, including hospital re-manufacturers of SUDs, will be affected by these requirements which are based on the actual average of FDA receipt of new PMA applications in FY 2002 through 2006. FDA's estimate of the hours per response (668) was derived through FDA's experience and consultation with industry and trade associations. In addition, FDA also based its estimate on the results of an earlier study which accounts for the bulk of the hourly burden for this requirement, identified by manufacturers.

§ 814.37—PMA Amendments and Re-Submitted PMAs

As part of the review process, FDA often requests PMA applicant to submit additional information regarding the device necessary for FDA to file the PMA or to complete its review and make a final decision. The PMA applicant may, also on their own initiative, submit additional information to FDA during the review process. These amendments contain information ranging from additional test results, re-analysis of the original data set to revised device labeling. Almost all PMAs received by the agency have amendments submitted during the review process. FDA estimates that 8,016 burden hours are necessary to satisfy this requirement.

§ 814.39 (a)—PMA Supplements

FDA believes that the amendments mandated by FDAMA for § 814.39(f), permitting the submission of the 30-day notices in lieu of regular PMA supplements, will result in an approximate 20 percent reduction in the total number of hours as compared to regular PMA supplements. As a result, FDA estimates that 27,600 hours of burden are needed to complete the requirements for regular PMA supplements.

§ 814.39(d)—Special PMA Supplements—Changes Being Affected

This type of supplements is intended to enhance the safety of the device or the safe use of the device. The number of PMA supplements received that fit this category averaged 70 per year based on the numbers received from FY 2002 through FY 2006. Because of the minimal data required to be included in this type of supplement, FDA estimates that the burden hours necessary to satisfy this requirement are 420 hours.

§ 814.39(f)—30-Day Notice

Under section 515(d) of the act, modifications to manufacturing procedures or methods of manufacture that affect the safety and effectiveness of a device subject to an approved PMA do not require submission of a PMA supplement under paragraph (a) of this section and are eligible to be the subject of a 30-day notice. A 30-day notice shall describe in detail the change, summarize the data or information supporting the change, and state that the change has been made in accordance with the requirements of part 820 (21 CFR part 820). The manufacturer may distribute the device 30 days after the date on which FDA receives the 30-day notice, unless FDA notifies the applicant within 30 days from receipt of the notice, that it is not adequate. FDA estimates the burden to satisfy this requirement is 4,064 hours.

§ 814.82 (a)(9)—Post-Approval Requirements

Post-approval requirements concerns approved PMAs that were not reclassified and require a periodic report. After approval, all PMAs require a submission of an annual report. On average, approximately half of the submitted PMAs (34), require associated post-approval studies, i.e., follow-up of patients used in clinical trials to support the PMA or additional preclinical information, that is labor-intensive to compile and complete; the remaining PMAs require minimal information. Based on experience and consultation with industry, FDA has estimated that preparation of reports and information required by this section requires 4,590 hours.

§ 814.84(b)—Reports

Post-approval requirements described in § 814.82 (a)(7) require submission of an annual report for each approved PMA. FDA estimates that respondents will average about 10 hours in preparing their reports to meet this requirement. This estimate is based on FDA's experience and consultation with industry. Thus, FDA estimates that the periodic reporting burden required by this section will take 340 hours.

Statutory Reporting Burden Estimate (FDAMA)

The total statutory reporting burden under the requirements of sections 201, 202, 205, 208, and 209 of FDAMA is estimated to be 1,400 hours. This burden estimate was based on actual real FDA data tracked from January 1, 1998, to the present, and an estimate was also derived to forecast future expectations with regard to this statutory data.

§ 814.82 (a) (5) and (a)(6)—Recordkeeping

The recordkeeping burden under this section requires the maintenance of records, used to trace patients and the organization and the indexing of records into identifiable files to ensure the device's continued safety and effectiveness. These records are required only of those manufacturers who have an approved PMA and who had original clinical research in support of that PMA. For a typical year's submissions,

70 percent of the PMAs are eventually approved with 75 percent of these having original clinical trial data. Therefore, approximately 34 PMAs a year (48 annual submissions x 70 percent), would be subject to these requirements. Also, because the requirements apply to all active PMAs, all holders of an active PMA application must maintain these records.

PMAs have been required since 1976, and there are 1,128 active PMAs that could be subject to these requirements, based on actual FDA data. Each study has approximately 200 subjects, and at an average of 5 minutes per subject, there is a total burden per study of 1,000 minutes, or 17 hours. The aggregate burden for all 1,128 holders of approved original PMAs, therefore, is 19,176 hours (1,127 approved PMAs with clinical data x 17 hours per PMA).

The applicant determines which records should be maintained during product development to document and/or substantiate the device's safety and effectiveness. Records required by the current good manufacturing practices for medical devices regulation (part 820) may be relevant to a PMA review and may be submitted as part of an application. In individual instances, records may be required as conditions of approval to ensure the device's continuing safety and effectiveness.

Dated: June 21, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7–12502 Filed 6–27–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Request for Notification From Industry Organizations Interested in Participating in the Selection Process for a Nonvoting Industry Representative on the Allergenic Products Advisory Committee and Request for Nominations for a Nonvoting Industry Representative on the Allergenic Products Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any industry organizations interested in participating in the selection of a nonvoting industry representative to serve on its Allergenic Products Advisory Committee for the Center for Biologics Evaluation and Research (CBER) notify FDA in writing. A nominee may either be self-nominated or nominated by an organization to serve as a nonvoting industry representative. Nomination will be accepted for current vacancies effective with this notice.

DATES: Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests must send a letter stating the interest to FDA by July 30, 2007, for vacancies listed in the notice. Concurrently, nomination material for prospective candidates should be sent to FDA by July 30, 2007.

ADDRESSES: All letters of interest and nominations should be submitted in writing to Gail Dapolito (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Gail Dapolito, Center for Biologics Evaluation and Research, Food and Drug Administration (HFM–71), 1401 Rockville Pike, Rockville, MD 20892, 301–827–1289, *gail.dapolito@fda.hhs.gov*

SUPPLEMENTARY INFORMATION: Section 120 of the FDA Modernization Act of 1997 (FDAMA) (21 U.S.C. 355) requires that newly formed FDA advisory committees include representatives from the biologic manufacturing industries. Although not required for existing committees, to keep within the spirit of FDAMA, the agency intends to add nonvoting industry representatives to its CBER advisory committee identified below.

I. CBER Allergenic Products Advisory Committee

The Committee reviews and evaluates available data concerning the safety, effectiveness, and adequacy of labeling of marketed and investigational allergenic biological products or materials that are administered to humans for the diagnosis, prevention, or treatment of allergies and allergic disease, and makes appropriate recommendations to the Commissioner of Food and Drugs of its findings regarding the affirmation or revocation of biological product licenses, on the safety, effectiveness, and labeling of the products, on clinical and laboratory studies of such products, on amendments or revisions to regulations governing the manufacture, testing and licensing of allergenic biological products, and on the quality and relevance of FDA's research programs which provide the scientific support for regulating these agents.

II. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (see **ADDRESSES**) within 30 days of publication of this document. Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations; and a list of all nominees along with their current resumes. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for the Allergenic Products Advisory Committee. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within 60 days, the Commissioner of Food and Drugs will select the nonvoting member to represent industry interests.

III. Application Procedure

Individuals may self nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. A current curriculum vitae and the name of the committee of interest should be sent to the FDA contact person within the 30 days. FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the committee. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

FDA has a special interest in ensuring that women, minority groups, individuals with physical disabilities, and small businesses are adequately represented on its advisory committees, and therefore, encourages, nominations for appropriately qualified candidates from these groups. Specifically, in this document, nominations for nonvoting representatives of industry interests are encouraged from the allergenic product manufacturing industry.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: June 21, 2007.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E7–12527 Filed 6–27–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2007N–0246]

Menley & James Laboratories, Inc. et al.; Proposal to Withdraw Approval of Six New Drug Applications; Opportunity for a Hearing

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity to request a hearing on the agency's proposal to withdraw approval of six new drug applications (NDAs) from multiple sponsors. The basis for the proposal is that the sponsors have repeatedly failed to file required annual reports for these applications.

DATES: Submit written requests for a hearing by July 30, 2007; submit data and information in support of the hearing request by August 27, 2007.

ADDRESSES: Requests for a hearing, supporting data, and other comments are to be identified with Docket No. 2007N–0246 and submitted to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Florine P. Purdie, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–2041.

SUPPLEMENTARY INFORMATION: The holders of approved applications to market new drugs for human use are required to submit annual reports to FDA concerning each of their approved applications in accordance with § 314.81 (21 CFR 314.81). The holders of the approved applications listed in the following table have failed to submit the required annual reports and have not responded to the agency's request by certified mail for submission of the reports.

Application No.	Drug	Applicant
NDA 6–410	Benzedrex (propylhexadrine) Nasal Spray	Menley & James Laboratories, Inc., Commonwealth Corporate Center, 100 Tournament Drive, Horsham, PA 19044
NDA 7–518	Synthetic Vitamin A	Pfizer Laboratories, Division of Pfizer, Inc., 235 East 42d St., New York, NY 10017
NDA 8–837	Isoniazid Tablets	Barnes Hind, 895 Kifer Rd., Sunnyvale, CA 94806
NDA 8–851	NDK Fluoride Dentrifice (sodium monofluorophosphate)	NDK Co., c/o J.W. Emmer/Kenneth Emmer, 215 Genevieve Dr., Lafayette, LA 70503
NDA 9–395	Paskalium (potassium aminosalicylate)	Glenwood, 111 Cedar Lane, Englewood, NJ 07631
NDA 19–518	Extra Strength Aim (sodium monofluorophosphate)	Chesebrough-Ponds USA Co., 33 Benedict Pl., P.O. Box 6000, Greenwich, CT 06836–6000

Therefore, notice is given to the holders of the approved applications listed in the table and to all other interested persons that the Director of the Center for Drug Evaluation and Research proposes to issue an order under section 505(e) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(e)) withdrawing approval of the applications and all amendments and supplements thereto on the ground that the applicants have failed to submit reports required under § 314.81.

In accordance with section 505 of the act and 21 CFR part 314, the applicants are hereby provided an opportunity for a hearing to show why the applications listed previously should not be withdrawn and an opportunity to raise, for administrative determination, all issues relating to the legal status of the drug products covered by these applications.

An applicant who decides to seek a hearing shall file the following: (1) A written notice of participation and request for a hearing (see **DATES**), and (2) the data, information, and analyses relied on to demonstrate that there is a genuine and substantial issue of fact that requires a hearing (see **DATES**). Any other interested person may also submit comments on this notice. The procedures and requirements governing this notice of opportunity for a hearing, notice of participation and request for a hearing, information and analyses to justify a hearing, other comments, and a grant or denial of a hearing are contained in § 314.200 and 21 CFR part 12.

The failure of an applicant to file a timely written notice of participation and request for a hearing, as required by § 314.200, constitutes an election by that applicant not to avail itself of the opportunity for a hearing concerning the proposal to withdraw approval of the applications and constitutes a waiver of any contentions concerning the legal status of the drug products. FDA will then withdraw approval of the applications and the drug products may not thereafter lawfully be marketed, and FDA will begin appropriate regulatory action to remove the products from the market. Any new drug product marketed without an approved NDA is subject to regulatory action at any time.

A request for a hearing may not rest upon mere allegations or denials, but must present specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. Reports submitted to remedy the deficiencies must be complete in all respects in accordance with § 314.81. If the submission is not complete or if a request for a hearing is not made in the required format or with the required reports, the Commissioner of Food and Drugs (the Commissioner) will enter summary judgment against the person who requests the hearing, making findings and conclusions, and denying a hearing.

All submissions under this notice of opportunity for a hearing must be filed in four copies. Except for data and information prohibited from public disclosure under section 301 of the act (21 U.S.C. 331(j)) or 18 U.S.C. 1905, the submissions may be seen in the Division of Dockets Management (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under section 505 of the act and under authority delegated to the Director, Center for

Drug Evaluation and Research, by the Commissioner.

Dated: June 11, 2007.

Douglas C. Throckmorton,

Deputy Director, Center for Drug Evaluation and Research.

[FR Doc. E7–12494 Filed 6–27–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Dermatologic and Ophthalmic Drugs Advisory Committee and the Drug Safety and Risk Management 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 Committees: Dermatologic and Ophthalmic Drugs Advisory Committee and the Drug Safety and Risk Management Advisory Committee.

General Function of the Committees: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on August 1, 2007, from 8 a.m. to 12:30 p.m.

Location: Hilton Washington DC North/Gaithersburg, The Ballrooms, 620 Perry Pkwy, Gaithersburg, MD.

Contact Person: Sohail Mosaddegh, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, fax: 301–827–6776, e-mail: *Sohail.Mosaddegh@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), codes 3014512534 or 3014512535. 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: The committees will meet in joint session to be briefed on iPLEDGE, the risk management program for isotretinoin products. Presentations will provide updates on risk management activities for isotretinoin since the full implementation of iPLEDGE on March 1, 2006.

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/ohrms/dockets/ac/acmenu.htm*, click on the year 2007 and 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 July 11, 2007. Oral presentations from the public will be scheduled between approximately 10:15 a.m. and 11:15 a.m. Those desiring to make 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 July 2, 2007. 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 July 3, 2007.

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 John Lauttman, 301-827-7001, at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: June 21, 2007.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E7–12501 Filed 6–27–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Data Collection; Comment Request; National Physician Survey of Practices on Diet, Physical Activity, and Weight Control

SUMMARY: In compliance with the provisions of Section 3506 (c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comments on proposed data collection projects, the National Institutes of Health (NIH), National Cancer Institute (NCI) 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: Physician Survey of Practices on Diet, Physical Activity, and Weight Control. *Type of Information Collection Request:* NEW. *Need and Use of Information Collection:* This study will obtain current, national data on primary care physicians' knowledge, attitudes, and practices related to diet, physical activity, and weight control. Obesity, poor diet, and lack of physical activity are becoming recognized as major public health problems in the United States, and have been linked to increased risk, adverse prognosis, and poor quality of life for cancer and many other chronic diseases. The data collected in this study will support and further NCI work in monitoring and evaluating providers' cancer prevention knowledge, attitudes, and practices and their impact on population health, as well as enable monitoring of progress toward major cancer control goals. Data from the survey will be used to profile existing physician practice, understand barriers to counseling and referral, and to inform methods for improving the utilization of these services for adults and children. Two questionnaires, one sent to physicians and one sent to their practice administrators, will be administered by mail or telephone to a randomly-selected national sample of 2,000 physicians belonging to primary care specialties. Study participants will be 2,000 practicing physicians who are family practitioners, general internists, pediatricians, and obstetrician/gynecologists and 2,000 practice administrators.

The annual reporting burden is as follows: *Estimated Number of Respondents:* 4,000; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours Per Response:* .333; and *Estimated Total Annual Burden Hours Requested:* 1,332. The annualized cost to respondents is estimated at: $65,048. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Type of respondent	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours
Physician	2000	1	0.333	666
Medical Practice Administrator	2000	1	0.333	666
Total	4000	1		1,332

*Hourly earnings data are taken from the National Compensation Survey: Occupational Wages in the United States, June 2005, U.S. Department of Labor, U.S. Bureau of Labor Statistics.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (a) Whether the proposed collection of information is necessary for the performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Send comments to Ashley Wilder Smith, PhD, M.P.H., Health Sciences Specialist, National Cancer Institute, 6130 Executive Blvd., MSC 7344, Executive Plaza North, Room 4090, Bethesda, MD 20892–7344. Telephone: 301–451–1843; E-mail: *smithas@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication should be received by August 27, 2007.

Dated: June 20, 2007.

Ashley Wilder Smith,

National Cancer Institute Task Order Monitor, National Institutes of Health.

[FR Doc. E7–12535 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Orally Active Derivatives of 1,3,5(10)-estratriene

Description of Technology: The utility of estrogenic substances in the practice of medicine is well documented. Estrogens may be used for the replacement of the natural hormone estradiol in hypogonadism, and following the removal of the ovaries or cessation of ovarian activity during menopause. They are also widely employed as a component of oral contraceptives. However, orally-active synthetic estrogens are associated with a number of side effects, such as: Enhanced risk of endometrial carcinoma; induction of malignant carcinoma, especially in the cervix, breast, vagina and liver; promotion of gallbladder disease, thromboembolic and thrombotic diseases, myocardial infarction, hepatic adenoma, elevated blood pressure, and hypercalcemia; and reduced glucose tolerance.

The NIH announces a new family of novel, active estrogens that are nitrate esters of estradiol. These nitrate esters possess enhanced estrogenic activity following oral administration and lack a 17-ethynyl alcohol, which has been implicated in many side effects attributed to other synthetic estrogens. It is anticipated that these esters could be used in all instances where estrogen is prescribed as a treatment.

Applications: Hormone replacement therapies; Oral contraceptives.

Market: The hormone replacement market exceeds one billion dollars per year, and the oral contraceptive market is more than three billion dollars per year.

Development Status: Early stage.

Inventors: Hyun K. Kim *et al.* (NICHD).

Patent Status: U.S. Patent 5,554,603 issued 10 Sep 1996 (HHS Reference No. E–137–1993/0–US–01); Foreign counterparts in Australia, Canada, Japan, and Europe.

Licensing Status: Available for exclusive or non-exclusive licensing.

Licensing Contact: Tara L. Kirby, PhD; 301/435–4426; *tarak@mail.nih.gov.*

Methods of Inducing Immune Tolerance Using Immunotoxins

Description of Invention: The invention concerns immunotoxins and methods of using the immunotoxins for the treatment of rejection response in a patient, including graft-versus-host disease and transplantation of organs, tissues and cells into a host. In a specific embodiment of the invention, the transplant involves pancreatic islet cells. The immunotoxins are targeted via an antibody that is specific to T cells. This allows the specific ablation of resting T cells, resulting in an accentuation of immune tolerizing responses and an increased tolerance to transplants and grafts. The toxin portion of the immunotoxin is genetically engineered to maintain bioactivity when recombinantly produced in *Pichia pastoris.* Data are available in transgenic animals expressing human CD3ε which

supports the effects of the immunotoxin against T cells.

Applications: Use of immunotoxins decreases T cell population, allowing greater host immune tolerance of transplants and grafts; Specific method for increasing immune tolerance to pancreatic islet transplants.

Advantages: Specificity of the immunotoxin avoids the killing of other cells, reducing side-effects associated with other mechanisms of treatment (X-ray and cyclophosphamide) such as infection and induced malignancy; A GMP production process for the immunotoxin has already been successfully implemented.

Benefits: New methods and compositions with limited side-effects have the potential to revolutionize treatment of transplant/graft recipients; provides an opportunity to capture a significant market share for the millions of people who require transplants/grafts.

Inventors: David Neville *et al.* (NIMH).

Patent Status: U.S. Patent No. 5,167,956 issued 01 Dec 1992 (HHS Reference No. E–012–1991/0–US–01); U.S. Patent No. 5,762,927 issued 09 Jun 1998 (HHS Reference No. E–012–1991/4–US–02); U.S. Patent No. 6,103,235 issued 15 Aug 2000 (HHS Reference No. E–012–1991/7–US–01); U.S. Patent No. 7,125,553 issued 24 Oct 2006 (HHS Reference No. E–012–1991/7–US–02); U.S. Patent Application No. 09/810,999 filed 16 Mar 2001, which published as U.S. 2001/0024645 on 27 Sep 2001, Allowed (HHS Reference No. E–059–1998/0–US–02); International Patent Application No. PCT/US00/10253 filed 14 Apr 2000, which published as WO 00/61132 on 19 Oct 2000 (HHS Reference E–168–1999/0–PCT–02); U.S. Patent No. 6,632,928 issued 14 Oct 2003 (HHS Reference No. E–044–1997/0–US–07); U.S. Patent Application No. 10/435,567 filed 09 May 2003, which published as 2003/0185825 on 02 Oct 2003 (HHS Reference No. E–044–1997/0–US–08); U.S. Patent Application No. 10/296,085 filed 18 Nov 2002, which published as 2004/0127682 on 01 Jul 2004 (HHS Reference No. E–044–1997/1–US–06); Foreign rights are also available.

Licensing Status: Available for exclusive or non-exclusive licensing.

Licensing Contact: David A. Lambertson, PhD; 301/435–4632; *lambertsond@mail.nih.gov.*

Collaborative Research Opportunity: The National Institute of Mental Health, Laboratory of Molecular Biology, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize methods of using the immunotoxins for the treatment of rejection response in a patient. Please contact David Neville at *davidn@mail.nih.gov* for more information.

Dated: June 20, 2007.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E7–12534 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Special Emphasis Panel, August 2, 2007, 1:30 p.m. to August 2, 2007, 3:30 p.m., Marriott Bethesda North Hotel & Conference Center, 5701 Marinelli Road, North Bethesda, MD 20852 which was published in the **Federal Register** on April 24, 2007, 72 FR 20348.

This meeting notice is amended to reflect the location change to the Embassy Suites Hotel at Chevy Chase Pavilion, 1400 Military Road, NW., Washington, DC 20015 and meeting time to 3 p.m. to 5 p.m. The meeting is closed to the public.

Dated: June 21, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3185 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), 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/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Antibody Array for Cancer Detection.

Date: July 19, 2007.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6116 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Lalita D. Palekar, PhD, Scientific Review Administrator, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 7141, Bethesda, MD 20892–7405, 301–496–7575, *palekarl@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Small Grants for Behavioral Research in Cancer Control.

Date: July 26, 2007.

Time: 8:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Marriott Gaithersburg Washingtonian Ctr., 204 Boardwalk Place, Gaithersburg, MD 20878.

Contact Person: Rhonda J. Moore, PhD, Scientific Review Administrator, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Suite 701, Room 7151, Bethesda, MD 20892–8329, 301–451–9385, *moorerh@mail.nih.gov.*

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee A—Cancer Centers.

Date: August 2–3, 2007.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Gail J. Bryant, Scientific Review Administrator, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 8107, MSC 8328, Bethesda, MD 20892–8328, 301–402–0801, *gb30t@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Lung Cancer and Inflammation.

Date: August 7–8, 2007.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Thomas M. Vollberg, PhD, Scientific Review Administrator, Special Review and Logistics Branch, Division of extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 7142, Bethesda, MD 20892, 301–594–9582, *vollert@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction;

93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS).

Dated: June 21, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3186 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), 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 Center for Research Resources Special Emphasis Panel, CM SEP.

Date: July 18, 2007.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Barbara J. Nelson, PhD, Scientific Review Administrator, National Center for Research Resources, or National Institutes of Health, 6701 Democracy Blvd., 1 Democracy Plaza, Room 1080, MSC 4874, Bethesda, MD 20892–4874, 301–435–0806.

Name of Committee: National Center for Research Resources Special Emphasis Panel, Conference Grant SEP.

Date: July 18, 2007.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Steven Birken, PhD, Scientific Review Administrator, Office of Review, National Center for Research Resources, National Institutes of Health, 6701 Democracy Blvd., 10th Fl., Bethesda, MD 20892, 301–435–1078, *birkens@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333, National Institutes of Health, HHS)

Dated: June 21, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3183 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Research Projects in Genetic Epidemiology.

Date: August 2, 2007.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Mark Roltsch, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892–7924, 301–435–0287, *roltschm@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Conference Grant (R13's).

Date: August 9, 2007.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Chang Sook Kim, PhD, Scientific Review Administrator, Review Branch, DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7190, Bethesda, MD 20892–7924, 301–435–0287, *carolko@mail.nih.gov.*

Dated: June 21, 2007.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3180 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), 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 Human Genome Research Institute Special Emphasis Panel, Encode Scaling and DCC RFA's.

Date: July 12–13, 2007.

Time: 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Eric P. Newman Education Center, 660 S. Euclid Avenue, Saint Louis, MO 63110.

Contact Person: Keith McKenney, PhD, Scientific Review Administrator, NHGRI, 5635 Fishers Lane, Suite 4076, Bethesda, MD 20814, 301–594–4280, *mckenneyk@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: June 21, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3184 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), 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 of Nursing Research Special Emphasis Panel, NINR Loan Repayment Program (L30s).

Date: July 13, 2007.

Time: 9 a.m. to 12 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Suite 710, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Jeffrey M. Chernak, PhD, Scientific Review Administrator, Office of Review, Division of Extramural Activities, National Institute of Nursing Research/NIH, 6701 Democracy Plaza, Suite 712, MSC 4870, Bethesda, MD 20817, (301) 402–6959, *chernak@nih.gov*.

Name of Committee: National Institute of Nursing Research Special Emphasis Panel, Exploratory and Center Core Grant Applications (P20s and P30s).

Date: July 16–17, 2007.

Time: July 16, 2007, 1 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Time: July 17, 2007, 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suite, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Ray Bramhall, PhD, Scientific Review Administrator, National Institute of Nursing Research, National Institutes of Health, 6701 Democracy Blvd., Rm. 710, Bethesda, MD 20817, (301) 496–9629, *bramhallr@mail.nih.gov*.

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 fo Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: June 21, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3181 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), 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 6 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 Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel, Small Research Grants Review.

Date: July 31, 2007.

Time: 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Eric H. Brown, PhD, Scientific Review Administrator, National Institutes of Arthritis and Musculoskeletal Skin Diseases, National Institutes of Health, 6701 Democracy Blvd, Room 824, MSC 4872, Bethesda, MD 20892–4874, (301) 594–4955, *browneri@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: June 21, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3182 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), 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 Neurological Disorders and Stroke Special Emphasis Panel; NIBIB Blueprint-Neuroimaging Informatics Software Enhancement.

Date: July 13, 2007.

Time: 8:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Capital Hilton, 1001 16th Street, NW., Washington, DC 20036.

Contact Person: Shantadurga Rajaram, PhD, Scientific Review Administrator, Scientific Review Branch, NIH/NINDS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, Msc 9529, Bethesda, MD 20852, (301) 435-6033, *rajarams@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: June 22, 2007.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3187 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Oral Muscosal Defense System.

Date: July 2, 2007.

Time: 2:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Daniel F. McDonald, PhD, Scientific Review Administrator, Chief, MOSS IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, (301) 435–1215, *mcdonals@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; EPIC Member Conflicts.

Date: July 18–19, 2007.

Time: 7 a.m. to 11:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Steven H. Krosnick, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, MSC 7770, Bethesda, MD 20892, (301) 435–1712, *krosnics@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS).

Dated: June 21, 2007

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3179 Filed 6–27–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, 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 proposed continuing information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the FEMA Mitigation Success Story database used to document experiences of States, communities, private businesses, and homeowner's information describing successful mitigation and flood insurance practices occurring in communities nationwide.

SUPPLEMENTARY INFORMATION: Consistent with performance-based management practices mandated by the Government Performance Results Act (GPRA), [MSOffice1]FEMA has outlined its critical functions to meet strategic goals and objectives, including the use of risk communication practices aimed at reducing the loss of life and property due to disasters. FEMA will partially fulfill these requirements by collecting and disseminating information describing successful mitigation and flood insurance practices occurring in communities nationwide. The Mitigation Success Stories database is one of several program strategies specifically addressing, strategic objective 1.4 [MSOffice2]which aims at helping individuals, local governments, States, Territories, tribal nations, and Federal agencies make good risk management decisions. The database is a tool that enables FEMA to translate hazard data into usable information for community risk management through risk communication.

Collection of Information

Title: FEMA Mitigation Success Story Database.

Type of Information Collection: Extension, without change of a currently approved collection.

OMB Number: 1660–0089.

Form Numbers: None.

Abstract: FEMA uses the information in the database to document and disseminate first-hand experiences of States, communities, private businesses, and homeowners that incorporate mitigation and flood insurance activities that are cost effective and promote strategic partnerships. By sharing information, communities and individuals can learn about available Federal programs to support the implementation of noteworthy local activities.

Affected Public: Individuals or households, business or other for-profit, not-for-profit institutions, farms, Federal Government, and State, Local or Tribal Government.

Estimated Total Annual Burden Hours:

ANNUAL HOUR BURDEN

Data collection activity/instrument	Number of respondents (A)	Frequency of responses (B)	Hour burden per response (C)	Annual responses (D) =(A × B)	Total annual burden hours (C × D)
Electronic (Web site)	15	1	1.5	15	23
Informal Interviews and Follow-up sessions	135	1	4.0	135	540
Total	150	1	5.5	150	563

Estimated Cost: The total estimated burden cost of individuals and households contributing potential stories, and for engineering consultants to review stories for credibility and accuracy, using wage rate categories is estimated to be $15,454. annually.

Comments: Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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. Comments must be submitted on or before August 27, 2007.

ADDRESSES: Interested persons should submit written comments to Chief, Records Management and Privacy, Information Resources Management Branch, Information Technology Services Division, Federal Emergency Management Agency, 500 C Street, SW., Room 609, Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Contact Eugene Luke, Emergency Management Specialist, Mitigation Division, 202–646–4246 for additional information. You may contact the Records Management Branch for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections@dhs.gov.*

Dated: 21 June 2007.

John A. Sharetts-Sullivan,

Chief, Records Management and Privacy, Information Resources Management Branch, Information Technology Services Division, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E7–12487 Filed 6–27–07; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1702–DR]

South Dakota; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of South Dakota (FEMA–1702–DR), dated May 22, 2007, and related determinations.

DATES: *Effective Date:* June 18, 2007.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of South Dakota is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of May 22, 2007.

Gregory County for Public Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E7–12488 Filed 6–27–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review; Form N–400, Application for Naturalization; OMB Control No. 1615–0052.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) 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 April 20, 2007, at 72 FR 19945 allowing for a 60-day public comment period. USCIS received one comment on 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 July 30, 2007. 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), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0052 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden ofthe proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Application for Naturalization.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–400; U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. USCIS uses the information on this form to determine an applicant's eligibility for naturalization.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 700,000 responses at 6 hours and 8 minutes (6.13 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 4,291,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit the USCIS Web site at: *http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=29227b58fa16e010VgnVCM1000000ecd190aRCRD&vgnextchannel=29227b58fa16e010VgnVCM1000000ecd190aRCRD.*

If you have additional questions please contact Richard A. Sloan, Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529; Telephone 202–272–8377.

Dated: June 22, 2007.

Richard Sloan,

Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E7–12459 Filed 6–27–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review; Form I–864, Affidavit of Support Under Section 213A of the Act; Form I–864A, Contract Between Sponsor and Household Member; Form I–864EZ, EZ Affidavit of Support under Section 213 of the Act; Form I–864W, Intending Immigrant's Affidavit of Support Exemption; OMB Control No. 1615–0075.

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 April 20, 2007, at 72 FR 19947 allowing for a 60-day public comment period. USCIS did not receive any comments on 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 July 30, 2007. 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), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0075 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Affidavit of Support Under Section 213A of the Act; Contract Between Sponsor and Household Member; EZ Affidavit of Support under Section 213 of the Act; Intending Immigrant's Affidavit of Support Exemption.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–864, Form I–864A, Form I–864EZ, and Form I–864W; 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. These forms are used by family-based and certain employment-based immigrants to have the petitioning relative execute an Affidavit of Support on their behalf.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* I–864, 439,500 responses at 6 hours per response; I–864A, 215,800 responses at 1.75 hours per response; I–864EZ, 100,000 responses at 2.5 hours per response; I–864W, 1,000 responses at 1 hour per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,265,650 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit the USCIS Web site at: *http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=29227b58fa16e010VgnVCM1000000ecd190aRCRD&vgnextchannel=29227b58fa16e010VgnVCM1000000ecd190aRCRD.*

If you have additional questions please contact Richard A. Sloan, Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529; Telephone 202–272–8377.

Dated: June 22, 2007.

Richard Sloan,

Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E7–12460 Filed 6–27–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review; Form N–600, Application for Certificate of Citizenship; OMB Control No. 1615–0057.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) 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 April 20, 2007, at 72 FR 19946 allowing for a 60-day public comment period. USCIS did not receive any comments on 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 July 30, 2007. 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), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at*rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail, please make sure to add OMB Control Number 1615–0057 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies' estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this Information Collection:

(1) Type of Information Collection: Extension of an existing information collection.

(2) Title of the Form/Collection: Application for Certificate of Citizenship.

(3) Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection: Form N-600; U.S. Citizenship and Immigration Services.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: *Primary:* Individuals or households. USCIS uses the information on the form to make a determination that the citizenship eligibility requirements and conditions are met by the applicant.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 88,500 responses at 1 hour and 35 minutes (1.583 hours) per response.

(6) An estimate of the total public burden (in hours) associated with the collection: 140,095 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit the USCIS Web site at: *http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=29227b58fa16e010VgnVCM1000000ecd190aRCRD&vgnextchannel=29227b58fa16e010VgnVCM1000000ecd190aRCRD.*

If you have additional questions, please contact Richard A. Sloan, Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529; Telephone 202–272–8377.

Dated: June 22, 2007.

Richard Sloan,

Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E7–12462 Filed 6–27–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF THE INTERIOR

Geological Survey

Climate Change Science Program Committee for Synthesis and Assessment Product 1.2: Past Climate Variability and Change in the Arctic and at High Latitudes

AGENCY: U.S. Geological Survey, DOI.

ACTION: Notice of meeting.

SUMMARY: The USGS–CCSP Committee for Synthesis and Assessment Product 1.2: Past Climate Variability and Change in the Arctic and at High Latitudes will meet in the Hampton Inn in Lakewood, Colorado on July 12–13, 2007.

Agenda: The goal of the meeting is to produce a detailed outline of the structure of the Synthesis and Assessment Product and to identify key areas of input and to create a list of potential contributing authors for these areas. Records under consideration will include, but not necessarily be limited to, paleo-records from tree rings, ice cores, lake sediments, pollen records, distributions of marine and terrestrial organisms as well as isotopic indicators measured on them, and the temporal evolution of terrestrial depositional and erosional environments. The agenda will focus on the key topics of the past record of change in Arctic sea ice extent, in the status of the Greenland ice sheet, paleo-temperature and paleo-precipitation records, and past intervals of rapid climate change. The meeting is open to the public at the times listed below. Pre-registration is required to attend. Contact the Designated Federal Officer (DFO) at the address given below by July 9, 2007 to pre-register and receive a copy of the meeting agenda. Public involvement in the meeting is encouraged. Prepared statements may be presented orally to the Committee on Thursday, July 12, 2007 between 11 a.m. and noon. Public statements will be limited to 3 minutes per person. For scheduling reasons, intent to make a public statement must be established at the time of pre-registration. A written copy of the oral statement must be left with the Committee's DFO at the

workshop as a matter of public record. Open discussions will accompany each formal session of the workshop. Short public comments/questions will be allowed if time permits. Seating will be available on a first come, first served basis. Please check the Synthesis and Assessment Product 1.2 Web page at CCSP (*http://www.climatescience.gov/Library/sap/sap 1-2/default.php*) for any last minute changes to the meeting time, date, location or agenda.

Meeting Dates and Times

Thursday, July 12, 2007: 11 a.m.–12 p.m. (public comments); 1:15 p.m.–5 p.m.

Friday, July 13, 2007: 8 a.m.–12 p.m.; 1 p.m.–5 p.m.

Meeting Address

Ponderosa Room, Hampton Inn, 137 Union Boulevard, Lakewood, CO 80228.

FOR FURTHER INFORMATION AND TO PRE-REGISTER CONTACT: Joan J. Fitzpatrick, U.S. Geological Survey, MS–980, Box 25046, DFC, Denver, CO 80225, (303) 236–7881, *jfitz@usgs.gov.*

Thomas R. Armstrong,

Senior Advisor, Global Change Programs, U.S. Geological Survey.

[FR Doc. 07–3161 Filed 6–27–07; 8:45 am]

BILLING CODE 4311–AM–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Advisory Board for Exceptional Children

AGENCY: Bureau of Indian Education, Interior.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Bureau of Indian Education is announcing that the Advisory Board for Exceptional Children will hold its next meeting in Denver, CO. The purpose of the meeting is to meet the mandates of the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) on Indian children with disabilities.

DATES: The meeting dates are:

1. Saturday, July 21, 2007, from 6 p.m. to 8:30 p.m.;
2. Sunday, July 22, 2007, 8 a.m. to 5 p.m.;
3. Monday, July 23, 2007, 8 a.m. to 5 p.m.; and
4. Tuesday, July 24, 2007, 6 p.m. to 9 p.m. Local Time.

ADDRESSES: The meetings will be held at the Renaissance Denver Hotel, 3801 Quebec St., Denver, CO 80207.

Written statements may be submitted to Mr. Thomas M. Dowd, Director, Bureau of Indian Education, 1849 C Street, NW., MS 3609–MIB, Washington, DC 20240; Telephone (202) 208–6123; Fax (202) 208–3312.

FOR FURTHER INFORMATION CONTACT: Dr. Sherry Allison, Designated Federal Official, Bureau of Indian Education, Albuquerque Service Center, Division of Performance and Accountability, P.O. Box 1088, Suite 332, Albuquerque, NM 87103; Telephone (505) 563–5277.

SUPPLEMENTARY INFORMATION: The Advisory Board was established to advise the Secretary of the Interior, through the Assistant Secretary—Indian Affairs, on the needs of Indian children with disabilities, as mandated by the Individuals with Disabilities Education Improvement Act of 2004 (Pub. L. 108–446).

The following items will be on the agenda:

- Special Education Director's Report.
- BIE Data Summit Report.
- Committee Work.
- Acting Chief, Albuquerque Service Center Report.
- BIE Level of Determination.

The meetings are open to the public.

Dated: June 18, 2007.

Carl J. Artman,

Assistant Secretary—Indian Affairs.

[FR Doc. E7–12493 Filed 6–27–07; 8:45 am]

BILLING CODE 4310–6W–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–952–07–1420–BJ]

Notice of Filing of Plats of Survey; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey described below are scheduled to be officially filed in the New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, (30) thirty calendar days from the date of this publication.

SUPPLEMENTARY INFORMATION:

New Mexico Principal Meridian, New Mexico

The plat representing the dependent resurvey and survey for townships 9 and 10 North, Range 14 East, accepted June 20, 2007, for Group 1062 New Mexico.

If a protest against a survey, as shown on any of the above plats is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed.

A person or party who wished to protest against this survey must file a written protest with the New Mexico State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within thirty days after the protest is filed.

FOR FURTHER INFORMATION CONTACT: This plat will be available for inspection in the New Mexico State Office, Bureau of Land Management, and P.O. Box 27115, Santa Fe, New Mexico, 87502–0115. Copies may be obtained from this office upon payment of $1.10 per sheet.

Dated: June 21, 2007.

Stephen W. Beyerlein,

Acting Chief Cadastral Surveyor, New Mexico.

[FR Doc. 07–3140 Filed 6–27–7; 8:45 am]

BILLING CODE 4310–FB–M

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before June 16, 2007. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by July 13, 2007.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

CONNECTICUT

Windham County

Putnam Railroad Station, 35 and 45–47 Main St., Putnam, 07000742.

FLORIDA

Seminole County

First Methodist Church of Oviedo, 263 King St., Oviedo, 07000743.

MICHIGAN

Berrien County

Union Block, 114 E. Front St., Buchanan, 07000746.

Houghton County

Quincy Mining Company Stamp Mills Historic District, M–26,Osceola, 07000750.

Ingham County

Arbaugh's Department Store Building, 401 S. Washington, Lansing, 07000748.

Kalamazoo County

Shields, Patrick and Sarah Dobbins, House, 6681 N. 2nd St., Alamo, 07000745.

Wayne County

Wardell, The, 15 E. Kirby Ave., Detroit, 07000744.

MISSISSIPPI

Hinds County

Raymond Historic District, (Raymond and Vicinity MRA), Roughly Town Sq, with parts of E. Main, Palestine, Cooper's Well, Clinton, Oak, Court, W. Main, Dupree, and Port Gibson, Raymond, 07000749.

Lauderdale County

Lacy Homestead, Address Restricted, Toomsuba, 07000747.

MISSOURI

Cape Girardeau County

Broadway—Middle Commercial Historic District, (Cape Girardeau, Missouri MPS), 500 Blk of Broadway and 100 blk of N. Middle St., Cape Girardeau, 07000753.

Jefferson County

Kimmswick Historic District, Roughly bounded by Front St., Fourth St., Mill St., Elm St. and Oak St., Kimmswick, 07000752.

St. Clair County

Harper School, jct. of MO 82 and MO U, Harper, 07000751.

NEW YORK

Delaware County

Pioneer Cemetery, Main St., Sidney, 07000754.

Livingston County

Boyd & Parker Park and Groveland Ambuscade, US 20A; Gray Hill Rd., Cuylerville, 07000757.

Oneida County

Hieber, John C., Building, 311 Main St., Utica, 07000756.

Onondaga County

Colden Mansion Ruins, NY 17K, Montgomery, 07000758.

Orleans County

Cobblestone Inn (Cobblestone Architecture of New York State MPS),12226 Ridge Rd., Oak Orchard, 07000755.

OREGON

Hood River County

Hill, Martin and Carrie, House, 2265 OR 35, Hood River, 07000760.

Multnomah County

Yale Union Laundry Building, 800 SE 10th Ave., Portland, 07000759.

RHODE ISLAND

Kent County

Harris Mill, 618 Main St., Coventry, 07000761.

TENNESSEE

Davidson County

Whitland Area Neighborhood, Roughly bounded by Whitland Ave., Bowling Ave., S. Wilson Blvd., and tributary of Richland Creek., Nashville, 07000763.

Shelby County

Universal Life Insurance Company, 480 Linden Ave., Memphis, 07000762.

VIRGINIA

Henrico County

Brook Road Marker, Jefferson Davis Highway, (UDC Commemorative Highway Markers along the Jefferson Davis Highway in Virginia), 0.2 mi. E of jct. of Hillard and Brook Rds., Richmond, 07000765.

King William County

Sharon Indian School, 13383 King William Rd., King William, 07000764.

Loudoun County

Green Garden, 22439 Green Garden Rd., Upperville, 07000769.

Richmond Independent city

Department of Public Utilities Howard (Overbrook) Road Facility,1307, 1311, 1315, 1317, 1319 Overbrook Rd., Richmond (Independent City), 07000767.

Rockingham County

Edom Store and Post Office, 5375 Jesse Bennett Way, Edom, 07000768.

Staunton Independent city

Western State Hospital (Boundary Increase II), 301 Greenville Ave., adjacent to NE corner of VA 11 and VA 250, Staunton (Independent City), 07000766.

[FR Doc. E7–12489 Filed 6–27–07; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–546]

In the Matter of Certain Male Prophylactic Devices; Notice of Commission Determination To Reverse an Initial Determination of the Administrative Law Judge That Section 337 Has Been Violated; Termination of Investigation With a Finding of No Violation of Section 337

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to reverse the presiding administrative law judge's finding of violation of section 337 of the Tariff Act, as amended, and has terminated the investigation with a finding of no violation of section 337.

FOR FURTHER INFORMATION CONTACT: Mark B. Rees, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3116. The public version of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS–ON–LINE) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on August 5, 2005, based on a complaint filed on behalf of Portfolio Technologies, Inc., of Chicago, Illinois. 70 FR 45422. The complaint, as amended and supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain male prophylactic devices by reason of infringement of claims 1–27, 31–33, and 36 of U.S. Patent No. 5,082,004. The respondents named in the investigation are Church & Dwight Co., Inc., of Princeton, New Jersey;

Reddy Medtech, Ltd., of Tamil Nadu, India; and Intellx, Inc., of Petoskey, Michigan.

On June 30, 2006, the presiding administrative law judge (''ALJ'') issued a final initial determination (''ID'') in which he ruled that there is no violation of section 337 of the Tariff Act of 1930, as amended. He found that certain valid claims were infringed, but concluded that there was no domestic industry under the economic prong of the domestic industry requirement. All parties petitioned for review of various parts of the final ID.

On September 29, 2006, the Commission determined to review the issues of claim construction, infringement, invalidity due to anticipation, and domestic industry, and requested briefing on these issues and certain subissues. 71 FR 58875 (Oct. 5, 2006). On December 5, 2006, the Commission determined to affirm in part, reverse in part, and remand in part the final ID. Among other things, the Commission reversed the ALJ's finding of no domestic industry under the economic prong. The Commission also determined to extend the target date for completion of the investigation until June 5, 2007. The date was subsequently moved to June 21, 2007, by an unreviewed ID.

On March 19, 2007, the ALJ issued his remand ID, in which he ruled that there is a violation of section 337 based on the infringement of certain valid claims and found that there is a domestic industry. In further briefing before the Commission, all parties claimed error.

Upon consideration of the parties' submissions and the record in this proceeding, the Commission has determined to reverse the ALJ's finding of violation of section 337 and has terminated the investigation with a finding of no violation. In reaching this conclusion, the Commission has reversed the ALJ's finding that the accused products infringe certain claims of U.S. Patent No. 5,082,004, as well as his finding that certain claims of that patent are invalid as anticipated by the prior art.

The authority for this notice is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.45(c) of the Commission's Rules of Practice and Procedure (19 CFR 210.45(c)).

Issued: June 21, 2007.

By order of the Commission.

William R. Bishop,

Acting Secretary to the Commission.

[FR Doc. E7–12519 Filed 6–27–07; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

[EOIR No. 162]

Codes of Conduct for the Immigration Judges and Board Members

AGENCY: Office of the Chief Immigration Judge; Board of Immigration Appeals,Executive Office for Immigration Review, Department of Justice.

ACTION: Notice.

SUMMARY: The Executive Office for Immigration Review (EOIR) is proposing newly formulated Codes of Conduct for the immigration judges of the Office of the Chief Immigration Judge and for the Board members of the Board of Immigration Appeals. EOIR is seeking public comment on the codes before final publication.

DATES: *Comment date:* Comments may be submitted not later than July 30, 2007.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail*: Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference EOIR Docket No. 162 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 305–0470 (not a toll free call).

FOR FURTHER INFORMATION CONTACT: Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 305–0470 (not a toll free call).

SUPPLEMENTARY INFORMATION: On January 9, 2006, the Attorney General directed a comprehensive review of the Immigration Courts and the Board of Immigration Appeals. This review was undertaken in response to concerns about the quality of decisions being issued by the immigration judges and the Board and about reports of intemperate behavior by some immigration judges. The Deputy Attorney General and the Associate Attorney General assembled a review team that, over the course of several months, conducted hundreds of interviews, administered an online survey, and analyzed thousands of documents to assess the adjudicative process in the Executive Office for Immigration Review (EOIR).

On August 9, 2006, the Attorney General announced that the review was complete, and he directed that a series of measures be taken to improve adjudications by the immigration judges and the Board. One of these measures required the EOIR Director to draft a Code of Judicial Conduct specifically applicable to immigration judges and the members of the Board of Immigration Appeals. The Director was then, after consultation with the Counsel for Professional Responsibility and the Director of the Office of Attorney Recruitment and Management, to submit that code to the Deputy Attorney General.

That has been accomplished and what follow are the Code of Judicial Conduct for immigration judges and the Code of Judicial Conduct for members of the Board of Immigration Appeals. The Department is seeking comments from the public before final publication. Once published, these Codes will be available on-line to counsel and litigants who appear before the Immigration Courts and the Board of Immigration Appeals.

Dated: June 20, 2007.

Kevin A. Ohlson,

Acting Director, EOIR

United States Department of Justice Code of Judicial Conduct for Immigration Judges

Preamble

In Order to Preserve the Integrity and Professionalism of the Immigration Court System, an Immigration Judge Shall Observe High Standards of Ethical Conduct, Act in a Manner that Promotes Public Confidence in the Impartiality of the Immigration Judge Corps, and Avoid Impropriety and the Appearance of Impropriety in All Activities.

Canons

Canon I. An immigration judge shall comply with the canons contained in this Code of Judicial Conduct for Immigration Judges.

Canon II. An immigration judge shall comply with the standards of conduct applicable to all attorneys in the Department of Justice, including the Standards of Ethical Conduct for Employees of the Executive Branch, codified in Title 5 of the Code of Federal Regulations, and the Department's supplemental regulations codified at 5 CFR part 3801 and 28 CFR part 45.

Canon III. An immigration judge shall comply with the provisions of the rules or code(s) of professional responsibility of the state(s) where the immigration judge is a member of the bar and the state(s) where the immigration judge performs his or her duties.

Canon IV. If an immigration judge requests ethical guidance from the Executive Office for Immigration Review, Office of General Counsel, the Professional Responsibility Advisory Office, or the Office of Government Ethics, the immigration judge shall comply with the resulting ethics opinion.

Canon V. An immigration judge shall be faithful to the law and maintain professional competence in it.

Canon VI. An immigration judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.

Canon VII. An immigration judge shall avoid any actions that, in the judgment of a reasonable person, would create the appearance that he or she is violating the law or applicable ethical standards.

Canon VIII. An immigration judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

Canon IX. An immigration judge shall be patient, dignified and courteous to litigants, witnesses, lawyers and others with whom the judge deals in his or her official capacity and shall not, in the performance of official duties, by words or conduct, manifest bias or prejudice.

Canon X. An immigration judge shall act in a professional manner toward the parties and their representatives before the court, and toward others with whom the immigration judge deals in an official capacity.

Canon XI. An immigration judge shall refrain from any conduct, including but not limited to financial and business dealings, that tends to reflect adversely on impartiality, demeans the judicial office, interferes with the proper performance of judicial duties, or exploits the immigration judge's official position.

Canon XII. An immigration judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or disability.

Canon XIII. An immigration judge shall not publicly disclose or use for any purpose unrelated to adjudicatory duties nonpublic information acquired in a judicial capacity.

Canon XIV. An immigration judge shall not, while a proceeding is pending or impending, make any public comment that might reasonably be expected to affect its outcome or impair its fairness, or make any nonpublic comment that might substantially interfere with a fair hearing.

Canon XV. An immigration judge shall not initiate, consider, or permit *ex parte* communications about the substance of a pending or impending case unless authorized by precedent, statute, or regulation. Communications about purely ministerial matters, such as a request for an extension of time, shall not be regarded as *ex parte* communications, provided the judge makes provision promptly to notify all other parties of the substance of the communication and allows an opportunity to respond. An immigration judge's communications with other employees of the Department of Justice shall not be considered *ex parte* communications unless those employees are witnesses in a pending or impending proceeding before the immigration judge and the communication involves that proceeding.

Canon XVI. An immigration judge shall follow judicial precedent and agency policy regarding recusal when deciding whether to remove himself or herself from a particular case.

Commentary

This Code of Judicial Conduct for Immigration Judges (the ''Code'') is being promulgated in order to maintain and promote the highest ethical standards of the Immigration Judge Corps. The canons contained in this Code are binding on all immigration judges and are effective immediately upon the approval of the Deputy Attorney General or his or her designee. Violations of these canons may serve as the basis for disciplinary action, but may not be used in any other proceeding, and may not be used to challenge the rulings of an Immigration Judge. This Code does not create any rights or interests for any party outside of the Department of Justice, nor may violations furnish the basis for civil liability, injunctive relief or criminal prosecution.

This Code supplements, and does not supersede, the personnel disciplinary rules, ethics rules, and management policies of the Executive Office for Immigration Review, the Department of Justice, and/or the United States government. Similarly, this Code does not affect the applicability or scope of the provisions of the Standards of Ethical Conduct for Executive Branch Employees, or the rules or code(s) of professional responsibility applicable to the immigration judge. An immigration judge is subject to the rules or code(s) of professional responsibility in the state(s) where he or she is a member of the bar and the rules or code(s) of the state(s) where he or she performs his or her duties. See 28 U.S.C. 530B. Immigration judges are encouraged to seek ethics opinions when confronted with the complex questions that may arise when professional responsibility rules conflict.

The canons contained in this Code are authoritative. The commentary portions of the Code are not intended as a statement of additional rules. Commentary is made to provide, by explanation and example, more detailed guidance about the applicability of specific sections and to further facilitate an understanding and use of the Code.

An immigration judge who manifests bias or engages in unprofessional conduct in any manner during a proceeding may impair the fairness of the proceeding and may bring into question the impartiality of the immigration court system. An immigration judge must be alert to avoid behavior, to include inappropriate demeanor, that may be perceived as prejudicial. The test for appearance of impropriety is whether the conduct would create in the mind of a reasonable person with knowledge of the relevant facts the belief that the immigration judge's ability to carry out adjudicatory responsibilities with integrity, impartiality, and competence is impaired.

Prohibitions against behaving with impropriety or the appearance of impropriety apply to both the professional and personal conduct of an immigration judge. An immigration judge must be mindful that even private conduct and associations can reflect upon the immigration judge's office and affect the public's confidence in the immigration court system. Accordingly, an immigration judge should not, for example, be a member of an organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of an immigration judge in such an organization may give rise to perceptions that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which immigration judges should be sensitive.

The requirement that immigration judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition of the matter. The requirement does not prohibit

immigration judges from making appropriate comments in open court or in written filings in the course of their official duties. Comments made to other Department of Justice employees in the course of official business do not constitute ''public'' comments.

United States Department of Justice Code of Judicial Conduct for Members of the Board of Immigration Appeals

Preamble

In Order to Preserve the Integrity and Professionalism of the Board of Immigration Appeals (the ''Board''), a Member of the Board of Immigration Appeals (''Board Member'') Shall Observe High Standards of Ethical Conduct, Act in a Manner that Promotes Public Confidence in the Impartiality of the Board, and Avoid Impropriety and the Appearance of Impropriety in All Activities.

Canons

Canon I. A Board Member shall comply with the canons contained in this Code of Judicial Conduct for Members of the Board of Immigration Appeals.

Canon II. A Board Member shall comply with the standards of conduct applicable to all attorneys in the Department of Justice, including the Standards of Ethical Conduct for Employees of the Executive Branch codified in Title 5 of the Code of Federal Regulations, and the Department's supplemental regulations codified at 5 CFR part 3801 and 28 CFR part 45.

Canon III. A Board Member shall comply with the provisions of the rules or code(s) of professional responsibility of the state(s) where the Board Member is a member of the bar and the state(s) where the Board Member performs his or her duties.

Canon IV. If a Board Member requests ethical guidance from the Executive Office for Immigration Review, Office of General Counsel, the Professional Responsibility Advisory Office, or the Office of Government Ethics, the Board Member shall comply with the resulting ethics opinion.

Canon V. A Board Member shall be faithful to the law and maintain professional competence in it.

Canon VI. A Board Member shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.

Canon VII. A Board Member shall avoid any actions that, in the judgment of a reasonable person, would create the appearance that he or she is violating the law or applicable ethical standards.

Canon VIII. A Board Member shall not be swayed by partisan interests, public clamor, or fear of criticism.

Canon IX. A Board Member shall not, in the performance of official duties, by words or conduct, manifest bias or prejudice.

Canon X. A Board Member shall act in a professional manner toward the parties and their representatives before the Board, and toward others with whom the Board Member deals in an official capacity.

Canon XI. A Board Member shall refrain from any conduct, including but not limited to financial and business dealings, that tends to reflect adversely on impartiality, demeans the judicial office, interferes with the proper performance of judicial duties, or exploits the Board Member's official position.

Canon XII. A Board Member shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or disability.

Canon XIII. A Board Member shall not publicly disclose or use for any purpose unrelated to adjudicatory duties nonpublic information acquired in a judicial capacity.

Canon XIV. A Board Member shall not, while a proceeding is pending or impending, make any public comment that might reasonably be expected to affect its outcome or impair its fairness, or make any nonpublic comment that might substantially interfere with a fair hearing.

Canon XV. A Board Member shall not initiate, consider, or permit *ex parte* communications about the substance of a pending or impending case unless authorized by precedent, statute, or regulation. Communications about purely ministerial matters, such as a request for an extension of time, shall not be regarded as *ex parte* communications, provided the Board Member makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond. A Board Member's communications with other employees of the Department of Justice shall not be considered *ex parte* communications unless those employees are witnesses or counsel involved in a pending or impending proceeding before the Board Member, and the communication involves that proceeding.

Canon XVI. A Board Member shall follow judicial precedent and agency policy regarding recusal when deciding whether to remove himself or herself from a particular case.

Commentary

This Code of Judicial Conduct for Members of the Board of Immigration Appeals (the ''Code'') is being promulgated in order to maintain and promote the highest ethical standards of the Board of Immigration Appeals. The canons contained in this Code are binding on all Board Members and are effective immediately upon the approval of the Deputy Attorney General or his or her designee. Violations of these canons may serve as the basis for disciplinary action, but may not be used in any other proceeding, and may not be used to challenge the rulings of a Board Member. This Code does not create any rights or interests for any party outside of the Department of Justice, nor may violations furnish the basis for civil liability, injunctive relief or criminal prosecution.

This Code supplements, and does not supersede, the personnel disciplinary rules, ethics rules, and management policies of the Executive Office for Immigration Review, the Department of Justice, and/or the United States government. Similarly, this Code does not affect the applicability or scope of the provisions of the Standards of Ethical Conduct for Executive Branch Employees, or the rules or code(s) of professional responsibility applicable to the Board Member. A Board Member is subject to the rules or code(s) of professional responsibility in the state(s) where he or she is a member of the bar and the rules or code(s) of the state(s) where he or she performs his or her duties. See 28 U.S.C. 530B. Board Members are encouraged to seek ethics opinions when confronted with the complex questions that may arise when professional responsibility rules conflict.

The canons contained in this Code are authoritative. The commentary portions of the Code are not intended as a statement of additional rules. Commentary is made to provide, by explanation and example, more detailed guidance about the applicability of specific sections and to further facilitate an understanding and use of the Code.

A Board Member who manifests bias or engages in unprofessional conduct in any manner during a proceeding may impair the fairness of the proceeding and may bring into question the impartiality of the immigration court system and the Board of Immigration Appeals. A Board Member must be alert to avoid behavior, to include inappropriate demeanor, that may be perceived as prejudicial. The test for appearance of impropriety is whether the conduct would create in the mind of

a reasonable person with knowledge of the relevant facts the belief that the Board Member's ability to carry out adjudicatory responsibilities with integrity, impartiality, and competence is impaired.

Prohibitions against behaving with impropriety or the appearance of impropriety apply to both the professional and personal conduct of a Board Member. A Board Member must be mindful that even private conduct and associations can reflect upon the Board Member's office and affect the public's confidence in the immigration court system and the Board of Immigration Appeals. Accordingly, a Board Member should not, for example, be a member of an organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a Board Member in such an organization may give rise to perceptions that the Board Member's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which Board Members should be sensitive.

The requirement that Board Members abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition of the matter. The requirement does not prohibit Board Members from making appropriate comments in open court or in written filings in the course of their official duties. Comments made to other Department of Justice employees in the course of official business do not constitute ''public'' comments.

[FR Doc. 07–3174 Filed 6–27–07; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

June 25, 2007.

The Department of Labor (DOL) has submitted the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). Copies of these ICRs, with applicable supporting documentation, may be obtained from RegInfo.gov at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number) / e-mail: *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316 / Fax: 202–395–6974 (these are not toll-free numbers), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- 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.

Type of Review: Extension without change of currently approved collection.

Title: Occupational Noise Exposure (29 CFR 1910.95).

OMB Number: 1218–0048.

Type of Response: Recordkeeping and third-party disclosure.

Affected Public: Public Sector: Business or other for-profits.

Number of Respondents: 379,512.

Number of Annual Responses: 16,610,221.

Estimated Time per Response: Varies from 2 minutes to notify employees when noise exposure exceeds the 8-hour time-weighted average of 85 decibels to 1 hour for employees in small establishments to take audiometric examinations.

Total Burden Hours: 2,853,730.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $40,993,579.

Description: The purpose of the Occupational Noise Standard and its information collection requirements are to provide protection to employees from adverse health effects associated with occupational exposure to noise. The standard requires employers to establish and maintain accurate records of employee exposure to noise and audiometric testing performed in compliance with this standard.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension without change of currently approved collection.

Title: Asbestos in General Industry (29 CFR 1910.1001).

OMB Number: 1218–0133.

Type of Response: Recordkeeping.

Affected Public: Public Sector: Business or other for-profits.

Number of Respondents: 243.

Number of Annual Responses: 65,048.

Estimated Time per Response: Varies from 5 minutes to maintain records to 1.5 hours for employees to receive training or medical evaluations.

Total Burden Hours: 23,849.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $1,625,000.

Description: The Asbestos Standard requires employers to train employees about the hazards of asbestos, to monitor employee exposure, to provide medical surveillance, and to maintain accurate records of employee exposure to asbestos. These records are used by employers, employees, and the Government to ensure that employees are not harmed by exposure to asbestos in the workplace.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension without change of currently approved collection.

Title: Construction Fall Protection Plans and Training Requirements (29 CFR 1926.502 and 1926.503).

OMB Number: 1218–0197.

Type of Response: Recordkeeping.

Affected Public: Public Sector: Business or other for-profits.

Number of Respondents: 301,178.

Number of Annual Responses: 6,039,818.

Estimated Time per Response: Time per response ranges from 5 minutes to certify a safety net to 1 hour to develop a fall protection plan.

Total Burden Hours: 484,082.

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $0.

Description: The Fall Protection Systems Criteria and Practices Standard (29 CFR 1926.502) allows employers to develop alternative procedures to conventional fall protection systems when the systems are infeasible or

create a greater hazard. The alternative procedures (plan) must be written. Also, employers who use safety net systems may certify that the installation meets the Standard's criteria in lieu of performing a drop-test on the net. The Training Requirements Standard (29 CFR 1926.503) requires employers to prepare training certification records for their employees. The plan and certification records ensure that employers comply with the requirements to protect employees from falls.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. E7–12522 Filed 6–27–07; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

June 22, 2007.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained at *http://www.reginfo.gov/public/do/PRAMain*, or contact Ira Mills on 202–693–4122 (this is not a toll-free number) or e-mail: *Mills.Ira@dol.gov.*

Comments should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for U.S. Department of Labor/Employment and Training Administration (ETA), Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- 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: Employment and Training Administration.

Type of Review: Revision of a Currently Approved Collection.

Title: Job Corps Health Questionnaire.

OMB Number: 1205–0033.

Frequency: Other; once.

Affected Public: Individuals or households; business or other for-profit; not-for-profit institutions; Federal Government; State, Local, or Tribal govt.

Type of Response: Recordkeeping and reporting.

Number of Respondents: 87,943.

Annual Responses: 87,943.

Average Response Time: 5 minutes.

Total Annual Burden Hours: 7,329.

Total Annualized Capital/Startup Costs: 0.

Total Annual Costs (operating/maintaining systems or purchasing services): 0.

Description: Applicants wishing to enroll in the Job Crops program must first be deemed eligible based on the eligibility criteria as defined in 20 CFR 670.400 and then selected based on the additional selection factors in 20 CFR 670.410. This admission process is carried out by admission counselors. The information on the ETA 6–53 is collected by the admissions counselors to enable the centers to determine the health needs of the applicant. After the admission counselors have determined eligibility and the applicant has been selected for assignment into the Job Corps program, completes the form and sends it with the admission packet to the Job Corps center for review.

Ira L. Mills,

Departmental Clearance Officer/Team Leader.

[FR Doc. E7–12528 Filed 6–27–07; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,634]

Corsair Memory, Fremont, CA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 6, 2007 in response to a petition filed by a state of California One-Stop representative on behalf of workers at Corsair Memory, Fremont, California.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 20th day of June, 2007.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E7–12515 Filed 6–27–07; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,293]

Georgia Pacific Corrugated Number 1 LLCA.K.A. Great Northern Nekoosa Corporation, Ridgeway, VA; Notice of Negative Determination Regarding Application for Reconsideration

By application dated June 6, 2007, the petitioner requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on May 10, 2007 and published in the **Federal Register** on May 24, 2007 (72 FR 29182).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) if in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The petition for the workers of Georgia Pacific Corrugated Number 1 LLC, a.k.a. Great Northern Nekoosa Corporation, Ridgeway, Virginia engaged in production of corrugated packaging was denied because the ''contributed importantly'' group eligibility requirement of Section 222 of the Trade Act of 1974, as amended, was not met, nor was there a shift in production from that firm to a foreign country in 2005, 2006 and January through March of 2007. The ''contributed importantly'' test is generally demonstrated through a survey of the workers' firm's declining

customers. The survey revealed no imports of corrugated packaging by declining customers during the relevant period. The subject firm did not import corrugated packaging nor shift production to a foreign country during the relevant period.

The petitioner states that the affected workers lost their jobs as a direct result of a loss of customers in the textile and furniture industry. The petitioner alleges that customers of the subject firm which manufacture textile products and furniture decreased purchases of corrugated packaging from the subject firm because their business was in its turn negatively impacted by increased imports of textiles and furniture. As a result, several of the customers were certified eligible for TAA. Therefore, the petitioner concludes that because sales and production of corrugated packaging at the subject firm have been negatively impacted by the closure of other businesses in the area and by increasing presence of foreign imports of textile products and furniture on the market, workers of the subject firm should be eligible for TAA.

In order to establish import impact, the Department must consider imports that are like or directly competitive with those produced at the subject firm. The Department conducted a survey of the subject firm's major declining customer regarding their purchases of corrugated packaging. The survey revealed that the declining customers did not increase their imports of corrugated packaging during the relevant period.

Imports of textiles and furniture cannot be considered like or directly competitive with corrugated packaging produced by Georgia Pacific Corrugated Number 1, LLC, Ridgeway, Virginia and imports of textiles and furniture are not relevant in this investigation.

The fact that subject firm's customers were certified for TAA is relevant to this investigation if determining whether workers of the subject firm are eligible for TAA based on the secondary upstream supplier of trade certified primary firm impact. For certification on the basis of the workers' firm being a secondary upstream supplier, the subject firm must produce a component part of the article that was the basis for the customers' certification.

In this case, however, the subject firm does not act as an upstream supplier, because corrugated packaging does not form a component part of textile products and furniture. Thus the subject firm workers are not eligible under secondary impact.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 20th day of June, 2007.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E7–12518 Filed 6–27–07; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of June 11 through June 15, 2007.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issued a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of

section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (i.e., conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W–61,489; Lake Region Manufacturing, Chaska, MN: May 9, 2006

TA–W–61,493; Alsco Industries, Inc., Dental Flossers Dept., ET Staffing, Express Personnel, Sturbridge, MA: May 9, 2006

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

TA–W–61,544; Bodiform, Inc., a Division of Ballet Makers, Hialeah, FL: May 16, 2006

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of section 222(a)(2)(A) (increased imports) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–61,195; Eaton Corporation, Golf Grip Division, Laurinburg, NC: March 20, 2006

TA–W–61,423C; Lane Furniture Industries, Inc., Upholstery Division, Pontotoc, MS: April 30, 2006

TA–W–61,520; Fair-Rite Products Corporation, Flat Rock, IL: May 15, 2006

TA–W–61,555; National Braid Manufacturing Co., Long Island City, NY: May 15, 2006

TA–W–61,570; HDM Furniture Industries, Inc., High Point, NC: May 17, 2006

TA–W–61,583; Margaret O'Leary Inc., San Francisco, CA: May 23, 2006

TA-W–61,621; DeRoyal Textiles, Camden, SC: June 4, 2006

TA–W–61,579; Jockey International, Inc., Manufacturing Division, Millen, GA: March 22, 2006

TA–W–61,514; WestPoint Home, Inc., Marianna, FL: May 16, 2006

The following certifications have been issued. The requirements of section 222(a)(2)(B) (shift in production) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–61,327; Freightliner LLC, Mt. Holly Truck Manufacturing Plant, Fuel Tank Fab Div, Mount Holly, NC: April 13, 2006

TA–W–61,329; Fleetwood Travel Trailers of California, Rialto, CA: April 16, 2006

TA–W–61,433; Nacom Corporation, Kelly Services and Simos, Griffin, GA: April 11, 2006

TA–W–61,538; Intermetic Corporation, Working World, Spring Grove, IL: May 17, 2006

TA–W–61,595; Asheboro Elastics Corporation, Asheboro, NC: May 30, 2006

TA–W–61,597; Vishay Transducers, Ltd, City of Industry, CA: May 30, 2006

TA–W–61,612; FCI USA Inc., Auto Div., Premium Services, Quality Specialist, Westland, MI: May 30, 2006

TA–W–61,613; Premier Manufacturing Support Services Inc., Spring Hill, TN: June 1, 2006

TA–W–61,485; QRS Music Technologies, Inc., Seneca, PA: May 1, 2006

TA–W–61,513; WestPoint Home, Inc., Chipley, FL: May 16, 2006

The following certifications have been issued. The requirements of section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–61,418; Temco Metal Products, Clackamas, OR: April 27, 2006

TA–W–61,465; IIG DSS Technologies LLC, Fair Haven, MI: May 7, 2006

TA–W–61,509; WestPoint Home, Inc., Griffex Chemicals, Opelika, AL: May 14, 2006

TA–W–61,600; Chamber's Fabrics, Inc., High Point, NC: May 31, 2006

TA–W–61,616; TDS Automotive US, A Subsidiary of TDS Logistics, Mt. Pleasant, TN: June 1, 2006

The following certifications have been issued. The requirements of section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of section 246 has not been met. Workers at the firm are 50 years of age or older.

TA–W–61,493; Alsco Industries, Inc., Dental Flossers Dept., ET Staffing, Express Personnel, Sturbridge, MA.

The Department has determined that criterion (2) of section 246 has not been met. Workers at the firm possess skills that are easily transferable.

TA–W–61,489; Lake Region Manufacturing, Chaska, MN.

TA–W–61,544; Bodiform, Inc., a Division of Ballet Makers, Hialeah, FL.

The Department has determined that criterion (3) of section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

TA–W–61,365; Ingersoll Rand, Climate Control Technologies Division, Bridgeton, MO.

TA–W–61,423; Lane Furniture Industries, Inc., Upholstery Division, Tupelo, MS.
TA–W–61,423A; Lane Furniture Industries, Inc., Corporate Office, *Tupelo, MS.*
TA–W–61,423D; Lane Furniture Industries, Inc., Upholstery Division, Saltillo, MS.
TA–W–61,423E; Lane Furniture Industries, Inc., Upholstery Division, Belden, MS.
TA–W–61,459; Honeywell International, Aerospace, Customer and Product Support, Technical, Tucson, AZ.
TA–W–61,483; GE Money, Formerly Know as GE Consumer Finance, Kettering, OH.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–61,328; H.C. Starck, Inc., Latrobe, PA.
TA–W–61,474; Interfacefabrics, Inc., Interface, Inc., Elkin, NC.
TA–W–61,601; Intel Corporation, FAB 23, Colorado Springs, CO.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–61,205; Collins and Aikman, Sterling Heights, MI.
TA–W–61,477; Gibraltar Industries, Metal Div., Buffalo, NY.
TA–W–61,564; Metal Powder Products Co., A Subsidiary of Revere Industries, Ford Road Division, St. Mary's, PA.
TA–W–61,429; Burns Best, Inc., Spooner, WI.
TA–W–61,437; Freightliner, LLC, Cleveland, NC.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–61,423B; Lane Furniture Industries, Inc., Wood Division, Nettleton, MS.
TA–W–61,472; Strategic Distribution, Inc., El Paso, TX.
TA–W–61,577; J.P. Morgan Chase & Co, Transaction Services, Detroit Item Processing, Belleville, MI.
TA–W–61,624; Lexington Furniture Industries, Plant #1, Thomasville, NC.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of June 11 through June 15, 2007. Copies of these determinations are available for inspection in Room C–5311, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: June 22, 2007.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E7–12517 Filed 6–27–07; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than July 9, 2007.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than July 9, 2007.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 19th day of June 2007.

Ralph DiBattista,

Director, Division of Trade Adjustment Assistance.

APPENDIX.—TAA PETITIONS INSTITUTED BETWEEN 6/11/07 AND 6/15/07

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
61655	Westell Inc.(Comp)	Aurora, IL	06/11/07	06/07/07
61656	Glen Raven technical Fabrics(Comp)	Burnsville, NC	06/11/07	06/08/07
61657	Cardone Industries, Inc.(Wkrs)	Philadelphia, PA	06/11/07	06/07/07
61658	NSI International Inc.(State)	Farmingdale, NY	06/11/07	06/06/07
61659	Mentor Graphics(State)	Wilsonville, OR	06/11/07	06/08/07
61660	Multi-Fineline Electronix, Inc.(Wkrs)	Anaheim, CA	06/11/07	06/06/07
61661	Collins and Aikman, Plastics Division(AFL–CIO)	Athens, TN	06/11/07	06/08/07
61662	Metso Paper USA(IAMAW)	Appleton, WI	06/12/07	06/06/07
61663	Black & Decker(Comp)	McAllen, TX	06/12/07	06/11/07
61664	Quality Inspection and Consulting(Comp)	Linden, TN	06/12/07	05/31/07
61665	Collins & Aikman, Dura Convertible Systems(State)	Adrian, MI	06/12/07	06/11/07
61666	Furnlite Inc.(Comp)	Fallston, NC	06/12/07	06/11/07
61667	J.D Phillips Corporation(Comp)	Alpena, MI	06/12/07	06/11/07
61668	Camaco(State)	Marianna, AR	06/12/07	06/11/07
61669	Superior Mills, Inc.(Wkrs)	Hopkinsville, KY	06/12/07	06/06/07

APPENDIX.—TAA PETITIONS INSTITUTED BETWEEN 6/11/07 AND 6/15/07—Continued

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
61670	Ferry Cap and Set Screw Company Plant 1(Wkrs)	Cleveland, OH	06/13/07	06/04/07
61671	Faradyne Motors(Comp)	Newark, NY	06/13/07	06/11/07
61672	Atwood Mobile Products, Inc.(Comp)	Elkhart, IN	06/13/07	06/08/07
61673	Voltarc Technologies, Inc.(State)	Waterbury, CT	06/13/07	06/12/07
61674	EGS Sola/Hevi Duty(Comp)	Celina, TN	06/13/07	06/11/07
61675	American Kleaner Manufacturing Company(Comp)	Rancho Cucamonga, CA	06/13/07	06/12/07
61676	Lynch Systems(Wkrs)	Bainbridge, GA	06/13/07	06/12/07
61677	Needle Nacks Ltd(Comp)	Madison, NC	06/13/07	06/12/07
61678	C-Tech Industries(Comp)	Calumet, MI	06/13/07	06/12/07
61679	Hartmann-Conco Inc.(Comp)	Rock Hill, SC	06/13/07	06/13/07
61680	Deerfield Specialty Papers, Inc.(Comp)	Augusta, GA	06/14/07	06/13/07
61681	Shakespeare(Wkrs)	Hewberry, SC	06/14/07	06/12/07
61682	NC Furniture House, Inc.(Wkrs)	Jamestown, NC	06/14/07	06/01/07
61683	Stanford Furniture Corporation(Comp)	Claremont, NC	06/14/07	06/11/07
61684	Eaton Corportion(Comp)	Vinita, OK	06/14/07	06/08/07
61685	Ford Motor Company(Wkrs)	Brook Park, OH	06/14/07	06/13/07
61686	Cummins Filtration(Wkrs)	Waynesboro, GA	06/15/07	06/14/07
61687	GSI Group(Wkrs)	Vandalia, IL	06/15/07	06/04/07
61688	Saline Metal Systems, LLC(Comp)	Saline, MI	06/15/07	06/14/07
61689	Johnson Controls, Inc.(Comp)	Oberlin, OH	06/15/07	06/14/07
61690	Kentucky Derby Hosiery(Comp)	Hopkinsville, KY	06/15/07	06/12/07
61691	Toshiba America Consumer Products(AFL–CIO)	Lebanon, TN	06/15/07	06/14/07
61692	Sirenza Microdevices(State)	Broomfield, CO	06/15/07	06/13/07
61693	Parker Hannifin(Wkrs)	Booneville, MS	06/15/07	06/13/07
61694	Kone Elevator and Escalator(Wkrs)	Mckinney, TX	06/15/07	06/11/07
61695	Standard Forged Products(USW)	Johnstown, PA	06/15/07	06/08/07
61696	Medtronic Vascular(Wkrs)	Santa Rosa, CA	06/15/07	06/14/07
61697	Gildan Activewear Malone, Inc.(Comp)	Bombay, NY	06/15/07	06/06/07
61698	Dan River Inc.(Wkrs)	New York, NY	06/15/07	06/14/07

[FR Doc. E7–12516 Filed 6–27–07; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Request for Certification of Compliance—Rural Industrialization Loan and Grant Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration is issuing this notice to announce the receipt of a ''Certification of Non-Relocation and Market and Capacity Information Report'' (Form 4279–2) for the following:

Applicant/Location: Hidden Orchard Health Resort, LLC/La Porte, Indiana.

Principal Product: The loan, guarantee, or grant application is for a new business venture to design, construct, and operate a 40-room destination spa including kitchen and dining area, meeting rooms, activity center, and related facilities. The NAICS industry codes for this enterprise are: 721199 All Other Traveler Accommodation; 713940 Fitness and Recreational Sports Centers; 812199 Other Personal Care Services; and, 621999 All Other Miscellaneous Ambulatory Health Care Services.

DATES: All interested parties may submit comments in writing no later than July 12, 2007. Copies of adverse comments received will be forwarded to the applicant noted above.

ADDRESSES: Address all comments concerning this notice to Anthony D. Dais, U.S. Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room S–4231, Washington, DC 20210; or e-mail *Dais.Anthony@dol.gov;* or transmit via fax 202–693–3015 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Anthony D. Dais, at telephone number (202) 693–2784 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 188 of the Consolidated Farm and Rural Development Act of 1972, as established under 29 CFR part 75, authorizes the United States Department of Agriculture to make or guarantee loans or grants to finance industrial and business activities in rural areas. The Secretary of Labor must review the application for financial assistance for the purpose of certifying to the Secretary of Agriculture that the assistance is not calculated, or likely, to result in: (a) A transfer of any employment or business activity from one area to another by the loan applicant's business operation; or, (b) An increase in the production of goods, materials, services, or facilities in an area where there is not sufficient demand to employ the efficient capacity of existing competitive enterprises unless the financial assistance will not have an adverse impact on existing competitive enterprises in the area. The Employment and Training Administration within the Department of Labor is responsible for the review and certification process. Comments should address the two bases for certification and, if possible, provide data to assist in the analysis of these issues.

Signed: At Washington, DC, this 20th of June, 2007.

Gay M. Gilbert,

Administrator, Office of Workforce Investment, Employment and Training Administration.

[FR Doc. E7–12408 Filed 6–27–07; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Veterans' Employment and Training Service

Office of the Assistant Secretary for Veterans' Employment and Training; The Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO); Notice of Open Meeting

The Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO) was established pursuant to Title II of the Veterans' Housing Opportunity and Benefits Improvement Act of 2006 (Pub. L. 109–233) and Section 9 of the Federal Advisory Committee Act (FACA) (Pub. L. 92–462, Title 5 U.S.C. app. II). The ACVETEO's authority is codified in Title 38 U.S. Code, Section 4110.

The ACVETEO is responsible for assessing employment and training needs of veterans; determining the extent to which the programs and activities of the Department of Labor meet these needs; and assisting in carrying out outreach to employers seeking to hire veterans.

The Advisory Committee on Veterans' Employment Training and Employer Outreach will meet on Tuesday, July 31st from 8 a.m. to 4:15 p.m. at the U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC (202–693–4700). The committee will discuss programs assisting veterans seeking employment and raising employer awareness as to the advantages of hiring veterans.

Individuals needing special accommodations should notify Bill Offutt at (202) 693–4717 by July 23rd, 2007.

Signed in Washington, DC, this 18th day of June, 2007.

Charles S. Ciccolella,

Assistant Secretary, Veterans Employment and Training.

[FR Doc. E7–12603 Filed 6–27–07; 8:45 am]

BILLING CODE 4510–79–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–182 EA–07–160]

In the Matter of Purdue University (Purdue University Research Reactor); Order Modifying Facility Operating License No. R–87

I

Purdue University (the licensee) is the holder of Facility Operating License No. R–87 (the license) issued on August 16, 1962, by the U.S. Atomic Energy Commission, and subsequently renewed on August 8, 1988, by the U.S. Nuclear Regulatory Commission (the NRC or the Commission). The license authorizes operation of Purdue University Research Reactor (the facility) at a power level up to 1 kilowatt thermal. The facility is a research reactor located on the campus of Purdue University, in the city of West Lafayette, Tippecanoe County, Indiana. The mailing address is Radiation Laboratories, Purdue University, Nuclear Engineering Building, 400 Central Drive, West Lafayette, IN 47907–2017.

II

Title 10 of the Code of Federal Regulations (10 CFR) Section 50.64, limits the use of high-enriched uranium (HEU) fuel in domestic non-power reactors (research and test reactors) (see 51 FR 6514). The regulation, which became effective on March 27, 1986, requires that if Federal Government funding for conversion-related costs is available, each licensee of a non-power reactor authorized to use HEU fuel shall replace it with low-enriched uranium (LEU) fuel acceptable to the Commission unless the Commission has determined that the reactor has a unique purpose. The Commission's stated purpose for these requirements was to reduce, to the maximum extent possible, the use of HEU fuel in order to reduce the risk of theft and diversion of HEU fuel used in non-power reactors.

Paragraphs 50.64(b)(2)(i) and (ii) require that a licensee of a non-power reactor: (1) Not acquire more HEU fuel if LEU fuel that is acceptable to the Commission for that reactor is available when the licensee proposes to acquire HEU fuel and (2) replace all HEU fuel in its possession with available LEU fuel acceptable to the Commission for that reactor in accordance with a schedule determined pursuant to 10 CFR 50.64(c)(2).

Paragraph 50.64(c)(2)(i) requires, among other things, that each licensee of a non-power reactor authorized to possess and to use HEU fuel develop and submit to the Director of the Office of Nuclear Reactor Regulation (Director) by March 27, 1987, and at 12-month intervals thereafter, a written proposal for meeting the requirements of the rule. The licensee shall include in its proposal a certification that Federal Government funding for conversion is available through the U.S. Department of Energy or other appropriate Federal agency and a schedule for conversion, based upon availability of replacement fuel acceptable to the Commission for that reactor and upon consideration of other factors such as the availability of shipping casks, implementation of arrangements for available financial support, and reactor usage.

Paragraph 50.64(c)(2)(iii) requires the licensee to include in the proposal, to the extent required to effect conversion, all necessary changes to the license, to the facility, and to licensee procedures. This paragraph also requires the licensee to submit supporting safety analyses in time to meet the conversion schedule.

Paragraph 50.64(c)(2)(iii) also requires the Director to review the licensee proposal, to confirm the status of Federal Government funding, and to determine a final schedule, if the licensee has submitted a schedule for conversion.

Section 50.64(c)(3) requires the Director to review the supporting safety analyses and to issue an appropriate enforcement order directing both the conversion and, to the extent consistent with protection of public health and safety, any necessary changes to the license, the facility, and licensee procedures. In the **Federal Register** notice of the final rule (51 FR 6514), the Commission explained that in most, if not all, cases, the enforcement order would be an order to modify the license under 10 CFR 2.204 (now 10 CFR 2.202).

Section 2.309 states the requirements for a person whose interest may be affected by any proceeding to initiate a hearing or to participate as a party.

III

On August 13, 2006, as supplemented on May 3, 2007, the licensee submitted its conversion proposal. The NRC staff is in the process of reviewing the conversion proposal. On May 25, 2007, the licensee submitted an additional letter as part of its conversion proposal, which indicated that early approval to changes to the uranium-235 possession limit in its license were needed to support the proposed schedule for conversion to LEU fuel. The receipt and possession, but not use in the reactor, of the LEU fuel are required by the licensee at this time to assemble the fuel elements in order to meet the proposed timely conversion. The LEU fuel contains the uranium-235 isotope at an enrichment of less than 20 percent. The NRC staff reviewed the licensee's proposal and the requirements of 10 CFR 50.64, and has determined that the public health and safety and common defense and security require the licensee to receive and possess the LEU fuel prior to the conversion. This is necessary so the LEU fuel elements may be prepared to convert the reactor from

HEU fuel in accordance with the schedules planned by the Department of Energy to support U.S. non-proliferation policies and the licensee to support its academic mission.

IV

Accordingly, pursuant to Sections 51, 53, 57, 101, 104, 161b, 161i, and 161o of the Atomic Energy Act of 1954, as amended, and to Commission regulations in 10 CFR 2.202 and 10 CFR 50.64, *It is hereby ordered that:*

Facility Operating License No. R–87 is modified by adding the following license condition:

2.B.(4) Pursuant to the Act and 10 CFR Part 70, ''Domestic Licensing of Special Nuclear Material,'' to receive and possess, but not use in the reactor, in addition to the amount specified under License Condition 2.B.(2), up to 4.0 kilograms of contained uranium-235 in the form of reactor fuel, at enrichments less than 20 percent.

This Order will be effective 20 days after the date of publication of this Order in the **Federal Register**.

V

Pursuant to the Atomic Energy Act of 1954, as amended, any person adversely affected by this Order may submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of this Order. Any answer or request for a hearing shall set forth the matters of fact and law on which the person adversely affected, relies and the reasons why the Order should not have been issued. Any answer or request for a hearing shall be filed: (1) By first class mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) by courier, express mail, and expedited delivery services to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Because of possible delays in delivery of mail to the United States Government Offices, it is requested that answers and/or requests for hearing be transmitted to the Secretary of the Commission either by e-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV;* or by facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at 301–415–1101 (the verification number is 301–415–1966). Copies of the request for hearing must also be sent to the Director, Office of Nuclear Reactor Regulation and to the Assistant General Counsel for Materials Litigation and Enforcement, Office of the General Counsel, with both copies addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and the NRC requests that a copy also be transmitted either by facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov.*

If a person requests a hearing, he or she shall set forth in the request for a hearing with particularity the manner in which his or her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309.

If a hearing is requested by a person whose interest is adversely affected, the Commission shall issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

In accordance with 10 CFR 51.10(d) this Order is not subject to Section 102(2) of the National Environmental Policy Act, as amended. The NRC staff notes, however, that with respect to environmental impacts associated with the changes imposed by this Order as described in the safety evaluation, the changes would, if imposed by other than an Order, meet the definition of a categorical exclusion in accordance with 10 CFR 51.22(c)(9). Thus, pursuant to either 10 CFR 51.10(d) or 51.22(c)(9), no environmental assessment nor environmental impact statement is required.

For further information see the letter from the licensee dated May 25, 2007 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML071500054), the application for conversion and safety analysis report (ADAMS Accession No. ML062400495 and ML070920272), the NRC staff's request for additional information (ADAMS Accession No. ML070680273), the licensee's reply (ADAMS Accession No. ML071410299) and the cover letter to the licensee and the staff's safety evaluation dated June 21, 2007 (ADAMS Accession No. ML071550409), available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who have problems in accessing the documents in ADAMS should contact the NRC PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Dated this 21st day of June 2007.

For the Nuclear Regulatory Commission.

James T. Wiggins,

Acting Director, Office of Nuclear Reactor Regulation.

[FR Doc. E7–12565 Filed 6–27–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Notice of Electronic Distribution Initiative Pilot Program

The Office of Nuclear Reactor Regulation (NRR) at the U.S. Nuclear Regulatory Commission (NRC) is implementing a pilot program to test the feasibility of its electronic distribution initiative (EDI). The EDI seeks to provide a more effective and efficient method of communication with internal and external stakeholders. The EDI is an alternative to paper copy (hardcopy) distribution of correspondence and is replacing hardcopy distribution with distribution via electronic mail (e-mail).

Currently, the NRR staff provides paper copies for reactor licensing activities to the addressee and each entity on the carbon copy list, otherwise known as the Service List. In the future, the NRR staff intends to provide those on the Service List via e-mail an electronic link to licensing documents which are available publicly in the NRC's Agencywide Documents Access and Management System. The addressees will continue to receive the official NRC hardcopy. The distribution of documents containing safeguards, proprietary or security-related information, or other information that is withheld from public disclosure will not be affected by this initiative at the present time.

The EDI pilot program will begin July 1 and end September 30, 2007. Exelon Generation Company, LLC (Exelon), one of the NRC's licensees, has agreed to participate in this pilot program. The Exelon plants included are: Byron Station, Units 1 and 2; Braidwood Station, Units 1 and 2; Clinton Power Station, Unit 1; Dresden Nuclear Power Station, Units 2 and 3; LaSalle County Station, Units 1 and 2; and Quad Cities Nuclear Power Station, Units 1 and 2.

The NRR staff plan to expand the EDI to include all the operating reactor licensees, with the goal for implementation to begin in January 2008.

Dated at Rockville, Maryland, this 21st day of June 2007.

For the Nuclear Regulatory Commission.

Russell A. Gibbs,

Chief, Plant Licensing Branch III–2, Division of Operating Reactor Licensing. Office of Nuclear Reactor Regulation.

[FR Doc. E7–12563 Filed 6–27–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Draft Regulatory Guide: Issuance, Availability

The U.S. Nuclear Regulatory Commission (NRC) has issued for public comment a draft of a revised existing guide in the agency's Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft regulatory guide, entitled ''Guidance on Monitoring and Responding to Reactor Coolant System Leakage,'' is temporarily identified by its task number, DG–1173, which should be mentioned in all related correspondence.

General Design Criterion (GDC) 14, ''Reactor Coolant Pressure Boundary,'' as set forth in Appendix A, ''General Design Criteria for Nuclear Power Plants,'' to Title 10, Part 50, of the *Code of Federal Regulations* (10 CFR Part 50), ''Domestic Licensing of Production and Utilization Facilities'', requires that the reactor coolant pressure boundary (RCPB) shall be designed, fabricated, erected, and tested so as to have an extremely low probability of abnormal leakage, of rapidly propagating failure, and of gross rupture. As a result, these nuclear components are normally designed to the criteria established in Section III of the Boiler and Pressure Vessel Code promulgated by the American Society of Mechanical Engineers.

During the design phase, degradation-resistant materials are normally specified for reactor coolant system components. However, materials can degrade as a result of the complex interaction of the materials, the stresses they encounter, and the normal and upset operating environments in which they are used. Such material degradation could lead to the leakage of the reactor coolant. Consequently, GDC 30, ''Quality of Reactor Coolant Pressure Boundary,'' of Appendix A to 10 CFR Part 50, requires that means shall be provided for detecting and, to the extent practical, identifying the location of the source of reactor coolant leakage. Additionally, 10 CFR 50.55a, ''Codes and Standards'', requires the performance of inservice inspection and testing of nuclear power plant components. Thus, the concept of defense-in-depth is used to provide assurance that structural integrity of the RCPB is maintained. This guide describes methods that the staff of the U.S. Nuclear Regulatory Commission (NRC) considers acceptable for implementing these requirements, with regard to selecting reactor coolant leakage detection systems, monitoring for leakage, and responding to leakage. This guide applies to light-water cooled reactors.

The NRC staff is soliciting comments on Draft Regulatory Guide DG–1173. Comments may be accompanied by relevant information or supporting data, and should mention DG–1173 in the subject line. Comments submitted in writing or in electronic form will be made available to the public in their entirety through the NRC's Agencywide Documents Access and Management System (ADAMS). Personal information will not be removed from your comments. You may submit comments by any of the following methods.

Mail comments to: Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

E-mail comments to: *NRCREP@nrc.gov.* You may also submit comments via the NRC's rulemaking Web site at *http://ruleforum.llnl.gov.* Address questions about our rulemaking Web site to Carol A. Gallagher (301) 415–5905; e-mail *CAG@nrc.gov.*

Hand-deliver comments to: Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Fax comments to: Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for technical information about Draft Regulatory Guide DG–1173 may be directed to NRC Senior Program Manager, Makuteswara Srinivasan, at (301) 415–6356 or e-mail *MXS5@nrc.gov.*

Comments would be most helpful if received by 60 days from issuance of FRN. Comments received after that date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Electronic copies of Draft Regulatory Guide DG–1173 are available through the NRC's public Web site under Draft Regulatory Guides in the Regulatory Guides document collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/.* Electronic copies are also available in ADAMS (*http://www.nrc.gov/reading-rm/adams.html*), under Accession #ML071070410.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *PDR@nrc.gov.* Requests for single copies of draft or final guides (which may be reproduced) should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Reproduction and Distribution Services Section; by e-mail to *DISTRIBUTION@nrc.gov;* or by fax to (301) 415–2289. Telephone requests cannot be accommodated.

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(5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 20th day of June, 2007.

For the U.S. Nuclear Regulatory Commission.

Jimi T. Yerokun,

Chief,Risk Applications and Special Projects Branch,Division of Risk Assessment and Special Projects,Office of Nuclear Regulatory Research.

[FR Doc. E7–12562 Filed 6–27–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Guidance for Electronic Submissions to the NRC; Report Available for Comment

AGENCY: Nuclear Regulatory Commission.

ACTION: Announcement of issuance for public comment, availability.

SUMMARY: The Nuclear Regulatory Commission currently has three separate documents providing guidance to the public on how to submit documents electronically to the agency. The NRC has consolidated these documents into one guidance document and is issuing it for public comment. This guidance contains a new chapter providing guidance for Combined License Application (COLA) submittals. Its provisions pertaining to electronic filings in adjudications (other than the high level waste repository licensing proceeding and the Vogtle early site permit proceeding) are not to be used until the Commission issues its final rule on the subject.

DATES: The NRC expects to update the guidance found in this document as changes in technology warrant. Comments from the public are welcome at any time and the NRC will make changes to this document as appropriate.

ADDRESSES: ''Guidance for Electronic Submissions to the NRC'' is available for inspection and copying for a fee at the NRC Public Document Room, Public File Area O1–F21, 11555 Rockville Pike, Rockville, Maryland. Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm.html.* From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS Accession Number for ''Guidance for Electronic Submissions to the NRC'' is: ML071580647. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

A free single copy of ''Guidance for Electronic Submissions to the NRC may be requested by writing to Office of Administration, Reproduction and Distribution Services, U.S. Nuclear Regulatory Commission, Printing and Graphics Branch, Washington, DC 20555–0001; facsimile: 301–415–2289; e-mail: *DISTRIBUTION@nrc.gov.*

Please submit comments to Chief, Rulemaking, Directives, and Editing Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. You may also deliver comments to 11545 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:30 p.m. Federal workdays, or e-mail to: *nrcrep@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Thomas E. Smith, Information and Records Services Division, Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone: 301–415–7043, e-mail: *tes@nrc.gov.*

SUPPLEMENTARY INFORMATION: The report ''Guidance for Electronic Submissions to the NRC'', consolidates several pre-existing documents that provide guidance for electronic submittals to the NRC. The result is a single guidance document, which addresses electronic submittals to the NRC. The following documents have been consolidated into this guidance document and are superseded:

1. Guidance for Submission of Electronic Docket Materials under 10 CFR Part 2, Subpart J,
2. Guidance for Submission of Electronic Docket Materials (10 CFR Part 2, Subpart C, 10 CFR Part 13, 10 CFR Part 110) and
3. Appendix A, United States Nuclear Regulatory Commission (NRC), Guidance for Electronic Submissions to the Commission.

Dated at Rockville, Maryland, June 18, 2007.

For the Nuclear Regulatory Commission.

Jennifer Golder,

Acting Director, Information and Records Services Division, Office of Information Services.

[FR Doc. E7–12548 Filed 6–27–07; 8:45 am]

BILLING CODE 7590–01–P

OVERSEAS PRIVATE INVESTMENT CORPORATION

Submission for OMB Review—Comment Request

AGENCY: Overseas Private Investment Corporation (OPIC).

ACTION: Request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to publish a Notice in the **Federal Register** notifying the public that the Agency is preparing an information collection request for OMB review and approval and to request public review and comment on the submission. Comments are being solicited on the need for the information; the accuracy of the Agency's burden estimate, practical utility and clarity of the information to be collected; and on ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form, OMB control number 3420–0001, under review is summarized below.

DATES: Comments must be received within 60 calendar-days of publication of this Notice.

ADDRESSES: Copies of the subject form and the request for review prepared for submission to OMB may be obtained from the Agency submitting officer. Comments on the form should be submitted to the Agency Submitting Officer.

FOR FURTHER INFORMATION CONTACT: OPIC Agency Submitting Officer: Essie Bryant, Record Manager, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; (202) 336–8563.

Summary Form Under Review

Type of Request: Revised form.

Title: Request for Registration for Political Risk Investment Insurance.

Form Number: OPIC–50.

Frequency of Use: Once per investor per project.

Type of Respondents: Business or other institution (except farms); individuals.

Description of Affected Public: U.S. companies or citizens investing overseas.

Reporting Hours: ½ hour per project.

Number of Responses: 333 per year.

Federal Cost: $1,000.00.

Authority for Information Collection: Sections 231, 234(a), 239(d), and 240A of the Foreign Assistance Act of 1961, as amended.

Abstract (Needs and Uses): The OPIC Form 50 is submitted by eligible investors to register their intent to make international investments, and ultimately, to seek OPIC political risk insurance. By submitting Form 50 to OPIC prior to making an irrevocable commitment, the incentive effect of OPIC is demonstrated.

Dated: June 22, 2007.

Eli H. Landy,

Senior Administrative Counsel & FOIA Director, Department of Legal Affairs.

[FR Doc. 07–3157 Filed 6–27–07; 8:45 am]

BILLING CODE 3210–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55938; File No. SR–CBOE–2007–26]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change, and Amendment No. 3 Thereto, to List and Trade Credit Default Basket Options

June 21, 2007.

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 April 5, 2007, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change to list and trade credit default basket options. On June 15, 2007, CBOE filed Amendment No. 1 to the proposed rule change. On June 19, 2007 CBOE withdrew Amendment No. 1 and filed Amendment No. 2 to the proposed rule change, and on June 21, 2007, CBOE withdrew Amendment No. 2 and filed Amendment No. 3.[3] The proposed rule change is described in Items I, II, and III below, which Items have been prepared substantially by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules to provide for the listing and trading of Credit Default Basket Options, which are cash-settled call options based on the occurrence of a Credit Event in one, some or all of the Basket Components, as specified by the Exchange at listing.[4] The text of the proposed rule change is available at the Exchange's Web site (*http://www.cboe.org/legal*), the principal office of CBOE, and the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of 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 aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commission recently approved the Exchange's proposal to list and trade Credit Default Options, which are cash-settled, binary call options that pay a fixed cash settlement amount based on the confirmation of a credit event in a Reference Entity (*i.e.*, debt security issuer or guarantor).[5] To provide investors with different and varied hedging and risk-shifting vehicles to manage investments in debt securities, the Exchange anticipates introducing additional types of Credit Options linked to debt securities. The purpose of the proposed rule change is to enable the Exchange to list and trade the second in a series of Credit Options the Exchange anticipates introducing: Credit Default Basket Options.

Structure of a Credit Default Basket

Credit Default Basket Options are cash-settled call options based on a basket of at least two Reference Entities (''Basket Components''). After the Basket Components have been identified, the Exchange would specify a debt security as the Reference Obligation of each Basket Component (*e.g.*, Corporation XYZ 8.375% July 2033 bond). The Exchange would also specify the Notional Face Value of the underlying Credit Default Basket (*e.g.*, $100,000) and the weight allocated to each Basket Component (representing the fraction of the Basket Notional Face Value allocated to the particular Basket Component). Additionally, the Exchange would specify the recovery rate for each Basket Component and the applicable Credit Event(s) for each Basket Component. Further, Basket Components would remain fixed from the time of listing to the expiration date of the option, except that Basket Components could be replaced by Successor Basket Components following a Succession Event and would be removed from the Credit Default Basket after a Credit Event or Redemption Event is confirmed by the Exchange.

The underlying Credit Default Basket could be reconstituted periodically and new option series on the reconstituted Credit Default Basket would be listed as new option classes. Existing options based on the original Credit Default Basket would continue to trade until expiration.

Cash Settlement Types: Multiple and Single Payout Credit Default Basket Options

The Exchange proposes to list and trade two settlement types of Credit Default Basket Options. The first settlement type would be a Multiple Payout Credit Default Basket Option that would automatically pay out a cash settlement amount each time a Credit Event is confirmed in a Basket Component during the life of the option. A cash settlement amount would be paid only once in connection with a particular Basket Component that has a confirmed Credit Event, after which time that Basket Component would be removed from the Credit Default Basket. If a Credit Event is confirmed in every Basket Component prior to expiration, the Multiple Payout Credit Default Basket Option would cease to trade; or, if no Credit Event is confirmed in any Basket Component prior to expiration, the Multiple Payout Credit Default Basket Option would expire worthless. The second settlement type would be a Single Payout Credit Default Basket Option that would be automatically exercised and pay a single cash settlement amount as soon as the first Credit Event is confirmed in any one of the Basket Components. If no Credit Event is confirmed in any Basket Component prior to expiration, the Single Payout Credit Default Basket Option would expire worthless.

Both settlement types of Credit Default Basket Options would have a cash settlement amount equal to one minus the Basket Component recovery rate as specified by the Exchange at listing multiplied by the Notional Face Value of the Basket Component. The Notional Face Value of the Basket

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 3 replaced the filing in its entirety.

[4] This filing proposes new rules and amendments to existing Chapter XXIX, which was recently added to the Exchange's rulebook. *See* Securities Exchange Act Release No. 55871 (June 6, 2007), 72 FR 32372 (June 12, 2007) (SR–CBOE–2006–84) (approving proposal to list and trade Credit Default Options and designating Credit Default Options as standardized options). This filing also assumes that proposed amendments, deletions, and additions to existing Chapter XXIX set forth in a separate rule filing are effective. *See* Securities Exchange Act Release No. 55919 (June 18, 2007) (SR–CBOE–2007–62). In addition, the changes to existing Rules 5.3, 5.4, 6.1, and 29.19 and to the introduction to Chapter XXIX assume that unrelated changes proposed in two other separate rule filings are effective. *See* Securities Exchange Act Release No. 53935 (June 2, 2006), 71 FR 34174 (June 13, 2006) (SR–CBOE–2003–41) (notice of proposal to list and trade Options on Corporate Bonds); SR–CBOE–2006–99 (proposal to adopt rules related to FLEX Hybrid Trading System).

[5] *See supra* note 4.

Component would represent the weight that a particular Basket Component would be given relative to the Credit Default Basket in which it is included. As discussed above, the Credit Default Basket would have a specified Notional Face Value (*e.g.*, $100,000) and each Basket Component would have a specified recovery rate, as set at listing. For example, assume that a Credit Default Basket Option has a Notional Face Value of $100,000 and is comprised of ten Basket Components. Assume also that each Basket Component is equally weighted (or has the same Notional Face Value of Basket Component). This would equate to each Basket Component having a Notional Face Value of $10,000. If a Credit Event is confirmed for a Basket Component with a specified recovery rate of 40% (or 0.40), the cash settlement amount would be $6,000 (or $10,000 * (1 − 0.40)).

The distinction between the two settlement types is that a Multiple Payout Credit Default Basket Option would automatically pay holders a cash settlement amount for each Basket Component that has a confirmed Credit Event during the life of the option. A cash settlement amount would be paid only once in connection with a particular Basket Component that has a confirmed Credit Event, after which time that Basket Component would be removed from the Credit Default Basket. In contrast, a Single Payout Credit Default Basket Option would automatically exercise and pay holders a single cash settlement amount for the first Basket Component that has a confirmed Credit Event, at which point the option would cease trading and expire.

Credit Events

Circumstances giving rise to a ''Credit Event'' for Credit Default Basket Options would be defined identically to those giving rise to a Credit Event for Credit Default Options, as defined in Rule 29.1. For Credit Default Basket Options, a ''Credit Event'' would occur when a Reference Entity:

(i) Has a Failure-to-Pay Default on a specific debt security obligation (the ''Reference Obligation'') or any other debt security obligations other than non-recourse indebtedness (the set of these obligations and the Reference Obligation are referred to as the ''Relevant Obligations''). The term ''Failure-to-Pay Default'' would be defined in accordance with the terms of the Relevant Obligations, provided that the minimum failure to pay amount, individually or in the aggregate, shall be the greater of $750,000 or the amount specified in accordance with the terms of the Relevant Obligation(s); and/or

(ii) Has any other Event of Default on the Relevant Obligations. Each such ''Event(s) of Default'' would be specified by the Exchange at the time the option class is initially listed in accordance with the procedures of proposed Rule 29.2A and, if so specified, would be defined in accordance with the terms of the Relevant Obligations; provided that the default amount relates to a principal amount of the Relevant Obligation(s), individually or in the aggregate, that is the greater of $7.5 million or the amount specified in accordance with the terms of the Relevant Obligation(s); and/or

(iii) Has a change in the terms of the Relevant Obligations (a ''Restructuring''). The terms of such a Restructuring would be specified by the Exchange in accordance with proposed Rule 29.2A and, if so specified, would be defined in accordance with the terms of the Relevant Obligations; provided that the restructuring relates to a principal amount of the Relevant Obligation(s), individually or in the aggregate, that is the greater of $7.5 million or the amount specified in the terms of the Relevant Obligation(s).

Similar to Credit Default Options, the particular Credit Events applicable to a Credit Default Basket Option would be designated by the Exchange on a class-by-class basis. However, the applicable Credit Events for Basket Components of a given Credit Default Basket Option class may not be the same. The Exchange would select from among the Credit Event terms in the underlying instruments of the Relevant Obligations of the particular Reference Entity (*i.e.*, Basket Component) for the given Credit Default Basket Option class.

Again, similar to Credit Default Options, the Exchange would confirm a Credit Event for a Credit Default Basket Option through at least two sources, which may include announcements published via newswire services or information services companies, the names of which would be announced to the membership via Regulatory Circular, and/or information contained in any order, decree, notice of filing, however described, of or filed with the courts, the Commission, an exchange or association, the Options Clearing Corporation (''OCC''), or another regulatory agency or similar authority. Every determination of a Credit Event would be within the Exchange's sole discretion and would be conclusive and binding on all holders and sellers of Credit Default Basket Options and not subject to review.

Automatic Payout and Exercise

Upon the confirmation of a Credit Event, a Credit Default Basket Option would either automatically pay out (for Multiple Payout Credit Default Basket Options) or be automatically exercised (for Single Payout Credit Default Basket Options). To trigger an automatic payout or automatic exercise, a Credit Event would need to have (i) Occurred between the option's listing date and 10:59 p.m. (CT) on the option's last trading day which, subject to certain exceptions, would generally be the third Friday of the expiration month; and (ii) been confirmed by the Exchange no later than the option's expiration date which, subject to certain exceptions, would generally be the fourth business day after the third Friday of the expiration month.

If the Exchange confirms a Credit Event, the holder of a Multiple Payout Credit Default Basket Option would receive an automatic payout for each Basket Component that has a confirmed Credit Event during the life of the option. A cash settlement amount would be paid only once in connection with a particular Basket Component that has a confirmed Credit Event, after which time that Basket Component would be removed from the Credit Default Basket. (If a Credit Event were confirmed for every Basket Component during the life of the option, the Multiple Payout Credit Default Basket Option would cease trading and expire.) For a Single Payout Credit Default Basket Option, once the Exchange confirms a Credit Event, the option would be automatically exercised and pay holders a single cash settlement for the first Basket Component that has a confirmed Credit Event, at which point the option would cease trading and expire. For both types of Credit Default Basket Options, if no Credit Event is confirmed in any Basket Component prior to the expiration date, the cash settlement amount would be $0.

Description of Rules Proposed

The proposed new rules and amendments for the listing and trading of Credit Default Basket Options are layered into existing Chapter XXIX and are premised on the assumption that certain amendments, deletions, and additions to existing Chapter XXIX are effective.[6] Below, the Exchange specifies and describes the new rules and amendments currently being proposed for Credit Default Basket Options. Such new rules and amendments include, but are not

[6] *See supra* note 5.

limited to, new definitions, new margin requirements, and new settlement procedures. The Exchange also notes where it is proposing amendments to rules in Chapter XXIX so that Chapter XXIX would generally apply to Credit Options (*i.e.*, Credit Default Options and Credit Default Basket Options).[7]

a. Definitions (Changes to Rule 29.1)

The Exchange is proposing to supplement Rule 29.1 to include new definitions applicable to Credit Default Basket Options and to add and expand upon existing definitions. In particular, the Exchange is proposing new definitions for ''Credit Option,'' ''Credit Default Basket Option,'' ''Notional Face Value of Basket,'' and ''Notional Face Value of Basket Component.''

The term ''Credit Option'' would be defined as an option that is subject to the rules in Chapter XXIX.

The term ''Credit Default Basket Option'' would be defined to mean a call option based on a basket comprised of at least two Reference Entities (''Basket Component(s)''), which would settle in cash in one of two manners. A Multiple Payout Credit Default Basket Option would automatically pay a cash settlement amount each time a Credit Event is confirmed in a Basket Component during the life of the option. A cash settlement amount would be paid only once in connection with a particular Basket Component that has a confirmed Credit Event, after which time that Basket Component would be removed from the Credit Default Basket. If a Credit Event is confirmed in every Basket Component prior to expiration, the option would cease to trade. A Single Payout Credit Default Basket Option would be automatically exercised and pay a single cash settlement amount as soon as the first Credit Event is confirmed in any one of the Basket Components. If no Credit Event is confirmed in any Basket Component prior to expiration, the option would expire worthless.

The term ''Notional Face Value of Basket'' would be defined as the total face value for the Credit Default Basket as specified by the Exchange at listing.

The term ''Notional Face Value of Basket Component'' would be defined as the weight of the Basket Component multiplied by the Notional Face Value of Basket as specified by the Exchange at listing.

The Exchange is also proposing to amend the existing definitions of ''Cash Settlement Amount,'' ''Expiration Date,'' and ''Last Trading Date'' so that those terms would be applicable to Credit Default Basket Options. The term ''Cash Settlement Amount'' would be amended to include two sub-paragraphs so that the term would be defined separately for Credit Default Options and for Credit Default Basket Options. For Credit Default Options, the Exchange is proposing that the existing definition of ''Cash Settlement Amount'' would be codified as new subparagraph (a). For Credit Default Basket Options, the Exchange is proposing that a new definition of the term ''Cash Settlement Amount'' be codified as new subparagraph (b) and would be defined in terms of the amount paid for a Basket Component that has a confirmed Credit Event. That amount would be equal to one minus the Basket Component recovery rate specified by the Exchange at listing multiplied by the Notional Face Value of the Basket Component. The exercise settlement value would be equal to the cash settlement amount divided by the contract multiplier specified by the Exchange.

For example, if the Notional Face Value of the Basket Component is $10,000 and the Exchange specifies a recovery rate of 40% (or 0.40) for the particular Basket Component in which a Credit Event is confirmed, the cash settlement amount would be $6,000 (or $10,000 * (1 − 0.40)). For holders of a long Single Payout Credit Default Basket Option, the cash settlement amount, based on this equation, would be paid a single time when the first Credit Event is confirmed during the life of the option. In either type of Credit Default Basket Options, if no Credit Event is confirmed in any Basket Component, the cash settlement value would be $0.

The term ''Expiration Date'' would be amended to include two sub-paragraphs so that the term would be defined separately for Credit Default Options and for Credit Default Basket Options.[8] As for Credit Default Basket Options, the term ''Expiration Date'' would be defined as the fourth business day after the third Friday of the expiration month (or, if that day is not a business day, the fourth business day after the preceding business day); provided, however, if a Credit Event is confirmed by the Exchange to members and the Clearing Corporation before that day in (i) Every Basket Component for a Multiple Payout Credit Default Basket Option; or (ii) the first Credit Event in any one of the Basket Components for a Single Payout Credit Default Basket Option; or a Redemption Event, as provided for in Rule 29.4, has been confirmed in the last Basket Component prior to that day, the expiration date would be accelerated to the second business day immediately following the last confirmation date.

The term ''Last Trading Date'' would be amended to include two sub-paragraphs so that the term would be defined separately for Credit Default Options and for Credit Default Basket Options.[9] As for Credit Default Basket Options, the term ''Last Trading Date'' would be defined as the third Friday of the contract month (or if that day is not a business day, the preceding business day); provided, however, if a Credit Event has been confirmed by the Exchange to members and the OCC prior to that day in (i) Every Basket Component for a Multiple Payout Credit Default Basket Option; or (ii) the first Credit Event in any one of the Basket Components for a Single Payout Credit Default Basket Option; or a Redemption Event, as provided for in Rule 29.4, has been confirmed in the last Basket Component prior to that day, the series would cease trading at the time of the confirmation and the last trading day would be changed to the confirmation date.

The Exchange proposes to amend the existing definition of ''Credit Event'' so that it would apply to ''Credit Default Basket Options.'' The change would include reference to Rules 29.2, *Designation of Credit Default Option Contracts,* and 29.2A, *Designation and Terms of Credit Default Basket Option Contracts.*

The Exchange proposes to amend the existing definition of ''Reference Entity'' so that it would apply to ''Credit Default Basket Options.'' The Exchange also proposes to replace the word ''underlying'' with ''underlies.''

b. Initial and Maintenance Listing Criteria, Designation and Terms of Credit Default Basket Options, and Adjustment (Changes to Rule 5.3 and 5.4, Proposed Rule 29.2A, and Rule 29.4)

The Exchange proposes amending Rule 5.3.11, *Criteria for Underlying Securities,* so that it would apply to all Credit Options. Under the proposed criteria, the Exchange may list and trade a Credit Option that overlies a Reference Obligation of a Reference Entity,

[7] The Exchange is proposing changing all references to ''Credit Default Options'' in the Title and Introduction to Chapter XXIX to ''Credit Options.''

[8] The Exchange also proposes to make a conforming amendment to the definition of ''Expiration Date'' for Credit Default Options by replacing the phrase ''the third Friday of the expiration month'' with the phrase ''that day.''

[9] The Exchange also proposes to amend the definition of ''Last Trading Day'' for Credit Default Options by including the phrase ''of a Redemption Event, as provided for in Rule 29.4, has been confirmed prior to that day.'' The Exchange also proposes to change the word ''would'' to ''will.''

provided that the Reference Entity satisfies the following: First, the Reference Entity or the Reference Entity's parent, if the Reference Entity is a wholly-owned subsidiary, must have at least one class of securities that is duly registered and is an ''NMS stock'' as defined in Rule 600 of Regulation NMS.[10] Second, the registered equity securities issued by the Reference Entity must also satisfy the requirements for continued options trading on CBOE pursuant to existing Exchange Rule 5.4.[11]

The Exchange also proposes amending Rule 5.4.15, *Withdrawal of Approval of Underlying Securities,* so that it would apply to all Credit Options. Rule 5.4.15 would similarly provide that Credit Options initially approved for options trading shall be deemed not to meet the Exchange's requirements for continued approval, and the Exchange would not open for trading any additional series of the class covering such options and may prohibit any opening purchases transactions in such series as provided in existing Rule 5.4, at any time the Exchange determines on the basis of information made publicly available that any of the listing requirements identified above are not satisfied.

Proposed Rule 29.2A would be added to provide the terms by which the Exchange would designate each Credit Default Basket Option class.[12] Under the proposed rule, the Exchange would designate each Credit Default Basket Option class by reference to: (i) The Notional Face Value of Basket (*e.g.*, $100,000); (ii) the Basket Components; (iii) the weight of each Basket Component, which would represent the fraction of the Notional Face Value of the Basket allocated to each Basket Component; (iv) the recovery rate of each Basket Component; (v) the specified debt security that defines the Reference Obligation of each Basket Component (*e.g.*, Corporation XYZ 8.375% July 2033 bond); and (vi) the applicable Credit Event(s). The applicable Credit Event(s) would include a Failure-to-Pay Default and may include any other Event(s) of Default or Restructuring that is specified by the Exchange.[13]

After a particular Credit Default Basket Option class has been approved for listing and trading on the Exchange, the Exchange would from time to time open for trading series of options on that class. Only Credit Default Basket Option contracts approved by the Exchange and currently open for trading on the Exchange would be eligible to be purchased or written on the Exchange. Prior to the opening of trading in a particular Credit Default Basket Options series in a given class, the Exchange would fix the expiration month and year. To the extent possible, CBOE intends to have Credit Default Basket Options recognized and treated like existing standardized options. Standardized systems for listing, trading, transmitting, clearing, and settling options, including systems used by OCC, would be employed in connection with Credit Default Basket Options. Credit Default Basket Options would also have a symbology based on the current system.

A Credit Default Basket Option series would generally be listed up to 123 months ahead of its expiration date and could expire in the months of March, June, September, and December. The Exchange usually would open one to four series for each year up to 10.25 years from the current expiration. Additional series of options on the same Credit Default Basket Option class could be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market or to meet customer demand. The opening of a new series of Credit Default Basket Options on the Exchange would not affect any other series of options of the same class previously opened.

The proposed amendment to Rule 29.4, *Adjustments,* which for purposes of Credit Options would replace existing Rule 5.7, *Adjustments,* contains information about adjustments to Credit Default Basket Options due to succession or redemption events in the Reference Entity.

With respect to adjustments related to a succession, the proposed rule provides that a Basket Component may be replaced by one or more Basket Components (''Successor Basket Components'') that would consist of the Successor Reference Entity(ies). For purposes of the proposed rule, a ''Successor Reference Entity'' and a ''Succession Event'' would be defined in accordance with the terms of the Relevant Obligations of the Basket Component that is subject to adjustment for succession. For each Successor Basket Component, the Exchange would specify the Reference Obligation (*e.g.*, XYZ 8.375% December 2033 bond), recovery rate, and basket weight of each Successor Basket Component(s).

In respect of each Successor Basket Component, the newly specified weight(s) would equal the weight of the predecessor Basket Component replaced by the Successor Basket Component(s). For example, if two Successor Basket Components replaced one Basket Component, the Exchange would specify each of their recovery rates and the basket weight of each Successor Basket Component. The recovery rates of the Successor Basket Components could differ from the specified recovery rate of the predecessor Basket Component and the recovery rates of the two Successor Basket Components could differ from one another. However, the sum basket weights of the two Successor Basket Components (however apportioned by the Exchange) would equal the basket weight of the predecessor Basket Component.

All other terms and conditions of each Credit Default Basket Option containing a Successor Basket Component would be the same as the original Credit Default Basket Option unless the Exchange determines, in its sole discretion, that a modification is necessary and appropriate for the protection of investors and the public interest, including but not limited to the maintenance of fair and orderly markets, consistency of interpretation and practice, and the efficiency of settlement procedures.

With respect to adjustments related to a redemption, the proposed amendment provides that, once the Exchange has confirmed a Redemption Event in a Basket Component, that Basket Component will be removed from the Credit Default Basket. If a Credit Event has been confirmed to have occurred

[10] This criterion is designed to ensure that there is adequate information publicly available regarding the issuer of a debt security that serves as a Reference Obligation underlying a Credit Option. The market for debt securities serving as Reference Obligations is largely an over-the-counter market and many debt securities, including those among the most actively traded, are not themselves registered under Section 12 of the Act, 15 U.S.C. 78*l*. The issuers of many unregistered debt securities, however, have equity securities that are duly registered and are ''NMS stocks'' as defined in Rule 600 of Regulation NMS, 17 CFR 242.600. These issuers are required to provide periodic reports to the public due to the equity registration, and the fact that their debt securities are unregistered does not diminish in practical terms the information provided by their periodic reports. Thus, the requirements enable a wide array of Credit Options to be listed while ensuring sufficient public disclosure of information about any debt securities that serve as Reference Obligations underlying the exchange-traded Credit Options.

[11] The provisions of existing Rule 5.4.01 require that an equity security underlying an option be itself widely held and actively traded. The requirement that the securities of an issuer of a debt security meet the criterion of Rule 5.4.01 provides an additional assurance that such issuer's securities enjoy widespread investor interest.

[12] For ease of reference, the Exchange is proposing to place proposed Rule 29.2A immediately after Rule 29.2, *Designation of Credit Default Option Contracts.*

[13] The Exchange would specify the applicable Credit Event(s) in accordance with proposed amended Rule 29.1(c), new Rule 29.2A, and proposed amended Rule 29.4.

prior to the effective date of a Redemption Event, the cash settlement amount shall be as provided in Rule 29.1(a). The Credit Event confirmation period would begin when the Credit Default Basket Option contract is listed and would extend to 3 p.m. (CT) on the fourth Exchange business day after the effective date of the Redemption Event.

A ''Redemption Event'' would be defined in accordance with the terms of the Relevant Obligations and would include the redemption of the Reference Obligation and of all other Relevant Obligations. However, if the Reference Obligation is redeemed or matures but other Relevant Obligations remain, a new Reference Obligation would be specified from among the remaining Relevant Obligations and the substitution would not be deemed a Redemption Event.

As with Credit Default Options, the Exchange would confirm adjustment events affecting Credit Default Basket Options based on at least two sources, which may include announcements published via newswire services or information services companies, the names of which would be announced to the membership via Regulatory Circular, and/or information submitted to or filed with the courts, the Commission, an exchange or association, the OCC, or another regulatory agency or similar authority. Rule 29.4 would provide that every such determination made pursuant to the rule would be within the Exchange's sole discretion and be conclusive and binding on all holders and sellers and not subject to review.

c. Determination of Credit Events, Automatic Payout and Exercise, and Settlement (Amendments to Rules 29.9–29.10)

The Exchange proposes amending Rule 29.9, *Determination of Credit Event, Automatic Exercise and Settlement,* so that it would apply to Credit Default Basket Options. Specifically, the Exchange is proposing new text to Rule 29.9 that would provide that Credit Default Basket Options would be subject to automatic payouts and/or exercise upon the Exchange confirming that a Credit Event has occurred in a Basket Component between the listing date and the last trading date as follows: (i) Multiple Payout Credit Default Basket Options would be subject to automatic payouts each time a Credit Event is confirmed in a Basket Component; [14] and (ii) Single Payout Credit Default Basket Options would be subject to automatic exercise as soon as a Credit Event is confirmed in any one of the Basket Components. As with Credit Default Options, the Credit Event confirmation period would begin when the Credit Default Basket Option is listed and would extend to 3 p.m. (CT) on the expiration date.

The Exchange would confirm a Credit Event based on at least two sources, which could include announcements published via newswire services or information services companies, the names of which would be announced to the membership via Regulatory Circular, or information submitted to or filed with the courts, the Commission, an exchange or association, the OCC, or another regulatory agency or similar authority. Every determination made pursuant to proposed Rule 29.9 would be within the Exchange's sole discretion and be conclusive and binding on all holders and sellers and not subject to review.

The proposed amendment to Rule 29.9 would also provide that, if the Exchange determines that a Credit Event in a Basket Component has occurred prior to 10:59 p.m. (CT) on the last trading day: (i) A Multiple Payout Credit Default Basket Option would automatically pay the cash settlement amount (*i.e.*, one minus the Basket Component recovery rate specified by the Exchange at listing multiplied by the Notional Face Value of the Basket Component); however, if a Credit Event has been confirmed by the Exchange for each Basket Component prior to the last day of trading, the Multiple Payout Credit Default Basket Option would cease trading upon confirmation of the last Credit Event; and (ii) a Single Payout Credit Default Basket Option would automatically exercise and pay the cash settlement amount (*i.e.*, one minus the Basket Component recovery rate specified by the Exchange at listing multiplied by the Notional Face Value of the Basket Component); however, if a Credit Event has been confirmed by the Exchange prior to the last day of trading, the Single Payout Credit Default Basket Option would cease trading upon confirmation of the Credit Event.

Once a Credit Event is confirmed, the Exchange would provide the OCC with notice of the Credit Event and notice of the applicable cash settlement value, similar to the notification procedures that are in place for existing products trading on the Exchange. The rights and obligations of holders and sellers of Credit Default Basket Options dealt in on the Exchange shall be set forth in the by-laws and rules of OCC.

The Exchange proposes amending Rule 29.10 so that it would apply to all Credit Options and would provide that the ''reporting authority'' as used in this rule refers to the Exchange or any other entity identified by the Exchange as the ''reporting authority'' in respect of a class of Credit Default Options for purposes of the by-laws and rules of the OCC and any affiliate of the Exchange or any such other entity. No reporting authority makes any warranty, express or implied, as to the results to be obtained by any person or entity from the use of any Credit Default Option. Any reporting authority hereby disclaims all warranties of merchantability or fitness for a particular purpose or use with respect to any Credit Default Option. Any reporting authority shall have no liability for any damages, claims, losses (including any indirect or consequential losses), expenses, or delays, whether direct or indirect, foreseen or unforeseen, suffered by any person relating to any Credit Default Option, including without limitation as a result of any error, omission, or delay in confirming, or disseminating notice of, any Credit Event, any determination to adjust or not to adjust the terms of outstanding Credit Options, or any other determination with respect to Credit Default Options for which it has responsibility under the by-laws and rules of the OCC.

d. Position Limits, Reporting Requirements, Exercise Limits, and Other Restrictions (Amendments to Rules 29.5–29.8)

The Exchange is proposing that the position limits for Credit Default Basket Option contracts be equal to 50,000 contracts on the same side of the market. The Exchange believes that position limits set at this level would inhibit market manipulation or would mitigate other possible disruptions in the market. However, over time and based on the Exchange's experience in trading Credit Default Basket Options, CBOE may seek to increase these limits. Any such increase would be reflected through a rule filing submitted pursuant to Section 19(b) of the Act.[15]

In determining compliance with the Exchange's position limit requirements, the proposed amendment to Rule 29.5 would provide that Credit Default Basket Options shall not be aggregated with option contracts on the same or similar underlying security. CBOE believes that the nature of Credit Default

[14] As provided in proposed Rule 29.1(h)(i), a cash settlement amount would be paid only once in connection with a particular Basket Component that has a confirmed Credit Event, after which time that Basket Component would be removed from the Credit Default Basket.

[15] 15 U.S.C. 78s(b).

Basket Options as well as the risk/return profile of these options provides significant differences to existing standardized options that render aggregation of such positions unnecessary. In addition, Credit Default Basket Options would not be subject to the hedge exemption to the standard position limits found in existing Rule 4.11.04.

Instead, the following qualified hedge exemption strategies and positions would be exempt from the established position limits: (i) A Credit Default Basket Option position ''hedged'' or ''covered'' by an appropriate amount of cash to meet the cash settlement amount obligation (*e.g.*, $100,000 for a Credit Default Basket Option with a Notional Face Value of Basket of $100,000); and (ii) a Credit Default Basket Option position ''hedged'' or ''covered'' by a sufficient amount of any of the Basket Component debt securities, instruments, or interests related to the Reference Entity that equals the sum of the cash settlement amounts for Basket Components for a Multiple Payout Credit Default Basket Option or equals the maximum Basket Component cash settlement amount for a Single Payout Credit Default Basket Option.

The Exchange proposes amending Rule 29.5 so that it would apply to all Credit Options. Therefore, the existing Market-Maker and firm facilitation exemptions to position limits currently available to members under existing Rules 4.11.05 and 4.11.06, respectively, would also apply. Pursuant to Rule 4.11.05 (the Market-Maker exemption), the Exchange may grant a Marker-Maker an exemption from the standard position limit of 50,000 contracts for Credit Default Basket Options for the purpose of maintaining a fair and orderly market. With respect to Credit Default Basket Options, Rule 29.5 makes clear that a Market-Maker's position would have to generally be within 20% of the applicable limit of 50,000 contracts before an exemption would be granted. Pursuant to Rule 4.11.06 (the firm facilitation exemption), the Exchange may grant a member organization an exemption from the standard position limit of 50,000 contracts for Credit Default Basket Options for the purpose of facilitating a customer order. With respect to Credit Default Basket Options, Rule 29.5 makes clear that a member organization's aggregate exemption position could not exceed three times the standard limit of 50,000 contracts and would be applied consistent with the procedures described in existing Rule 4.11.06.

The Exchange proposes amending Rule 29.6, *Reports Related to Position Limits and Liquidation of Positions*, so that it would apply to all Credit Options. Therefore, the standard equity reporting requirements described in existing Rule 4.13, *Reports Related to Position Limits,* would be applicable to Credit Options. As such, in accordance with Rule 4.13(a), positions in Credit Options would be reported to the Exchange via the Large Option Positions Report when an account establishes an aggregate same side of the market position of 200 or more Credit Options. In computing reportable Credit Options under existing Rule 4.13, Credit Options could not be aggregated with non-Credit Option contracts. In addition, Credit Options on a given class shall not be aggregated with any other class of Credit Options. Rule 4.13(b) imposes additional reporting requirements for positions in excess of 10,000 contracts. The reporting requirements in Rule 4.13(b) would also apply to Credit Options, except that the reporting requirement would be triggered for a Credit Option position on behalf of a member's account or for the account of a customer in excess of 1,000 contracts on the same side of the market, instead of the normal 10,000 contract trigger amount. The data to be reported would include, but would not be limited to, the Credit Option positions, whether such positions are hedged, and documentation as to how such contracts are hedged. The Exchange believes that the reporting requirements and the surveillance procedures for hedged positions would enable the Exchange to closely monitor sizable positions and corresponding hedges.

The Exchange proposes amending Rule 29.7, so that it would apply to all Credit Options and, as a result, there would be no exercise limits for Credit Options.

The Exchange proposes amending Rule 29.8, so that it would apply to all Credit Options. Rule 29.8 would provide that Credit Options shall also be subject to existing Rule 4.16, *Other Restrictions on Options Transactions and Exercises*, which provides the Exchange's Board with the power to impose restrictions on transactions or exercises in one or more series of options of any class dealt in on the Exchange as the Board in its judgment determines advisable in the interests of maintaining a fair and orderly market or otherwise deems advisable in the public interest or for the protection of investors.

CBOE believes the proposed safeguards would serve sufficiently to help monitor open interest in Credit Option series and significantly reduce any risks.

e. Margin Requirements (Amendment to Rules 12.3 and 12.5)

The Exchange is proposing to amend Rule 12.3(*l*), *Margin Requirements,* so that it would apply to all Credit Options. Rule 12.3(*l*) would also be amended to include sub-paragraphs so that margin account and cash account requirements would be defined separately for Credit Default Options and for Credit Default Basket Options.

In addition, the Exchange is also proposing to supplement Rule 12.3(*l*), to include requirements applicable to the initial and maintenance margin required on any Credit Default Basket Options carried in a customer's account. The requirements would be as follows: The initial and maintenance margin required on any Credit Default Basket Option carried long in a customer's account would be 100% of the current market value; provided, however, for the account of a qualified customer, the margin would be 15% of the current market value.

The initial and maintenance margin required on any Credit Default Basket Option carried short in a customer's account would be as follows: (i) For Multiple Payout Credit Default Basket Options, the sum of each Basket Component's cash settlement amount as defined in Rule 29.1; provided, however, for the account of a qualified customer (as defined in Rule 12.3(*l*)(1)(i)), the margin would be the lesser of the current market value plus 15% of the sum of each Basket Component's cash settlement amount as defined in Rule 29.1 or of the sum of each Basket Component's cash settlement amount; or (ii) for Single Payout Credit Default Basket Options, the Basket Component cash settlement amount as defined in Rule 29.1 that is highest; provided, however, for the account of a qualified customer (as defined in Rule 12.3(*l*)(1)(i)), the margin would be the lesser of the current market value plus 15% of the Basket Component cash settlement defined in Rule 29.1 that is the highest or the Basket Component cash settlement amount that is the highest.

The Exchange proposes amending Rule 12.5, *Determination of Value for Margin Purposes*, so that it would apply to all Credit Options. Rule 12.5 would provide that Credit Options carried for the account of a qualified customer may be deemed to have market value for the purposes of the customer margin account provisions provided in existing Rule 12.3(c). For purposes of these proposed provisions, the term ''qualified customer'' would be defined as a person or entity that owns and

invests on a discretionary basis no less than $5,000,000 in investments.

Under the proposal, a deposit of cash or marginable securities could satisfy Credit Default Basket Option margin requirements.

The proposed margin provisions also would provide that a Credit Default Basket Option carried short in a customer's account be deemed a covered position, and eligible for the cash account, provided any one of the following either is held in the account at the time the option is written or is received into the account promptly thereafter: (i) For Multiple Payout Credit Default Basket Options, cash or cash equivalents equal to 100% of the sum of each Basket Component's cash settlement amount as defined in Rule 29.1; (ii) For Single Payout Credit Default Basket Options, cash or cash equivalents equal to 100% of the Basket Component cash settlement amount as defined in Rule 29.1 that is the highest; or (iii) an escrow agreement.

Under the proposal, the escrow agreement must certify that the bank holds for the account of the customer as security for the agreement (i) Cash, (ii) cash equivalents, (iii) one or more qualified equity securities, or (iv) a combination thereof having an aggregate market value of not less than 100% of the sum of each Basket Component's cash settlement amount sum as defined in Rule 29.1 in the case of Multiple Payout Credit Default Basket Options or 100% of the Basket Component cash settlement amount as defined in Rule 29.1 that is the highest in the case of Single Payout Credit Default Basket Options, and that the bank will promptly pay the member organization the cash settlement amount in the event of a Credit Event as defined in Rule 29.1. In addition, in accordance with Rule 12.3(a)(3), an escrow agreement must be issued in a form acceptable to the Exchange. In this regard, the Exchange notes that it has traditionally recognized as acceptable the escrow agreement forms of the OCC and the New York Stock Exchange.

The Exchange notes that, in accordance with Rule 12.10, *Margin Required is Minimum*, the Exchange would also have the ability to determine at any time to impose higher margin requirements than those described above in respect of any Credit Default Basket Option position(s) when it deems such higher margin requirements appropriate.

In setting the proposed margin requirements, particularly those with respect to qualified customers, and the proposed position limit and reporting requirements described above, the Exchange has been cognizant of the sophistication and capitalization of the particular market participants and their need for substantial options transaction capacity to hedge their substantial investment portfolios, on the one hand, and the potential for untoward effects on the market and on firms that might be attributable to excessive Credit Default Basket Option positions, on the other. The Exchange has also been cognizant of the existence of the competitive OTC market, in which similar restrictions do not apply. For these reasons, the Exchange believes that the requirements set forth in the proposed rules strike a necessary and appropriate balance and adequately address concerns that a member or its customer may try to maintain an inordinately large unhedged position in Credit Default Basket Options.

As part of its regulatory oversight of member organizations, the Exchange, in its capacity as a Designated Examining Authority (''DEA''), generally reviews member organizations' compliance with margin requirements applicable to customer accounts. In the future, the Exchange will include Credit Default Basket Option margin requirements as part of this review. Additionally, the Exchange, as a DEA, will review applicable member organizations' internal procedures for managing credit risk associated with extending margin to customers trading Credit Default Basket Options. The Exchange also notes that, pursuant to Rule 12.10, the Exchange may at any time impose higher margin requirements when it deems such higher margin requirements advisable.

f. Trading Mechanics for Credit Default Basket Options and Credit Options Generally Where Applicable (Amendments to Rules 29.11–29.15 and 29.17–29.19)

The Exchange proposes to trade all Credit Options, including Credit Default Basket Options, similar to the manner in which it trades equity options on its Hybrid Trading System (''Hybrid''). This is the same manner in which the Exchange proposed to trade Credit Default Options. As a result, the Exchange is proposing to globally amend the rules governing the trading mechanics for Credit Default Options to apply to Credit Options in general. Where applicable, the Exchange notes proposed amendments that are specific to Credit Default Basket Options.

- *Days and Hours of Business (Amendment to Rules 29.11 and Rule 6.1):* The Exchange proposes amending Rule 29.11 so that it would apply to all Credit Options. Rule 29.11 provides that, except under unusual conditions as may be determined by the Exchange, the hours during which Credit Options transactions may be made on the Exchange would be from 8:30 a.m. to 3:00 p.m. (CT). The Exchange notes that there is a cross-reference to Rule 29.11 in existing Rule 6.1, *Days and Hours of Business.* This reflects that Rule 29.11 supplements existing Rule 6.1. The Exchange similarly proposes to amend Rule 6.1 so that it would apply to all Credit Options.
- *Trading Rotations (Amendment to Rule 29.12):* The Exchange proposes amending Rule 29.12 so that it would apply to all Credit Options. Trading rotations would generally be conducted through use of the Hybrid Opening System (''HOSS''), which is described in existing Rule 6.2B. Normally, equity options open at a randomly selected time following the opening of the underlying security. Because Credit Options would not have a traditional underlying security, the opening rotation process would begin at a randomly selected time within a number of seconds after 8:30 a.m. (CT), unless unusual circumstances exist.
- *Trading Halts and Suspension of Trading (Amendment to Rule 29.13):* The Exchange proposes amending Rule 29.13 so that it would apply to all Credit Options. The trading halt procedures contained in existing Rules 6.3 and 6.3B that are applicable to equity options would also be applicable to Credit Options. In addition, Rule 29.13 would provide that another factor that may be considered by Floor Officials in connection with the institution of trading halts under existing Rule 6.3 in Credit Options is that current quotations for the Relevant Obligations or other securities of the Reference Entity are unavailable or have become unreliable.
- *Premium Bids and Offers & Minimum Increments, Priority, and Allocation (Amendment to Rule 29.14):* The Exchange proposes amending Rule 29.14 so that it would apply to Credit Default Basket Options and, where applicable, generally to all Credit Options. Bids and offers for Credit Default Basket Options would be expressed in terms of dollars per the contract multiplier unit (*e.g.*, a bid of ''7'' would represent a bid of $7,000 for a Credit Option with a specified contract multiplier of 1,000). In addition, the minimum price variation (''MPV'') for bids and offers on both simple and complex orders for Credit Default Basket Options would be $0.05. All bids or offers made for Credit Option contracts shall be deemed to be for one contract unless a specific number of option contracts is expressed in the bid or offer. A bid or offer for more than one

option contract shall be deemed to be for the amount thereof or a smaller number of option contracts. The rules of priority and order allocation procedures set forth in Rule 6.45A, *Priority and Allocation of Equity Option Trades on the CBOE Hybrid System,* shall apply to Credit Options.

• *Nullification and Adjustment of Credit Default Option Transactions (Amendment to Rule 29.15):* The provisions in existing Rule 6.25, which pertain to the nullification and adjustment of equity option transactions, would be generally applicable to Credit Options. The Exchange proposes amending Rule 29.15 so that it would apply to all Credit Options. Rule 29.15 provides that for Credit Options, there would be two categories of obvious errors. The first type of error pertains to an obvious pricing error, which occurs when the execution price of an electronic transaction is below or above the theoretical price range (*i.e.*, $0–$100) for the series by an amount equal to at least 5% per contract. Trading Officials would adjust such transactions to a price within 5% of the theoretical price range (*i.e.*, to—$5 or $105), unless both parties agree to a nullification. The second type of error pertains to electronic or open outcry transactions arising out of a verifiable disruption or malfunction in the use or operation of any Exchange automated quotation, dissemination, execution, or communication system. Trading Officials would nullify such transactions, unless both parties agree to an adjustment. All other provisions of existing Rule 6.25 related to procedures for review, and obvious error panel and appeals committee reviews, would apply unchanged.

• *Market-Maker Appointments & Obligations (Amendment to Rule 29.17):* The Exchange proposes amending Rule 29.17 so that it would apply to all Credit Options. Rule 29.17 provides that the Market-Maker appointment process for Credit Option classes shall be the same as the appointments for other options, as set out in existing Rules 8.3, *Appointment of Market-Makers;* 8.4, *Remote Market-Makers;* 8.15A, *Lead Market-Makers in Hybrid Classes;* and 8.95, *Allocation of Securities and Location of Trading Crowds and DPMs.* This rule would further provide that an appointed Market-Maker may, but would not be obligated to, enter a response to a request for quotes in an appointed Credit Option class and need not provide continuous quotes or quote a minimum bid-offer spread. When quoting, the Market-Maker's minimum value size would be at least one contract. With respect to an appointed DPM or LMM, as applicable, there would be additional obligations to enter opening quotes in accordance with existing Rule 6.2B, *Hybrid Opening System (''HOSS''),* in 100% of the series in the appointed class and to enter a quote in response to any open outcry request for quotes on any appointed Credit Option class. The Exchange also could establish permissible price differences for one or more series of classes of Credit Options as warranted by market conditions. These quoting mechanics would be similar to the mechanics that exist today for trading Flexible Exchange Options (''FLEX Options'') on the Exchange.

• *Exchange Authority (Existing Rule 29.18):* Existing rule 29.18 provides that, for purposes of options that are subject to Chapter XXIX, references in the Exchange Rules to the appropriate committee shall be read to be to the Exchange.[16] Under this rule, the Exchange may determine to assign these authorities with respect to options that are subject to Chapter XXIX, including Credit Default Basket Options, to committees and/or Exchange staff. Under this rule, the Exchange has the flexibility to delegate the authorities under the rules with respect to options that are subject to Chapter XXIX, including Credit Default Basket Options, to an appropriate committee or appropriate Exchange staff and does not have to make a rule change merely, for instance, to accommodate the reassignment of any such authority.

• *FLEX Trading Rules (Amendment to Rule 29.19):* In addition to Hybrid, the Exchange is proposing that all Credit Options also would be eligible for trading as FLEX Options. For proposes of existing Chapter XXIVA and proposed Chapter XXIVB, which chapters contain the Exchange's rules pertaining to FLEX Options, references to the term ''FLEX Equity Options'' would include a Credit Option and references to the ''underlying security'' or ''underlying equity security'' in respect of a Credit Default Option would mean the Reference Obligation as defined in proposed Rule 29.1. For purposes of existing Rule 24A.4 and Rule 24B.4, FLEX Equity Options that are Credit Options would be cash-settled and may have maximum terms equal in length to those provided for under Rules 29.2 and 29.2A, and the exercise by exception provisions of OCC Rule 805 would not apply.

These trading mechanics are designed to create a modified trading environment that takes into account the relatively small number of transactions that are likely to occur in this sophisticated, large-size market, while at the same time providing the Credit Default Basket Options market with the price improvement and transparency benefits of competitive Exchange floor bidding, as compared to the OTC market. The Exchange believes that the resulting market environment would be fair, efficient, and creditworthy and, as such, would prove to be particularly suitable to the large sophisticated trades and investors that now resort to the OTC market to affect these types of options transactions.

g. Options Disclosure Document

To accommodate the listing and trading of Credit Default Basket Options, it is expected that the OCC would amend its by-laws and rules to reflect the different structure of Credit Default Basket Options.[17] In addition, the Exchange states that the OCC has sought to revise the Options Disclosure Document (''ODD'') to incorporate Credit Default Basket Options.[18]

h. Systems Capacity

CBOE represents that it believes the Exchange and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of Credit Default Basket Options as proposed herein.

i. Applicability of Rule 9b–1 under the Act

The Exchange asks the Commission to clarify that Credit Default Basket Options are standardized options under Rule 9b–1 Under the Act.[19] Subsection (a)(4) of Rule 9b–1[20] defines ''standardized options'' as ''options contracts trading on a national securities exchange, an automated quotations system of a registered securities association, or a foreign securities exchange which relate to options classes the terms of which are limited to specific expiration dates and exercise prices, or such other securities as the Commission may, by order, designate.''

[16] For example, references to determinations regarding the applicable opening parameter settings established by the ''appropriate Procedure Committee'' in Exchange Rule 6.2B, *Hybrid Opening System (''HOSS''),* are read to be by the ''Exchange.''

[17] *See* SR–OCC–2007–06 (proposal by OCC to amend and supplement its by-laws and rules to clear and settle ''credit default basket options'' proposed to be listed CBOE).

[18] *See* Securities Exchange Act Release No. 55921 (June 18, 2007) (SR–ODD–2007–03) (approving accelerated delivery of supplement to the ODD reflecting certain changes to disclosure regarding credit default options).

[19] 17 CFR 240.9b–1.

[20] CFR 240.9b–1(a)(4).

Credit Default Basket Options are like existing standardized options trading on CBOE in every respect except for the exercise price. Credit Default Basket Options (i) Trade on a national securities exchange, (ii) have a specific expiration date, (iii) have fixed terms, (iv) have a specific exercise style, and (v) would be issued and cleared by the OCC. All of these are attributes of ''standardized options'' as defined in Rule 9b–1. The one respect with which Credit Default Basket Options differ from existing standardized options is in the exercise price.

• ''Exercise price'' is not a defined term in Rule 9b–1. However, the significance of having a specific exercise price term in a standardized option is that traditionally it, in conjunction with the specific exercise style (*e.g.*, American-, European-, or capped-style), symbolizes the formula for calculating the exercise settlement of the option that is publicly known and announced, objectively determined, and unalterable. For example, in the case of a physical delivery option, the exercise price (which is sometimes called the ''strike price'') is the price at which the option holder has the right either to purchase (in the case of a call) or to sell (in the case of a put) the underlying interest upon exercise.[21] In the case of a cash-settled option, the exercise price is the base used for determining the amount of cash, if any, that the option holder is entitled to receive upon exercise (referred to as the ''cash settlement amount'').[22] Traditionally, the cash settlement amount is the amount by which the exercise settlement value of the underlying interest of a cash-settled call exceeds the exercise price, or the amount by which the exercise price of a cash-settled put exceeds the exercise settlement value of the underlying interest, multiplied by the multiplier for the option.

Whereas for traditional cash-settled options the cash settlement amount is determined by reference to the particular price of the underlying interest, the cash settlement amount for a Credit Default Basket Option would be an amount established by a fixed equation at the listing of the option. The equation would establish the cash settlement amount of a Credit Default Basket Option as one minus the Basket Recovery Rate specified by the Exchange at listing multiplied by the Notional Face Value of the Basket Component.

The cash settlement amount would be automatically paid each time a Credit Event is confirmed for a Basket Component for a Multiple Payout Credit Default Basket Options. This amount would be paid only once in connection with a particular Basket Component, after which time that Basket Component would be removed from the Credit Default Basket. For Single Payout Credit Basket Options, the cash settlement amount would be paid a single time when the first Credit Event is confirmed. As with traditional cash-settled options, the calculation of the cash settlement amount of a Credit Default Basket Option would be established prior to the commencement of trading according to this formula, which would be publicly known and announced, objectively determined, and unalterable. Thus, as with a traditional cash-settled option, a party entering into a Credit Default Basket Option would know exactly the terms under which a Credit Default Basket Option would be automatically paid and/or automatically exercised and the option's cash settlement amount. In this regard, the Exchange believes that Credit Default Basket Options, by their proposed terms, would be standardized options within the meaning of Rule 9b–1.

If the Commission cannot determine that Credit Default Basket Options are, by their proposed terms, standardized options, the Exchange requests that the Commission use its authority under Rule 9b–1(a)(4) to otherwise designate options, such as Credit Default Basket Options, as standardized options. The Commission used this authority very recently in 2007 to designate ''Credit Default Options'' as standardized options.[23] In making this designation the Commission found that Credit Default Options ''resemble standardized options in other significant respects. Credit default options have an underlying security and an expiration date. Like other standardized options, credit default options have standardized terms relating to exercise procedures, contract adjustments, time of issuance, effect of closing transactions, restrictions, and other matters pertaining to the rights and obligation of holders and writers. Further, credit default options are designed to provide market participants with the ability to hedge their exposure to an underlying security.'' Credit Default Basket Options are a grouping or collection of Credit Default Options. Therefore, the Exchange believes that Credit Default Basket Options share all of the same characteristics recently highlighted by the Commission warranting their designation as standardized for purposes of Rule 9b–1.

j. Surveillance Program

The Exchange represents that it will have in place adequate surveillance procedures to monitor trading in Credit Default Basket Options prior to listing and trading such options, thereby helping to ensure the maintenance of a fair and orderly market for trading in Credit Default Basket Options.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to national securities exchanges. Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[24] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 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 such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

The Commission has determined that a 15-day comment period is appropriate in this case.

[21] *See* ODD at 6–7.

[22] *See id.*

[23] *See supra* note 4.

[24] 15 U.S.C. 78f(b)(5).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2007–26 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2007–26. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of 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 Number SR–CBOE–2007–26 and should be submitted on or before July 13, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[25]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–12485 Filed 6–27–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55940; File No. SR–DTC–2007–04]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of a Proposed Rule Change Relating to a Policy Statement on the Eligibility of Foreign Securities

June 21, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on April 19, 2007, The Depository Trust Company (''DTC'') 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 primarily by DTC. 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 proposed rule change would add a new Policy Statement on the Eligibility of Foreign Securities to DTC's rules.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[3]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the Policy Statement is to set forth in a single place in an accessible manner the criteria and procedures for making the securities of foreign issuers (''Foreign Securities'') eligible for deposit and book-entry transfer through the facilities of DTC in accordance with the Securities Act of 1933 (''Securities Act'')[4] and the rules and regulations of the Commission thereunder. For purposes of the Policy Statement, (1) the term ''security'' has the meaning provided in Section 2(a)(1) of the Securities Act,[5] (2) the term ''foreign issuer'' has the meaning provided in Rule 405 of the Commission under the Securities Act (and includes both a ''foreign government'' and a ''foreign private issuer'' as defined in Rule 405)[6] and (3) capitalized terms that are used but not otherwise defined in the Policy Statement have the meanings given to such terms in the Rules of DTC.

The Policy Statement covers both Foreign Securities deposited with DTC at the time that such Foreign Securities are first distributed (referred to as ''new issues'' in the DTC system) and Foreign Securities deposited with DTC subsequent to the time that such Foreign Securities are first distributed (referred to as ''older issues'' in the DTC system). The criteria and procedures for making new issues of Foreign Securities eligible for deposit and book-entry transfer through the facilities of DTC have previously been codified by DTC. The criteria and procedures for making older issues of Foreign Securities eligible for deposit and book-entry transfer through the facilities of DTC have not previously been codified by DTC. Accordingly, what would be new in the Policy Statement are the criteria and procedures for making older issues of unregistered Foreign Securities DTC-eligible.[7] These are generally securities that may be freely traded outside the U.S. over the counter or on foreign exchanges or traded in the U.S. over the counter market subject to the resale restrictions of the Securities Act.

The proposed rule change, as it relates to older issues of unregistered Foreign

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[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] A Policy Statement is used by DTC to clarify and consolidate the Rules of DTC with respect to the subject of the Policy Statement. A Policy Statement is a part of the Rules of DTC. As such, pursuant to Rule 2 Section 1 of the DTC Rules and the Participants Agreement that participants enter into with DTC, a Policy Statement is binding on DTC participants.

[3] The Commission has modified parts of these statements.

[4] 15 U.S.C. 77 *et seq.*

[5] 15 U.S.C. 77b(a)(1).

[6] 17 CFR 230.405. The term foreign issuer means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

[7] Registered securities, whether new issues or older issues, whether foreign or domestic, can always be made DTC-eligible.

Securities, represents an extension, with no material change, in arrangements that now apply to new issues of unregistered Foreign Securities, including securities that may be resold without registration under the Securities Act pursuant to Regulation S or Rule 144A. The proposed rule change, by establishing the criteria and procedures for a wider but not fundamentally different range of unregistered Foreign Securities to settle at DTC would increase the transparency and reduce the risk and cost of transactions in these securities.

At the present time, purchases and sales of older issues of unregistered Foreign Securities by U.S. investors typically settle through foreign intermediaries and central securities depositories in multiple jurisdictions. By having these transactions settle at DTC, U.S. investors and intermediaries would be able to benefit from (1) DTC risk management controls approved by the Commission and the Board of Governors of the Federal Reserve System, (2) a more visible and less complicated settlement process and (3) greater control over settlement costs with fees determined by the user-representative board of directors of DTC.

In all cases and circumstances, participants of DTC would be responsible for determining that their deposit of older issues of unregistered Foreign Securities with DTC, as well as their transactions in such securities through the facilities of DTC, are in compliance with the Rules of DTC and the federal securities laws.

Categories of Foreign Securities Eligible for DTC Services

Under the Policy Statement, the following categories of Foreign Securities would be eligible for DTC book-entry delivery services as and to the extent set forth below: [8]

(1) Foreign Securities that are registered under the Securities Act (''Registered Foreign Securities'') would be eligible for all DTC services.

(2) Foreign Securities that are exempt from registration under the Securities Act pursuant to an exemption that does not involve any resale restrictions (''Exempt Foreign Securities'') would be eligible for all DTC services.

(3) Foreign Securities that may be offered and sold without registration under the Securities Act pursuant to Regulation S (''Foreign Regulation S Securities'') [9] would be eligible for all DTC services. This would include Category 1 securities, Category 2 securities and Category 3 securities under Regulation S.[10]

(4) Foreign Securities that may be resold without registration under the Securities Act pursuant to Rule 144A (''Foreign Rule 144A Securities'') [11] would be eligible for all DTC services. If such Foreign Rule 144A Securities are not investment grade securities (*i.e.*, nonconvertible debt securities or nonconvertible preferred stock rated in one of the top four categories by a nationally recognized statistical rating agency), then to be eligible for DTC services such Foreign Rule 144A Securities would have to be securities designated for inclusion in a system of a self-regulatory organization approved by the Commission for the reporting of quotation and trade information on Rule 144A transactions (''SRO Rule 144A System'').[12]

(5) Foreign Securities that may be resold without registration under the Securities Act pursuant to Rule 144 (''Foreign Restricted Securities'') [13] would be eligible for all DTC services.

(6) Foreign Securities that may be resold without registration under the Securities Act pursuant to any other exemption (''Foreign Other Eligible Securities'') would be eligible for all DTC services. This shall include without limitation an exemption pursuant to Rule 801 [14] in connection with a rights offering or an exemption pursuant to Rule 802 [15] in connection with an exchange offer.

Although all the foregoing categories of Foreign Securities would be eligible for deposit and book-entry transfer through the facilities of DTC, DTC would have the right adopt associated procedures to determine in accordance with Rule 5, Section 1 of the DTC Rules, and its obligations as a registered clearing agency subject to regulation by the Commission whether any particular issue would be accepted for deposit and made eligible for some or all DTC services.

Responsibilities of Issuers and Participants

Issuers and participants would be responsible for determining that their deposit of Foreign Securities with DTC and their transactions in Foreign Securities through the facilities of DTC are in compliance with the Rules of DTC and the federal securities laws. In particular and without limitation, issuers and participants would be responsible not to engage in any transactions in Foreign Securities, including any distribution of unregistered Foreign Securities through the facilities of DTC, in violation of the Securities Act and the rules and regulations of the Commission

[8] The categories of Foreign Regulation SSecurities, Foreign Rule 144A Securities, Foreign Restricted Securities and Foreign Other Eligible Securities are not all mutually exclusive. For example, (i) Foreign Regulation S Securities may be resold to qualified institutional buyers (as defined in Rule 144A) pursuant to Rule 144A, (ii) Foreign Rule 144A Securities may be resold in offshore transactions (as defined in Regulation S) pursuant to Regulation S and (iii) Foreign Regulation S Securities and Foreign Rule 144A Securities that are restricted securities (as defined in Rule 144) may be resold pursuant to Rule 144.

[9] 17 CFR 230.901 through 905.

[10] Category 1 of the primary offering safe harbor of Regulation S includes the securities of foreign issuers for which there is no substantial U.S. market in the subject securities, securities being offered by foreign (or domestic) issuers in overseas directed offerings, the securities of foreign governments and securities being offered by foreign issuers pursuant to employee benefit plans. Category 2 of the primary offering safe harbor of Regulation S includes the equity securities of reporting foreign issuers, the debt securities of foreign (or domestic) reporting issuers and the debt securities of nonreporting foreign issuers even if there is substantial U.S. market interest in the subject securities. Category 3 of the primary offering safe harbor of Regulation S includes the equity securities of non-reporting foreign issuers with substantial U.S. market interest in the subject securities. 17 CFR 230.903.

[11] 17 CFR 230.144A.

[12] For the requirement that securities other than investment grade securities be designated for inclusion in a Self Regulatory Organization (''SRO'') Rule 144A System approved by the Commission, see Securities Exchange Act Release No. 33327 (December 13, 1993), 58 FR 67878 (December 22, 1993) (File No. SR–DTC–90–06) (Order Approving a Proposed Rule Change by DTC Relating to the Eligibility of Rule 144A Securities at DTC).

The original SRO Rule 144A System approved by the Commission was the Private Offerings, Resales, and Trading through Automated Linkages (''PORTAL'') Market System operated by the National Association of Securities Dealers, Inc. (''NASD''). For a description of the PORTAL Market System and the relationship between the PORTAL Market System and DTC, see Securities Exchange Act Release Nos. 27956 (April 27, 1990), 55 FR 18781 (May 4, 1990) (File No. SR–NASD–88–23) (Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendments to Proposed Rule of NASD Relating to the Operation of the PORTAL Market) and 33326 (December 13, 1993), 58 FR 66388 (December 22, 1993) (File No. SR–NASD–91–5) (Order Approving a Proposed Rule Change Relating to the Operation of the PORTAL Market).

In 2001, the Commission approved an NASD proposed rule change to require PORTAL participants to submit trade reports of secondary market transactions in PORTAL equity securities through the NASD Automated Confirmation and Transaction Service (''ACT'') and PORTAL high-yield debt securities through the NASD Trade Reporting and Comparison Entry Service (''TRACE'') and to redefine the PORTAL Market System to include ACT and TRACE. Securities Exchange Act Release No. 44042 (March 6, 2001), 66 FR 14969 (March 13, 2001) (File No. SR–NASD–99–66) (Order Approving Proposed Rule Change Relating to the Implementation of Mandatory Trade Reporting for PORTAL Securities). As a result, ACT and TRACE are each an SRO Rule 144A System for purposes of the DTC Rule 144A eligibility requirement.

[13] 17 CFR 230.144.

[14] 17 CFR 230.801.

[15] 17 CFR 230.802.

thereunder. These responsibilities of issuers and participants are based on the following:

(1) Issuers and participants depositing Foreign Securities with DTC and participants engaging in transactions in Foreign Securities through the facilities of DTC are subject to the Rules of DTC and the federal securities laws.

(2) Rule 2 Section 7 of the DTC Rules provides, ''In connection with their use of the Corporation's [DTC's] services, Participants and Pledgees must comply with all applicable laws, including all applicable laws relating to securities, taxation and money laundering.''

(3) Section 7(b) of the ''Operational Arrangements (Necessary for an Issue to Become and Remain Eligible for DTC Services)'' of DTC (''DTC Operational Arrangements'') which relate to book-entry only (''BEO'') issues being made eligible for DTC services provides:

> Issuer recognizes that DTC does not in any way undertake to, and shall not have any responsibility to, monitor or ascertain the compliance of any transactions in the Securities with the following, as amended from time to time: (1) Any exemptions from registration under the Securities Act of 1933; (2) the Investment Company Act of 1940; (3) the Employee Retirement Income Security Act of 1974; (4) the Internal Revenue Code of 1986; (5) any rules of any self-regulatory organizations (as defined under the Securities Exchange Act of 1934); or (6) any other local, state, federal, or foreign laws or regulations thereunder.

This and other representations made by issuers to DTC pursuant to the DTC Operational Arrangements are mirrored in the Letter of Representations that DTC receives from issuers in connection with their deposits of BEO issues with DTC.

(4) In 1994, in an order clarifying certain language in the Rule 144A approval order, the Commission concurred in the position taken by DTC with respect to Rule 5 of the DTC Rules that ''Rule 5 does not require DTC to determine whether securities, when deposited at DTC, may be transferred lawfully by book-entry in light of the Federal securities law.'' [16] The original Rule 144A order included the statement that Rule 5, Section 1 of DTC's Rule required DTC to determine whether in light of the Federal securities laws, particularly the provisions of Rules 144, 144A, and 145, the securities when deposited with DTC may be lawfully transferred by book-entry. DTC filed the rule change in order to clarify that DTC Rule 5 does not require DTC to determine whether securities deposited at DTC may be transferred lawfully pursuant to Federal securities laws. DTC subsequently amended Rule 5 to delete any implication that DTC was under any statutory or contractual obligation to determine whether securities deposited with DTC could be legally transferred by book-entry.[17]

DTC Procedures

DTC implements a variety of measures designed to facilitate compliance by issuers and participants with their obligations to DTC and pursuant to the federal securities laws. These measures are set forth below with particular reference to the proposal for Foreign Securities.

With respect to new issues of Foreign Securities:

(1) For all Foreign Securities, DTC would require (a) from the Participant seeking DTC eligibility (*e.g.*, the underwriter) an Eligibility Questionnaire that sets forth *inter alia* the basis on which the securities are eligible for deposit and book-entry transfer through the facilities of DTC and (b) from the issuer a Letter of Representations with representations that incorporate by reference substantially all of the standard representations set forth in the DTC Operational Arrangements.

(2) For Foreign Regulation S Securities, DTC would require from the issuer a rider to the Letter of Representations with *inter alia* additional representations relating to the securities being eligible for resale pursuant to Regulation S and having a CUSIP or CINS identification number different from the CUSIP or CINS identification number of any registered securities of the issuer of the same class.

(3) For Foreign Rule 144A Securities, DTC would require from the issuer a rider to the Letter of Representations with *inter alia* additional representations relating to the securities being eligible for resale pursuant to Rule 144A, having a CUSIP or CINS identification number different from the CUSIP or CINS identification number of any registered securities of the issuer of the same class and whether the securities are investment grade securities or securities designated for inclusion in an SRO Rule 144A System.

With respect to older issues of Foreign Securities: [18]

(1) DTC (a) would determine that any unregistered Foreign Securities deposited with DTC have a CUSIP or CINS identification number that is different from the CUSIP or CINS identification of any registered securities of the issuer of the same class and (b) would confirm that any Foreign Rule 144A Securities deposited with DTC are investment grade securities or securities designated for inclusion in an SRO Rule 144A System.

(2) DTC would require from any participant that wishes to deposit any unregistered Foreign Securities with DTC or engage in any transactions in unregistered Foreign Securities through the facilities of DTC a one-time blanket Letter of Representations (''Participant Foreign Securities BLOR'') with *inter alia* representations that such Participant (a) will not deposit any unregistered Foreign Securities with DTC unless such securities are eligible for resale without registration under the Securities Act and (b) will not engage in any transactions in Foreign Securities, including any distribution of unregistered Foreign Securities through the facilities of DTC, in violation of the Securities Act and the rules and regulations of the Commission thereunder.[19] DTC would systemically block any Participant that has not executed a Participant Foreign Securities BLOR from (a) depositing any unregistered Foreign Securities with DTC or (b) engaging in any transactions in unregistered Foreign Securities through the facilities of DTC.

Additional Documentation

Although the foregoing documentation for new issues and older issues would be provided by issuers or

[16] Securities Exchange Act Release No. 33672 (February 23, 1994), 59 FR 10186 (March 3, 1994) (File No. SR–DTC–93–14) (Order Approving Proposed Rule Change Relating to a Clarification of Rule 5).

[17] The position taken by DTC with respect to original Rule 5 order and the clarification to Rule 5 are in accord with Section 17A(b)(3)(A) of the Act, which provides that a clearing agency shall not be registered under Section 17A unless the Commission determines that ''[s]uch clearing agency is so organized and has the capacity to * * * enforce (subject to any rule or order of the Commission pursuant to Section 17(d) or 19(g)(2) of this title) compliance by its participants with the rules of the clearing agency, and to carry out the purposes of this section.''15 U.S.C. 78q–1(b)(3)(A).

Accordingly, a clearing agency is authorized and required to enforce against its participants the rules of the clearing agency and the provisions of Section 17A of the Exchange Act but is not authorized or required (because it does not have the jurisdiction or power) to enforce against its participants (or non-participant issuers or transfer agents) the provisions of the Securities Act and the rules and regulations of the Commission thereunder.

[18] Foreign Securities that have historically been traded only on foreign securities exchanges and in foreign over-the-counter markets can be deposited as older issues and transferred by book-entry through the facilities of DTC, provided that they may legally be resold in the United States, *i.e.*, they are registered under the Securities Act or they are eligible for resale in the United States without registration under the Securities Act.

[19] A form of the proposed Participant Foreign Securities BLOR is attached as Exhibit 2 to the proposed rule change filed by DTC with the Commission.

participants in connection with the deposit of Foreign Securities with DTC and/or as a condition to engaging in transactions in Foreign Securities through the facilities of DTC, DTC would have the right and could adopt associated procedures to determine in accordance with Rule 5 Section 1 of the DTC Rules and its obligations as a registered clearing agency subject to regulation by the Commission whether any other or additional documentation would be required.

Section 17A(a)(2)(A) of the Act directs the Commission to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions and the establishment of linked or coordinated facilities for clearance and settlement. The deposit and book-entry transfer of Foreign Securities through the facilities of DTC in accordance with the criteria and procedures set forth in the proposed Policy Statement would (1) enable DTC to provide its participants with prompt and accurate clearance and settlement of their cross-border securities transactions, (2) enable DTC to enhance and extend its linkages with foreign depositories and exchanges and (3) enable DTC to support the cross-border initiatives of U.S. broker-dealers, banks and exchanges.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments relating to the proposed rule change have been solicited or received by DTC from members, participants or other persons. DTC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty five 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 ninety 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 the proposed rule change or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov. Please include File Number SR–DTC–2007–04 on the subject line.*

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–DTC–2007–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of DTC. 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–DTC–2007–04 and should be submitted on or before July 19, 2007.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[20]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–12531 Filed 6–27–07; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55941; File No. SR–ISE–2007–36]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change as Modified by Amendment No. 1 Thereto Relating to API Fees

June 21, 2007.

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 May 17, 2007, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') 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 substantially prepared by the Exchange. On June 11, 2007, the ISE submitted Amendment No. 1 to the proposed rule change.[3] ISE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by ISE under Section 19(b)(3)(A)(ii) of the Act[4] and Rule 19b-4(f)(2) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to adopt a High Throughput User Session/API fee for ISE market makers.[6] The text of the proposed rule change is available at the Exchange, the Commission's Public

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] Amendment No. 1 makes certain clarifying edits to the purpose section of the proposed rule change and the Schedule of Fees contained in Exhibit 5.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b-4(f)(2).

[6] *See* Telephone Conference between Samir Patel, Assistant General Counsel, ISE, and Richard Holley III, Special Counsel, Division of Market Regulation, Commission, dated June 21, 2007 (noting that the proposed fee is applicable to ISE market makers).

Reference Room, and *http://www.iseoptions.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of 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

The purpose of this proposed rule change is to adopt a High Throughput User Session/API fee for members.[7] ISE currently has three categories of authorized logins: (1) Quoting, order entry and listening (allowing the user to enter quotes, orders, and perform all other miscellaneous functions, such as setting parameters, pulling quotes and performing linkage functions (*e.g.*, sending and receiving P and P/A orders, laying off orders, etc.)); (2) order entry and listening (allowing the user to enter orders and perform all other miscellaneous functions, such as setting parameters, pulling quotes and performing linkage functions (but not quote)); and (3) listening (allowing the user only to query the system and to respond to other broadcasts).

An ISE market maker currently receives an allocation of 1,000,000 quotes per day per user. If a firm submits more quotes than those allocated, *i.e.*, 1,000,000 quotes per day per user as measured on an average in a single month, the firm is charged for additional users depending upon the number of quotes submitted.[8] Each month, the total number of quotes submitted by a market maker firm across all bins (*i.e.*, the group of options to which the market maker is appointed) is divided by the number of trading days, resulting in the average quotes per day. This number is then divided by 1,000,000 and rounded up to the nearest whole number, resulting in an implied number of users based on quotes. Members are invoiced on a monthly basis for the greater of (a) the greatest number of users authorized to login into the system, or (b) the number of implied users based on quotes.

ISE currently charges $950 per month for each quoting session for up to 1,000,000 quotes per day, on average for a month. Members are charged an additional user fee of $950 for each incremental usage of up to 1,000,000 quotes per day per user.

There are certain third party vendors used by members to connect to the ISE that currently permit only single logins, thus restricting a member's activity when utilizing these applications. To address this limitation, ISE has created a ''High Throughput User'' that permits an ISE Market Maker to quote up to 2,000,000 quotes per day in a month. A ''High Throughput User'' would be able to enter quotes, orders, and perform all other miscellaneous functions, such as setting parameters, pulling quotes and performing linkage functions (*e.g.*, sending and receiving P and P/A orders, laying off orders, etc.). The Exchange proposes to charge ''High Throughput Users'' a fee of $1,900 per month. Members will be charged an additional user fee of $1,900 for each incremental usage of up to 2,000,000 quotes per day per user.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4)[9] that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the Exchange believes this fee will allow its market making members to maximize their quoting ability.

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 proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[10] and Rule 19b–4(f)(2)[11] thereunder because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate 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.[12]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–ISE–2007–36 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2007–36. 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

[7] The ISE Central Exchange System uses an open Application Programming Interface (API). ISE Members program to ISE's API in order to develop applications that send trading commands and/or queries to and receive broadcasts and/or transactions from the trading system. The ISE Central Exchange System is the heart of ISE's marketplace, processing quotes from market makers, receiving orders from Electronic Access Members, tracking activity in the underlying markets, executing trades in the matching engine, and broadcasting trade details to the participating members.

[8] *See* Securities Exchange Act Release No. 53522 (March 20, 2006), 71 FR 14975 (March 24, 2006) (SR-ISE–2006–09) (providing an example of how the fee is assessed).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

[12] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, the Commission considers the period to commence on June 11, 2007, the date on which the Exchange filed Amendment No. 1.

post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2007–36 and should be submitted on or before July 19, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–12486 Filed 6–27–07; 8:45 am]

BILLING CODE 8010–01–P

[13] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Mississippi Division; Notice To Rescind a Notice of Intent To Prepare an Environmental Impact Statement (EIS): Hancock, Harrison, Jackson Counties, MS

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Rescind Notice of Intent to prepare an EIS.

SUMMARY: The FHWA is issuing this notice to advise the public that the Notice of Intent published on April 23, 2003 to prepare an Environmental Impact Statement (EIS) for a proposed relocation study of the CSX Railroad through the six counties of the Mississippi Gulf Coast is being rescinded.

FOR FURTHER INFORMATION CONTACT: Cecil Vick, Environment and Planning Management Team Leader, Federal Highway Administration, Mississippi Division, 666 North Street, Suite 105, Jackson, Mississippi 39202, Telephone: (601) 965–4217.

SUPPLEMENTARY INFORMATION:

Background

The FHWA is rescinding the notice of intent to prepare an Environmental Impact Statement (EIS) on a proposal to study the relocation of the CSX Railroad through the six counties of the Mississippi Gulf Coast—Jackson, Harrison, Hancock, Greene, Stone, and Pearl River Counties with logical termini at the Alabama and Louisiana State lines.

The purpose of the CSX Study was three-fold: Identify the best feasible corridor for relocation of the CSX Railroad in Mississippi; obtain the necessary environmental clearances; and, demonstrate the applicability of remote sensing technologies to environmental analysis for transportation planning projects and decision making. Of paramount importance to this effort was the public participation process.

Federal-aid funds are no longer available for the proposed action.

Andrew H. Hughes,

Division Administrator, Mississippi, Federal Highway Administration, Jackson, Mississippi.

[FR Doc. E7–12492 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2007–28416]

Notice of Request for Information (RFI): Training Certification for Drivers of Longer Combination Vehicles (LCVs)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval and invites public comment on its proposal. Specifically, the FMCSA requests OMB's approval to revise an ICR entitled, ''*Training Certification for Drivers of Longer Combination Vehicles (LCVs).*'' This ICR is necessary due to the paperwork requirement to complete and maintain training certificates that drivers must present to prospective employers. These certificates serve as proof the drivers have successfully completed sufficient training to operate LCVs safely on our Nation's highways. Motor carriers are required to maintain a copy of the training certification in each LCV driver's qualification (DQ) file, which may be reviewed by Federal or State enforcement officials.

DATES: We must receive your comments on or before August 27, 2007.

ADDRESSES: You may submit comments identified by any of the following methods. Please identify your comments by the FMCSA docket number provided at the beginning of this notice.

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

Docket: For access to the Docket Management System (DMS) to read background documents or comments received, go to *http://dms.dot.gov* at any time or to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. The DMS is available electronically 24 hours each day, 365 days each year. If you want notification of receipt of your comments, please include a self-addressed, stamped envelope, or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Tom Yager, Chief of the Driver and Carrier Operations Division, Department of Transportation, Federal Motor Carrier Safety Administration, West Building

6th Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–5370; E-mail: *MCPSD@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 4007(b) of the Motor Carrier Act of 1991 (Title IV of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102–240, 105 Stat. 1914, 2152; 49 U.S.C. 31307) requires the Secretary of Transportation to establish Federal minimum training requirements for drivers of LCVs. The responsibility for implementing the statutory requirement was subsequently delegated to FMCSA (49 CFR 1.73). The FMCSA, in a final rule entitled, ''Minimum Training Requirements for Longer Combination Vehicle (LCV) Operators and LCV Driver-Instructor Requirements'' adopted implementing regulations for the minimum training requirements for the operators of LCVs (see 69 FR 16722; March 30, 2004).

The 2004 final rule created an information collection burden concerning the certification of new, current and non-grandfathered LCV drivers; grandfathering those current LCV drivers who are eligible for certification; and the certification of LCV driver-instructors. The implementing regulations define an LCV as any combination of a truck-tractor and two or more semi-trailers or trailers, which operate on the National System of Interstate and Defense Highways (as defined in 23 CFR 470.107) with a GVW greater than 80,000 pounds. The purpose of this rule is to enhance the safety of LCV operations on our nation's highways.

Drivers are required to present a training certification form to prospective employers to prove they are certified to drive LCVs. Motor carriers must not allow drivers to operate LCVs without ensuring the drivers have been properly trained in accordance with the requirements under 49 CFR part 380. The training certification form provides this assurance. Motor carriers must maintain a copy of the LCV training certification form in the driver qualification file, required by 49 CFR 391.51. Motor carriers responsible for the operation of LCVs must be able to show Federal or State enforcement officials that drivers responsible for operating such LCVs are certified to do so, based on the training certificate located in their DQ files.

Title: Training Certification for Drivers of Longer Combination Vehicles.

OMB Control Number: 2126–0026.

Type of Request: Revision of a currently-approved information collection.

Respondents: Drivers who have completed the required LCV training and driver instructors responsible for conducting the required LCV training.

Estimated Number of Respondents: 1,200 drivers who complete the required LCV training each year; 6 driver instructors who complete LCV training must document their qualifications to train new LCV drivers.

Estimated Time per Response: 10 minutes for LCV drivers; 30 minutes for LCV instructors.

Expiration Date: June 30, 2007.

Frequency of Response: Annual.

Estimated Total Annual Burden: 203 hours. The FMCSA estimates that 10 minutes would be needed for newly certified LCV drivers to fulfill the information collection requirement, resulting in an annual information collection burden of 200 hours [1,200 LCV drivers × 10 minutes/60 minutes = 200 hours]. The estimated annual burden associated with instructor certification would be 3 burden hours [(2 classroom instructors × 10 minutes = 20 minutes) + (4 skills instructors × 15 minutes = 60 minutes) + (6 new instructors × 15 minute administrative burden per instructor certification = 90 minutes) = 170 minutes/60 minutes = 3 burden hours].

Definitions: The information collection requirement for the LCV training regulations under 49 CFR part 380 are applicable only to drivers of LCVs, as defined in 49 CFR 380.105. Section 380.105 defines LCV as any combination of a truck-tractor and two or more semi-trailers or trailers, which operate on the National System of Interstate and Defense Highways (defined in 23 CFR 470.107) with a gross vehicle weight greater than 80,000 pounds.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FMCSA's performance; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued on: June 21, 2007.

D. Marlene Thomas,

Associate Administrator for Administration.

[FR Doc. E7–12551 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–EX–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: July 23, 2007, 1 p.m. to 5 p.m., and July 24, 2007, 8 a.m. to 12 p.m., Central Daylight Time.

PLACE: This meeting will take place at the offices of the Property Casualty Insurers Association of America, 2600 S. River Road, Room 400, Des Plaines, IL 60018.

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.

Dated: June 25, 2007.

Robert W. Miller,

Acting Associate Administrator, for Enforcement and Program Delivery.

[FR Doc. 07–3197 Filed 6–26–07; 3:24 pm]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2007–28090]

Hours of Service (HOS) of Drivers; American Pyrotechnics Association (APA) Application for an Exemption From the 14-Hour Rule During Independence Day Celebrations

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Grant of application for exemption.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) grants the American Pyrotechnics Association's (APA) application for an exemption from the prohibition against driving a commercial motor vehicle (CMV) after the 14th hour of coming on duty. The exemption is applicable for a period beginning 7 days prior to, and 2 days immediately following Independence Day in 2007 and 2008. Fireworks personnel who operate CMVs

for the nine companies listed in this notice, in conjunction with fireworks shows celebrating Independence Day, are allowed to exclude off-duty and sleeper-berth time of any length in the calculation of the 14 hours. However, drivers are not allowed to drive after accumulating a total of 14 hours of on-duty time, following 10 consecutive hours off duty, and continue to be subject to the 11-hour driving time limit and the 60- and 70-hour weekly limits. No substantive comments were received in response to the Agency's May 30, 2007 notice requesting public comment on the APA application. The FMCSA has determined that the granting of the exemption would achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.

DATES: The exemption is effective June 28, 2007, and is applicable from June 28 (12:01 a.m.) through July 6, 2007 (11:59 p.m.), and from June 28 (12:01 a.m.) through July 6, 2008 (11:59 p.m.). The exemption expires on July 6, 2008.

ADDRESSES: *Docket:* For access to the docket to read background comments or comments received, go to *http://dms.dot.gov* and/or Room W12–140, Ground Floor of West Building, U.S. Department of Transportation (DOT), 1200 New Jersey Ave., SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review the DOT's complete Privacy Act Statement in the **Federal Register** (65 FR 19477; April 11, 2000). This statement is also available at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations: Telephone: 202–366–4009. E-mail: *MCPSD@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 4007 of the Transportation Equity Act for the 21st Century (Pub. L. 105–178, 112 Stat. 107, June 9, 1998) amended 49 U.S.C. 31315 and 31136(e) to provide FMCSA with authority to grant exemptions from its safety regulations. On August 20, 2004, FMCSA published a Final Rule (69 FR 51589) on this subject. Under 49 CFR part 381, FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public with an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency must then examine the safety analyses and the public comments, and determine whether the exemption would achieve a level of safety equivalent to or greater than the level that would be achieved by the current regulation (49 CFR 381.305). The Agency's decision must be published in the **Federal Register** (49 CFR 381.315(b)). If the Agency denies the request, it must state the reason for doing so. If the decision is to grant the exemption, the notice must specify the person or class of persons receiving the exemption and the regulatory provision or provisions from which an exemption is being granted. The notice must also specify the effective period of the exemption (up to two years) and explain the terms and conditions of the exemption. The exemption may be renewed.

APA's Application for an Exemption

APA requested an exemption from FMCSA's prohibition against drivers of property-carrying CMVs operating such vehicles after the 14th hour of coming on duty [49 CFR 395.3(a)(2)]. APA requested that fireworks personnel covered by the exemption would be allowed to exclude off-duty and sleeper-berth time of any length from the calculation of the 14-hour rule. Drivers would not be allowed to drive after the accumulation of 14 hours of on-duty time following 10 consecutive hours off duty. The exemption would be applicable to nine carriers employing approximately 100 drivers responsible for operating about 100 CMVs. A copy of the application for an exemption, which includes a list of all of the motor carriers that would be covered by it, is included in the docket referenced at the beginning of this notice.

On May 22, 2007, FMCSA published a notice in the **Federal Register** (72 FR 28755) granting a renewal of an identical exemption from APA for 70 of its member companies. The original exemption expired on July 7, 2006, and APA had requested a renewal for those original companies.

On May 30, 2007, FMCSA published a notice in the **Federal Register** (72 FR 30047) announcing APA's application for exemption for nine of its member carriers, and requesting public comment.

APA, a trade association representing the domestic fireworks industry, asserts that full compliance with the current hours-of-service (HOS) regulations during the brief period surrounding Independence Day imposes a substantial economic hardship on its members that operate fireworks for the public. This period is the busiest time of the year for these companies. APA members are engaged to stage multiple shows in celebration of Independence Day, during a compressed timeframe.

The member-company drivers that would be covered by the exemption are trained pyrotechnicians, each holding a commercial driver's license with a hazardous materials endorsement. These drivers transport fireworks and equipment to remote locations under demanding schedules. During the week before Independence Day, these companies are engaged to stage multiple shows in a very compressed period of time. To meet the press of business in this 1-week period under the current HOS rules, companies would be required to hire a second driver for most trips. This would result in a substantial increase in the cost of these shows, and as a result, many shows would be cancelled. Alternatively, APA members would be forced to significantly decrease their engagements. In either case, these companies would have to decrease the number of shows they provide, thereby denying many Americans a primary component of their Independence Day celebration.

APA believes that granting of the requested exemption will not adversely affect the safety of the motor carrier transportation provided by its member companies. An identical exemption has been in effect, including renewal, since 2004 for approximately 70 other APA member carriers. There have been no reported crashes or incidents involving these carriers. According to the APA, the exemption will enhance safety by decreasing the number of CMVs stationed with HM 1.3 and 1.4 products aboard at locations throughout the country. Under the exemption, CMVs will be able to return to their home base, which is a secured area for these types of products.

In its prior comparable exemption requests, APA stated they believe that the operational demands of this unique industry minimize the risks of CMV crashes. In the last few days before the Independence Day holiday, drivers spend their driving time transporting fireworks relatively short distances from the nearest distribution point to the site of the fireworks display. Most of their on-duty time, however, is devoted to installing, wiring, and double-checking

fireworks displays. Pyrotechnicians drive to the site of the fireworks display in the early morning and return late in the evening, thus avoiding much of the heavy traffic typical of the holiday. After setting the fireworks display in daylight in order to reduce the possibility of mistakes, the pyrotechnicians/drivers typically have several hours off duty in the late afternoon and early evening, just before the shoot. This enables them to rest or nap, reducing or eliminating the fatigue caused by the day's activities, and making their return trip later that evening safer.

In addition to driving at off-peak hours and having an opportunity for substantial rest periods during their tour of duty, pyrotechnicians who drive back to a hotel or motel in the 15th or 16th hours after coming on duty will be required to take 10 consecutive hours off-duty, like other drivers.

Discussion of Public Comments

On May 30, 2007, FMCSA requested public comment from all interested persons on the APA application for an exemption for these nine member companies (72 FR 30047). The comment period closed on June 14, 2007. There were no substantive comments filed in response to this notice.

FMCSA Decision

The FMCSA has determined that the granting of this exemption would achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. An identical exemption has been in effect, including renewal, since 2005 for approximately 70 other APA member carriers. There have been no reported crashes or incidents involving these carriers while operating under the exemption. No comments have been received concerning adverse impacts on safety in response to FMCSA's May 30, 2007 notice announcing this exemption application. Although FMCSA believes the 14-hour limit is generally conducive to safety, the current HOS regulations allow certain short-haul drivers a 16-hour driving ''window'' once a week, providing specified conditions are met. Because pyrotechnician-drivers operate like short-haul drivers (relatively little driving, a variety of work), FMCSA has concluded that the 9-day yearly exemption requested by APA is not likely to adversely affect motor carrier safety.

The drivers employed by the companies, firms, and entities listed in the appendix to this notice are granted relief from the requirements of 49 CFR 395.3(a)(2) under the following terms and conditions:

Terms of the Exemption

Period of the Exemption

The exemption from the requirements of 49 CFR 395.3(a)(2) [the ''14-hour rule''] is effective June 28, 2007, and is applicable from June 28 (12:01 a.m.) through July 6, 2007 (11:59 p.m.) and from June 28 (12:01 a.m.) through July 6, 2008 (11:59 p.m.). The exemption expires on July 7, 2008.

Extent of the Exemption

This exemption is restricted to drivers employed by the companies, firms and entities listed in the appendix to this notice. The drivers are entitled to a limited exemption from the requirements of 49 CFR 395.3(a)(2). This regulation, 49 CFR 395.3(a)(2), currently prohibits a driver from driving after the 14th hour of coming on duty and does not permit off-duty periods to extend the 14-hour limit. Drivers covered by this exemption may exclude off-duty and sleeper-berth time of any length from the calculation of the 14-hour limit. This exemption is contingent on each driver driving no more than 11 hours in a 14-hour period. The exemption is further contingent on each driver having a full 10 hours off duty following 14 hours on duty prior to beginning a new driving period. The drivers must comply with all other requirements of 49 CFR part 395.

Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with or is inconsistent with this exemption with respect to a person operating under the exemption (49 U.S.C. 31315(d)).

Notification to FMCSA

Under the exemption, each APA member company, firm and entity listed in the appendix to this notice must notify FMCSA within 5 business days of any accident (as defined in 49 CFR 390.5), involving any of the motor carrier's CMVs, operating under the terms of this exemption. The notification must include the following information:

a. Date of the accident,

b. City or town, and State, in which the accident occurred, or closest to the accident scene,

c. Driver's name and license number,

d. Vehicle number and State license number,

e. Number of individuals suffering physical injury,

f. Number of fatalities,

g. The police-reported cause of the accident,

h. Whether the driver was cited for violation of any traffic laws, or motor carrier safety regulations, and

i. The total driving time and total on-duty time period prior to the accident.

Termination

FMCSA does not believe the motor carriers and drivers covered by this exemption will experience any deterioration of their safety record. However, should this occur, FMCSA will take all steps necessary to protect the public interest, including revocation of the exemption. FMCSA will immediately revoke the exemption for failure to comply with its terms and conditions. Each motor carrier and each driver may be subject to periodic monitoring by FMCSA during the period of the exemption.

Issued on: June 22, 2007.

Larry W. Minor,

Acting Associate Administrator for Policy and Program Development.

Appendix to Notice of Application for Exemption by American Pyrotechnics Association From the 14-Hour Rule During 2007 and 2008 Independence Day Celebrations

LIST OF APA MEMBERS COVERED BY EXEMPTION FROM 14-HOUR RULE IN HOURS OF SERVICE FOR DRIVERS REGULATION

Company name	Address	City, State ZIP	DOT No.
Alpha-Lee Enterprises, Inc.	4111 FM 2351	Friendswood, TX 77546	1324580A
American Fireworks Company	7041 Darrow Road	Hudson, OH 44236	103972
Cartwright Fireworks, Inc.	1608 Keely Road	Franklin, PA 16323	882283
Entertainment Fireworks, Inc	P.O. Box 7160	Olympia, WA 98507–7160	680942
Fireworks Productions of Arizona, Ltd	17034 S. 54th Street	Chandler, AZ 85226	948780
Great Lakes Fireworks	24805 Marine	Eastpointe, MI 48021	1011216

LIST OF APA MEMBERS COVERED BY EXEMPTION FROM 14-HOUR RULE IN HOURS OF SERVICE FOR DRIVERS REGULATION—Continued

Company name	Address	City, State ZIP	DOT No.
Rainbow Fireworks, Inc.	76 Plum Ave.	Inman, KS 67546	1139643
Skyworks, Ltd.	13513 W. Carrier Road	Carrier, OK 73727	1421047
Stellar Fireworks, Inc.	4440 Southeast Blvd.	Wichita, KS 67210	1349562

[FR Doc. E7–12572 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket Number NHTSA–2007–27625]

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on March 23, 2007 [72 FR 13856].

DATES: Comments must be submitted on or before July 30, 2007.

FOR FURTHER INFORMATION CONTACT: Gayle Dalrymple at the National Highway Traffic Safety Administration (NHTSA), Office of Crash Avoidance Standards, 202–366–5559. 1200 New Jersey Ave., SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: Exemption from the Make Inoperative Prohibition.

OMB Number: 2127–0635.

Type of Request: Renewal.

Abstract: On February 27, 2001, NHTSA published a final rule (66 FR 12638) to facilitate the modification of a motor vehicle so that persons with disabilities can use the vehicle. The regulation is found at 49 CFR Part 595 Subpart C—Vehicle Modifications to Accommodate People with Disabilities. This final rule included two new ''collection of information,'' as that term is defined in 5 CFR Part 1320 Controlling Paperwork Burdens on the Public: modifier identification and a document to be provided to the owner of the modified vehicle stating the exemptions used for that vehicle and any reduction in load carrying capacity of the vehicle of more than 100 kg (220 lbs).

Affected Public: Business that modify vehicles, after the first retail sale, so that the vehicle may be used by persons with disabilities.

Estimated Total Annual Burden: 933 hours and $14.21.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

Comments Are Invited On

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility.
- Whether the Department's estimate of the burden of the proposed information collection is accurate.
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is most effective if OMB receives it within 30 days of publication.

Roger A. Saul,

Director, Office of Crashworthiness Standards.

[FR Doc. E7–12464 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2007–28531]

Notice of Receipt of Petition for Decision That Nonconforming 2004 Hyundai XG350 Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for decision that nonconforming 2004 Hyundai XG350 passenger cars are eligible for importation.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2004 Hyundai XG350 passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) are eligible for importation into the United States because (1) They are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is July 30, 2007.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. [Docket hours are from 9 a.m. to 5 p.m.]. Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the

United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Barry W. Taylor Enterprises, Inc., of Richmond, California (''BTE'') (Registered Importer 01–280) has petitioned NHTSA to decide whether nonconforming 2004 Hyundai XG350 passenger cars are eligible for importation into the United States. The vehicles which BTE believes are substantially similar are 2004 Hyundai XG350 passenger cars that were manufactured for importation into, and sale in, the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S. certified 2004 Hyundai XG350 passenger cars to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

BTE submitted information with its petition intended to demonstrate that non-U.S. certified 2004 Hyundai XG350 passenger cars, as originally manufactured, conform to many FMVSS in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 2004 Hyundai XG350 passenger cars are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 109 *New Pneumatic Tires,* 110 *Tire Selection and Rims,* 113 *Hood Latch System,* 114 *Theft Protection,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 135 *Passenger Car Brake Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 208 *Occupant Crash Protection,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 301 *Fuel System Integrity,* 302 *Flammability of Interior Materials,* and 401 *Interior Trunk Release.*

In addition, the petitioner claims that the vehicles comply with the Bumper Standard found in 49 CFR Part 581.

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* installation of a U.S.-model instrument cluster.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* Installation of U.S.-certified model (a) front and rear side-mounted marker lamps; and (b) high-mounted stoplamp.

Standard No. 111 *Rearview Mirrors:* Installation of a U.S.-model passenger side rearview mirror, or inscription of the required warning statement on the face of that mirror.

Standard No. 209 *Seat Belt Assemblies:* Installation of U.S.-certified model seat belt assemblies.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. [Docket hours are from 9 a.m. to 5 p.m.].

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: June 22, 2007.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. E7–12575 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2007–28533]

Decision That Certain Nonconforming Motor Vehicles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice of decision by NHTSA that certain nonconforming motor vehicles are eligible for importation.

SUMMARY: This document announces decisions by NHTSA that certain motor vehicles not originally manufactured to comply with all applicable Federal motor vehicle safety standards (FMVSS) are eligible for importation into the United States because they are substantially similar to vehicles originally manufactured for importation into and/or sale in the United States and certified by their manufacturers as complying with the safety standards, and they are capable of being readily altered to conform to the standards or because they have safety features that comply with, or are capable of being altered to comply with, all applicable FMVSS.

DATES: These decisions became effective on the dates specified in Annex A.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and/or sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Where there is no substantially similar U.S.-certified motor vehicle, 49 U.S.C. 30141(a)(1)(B) permits a nonconforming motor vehicle to be admitted into the United States if its safety features comply with, or are capable of being altered to comply with, all applicable FMVSS based on destructive test data or such other evidence as NHTSA decides to be adequate.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

NHTSA received petitions from registered importers to decide whether the vehicles listed in Annex A to this notice are eligible for importation into the United States. To afford an opportunity for public comment, NHTSA published notice of these petitions as specified in Annex A. The reader is referred to those notices for a thorough description of the petitions. No substantive comments were received in response to these notices. Based on its review of the information submitted by the petitioners, NHTSA has decided to grant the petitions.

Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final decision must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. Vehicle eligibility numbers assigned to vehicles admissible under this decision are specified in Annex A.

Final Decision

Accordingly, on the basis of the foregoing, NHTSA hereby decides that each motor vehicle listed in Annex A to this notice, which was not originally manufactured to comply with all applicable FMVSS, is either (1) Substantially similar to a motor vehicle manufactured for importation into and/or sale in the United States, and certified under 49 U.S.C. 30115, as specified in Annex A, and is capable of being readily altered to conform to all applicable FMVSS or (2) has safety features that comply with, or are capable of being altered to comply with, all applicable Federal motor vehicle safety standards.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: June 22, 2007.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

Annex A—Nonconforming Motor Vehicles Decided To BeEligible for Importation

1. Docket No. NHTSA–2006–26010
   Nonconforming Vehicles: 2003 and 2004 BMW 3 Series Passenger Cars
   Substantially Similar
   U.S.—Certified Vehicles: 2003 and 2004 BMW 3 Series Passenger Cars
   Notice of Petition
   Published at: 71 FR 61826 (October 19, 2006)
   Vehicle Eligibility Number: VSP–487(effective date November 27, 2006)
2. Docket No. NHTSA–2007–27376
   Nonconforming Vehicles: 2004 Volkswagen Passat Sedan and Wagon Model Passenger Cars
   Substantially Similar
   2004 Volkswagen Passat Sedan and Wagon Model Passenger Cars
   Notice of Petition
   Published at: 72 FR 9999 (March 6, 2007)
   Vehicle Eligibility Number: VSP–488 (effective date April 12, 2007)
3. Docket No. NHTSA–2007–26995
   Nonconforming Vehicles: 1996 BMW K75 Motorcycles
   Because there are no substantially similar U.S.—certified version 1995 BMW K75 Motorcycles, the petitioner sought import eligibility under 49 U.S.C. 30141(a)(1)(B).
   Notice of Petition
   Published at: 72 FR 3911 (January 26, 2007)
   Vehicle Eligibility Number: VCP–36(effective date March 13, 2007)
4. Docket No. NHTSA–2007–27337
   Nonconforming Vehicles: 2006–2007 Carrocerias Alcides Cimarron Trailers
   Because there are no substantially similar U.S.—certified version 2006–2007 Carrocerias Alcides Cimarron Trailers, the petitioner sought import eligibility under 49 U.S.C. 30141(a)(1)(B).
   Notice of Petition
   Published at: 72 FR 9074 (February 28, 2007)
   Vehicle Eligibility Number: VCP–37(effective date April 12, 2007)
5. Docket No. NHTSA–2007–27774
   Nonconforming Vehicles: 2007 Smart Car Passion, Pulse, and Pure (ForTwo Coupe and Cabriolet) Passenger Cars Manufactured Prior to September 1, 2006
   Because there are no substantially similar U.S.—certified version 2007 Smart Car Passion, Pulse, and Pure (ForTwo Coupe and Cabriolet) Passenger Cars, the petitioner sought import eligibility under 49 U.S.C. 30141(a)(1)(B).
   Notice of Petition
   Published at: 72 FR 17985 (April 10, 2007)
   Vehicle Eligibility Number: VCP–39(effective date May 23, 2007)

[FR Doc. E7–12545 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–98–4470]

Pipeline Safety: Meeting of the Technical Hazardous Liquid Pipeline Safety Standards Committee

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT).

ACTION: Notice of meeting.

SUMMARY: This notice announces a public meeting of PHMSA's Technical Hazardous Liquid Pipeline Safety Standards Committee (THLPSSC). The THLPSSC will vote on a proposal to extend pipeline safety regulations to certain unregulated hazardous liquid gathering lines and low-stress pipelines and on a supplemental proposal addressing new requirements for low-stress pipelines in the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (PIPES Act). PHMSA will also consult with the THLPSSC on a concept addressing internal corrosion.

DATES: The meeting will be on Tuesday, July 24, 2007, from 1 p.m. to 4 p.m. EST.

ADDRESSES: The THLPSSC will participate by telephone conference call. The public may attend the meeting at the U.S. Department of Transportation, 1200 New Jersey Avenue, SE., East Building, Second Floor, Washington, DC 20590, Room E27–302.

FOR FURTHER INFORMATION CONTACT: Cheryl Whetsel at (202) 366–4431, or by e-mail at *cheryl.whetsel@dot.gov*.

SUPPLEMENTARY INFORMATION:

I. Meeting Details

PHMSA will post additional information or changes approximately 15 days before the meeting on its Web site: *http://www.phmsa.dot.gov*.

Members of the public may attend and they may also make an oral statement during the meeting. To make an oral statement, you may contact Cheryl Whetsel before July 17. Please note that the meeting's presiding officer may deny any non-scheduled request to make an oral statement and may also limit the time of any speaker.

Comments regarding this meeting should reference Docket No. PHMSA–98–4470 and may be submitted in the following ways:

- *DOT Web site: http://dms.dot.gov*. To submit comments on the DOT electronic docket Web site, click ''Comment/Submissions,'' click

''Continue,'' fill in the requested information, click ''Continue,'' enter your comment, then click ''Submit.''

- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.
- *Hand Delivery:* DOT Docket Management System, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *E-Gov Web site: http://www.regulations.gov.* This Web site allows the public to enter comments on any **Federal Register** notice issued by any agency.

Instructions: Identify the docket number, PHMSA–98–4470, at the beginning of your comments. If you submit your comments by mail, submit two copies. To receive confirmation that PHMSA received your comments, include a self-addressed stamped postcard. Internet users may submit comments at *http://www.regulations.gov*, and may access all comments received by DOT at *http://dms.dot.gov* by performing a simple search for the docket number.

Note: All comments are posted without changes or edits to *http://dms.dot.gov*, including any personal information provided.

Privacy Act Statement: Anyone can search the electronic form of all comments received in response to 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.). DOT's complete Privacy Act Statement was published in the **Federal Register** on April 11, 2000 (65 FR 19477), and is on the Web at *http://dms.dot.gov.*

Information on Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, please contact Cheryl Whetsel at (202) 366–4431 by July 17.

II. Committee Background

The THLPSSC is a statutorily mandated advisory committee that advises PHMSA on proposed safety standards for hazardous liquid pipelines. The THLPSSC is established under section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 1) and the Pipeline Safety Law (49 U.S.C. Chap. 601). The THLPSSC consists of 15 members, five each representing government, industry, and the public.

The Pipeline Safety Law requires PHMSA to seek the THLPSSC's advice on the reasonableness, cost-effectiveness, and practicability of each proposed pipeline safety standard. The Pipeline Safety Law also requires PHMSA to submit the cost-benefit analysis and risk assessment information associated with the proposed standard to the THLPSSC. The THLPSSC evaluates the merits of the data and provides recommendations on the adequacy of the analyses.

III. Preliminary Meeting Schedule

The THLPSSC will discuss and vote on a proposal to extend pipeline safety regulations to certain unregulated hazardous liquid gathering lines and low-stress pipelines and on a supplemental proposal addressing new requirements in the PIPES Act. This supplemental proposal would apply all Federal hazardous liquid pipeline safety regulations to currently unregulated low-stress pipelines meeting certain criteria. These proposals will help protect unusually sensitive areas from the potential adverse impacts of releases from unregulated hazardous liquid pipelines in rural areas. PHMSA will also seek the THLPSSC's recommendations on a concept to address internal corrosion issues in hazardous liquid pipelines.

Authority: 49 U.S.C. 60102, 60115.

Issued in Washington, DC on June 22, 2007.

Jeffrey D. Wiese,

Acting Associate Administrator for Pipeline Safety.

[FR Doc. E7–12573 Filed 6–27–07; 8:45 am]

BILLING CODE 4910–60–W–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–55 (Sub-No. 679X)]

CSX Transportation, Inc.—Abandonment Exemption—in Delaware County, IN

CSX Transportation, Inc. (CSXT) has filed a verified notice of exemption under 49 CFR Part 1152 Subpart F—*Exempt Abandonments* to abandon a 1.4-mile line of railroad on its Northern Region, Great Lakes Division, Indianapolis Line Subdivision, from milepost QIM 0.0 to milepost QIM 1.4, known as the Muncie Belt, in Muncie, Delaware County, IN. The line traverses United States Postal Service Zip Code 43702.

CSXT has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; (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 or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements of 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 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.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on July 28, 2007, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by July 9, 2007. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by July 18, 2007, 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 CSXT's representative: Steven C. Armbrust, 500 Water St., J–150, Jacksonville, FL 32202.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

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[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service 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.

[2] Each OFA must be accompanied by the filing fee, which currently is set at $1,300. *See* 49 CFR 1002.2(f)(25).

CSXT has filed environmental and historic reports which address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by July 3, 2007. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, 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), CSXT 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 CSXT's filing of a notice of consummation by June 28, 2008, 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: June 20, 2007.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. E7–12293 Filed 6–27–07; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–976 (Sub-No. 2X)]; [STB Docket No. AB–369 (Sub-No. 6X)] [1]

Pittsburg & Shawmut Railroad, LLC—Abandonment Exemption—in Clarion and Jefferson Counties, PA; Buffalo & Pittsburgh Railroad, Inc.—Discontinuance Exemption—in Clarion and Jefferson Counties, PA

Pittsburg & Shawmut Railroad, LLC (Pittsburg & Shawmut) has filed a notice of exemption under 49 CFR Part 1152 Subpart F—*Exempt Abandonments and Discontinuances of Service* to abandon, and Buffalo & Pittsburgh Railroad, Inc. (BPRR), has filed a notice of exemption under the same Subpart to discontinue service and operating rights over, approximately 35.95 miles of rail line,[2] extending between milepost 6.0 in or near Lawsonham, Clarion County, PA, and milepost 41.95 in Brookville, Jefferson County, PA.[3] Pittsburg & Shawmut states that it may retain the track between milepost 41.50 and milepost 41.95 to be operated by BPRR as private side tracks or spurs, thereby reclassifying this 0.45-mile portion of the line. The line traverses United States Postal Service Zip Codes 15864, 16216 and 16242.

Pittsburg & Shawmut and BPRR have certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line to be rerouted; (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 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 (environmental reports), 49 CFR 1105.8 (historic reports), 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.

As a condition to these exemptions, any employee adversely affected by the abandonment or discontinuance shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, these exemptions will be effective on July 28, 2007, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[4] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[5] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by July 9, 2007. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by July 18, 2007, with: Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to Pittsburg & Shawmut's and BPRR's representative: Eric M. Hocky, Esquire, Gollatz, Griffin & Ewing, P.C., Four Penn Center, Suite 200, 1600 John F. Kennedy Blvd., Philadelphia, PA 19103.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

Pittsburg & Shawmut and BPRR, along with STI, have filed a joint combined environmental and historic report, which addresses the effects, if any, of the abandonment and discontinuance on the environment and historic resources for this line and the line addressed in *Shannon Transport, Inc.—Abandonment Exemption—in Clarion County, PA,* STB Docket No. AB–1004X, *et al.* Additionally, Pittsburg & Shawmut has filed a supplemental environmental and historic report, which specifically addresses the effects, if any, of the abandonment on this line. SEA will issue an environmental assessment (EA) by July 3, 2007. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, 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.

[1] For administrative purposes, the discontinuance exemption sought in STB Docket No. AB–369 (Sub-No. 6X) is being divided to correspond to the two abandonment exemptions sought here and in STB Docket No. AB–1004X.

[2] Both notices were initially filed on May 29, 2007. At the Board's request, both notices were supplemented by the applicants on June 8, 2007, with letters providing certain required certifications. Because the notices were not complete until the June 8 filings, that date will be considered the actual filing date for both notices and the basis for all due dates.

[3] In its notice of exemption filed in STB Docket No. AB–369 (Sub-No. 6X), BPRR seeks discontinuance over 48.45 miles of rail line, encompassing both the 35.95 miles of rail line at issue here and the remaining 12.5 miles of rail line corresponding to the notice of exemption filed by Shannon Transport, Inc. (STI), in *Shannon Transport, Inc.—Abandonment Exemption—in Clarion County, PA,* STB Docket No. AB–1004X, *et al.*

[4] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service 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.

[5] Each OFA must be accompanied by the filing fee, which is currently set at $1,300. *See* 49 CFR 1002.2(f)(25).

Pursuant to the provisions of 49 CFR 1152.29(e)(2), Pittsburg & Shawmut 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 Pittsburg & Shawmut's filing of a notice of consummation by June 28, 2008, 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: June 18, 2007.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. E7–12216 Filed 6–27–07; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–1004X]; [STB Docket No. AB–369 (Sub-No. 6X)] [1]

Shannon Transport, Inc.—Abandonment Exemption—in Clarion County, PA; Buffalo & Pittsburgh Railroad, Inc.—Discontinuance Exemption—in Clarion and Jefferson Counties, PA

Shannon Transport, Inc. (STI), has filed a notice of exemption under 49 CFR Part 1152 Subpart F—*Exempt Abandonments and Discontinuances of Service* to abandon, and Buffalo & Pittsburgh Railroad, Inc. (BPRR), has filed a notice of exemption under the same Subpart to discontinue service and operating rights over, approximately 12.5 miles of rail line,[2] extending between milepost 6.0 and milepost 4.0 in or near Lawsonham, and the connecting line between milepost 0.0 near Lawsonham and milepost 10.5 near Sligo, in Clarion County, PA.[3] The line traverses United States Postal Service Zip Codes 16248 and 16255.

STI and BPRR have certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line to be rerouted; (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 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 (environmental reports), 49 CFR 1105.8 (historic reports), 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, STI is abandoning all of the rail lines it owns, 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 Wellsville, Addison & Galeton R. Corp.—Abandonment*, 354 I.C.C. 744 (1978); and *Northampton and Bath R. Co.—Abandonment*, 354 I.C.C. 784 (1978). Because STI 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.

As a condition to BPRR's discontinuance exemption, any employee adversely affected by the discontinuance shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, these exemptions will be effective on July 28, 2007, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[4] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[5] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by July 9, 2007. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by July 18, 2007, with: Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to STI's and BPRR's representative: Eric M. Hocky, Esquire, Gollatz, Griffin & Ewing, P.C., Four Penn Center, Suite 200, 1600 John F. Kennedy Blvd., Philadelphia, PA 19103.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

STI and BPRR, along with Pittsburg & Shawmut, have filed a joint combined environmental and historic report, which addresses the effects, if any, of the abandonment and discontinuance on the environment and historic resources for this line and the line addressed in *Pittsburg & Shawmut Railroad, LLC—Abandonment Exemption—in Clarion and Jefferson Counties, PA*, STB Docket No. AB–976 (Sub-No. 2X), *et al.* Additionally, STI has filed a supplemental environmental and historic report, which specifically addresses the effects, if any, of the abandonment on this line. SEA will issue an environmental assessment (EA) by July 3, 2007. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, 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), STI shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If

[1] For administrative purposes, the discontinuance exemption sought in STB Docket No. AB–369 (Sub-No. 6X) is being divided to correspond to the two abandonment exemptions sought here and in STB Docket No. AB–976 (Sub-No. 2X).

[2] Both notices were initially filed on May 29, 2007. At the Board's request, both notices were supplemented by the applicants on June 8, 2007, with letters providing certain required certifications. Because the notices were not complete until the June 8 filings, that date will be considered the actual filing date for both notices and the basis for all due dates.

[3] In its notice of exemption filed in STB Docket No. AB–369 (Sub-No. 6X), BPRR seeks discontinuance over 48.45 miles of rail line, encompassing the 12.5 miles of rail line at issue here and the remaining 35.95 miles of rail line corresponding to the notice of exemption filed by Pittsburg & Shawmut Railroad, LLC (*Pittsburg & Shawmut),* in *Pittsburg & Shawmut Railroad, LLC—Abandonment Exemption—in Clarion and Jefferson Counties, PA*, STB Docket No. AB–976 (Sub-No. 2X), *et al.*

[4] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service 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.

[5] Each OFA must be accompanied by the filing fee, which is currently set at $1,300. *See* 49 CFR 1002.2(f)(25).

consummation has not been effected by STI's filing of a notice of consummation by June 28, 2008, 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: June 18, 2007.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. E7–12311 Filed 6–27–07; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: Bankers Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 16 to the Treasury Department Circular 570, 2006 Revision, published June 30, 2006, at 71 FR 37694.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6850.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued under 31 U.S.C. 9305 to the following company: Bankers Insurance Company (NAIC # 33162). Business Address: P.O. Box 15707, St. Petersburg Florida 33733. Phone: (727) 823–4000 xtn 4908. Underwriting Limitation b/:$4,364,000. Surety Licenses c/: AL, AZ, AR, CA, CT, DE, DC, FL, GA, HI, ID, IN, IA, KS, LA, MD, MS, MO, MT, NV, NC, OH, PA, SC, SD, TN, TX, UT, VA, WA, WV, WY. Incorporated in: Florida.

Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570 (''Circular''), 2006 Revision, to reflect this addition.

Certificates of Authority expire on June 30th each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (*see* 31 CFR part 223). A list of qualified companies is published annually as of July 1 in the Circular, which outlines details as to underwriting limitations, areas in which companies are licensed to transact surety business, and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.*

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West HIghway, Room 6F01, Hyattsville, MD 20782.

Dated: June 20, 2007.

Vivian L. Cooper,

Director, Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 07–3177 Filed 6–27–07; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds—Termination; GE Reinsurance Corporation

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 14 to the Treasury Department Circular 570, 2006 Revision, published June 30, 2006, at 71 FR 37694.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6850.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Certificate of Authority issued by the Treasury to the above-named company under 31 U.S.C. 9305 to quality as acceptable surety on Federal bonds has been terminated. The above-named company merged with and into Swiss Reinsurance America Corporation effective January 1, 2007. The surviving corporation of the merger activity is Swiss Reinsurance America Corporation, a New York domiciled corporation. Federal bond-approving officials should annotate their reference copies of the Treasury Department Circular 570 (''Circular''), 2006 Revision, to reflect this change.

In the event bond-approving officers have questions relating to bonds issued by the above-named company that has merged with and into Swiss Reinsurance America Corporation, they should contact Swiss Reinsurance America Corporation at (914) 828–8184.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.*

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: June 15, 2007.

Vivian L. Cooper,

Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 07–3176 Filed 6–27–07; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds—Termination: National Reinsurance Corporation

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 15 to the Treasury Department Circular 570, 2006 Revision, published June 30, 2006 at 71 FR 37694.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6860.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Certificate of Authority issued by the Treasury to the above-named company under 31 U.S.C. 9305 to qualify as an acceptable reinsurer on Federal bonds was terminated effective June 18, 2007. Federal bond-approving officials annotate their reference copies of the Treasury Department Circular 570 (''Circular''), 2006 Revision, to reflect this change.

With respect to any bonds currently in force with the above listed company, bond-approving officers may let such bonds run to expiration and need not secure new bonds. However, no new bonds should be accepted from this company, and bonds that are continuous in nature should not be renewed.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.*

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: June 20, 2007.

Vivian L. Cooper,

Director, Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 07–3175 Filed 6–27–07; 8:45 am]

BILLING CODE 4810–35–M

Federal Register

Thursday,
June 28, 2007

Part II

Department of Labor

Employment Standards Administration

Wage and Hour Division

29 CFR Part 825

Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information; Proposed Rule

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

29 CFR Part 825

RIN 1215–AB35

Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information

AGENCY: Employment Standards Administration, Wage and Hour Division, Department of Labor.

ACTION: Report on comments from the public.

SUMMARY: The Department of Labor's Employment Standards Administration/Wage and Hour Division undertook a review of the Family and Medical Leave Act (''FMLA'' or the ''Act'') and its regulations, and published a Request for Information (''RFI'') in the **Federal Register** on December 1, 2006 (71 FR 69504). The RFI asked the public to assist the Department by furnishing information about their experiences with the Act and comments on the effectiveness of the FMLA regulations. More than 15,000 comments were submitted in response to the RFI. The following report summarizes comments the Department received from its RFI.

ADDRESSES: A complete copy of this report is also available at *http://www.dol.gov/esa/whd/fmla2007report.htm.* It may also be obtained by writing to Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–0066 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

Foreword

No employment law matters more to America's caregiving workforce than the Family and Medical Leave Act (FMLA) of 1993. Since its enactment, millions of American workers and their families have benefited from enhanced opportunities for job-protected leave upon the birth or adoption of a child, to deal with their own serious illness, and when needed to care for family members.

After nearly fourteen years administering the law, two Department of Labor studies (1996, 2001) and several U.S. Supreme Court and lower court rulings, the Employment Standards Administration's Wage and Hour Division issued a Request for Information (RFI) on December 1, 2006.

The RFI asked the public to comment on their experiences with, and observations of, the Department's administration of the law and the effectiveness of the regulations. More than 15,000 comments were received in the next few months from workers, family members, employers, academics, and other interested parties. This input ranged from personal accounts, legal reviews, industry and academic studies, surveys, and recommendations for regulatory and statutory changes to address particular areas of concern.

There is broad consensus that family and medical leave is good for workers and their families, is in the public interest, and is good workplace policy. There are differing views on whether every provision of the law is being administered in accordance with the statute and with congressional intent. It is also evident from the comments that the FMLA has produced some unanticipated consequences in the workplace for both employees and employers.

A report of this kind is a unique step. Normally, the organization of comments received in response to a Departmental Request for Information would first be seen accompanying proposed changes to the rules. There are no proposals for regulatory changes being put forward by the Department with this Report. Rather, what we hope this Report does is provide information for a fuller discussion among all interested parties and policymakers about how some of the key FMLA regulatory provisions and their interpretations have played out in the workplace.

Finally, our thanks to the thousands of employees, employers, and other members of the public who participated in this information gathering by sharing their views, their research, and, in some cases, very personal comments. We greatly value those insights.

Victoria A. Lipnic,

Assistant Secretary of Labor, Employment Standards Administration.

June 2007.

Executive Summary

The Family and Medical Leave Act of 1993 (FMLA) opened a new era for American workers, providing employees with better opportunities to balance work and family needs. This landmark legislation provided workers with basic rights to job protection for absences due to the birth or adoption of a child or for a serious health condition of the worker or a family member.

For women dealing with difficult pregnancies or deliveries, or parents celebrating the arrival of a newborn or adopted child, the FMLA provides the opportunity to participate fully in these significant life events. For other workers—especially those who struggle with health problems or who are primary caregivers to ill family members—the FMLA has made it possible to deal with these serious challenges while holding on to jobs, health insurance, and some measure of economic security.

Background: What the Law Covers

The Family and Medical Leave Act of 1993, Public Law 103–3, 107 Stat. 6 (29 U.S.C. 2601 *et seq.*) (the ''FMLA'' or the ''Act'') was enacted on February 5, 1993 and became effective on August 5, 1993 for most covered employers. The FMLA entitles eligible employees of covered employers to take up to a total of twelve weeks of unpaid leave during a twelve month period for the birth of a child; for the placement of a child for adoption or foster care; to care for a newborn or newly-placed child; to care for a spouse, parent, son or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health condition. *See* 29 U.S.C. 2612. The twelve weeks of leave may be taken in a block, or, under certain circumstances, intermittently or on a reduced leave schedule. *Id.* When taken intermittently, the Department's regulations provide that leave may be taken in the shortest increment of time the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. 29 CFR 825.203(d).

Employers covered by the law must maintain for the employee any preexisting group health coverage during the leave period and, once the leave period has concluded, reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. *See* 29 U.S.C. 2614. If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department of Labor (''Department'') or file a private lawsuit in federal or state court. If the employer has violated an employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss

incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. *See* 29 U.S.C. 2617.

Who the Law Covers

The law generally covers employers with 50 or more employees, and employees must have worked for the employer for 12 months and have 1,250 hours of service during the previous year to be eligible for leave. Based on 2005 data, the latest year for which data was available the time the Request for Information was published, the Department estimates that:

- There were an estimated 94.4 million workers in establishments covered by the FMLA regulations,
- There were about 76.1 million workers in covered establishments who met the FMLA's requirements for eligibility,[1] and
- Between 8.0 percent and 17.1 percent of covered and eligible workers (or between 6.1 million and 13.0 million workers) took FMLA leave in 2005.[2]
- Nearly one-quarter of all employees who took FMLA leave took at least some of it intermittently.

Recent information submitted to the Department also suggests that FMLA awareness was higher in 2005 than in prior years. This information supports the Department's estimate of increased FMLA usage since prior studies of FMLA.

Request for Information and Prior FMLA Reports

After nearly fourteen years of experience implementing and administering the new law, the Department's Employment Standards Administration/Wage and Hour Division undertook a review of the FMLA regulations, culminating in the publication of a Request for Information (''RFI'') on December 1, 2006.[3] The RFI asked the public to assist the Department by furnishing information about their experiences with FMLA and comments on the effectiveness of the current FMLA regulations. The RFI generated a very heavy public response: More than 15,000 comments were submitted, many of which were brief emails with very personal and, in some cases, very moving accounts from employees who had used family or medical leave; others were highly-detailed and substantive legal or economic analyses responding to the specific questions in the RFI and raising other complex issues.[4]

Twice before, the Department has published reports about the FMLA and its use. The statute established a bipartisan Commission on Family and Medical Leave to study family and medical leave policies. The Commission surveyed workers and employers in 1995 and issued a report published by the Department in 1996, ''A Workable Balance: Report to Congress on Family and Medical Leave Policies.'' In 1999, the Department contracted with Westat, Inc. to update the employee and establishment surveys conducted in 1995. The Department published that report, ''Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update'' in January 2001.[5]

Never before has the Department looked in such granular detail at the legal developments surrounding the FMLA and its implementing regulations, as well as the practical consequences of such in the workplace. The RFI's questions and subject areas were derived from a series of stakeholder meetings the Department conducted in 2002–2003, a number of rulings of the U.S. Supreme Court and other federal courts, the Department's own experience administering the law, information from Congressional hearings, and public comments filed with the Office of Management and Budget (OMB) as described by OMB in their three annual reports to Congress on the FMLA's costs and benefits.[6]

Unlike the 2000 Westat Report, the Department's Report on the RFI Comments is not an analysis or comparison of one set of survey data with another some years later. The RFI was not meant to be a substitute for survey research about the leave needs of the workforce and leave policies offered by employers. The record presented here is different than the previous two Departmental reports because the RFI was a very different kind of information-gathering tool than the two previous surveys. Given the differences in data-gathering approaches, the depth with which the RFI looked at the regulations, and, of course, the self-selection bias by those who took the time to submit comments to the RFI, differences in the outcomes should be expected. Care must be taken to avoid improper comparisons of information collected in the RFI with data from the two surveys.

General Overview of the Report

Commenters consistently stated that the FMLA is generally working well—at least with respect to leave related to the birth or adoption of a child or for indisputably ''serious'' health conditions. Responses to the RFI substantiate that many employees and employers are not having noteworthy FMLA-related problems. However, employees often expressed a desire for a greater leave entitlement, while employers voiced concern about their ability to manage business operations and attendance control issues, particularly when unscheduled, intermittent leave is needed for chronic health conditions. Indeed, the overwhelming majority of comments submitted in response to the RFI addressed three primary topics: (1) Gratitude from employees who have used family and medical leave and descriptions of how it allowed them to balance their work and family care responsibilities, particularly when they had their own serious health condition or were needed to care for a family member;[7] (2) a desire for expanded benefits—*e.g.*, to provide more time off, to provide paid benefits, and to cover additional family members;[8] and (3) frustration by employers about difficulties in maintaining necessary staffing levels and controlling attendance problems in their workplaces as a result of one particular issue—unscheduled intermittent leave used by employees who have chronic health conditions.

Many employees offered powerful testimonials about the important role the FMLA has played in allowing them to continue working while addressing their own medical needs or family caregiving responsibilities. Chapter I,

[1] Recent data submitted to the Department on the size and scope of the FMLA's reach support these estimates. *See* Chapter XI of this Report.

[2] Recent data submitted to the Department support this estimate as well. *See* Chapter XI of this Report.

[3] 71 FR 69504.

[4] All comments are available for viewing via the public docket of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Many comments are also available on *www.regulations.gov.* The names of individual employees have been redacted from the Report where any personal medical information was shared.

[5] *See* ''Balancing the Needs of Families and Employers, Family and Medical Leave Surveys, 2000 Update,'' Westat Inc., January 2001. *See also* the description of the 2000 Westat Report in Chapter XI of this Report. *See also* 71 FR 69510.

[6] The 2001 report may be found at: *www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf,* the 2002 report at: *www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf,* and the 2004 report at: *www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf.*

[7] Many of these employee comments stated that there were no problems with FMLA and there should be no changes to the program.

[8] Because comments on the need for expanded benefits concern matters outside the scope of the Department's authority and the purposes of the RFI, these comments are not covered in any significant detail in this Report.

Employee Perspectives: Experiences in the Value of FMLA, is an important representative example of how meaningful the ability to use the Family and Medical Leave Act has been for employees. The Department could have written an entire report based simply on those comments.

But, no regulatory scheme, particularly at the outset, is perfect. In 1993, the FMLA was a brand-new employment standard and many of the concepts, particularly those that took effect in the final regulations, were borrowed from other areas of law or were completely new. Thus, it should come as no surprise that RFI commenters continued to debate some of the choices made by the Department as it sought to implement the statute in a manner consistent with Congressional intent.

As is evident from both the RFI record and from many of the legal challenges to regulatory provisions over the years, the debate continues on whether the Department successfully implemented the statutory requirements and Congressional intent, or struck the right balance in all places. That debate is reflected in Chapters II–XI. In many instances, commenters expressed the view that a certain regulation was ''exactly what Congress intended,'' while others said of the same regulation that ''it could not possibly be what Congress intended.'' Because of that, in order to provide context to the comments received, in many chapters legal background is provided and/or the evolution of a particular regulatory section is retraced through the rulemaking process. Indeed, many commenters did the same thing. While this is in some cases done in great detail, without that history it may be impossible to understand not just what suggestions are being offered, but why they are being offered. These historical summaries are not intended to endorse the legitimacy of any particular comment or suggestion.

As explained in the RFI, some of the issues brought to the attention of the Department in various forums over the years are beyond the statutory authority of the Department to address.[9] Nonetheless, many commenters provided suggestions for statutory changes to expand the FMLA. Among others, and in no particular order, were comments on: providing paid maternity leave, covering the care of additional family members (*e.g.*, siblings), changing the 75-mile eligibility test, reducing the coverage threshold below 50 employees, and providing coverage for part-time workers. Because these comments are beyond the Department's authority to address, we do not detail them in the chapters that follow.

Finally, this Report is not a catalogue of every comment received or every suggestion made about every part of the regulations. Nor is it a catalogue of every organization or group that submitted comments. We do believe that the comments selected for discussion are representative and the chapters that follow accurately reflect the record according to the most important subject matters presented—many of which, but not all, follow and detail the subjects and questions asked in the RFI. The chapters are designed to explain the questions asked in the RFI, provide background on the law where needed, and detail the feedback about the FMLA and the Department's implementation of it as raised in comments from employees and employers.

Given the detailed presentations in many of the responses to the RFI, and when the comments are read and studied in the aggregate, certain observations about the record stand out. Those observations follow in this Executive Summary or are found in Chapter XI: ''Data: FMLA Coverage, Usage, and Economic Impact''. We believe the observations included in this Report are evident from a plain reading of the thousands of comments received from both employers and employees.

The Department's Observations Regarding the Comments

The Department is pleased to observe that, in the vast majority of cases, the FMLA is working as intended. For example, the FMLA has succeeded in allowing working parents to take leave for the birth or adoption of a child, and in allowing employees to care for family members with serious health conditions. The FMLA also appears to work well when employees require block or foreseeable intermittent leave because of their own truly serious health condition. Absent the protections of the FMLA, many of these workers might not otherwise be permitted to be absent from their jobs when they need to be.

At the same time, a central defining theme in the comments involves an area that may not have been fully anticipated: The prevalence with which unscheduled intermittent FMLA leave would be taken in certain workplaces or work settings by individuals who have chronic health conditions. This is the single most serious area of friction between employers and employees seeking to use FMLA leave. The Department is cognizant that certain of its regulatory decisions and interpretations may have contributed to this situation.

Certain types of industries and worksites and their workers appear to be more impacted by unscheduled intermittent FMLA leave-taking than others and there is considerable tension between employers and employees over the use of this leave. The Department heard, in particular, from employers, and from the representatives of employees who work with them, whose business operations have a highly time-sensitive component, *e.g.*, delivery, transportation, transit, telecommunications, health care, assembly-line manufacturing, and public safety sectors.

While many employer comments used the words ''abuse'' and ''misuse'' to describe employee use of unscheduled intermittent leave, the Department cannot assess from the record how much leave taking is actual ''abuse'' and how much is legitimate. In some cases, the use of unscheduled intermittent leave appears to be causing a backlash by employers who are looking for every means possible (*e.g.,* repeatedly asking for more information in the medical certifications, especially in cases of chronic conditions) to reduce absenteeism.

Another area that generated significant comments is the current medical certification process. The Department recognizes that communication about medical conditions is essential to the smooth functioning of the FMLA in workplaces. However, none of the parties involved with the medical certification process—employers, employees, and health care providers—are happy with the current system. Employees are concerned about the time and cost of visits to health care providers to obtain medical certifications and the potential for invasion of their privacy. Employers, especially when it comes to intermittent leave use, seek predictability in attendance and are frustrated with medical certifications that do not provide meaningful guidance. Health care providers complain they cannot predict how many times a flare-up of a particular condition will occur.

Despite much work by the Department, it also appears that many employees still do not fully understand their rights under the law, or the procedures they must follow when seeking FMLA leave. For example, many employees are misinformed about the fact that paid leave can be substituted for, and run concurrently with, an employee's FMLA leave. Even

[9] *See* 71 FR 69504.

among employees who possess a general awareness of the law, many do not know how the FMLA applies to their individual circumstances. In turn, this failure in understanding may be contributing to some of the problems identified with the medical certification process, and with employers' ability to properly designate and administer FMLA leave. It is clear the Department has more work to do to further educate employees and employers regarding their rights and responsibilities under the law.

Summary of Chapters I–XI

Employee Perspective: Experiences in the Value of the FMLA (Chapter I)

Chapter I provides a representative sampling of comments received by the Department regarding the ''value'' FMLA provides to employees. In general, employees commented they were very happy to have the protections afforded by the FMLA. Many commented that the Act prevented job loss, allowed them to spend time with sick or injured family members, and, upon returning to work, encouraged a greater sense of loyalty to their employer. Some pointed out that their employers went above and beyond what is required by the law. Many employers also submitted comments that outlined advantages to complying with the FMLA and offering benefits beyond what the law requires.

The value of the FMLA was particularly noted by employees caring for both children and parents with serious health conditions; this observation was supported by employer comments, many of whom noted that they increasingly receive FMLA leave requests from employees with elder care responsibilities. Many employees commented that the FMLA would be more useful if it provided paid leave, if more time off was available, and if the program covered more types of family members, such as siblings, grandparents, etc.

Ragsdale Decision/Penalties (Chapter II)

This chapter discusses the impact of the Supreme Court's decision in *Ragsdale* v. *Wolverine World Wide, Inc.* on the FMLA implementing regulations. *Ragsdale* invalidated the ''categorical penalty'' in section 825.700(a) of the regulations, which provides that if an employer does not designate an employee's leave as FMLA leave, it may not count that leave against an employee's leave entitlement. Other courts have struck down similar ''categorical penalty'' rules in sections 825.110(d) (relating to deeming an employee eligible for leave) and 825.208(c) (relating to designation of paid leave). Since *Ragsdale,* many courts have applied equitable estoppel [10] principles when employers either fail to communicate required information or communicate incorrect information.

Employers commented that all categorical penalties should be removed from the regulations and that employers should be permitted to designate leave as FMLA leave retroactively. Some employers suggested that any penalty should be tailored to the specific harm suffered by the employee or suggested situations in which no penalty would be appropriate. Employees supported the current notice and designation requirements in the Department's regulations, with many noting that they suffer hardships when they do not know promptly whether the employer believes they are entitled to FMLA-protected leave. Some employee commenters suggested that employers be required to provide annual notices to employees regarding their FMLA eligibility status and periodic reports regarding any FMLA leave used. Employers expressed concerns that without some clarification they are unsure of their liabilities for failure to follow the notification requirements. Both groups expressed a need for the Department to clarify the impact of *Ragsdale* on the notification requirements in the current regulations.

Serious Health Condition (Chapter III)

The Department received many comments on the regulatory definition of serious health condition relating to a period of incapacity of more than three consecutive calendar days and treatment two or more times by a health care provider (sometimes called the ''objective test'') contained at 29 CFR 825.114(a)(2)(i) and its interaction with 29 CFR 825.114(c) (which provides examples of conditions that ordinarily are not covered). Chapter III summarizes these comments. Many of these comments echoed (or had their origins in) earlier comments to the record the Department received in 1993 when promulgating its current regulations.

The Department received many comments from employees and employee groups who believe that the objective test is a good, clear test that is serving its intended purpose, consistent with the legislative history, while a common theme from many employers was that the regulatory definition of serious health condition is vague and/or confusing. Moreover, comments from employer groups complained that there is no real requirement that a health condition be ''serious'' in the regulatory definition of serious health condition.

Many employee representatives felt section 825.114(c) imposes no independent limitation on the definition of serious health condition and therefore need not be changed. Other commenters took the very opposite tack—that the objective test extinguished Congress' intent to exclude minor illnesses and that the Department should breathe life into subsection (c) by making it more of a *per se* rule, as it was initially interpreted by Wage and Hour Opinion Letter FMLA–57 (Apr. 7, 1995).

Some employers offered to give meaning to subsection (c) by changing the period of incapacity in the objective test from ''calendar'' days to ''business'' days. Still other commenters suggested that the Department maintain the substantive language of both regulatory sections but explicitly adopt a recent court interpretation of the regulations that the ''treatment two or more times by a health care provider'' in section 825.114(a)(2)(i)(A) must occur during the period of ''more than three days'' incapacity. Some commenters suggested reconciling the two regulatory provisions by simply tightening the requirements for qualifying for a serious health condition under the objective test (*e.g.*, increasing the number of days of incapacity required).

Unscheduled Intermittent Leave (Chapter IV)

Chapter IV of the Report discusses the use of unscheduled intermittent leave under FMLA. Based on the comments received, unscheduled intermittent FMLA leave is crucial to employees with chronic serious health conditions resulting in sudden, unpredictable flare-ups. Conversely, it is precisely the use of unscheduled (or unforeseeable) intermittent leave for chronic conditions that presents the most serious difficulties for many employers in terms of scheduling, attendance, productivity, morale, and other concerns. With respect to employer comments, no other FMLA issue even comes close.

The Act itself does not provide a definition of ''chronic'' serious health conditions. During the 1993–1995 notice-and-comment rulemaking phase, the Department filled in this gap, as the regulatory definition of ''serious health condition'' evolved in response to public comments urging that this

[10] ''Equitable estoppel'' is a legal bar that prevents one person from taking advantage of a second person where the second party is injured by reasonably relying on the misrepresentations (or silence when there is a duty to speak) of the first person.

definition specifically cover chronic conditions.

Regarding intermittent leave, the Act provides for the taking of leave in small blocks, or intermittently, but does not specify the minimum increment. 29 U.S.C. 2612(b)(1). In its regulations, the Department rejected any minimum limitations on intermittent leave, citing the statute, and stating a concern that such limits would cause employees to take leave in greater amounts than necessary, and thus erode a worker's 12-week leave entitlement. 60 FR 2236. The Department also predicted initially that incidents of unscheduled intermittent leave would be unusual. 58 FR 31801.

The Act sets out a clear, 30-day notice requirement for leave that is foreseeable, but for leave foreseeable less than 30 days in advance, the Act has a less clear, ''as soon as practicable'' notice requirement. 29 U.S.C. 2612(e)(2)(B). The Department, through its interpretive actions, has defined ''as soon as practicable'' to mean two working days after the need for leave becomes known.[11]

Fourteen years later, the comments indicate that unscheduled intermittent FMLA leave for chronic conditions has become commonplace and it is difficult for employers to determine or monitor employees' incapacity when the chronic condition does not involve any active, direct treatment or care by a health care provider (*i.e.*, self-treatment by employees with chronic conditions such as asthma, diabetes, migraine headaches, and chronic back pain).

Employers expressed frustration about what they perceive to be employees' ability to avoid promptly alerting their employers of their need to take unscheduled leave in situations when it is clearly practicable for them to do so. A common example cited by employers involves ignoring mandatory shift call-in procedures even when the employee is fully able to comply, and then later reporting the absence as FMLA-qualifying after-the-fact. Thus, some employers allege, employees may use FMLA: (1) As a pretext for tardiness or to leave work early for reasons unrelated to a serious health condition, (2) to obtain a preferred shift instead of the one assigned by the employer, or (3) to convert a full-time position to a permanent part-time one. These employers believe the Department's regulatory interpretations have exacerbated this situation.

Other commenters said that when an employer is unable to verify that an employee's unscheduled absence is in fact caused by a chronic serious health condition, and the employer cannot seek additional medical verification of the need for the absence, the employer cannot distinguish between employees who legitimately need FMLA leave and employees who misuse the protections of FMLA to excuse an otherwise unexcused absence from work.

Notice: Employee Rights and Responsibilities (Chapter V)

Chapter V of the Report summarizes comments received regarding the FMLA rights and responsibilities of employees. The comments to the RFI indicate that many employees are not knowledgeable about their rights and responsibilities under the FMLA. Even among employees who possess a general awareness of the law, many do not know how the FMLA applies to their individual circumstances. This reported lack of employee awareness may contribute to frustrations voiced by the employer community concerning employee notice of the need for FMLA leave. Employers and their representatives commented on employees not providing notice of the need for leave in a timely fashion and receiving notice without sufficient information to make a determination as to whether or not the leave is FMLA-qualifying.

The Medical Certification and Verification Process (Chapter VI)

The Department received significant comments regarding the FMLA medical certification process. These comments are discussed in Chapter VI. Generally speaking, all parties involved in the certification process—employees, employers and health care providers—believed the current process needs to be improved.

Many employers commented that they are frustrated with certifications that do not provide meaningful guidance regarding the employee's expected use of intermittent leave. They also noted that the current regulatory framework provides them with limited options for verifying that employees are using FMLA leave for legitimate reasons. Employers also stated they want to be able to talk directly with the employee's health care provider (without using a health care provider of their own) and feel that greater communication would allow decisions regarding FMLA coverage to be made more quickly.

Employees commented that employers are not using the existing FMLA procedures appropriately to challenge medical certifications and are instead simply refusing to accept certifications without seeking clarification or a second opinion. Some employees also claimed that their use of unscheduled intermittent leave for chronic conditions seems to be causing a backlash among some employers who refuse FMLA coverage for any absences that exceed what is on the medical certification. Employees also expressed concern that increased communication between the employer and their health care providers could lead to an erosion of their right to medical confidentiality.

Finally, although the certification requirement calls for an estimate of the expected use of intermittent leave, health care providers commented that often there is no way they can furnish a reliable estimate of the frequency or severity of the flare ups and thus are unable to provide all the information required in the certification. Based on the comments received, employers, employees and health care providers almost universally believe the Department's model certification form WH–380 could be improved.

Interplay Between the FMLA and the Americans with Disabilities Act (Chapter VII)

A number of commenters discussed the relationship between the FMLA and the Americans with Disabilities Act (''ADA'').[12] Although the ADA also may provide employees with job-protected medical leave, the legislative history of the FMLA indicates that Congress intended for ''the leave provisions of the [FMLA to be] * ** wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA].'' [13] Nonetheless, the Department borrowed several important concepts from the ADA when finalizing the FMLA regulations. The practical realities of the workplace also mean that employee requests for medical leave often are covered by both statutes, thus requiring employers to consider carefully the rights and responsibilities imposed by each statute. Chapter VII summarizes the comments received by the Department regarding the interplay between FMLA and ADA.

Almost uniformly, employers and their representatives urged the Department to consider implementing more consistent procedures for handling and approving medical leave requests under the FMLA and ADA. These commenters argued that, in many instances—but particularly with respect to obtaining medical information—the ADA and its implementing regulations provided a ''much better model'' and struck a more appropriate balance between an employee's right to take

[11] *See* Wage and Hour Opinion Letter FMLA–101 (Jan. 15, 1999).

[12] 42 U.S.C. 12101–12117, 12201–12213.

[13] S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993).

reasonable leave for medical reasons and the legitimate interests of employers. Many of these commenters cited their own experience in administering the ADA as support for the idea that additional limits imposed by the FMLA were unnecessary, particularly because both statutes require employers to review similar types of medical information and make determinations about an employee's ability to work based on that information. These commenters also noted that, in many instances, the same human resources person reviews an employee's absences under both statutes, thus further blurring the line between what an employer could permissibly do under each statute.

Other commenters, including unions and other employee groups, argued that the differences between the two statutory schemes were a direct result of the distinctively different purposes of each law. These commenters noted that the ADA is intended to ensure that qualified individuals with disabilities are provided with equal opportunity to work, while the FMLA's purpose is to provide reasonable leave from work for eligible employees. These commenters generally opposed implementing procedures they viewed as placing additional limits on the availability of FMLA leave, or increasing requirements under the FMLA medical certification process.

Transfer to an Alternative Position (Chapter VIII)

The RFI did not specifically ask any questions about an employer's ability to transfer an employee to an ''alternative position'' but the Department received many comments on this topic. These comments are discussed in Chapter VIII of the Report. Under the FMLA, an employer may transfer an employee to an ''alternative position'' with equivalent pay and benefits when the employee needs to take intermittent or reduced schedule leave ''that is foreseeable based on planned medical treatment[.]'' 29 U.S.C. 2612(b)(2). Section 825.204 of the regulations explains more fully when an employer may transfer an employee to an alternative position in order to accommodate foreseeable intermittent leave or a reduced leave schedule.

A significant number of employer commenters questioned why the regulations only permit an employer to transfer an employee when the employee's need for leave is foreseeable based on planned medical treatment as opposed to a chronic need for unforeseeable (unscheduled) leave. Many commenters saw no practical basis for differentiating between foreseeable and unforeseeable need for leave in this context. In fact, many employers reported that the underlying rationale for the transfer provision—to provide ''greater staffing flexibility'' while maintaining the employee's same pay and benefits—is best served where the employee's need for leave is unforeseeable.

Substitution of Paid Leave (Chapter IX)

Chapter IX of the Report summarizes comments regarding the substitution of paid leave for unpaid FMLA leave. Under the statute, employees may substitute accrued paid leave for FMLA leave under certain circumstances. If employees forego the option to substitute paid leave, employers may then require such substitution.[14] The legislative history indicates that Congress had two purposes in providing for the substitution of accrued paid leave for unpaid FMLA leave. First, Congress sought to clarify that where employers provided paid leave for FMLA-covered reasons, they were only required to provide a total of 12 weeks of FMLA-protected leave including the period of paid leave (i.e., employees could not stack 12 weeks of unpaid FMLA leave on top of any accrued paid leave provided by the employer). The second purpose of substitution of paid leave was to mitigate the financial impact of income loss to the employee due to family or medical leave.

A major concern of the employer commenters was that when employees substitute paid vacation or personal leave for unpaid FMLA leave, they are able to circumvent certain aspects of employers' existing paid leave policies, such as notification requirements, minimum increments of leave, seniority, or time of year restrictions. These commenters stated that employees substituting such paid leave for unpaid FMLA leave are, therefore, treated more favorably than those employees who use their accrued leave for other reasons. Employee commenters noted that the ability to substitute paid leave is a critical factor in their ability to utilize their FMLA entitlements, because many employees simply cannot afford to take unpaid leave.

The comments also identified a number of other issues affected by substitution of paid leave. For example, employers questioned the wisdom of the regulation forbidding substitution if employees are receiving payments from a benefit plan such as workers' compensation or short-term disability plans. On the other hand, employees commented that they are improperly required by employers to substitute paid leave, despite contrary language in existing collective bargaining agreements providing employees with the right to decide when to use their leave.

Joint Employment (Chapter X)

Chapter X of the Report discusses comments regarding employer coverage under FMLA in cases in which a company utilizes the services of a Professional Employer Organization (PEO). Unlike a staffing or placement agency, PEOs generally are service providers that handle payroll and other human resource work for the employer and which, under the current regulations, may qualify in some circumstances as a primary employer in a joint employment arrangement.

The comments indicated that PEOs generally are not responsible for employment decisions like hiring, firing, supervision, etc. All of the comments in this area supported the view that the primary ''employer'' in these cases should be the client company that actually hires and uses the employees who are provided benefit services by the PEO. Thus, according to these comments, the client company, and not the PEO, should be responsible for the placement of employees returning from FMLA leave.

Data: FMLA Coverage, Usage, and Economic Impact (Chapter XI)

The Department received a significant number of comments on the usage and impact of the FMLA, including a variety of national surveys and numerous data on FMLA leave from individual companies or government and quasi-government agencies. This information, when supplemented by the data from the 2000 Westat Report (and despite its limitations), provides considerable insight and a far more detailed picture of the workings of the FMLA, and the impact of intermittent leave, in particular. Chapter XI of this Report provides a full discussion of the data received.

Several themes arose out of the data comments submitted in response to the RFI:

- The benefits of FMLA leave include retaining valuable human capital; having more productive employees at work; lower long-run health care costs; lower turnover costs; lower presenteeism costs; and lower public assistance costs.
- There are unquantifiable impacts on both sides. On the benefit side, the value of FMLA leave is often immeasurable. On the cost side, there

[14] 29 U.S.C. 2612(d).

can be a negative impact on customers and the public when workers do not show up for their shifts on time.

- A significant number of workers, especially for some facilities or workgroups, have medical certifications on file for chronic health conditions, and the number is increasing.
- Unscheduled intermittent FMLA leave causes staffing problems for employers requiring them to overstaff some positions and use mandatory overtime to cover other positions. Both of these increase costs and prices.
- The lack of employee notification can cause some positions to go temporarily understaffed resulting in service or production delays. This not only increases costs in the short run but also may potentially impact future business.
- Unscheduled intermittent FMLA leave can adversely impact the workplace in a variety of ways, including missed holidays and time-off for other employees, lower morale, and added stress that can result in health problems.

Further, it appears that the Department's intermittent FMLA leave estimates presented in the RFI—that about 1.5 million workers took intermittent FMLA leave in 2005, and that about 700,000 of these workers took unscheduled intermittent FMLA leave—may be too low.

While the percentage of FMLA covered and eligible workers who take FMLA leave may appear to be low relative to the total workforce and the percentage who take unscheduled intermittent leave may appear to be even smaller, the record shows that these workers can have a significant impact on the operations of their employers and their workplaces for a variety of reasons. First, as a number of commenters pointed out, these workers can repeatedly take unscheduled intermittent leave, over nine hours per week, and still not exhaust their allocation of FMLA leave for the year (generally, 12 weeks × 40 hours/week = 480 hours). Second, the record reveals that workplaces with time-sensitive operations, such as assembly-line manufacturing, transportation, transit, and public health and safety occupations can be disproportionably impacted by just a few employees who repeatedly take unscheduled intermittent leave. Third, the comments indicate that if the morale or health of workers covering for the absent employees on FMLA leave begins to suffer, either because they believe the absent workers are misusing unscheduled intermittent leave or from the stress caused by an increased workload, these workers may in turn seek and need their own FMLA certifications causing a ripple effect in attendance and productivity.

Finally, the data indicate that if unscheduled intermittent FMLA leave is taken, most employers will be able to resolve these infrequent low cost events on a case-by-case basis by using the existing workforce (or possibly bringing in temporary help) to cover for the absent worker, and likely will view unscheduled intermittent FMLA leave as an expected cost of business. On the other hand, for those establishments and workgroups with a high probability (rate) of unscheduled intermittent leave and where the cost of such leave is high, the comments suggest that none of the measures that are typically used to reduce the risk and costs associated with unscheduled intermittent FMLA leave appear to work very well. These establishments, whose risk management systems (*e.g.*, absence control policies, overstaffing, mandatory overtime) appear to be overwhelmed, are likely the employers reporting that intermittent FMLA leave has a moderate to large negative impact on their productivity and profits (1.8 to 12.7 percent of establishments according to the 2000 Westat Report). In addition, many of the traditional methods used to encourage good attendance or control absenteeism (*e.g.*, perfect attendance awards or no fault attendance polices) may not be used if they interfere with FMLA protected leave. These employers may try to make it more difficult for their workers to take unscheduled intermittent FMLA leave by repeatedly questioning the medical certifications or asking for recertifications—creating tension in the workplace.

Conclusion

In those sections of the FMLA dealing with leave for the birth of a child, for the adoption of a child, and associated with health conditions that require blocks of leave and are undeniably ''serious'' (*e.g.*, cancer, Alzheimer's, heart attack), the law appears to be working as anticipated and intended, and working very successfully. When addressing these areas, there is near unanimity in the comments—FMLA leave is a valuable benefit to the employee, improves employee morale, improves the lives of America's families, and, as a result, benefits employers. These aspects of the FMLA are fully supported by workers and their employers.

But to the extent that the use of FMLA leave has continued to increase in unanticipated ways, primarily in the area of intermittent leave taken as self-treatment for chronic serious health conditions, the Department has heard significant concerns. These unanticipated facets of the FMLA are the source of considerable friction in the following areas:

- How serious is ''serious''?
- What does ''intermittent'' leave mean and how long should it go on?
- What are the rules surrounding unforeseeable leave?
- How much information can an employer require before approving leave?
- What are an employee's responsibilities under the Act?
- What workplace rules may an employer actually enforce?
- How has other legislation, including the ADA and HIPAA, affected the FMLA?

Absent the protections of the FMLA, many workers with chronic conditions might not otherwise be permitted to be absent from their jobs. This is unquestionably a valuable right. But it is precisely the use of FMLA leave by a subset of these workers—those seeking unscheduled intermittent leave for a chronic condition—that appears to present the most serious difficulties for many employers in terms of scheduling, attendance, productivity, morale, and other concerns. As was clear from the record, these comments are not inconsistent with each other. These things are true at the same time.

The success of the FMLA depends on smooth communication among all parties. To the extent that employees and employers become more adversarial in their dealings with each other over the use of FMLA leave, it may become harder for workers to take leave when they need it most.

The Department hopes that this Report will further the discussion of these important issues and is grateful to all who participated in this information-gathering process.

I. Employee Perspective: Experiences in the Value of the FMLA

The chapters that follow in this Report deal in large part with the substantive comments from individual employers and employees, law firms, and groups representing employers and employees, assessing what works or does not work particularly well with specific regulatory sections of the FMLA. Because of that, it is easy to lose perspective about the overall value of the workplace protections provided by the Act. That value is best shown in the comments submitted by individual employees and, in some instances their employers or representatives. While it would be impossible for the Department

to catalog every comment it received in response to the Request for Information (''RFI'') about the value of the FMLA, this chapter provides a representative collection of comments recounting those personal experiences.[1] These comments also include some examples of best practices of employers in carrying out the FMLA—practices that often create or strengthen good relationships between employers and employees. These comments reflect the belief stated in the regulations that a ''direct correlation exists between stability in the family and productivity in the workplace'' and demonstrate that the underlying intent of the Act ''to allow employees to balance their work and family life by taking reasonable unpaid leave'' for certain qualifying family and medical reasons is being fulfilled. 29 CFR 825.101.

Many employees were grateful that the Act existed and that they were able to utilize the leave entitlement in a time of need. Some employees specifically commented that the Act helped them during difficult periods of caring for loved ones who were ill. For example, one employee wrote that she used FMLA leave twice, once to care for a seriously ill child and again ''when my husband was injured in Afghanistan and needed assistance in his recovery[.]'' An Employee Comment, Doc. 2666, at 1.[2] She noted that ''without this [FMLA] protection, I probably would have lost my job and all its benefits[.]'' *Id.* Another employee said he could not have cared for his ill wife without FMLA. An Employee Comment, Doc. FL18, at 1. ''My wife * * * has a medical condition that is covered by the FMLA. I have used intermittent FMLA leave to take her to the doctor whose office is located approximately 4 hours away by car from where we live. I have been doing this on average once a month for approximately 3 years. I would not be able to do this without the FMLA.'' *Id.*

One employee, whose comment echoed the sentiment that the FMLA allows employees to balance their work obligations with the need to care for their loved ones, appreciated how his family benefited from FMLA leave. ''Presently, my sister is having to care for our ailing mother while holding down a job. The Family and Medical Leave Act is very important to her as well as her family in her continued effort to care for our mother in her final days.'' An Employee Comment, Doc. FL9, at 1. Another employee said, ''I * * * recently returned from taking a two week FML[A leave] to care for my elderly stepfather after open heart surgery. My family and I were appreciative that because of the FML[A] I was able to request time to assist with his care and recuperation at home. We all have no doubt that my time was invaluable with his improvement once home.'' An Employee Comment, Doc. 139, at 1.

Other commenters also noted the value of FMLA when they needed leave because of their own serious health conditions. For example, one employee said, ''As a cancer survivor myself, I cannot imagine how much more difficult those days of treatments and frequent doctor appointments would've been without FMLA. I did my best to be at work as much as possible, but chemotherapy and radiation not only sap the body of energy, but also take hours every day and every week in treatment rooms.'' An Employee Comment, Doc. 5798, at 1. Another employee, who used FMLA leave on several occasions for her own serious health condition, stated that she was ''very thankful for the existence of the Family and Medical Leave Act (FMLA). As a two-time survivor of breast cancer, I have taken FMLA leave both on a continuous and an intermittent basis—continuous leave to recover from my surgeries (therapeutic and reconstructive) and intermittent for doctors appointments, radiation therapy, and chemotherapy treatments.'' An Employee Comment, Doc. 234, at 1. Other employees specifically pointed out the value of the FMLA in allowing them to focus completely on recovery. For example, a correctional officer commented, ''I was out of work for a short period of time due to a serious medical condition that was treatable. FMLA gives the employee the ability to tend to these concerns with their full attention, to recuperate without sacrificing their career [or] their livelihood.'' An Employee Comment, Doc. FL87, at 1.

Several employees commented specifically about the value of intermittent leave under the FMLA. A railroad employee of thirty-six years said he uses intermittent leave to care for his wife, who suffers from Multiple Sclerosis (''MS''). An Employee Comment, Doc. FL115, at 1. Acknowledging the sporadic need for leave, the commenter said, ''Since MS is an incurable disease without a schedule or any way of knowing when an episode is going to [occur], I cannot always foresee when I am needed at home. The only time I know I am needed is when [my wife] has an appointment with her doctor. This is subject to change if she is unable to go to the doctor due to weakness.'' *Id.* Similarly, an AT&T employee commented that intermittent leave under the Act makes it possible for her to care for her mother, who has Alzheimer's disease. ''I only take an hour here and there as needed. I try to work doctor appointments and other things around my work schedule. However, it is impossible to always do that. FMLA has been a life saver for me. Had I not had FMLA for this reason I don't know what I would do.'' An Employee Comment, Doc. 10046A, at 1.

Many employees commented that the Act helped save their jobs. For example, one employee, who commented that her child's health condition sometimes keeps her out of work for several days at a time, said, ''FMLA has tremendously helped my family. I have a child born w/[asthma], allergies & other medical issues. And, there are times I'm out of work for days[. I]f I didn't have FMLA I would have been fired [a long] time ago. I've been able to maintain my employment and keep my household from having to need assistance from the commonwealth.'' An Employee Comment, Doc. 229, at 1. Another employee said, ''I returned home after three months [of FMLA leave] to be told I no longer had a job. I was told it would be unfair of me to expect my coworkers to cover for me so they were forced to hire a new employee * * * When I asked the manager about the previous assurances that my job would be held until I returned I wasn't given a direct answer. I invoked the FMLA and was able to keep my job.'' An Employee Comment, Doc. 61, at 1. A teacher stated, ''Without [the FMLA], I couldn't have cared for both of my parents at different times in their lives and kept my job * * * Because of the act I was able to keep my parents out of nursing homes and still keep my job to support them later. This is the best thing you can do for working families around our country.'' An Employee Comment, Doc. 1181, at 1.

Similarly, an employee with a chronic serious health condition commented, ''I can get sick at any time and need brain surgery. This can put me out of commission for a month or two. FMLA gives me the peace of mind that I cannot be fired after I have been in a job for a year. I cannot stress how monumental that assurance is.'' An Employee Comment, Doc. 159, at 1. Another employee said, ''Without the availability of FMLA I'm not certain of what would have happened to my family when my husband was diagnosed with ALS 5

[1] The Request for Information can be found at 71 FR 69,508 (December 1, 2006).

[2] The names of individual employees have been redacted from the Report where any personal or medical information was provided.

years ago. Thankfully it was there, so I could be with him as he was dying.'' An Employee Comment, Doc. 4332, at 1. A union steward, using FMLA leave for his own serious health condition, commented that ''FMLA not only allows me to take time off for * * * therapy/medical appointments but also allows [me] to take time off as needed when I have sporadic episodes in which the medicine does not work, needs to be fine tuned or changed which is essential to my well-being.'' An Employee Comment, Doc. 4619, at 1. He further commented, ''Without FMLA I would have been fired long ago[.] * * * FMLA saved my job and I also believe saved my life, and to this day gives me a sense of security against any discipline or termination based on my legitimate medical needs.'' *Id.*

The FMLA appears to be particularly valued by employees caring for both children and parents with serious health conditions. A telephone company employee providing care for her asthmatic son and for her 84-year-old mother commented: ''I am part of what is known as the ''Sandwich Generation''[.] * * * I have had several occasions to use FMLA[.] * * * Without FMLA protection I would have lost my job.'' An Employee Comment, Doc. R133, at 1. Another employee described taking leave for a three-month period for the birth of her child, then needing leave intermittently to care for her father ''for a few days after each hospitalization'' for his chronic heart disease. An Employee Comment, Doc. 6311, at 1. According to this commenter, ''Knowing that I was protected meant I didn't have to choose between my Father's health and my job.'' *Id.* at 1.

In a similar vein, one commenter who administers FMLA leave for her employer noted, ''What I am seeing with increasing regularity are FMLA requests for employees to care for an elderly parent who is ill and not able to afford a caregiver to attend to his/her needs. These are usually for intermittent leaves that will allow the employee to chauffer their parent to the doctor [or] attend to their parent post surgery. As our working population ages, [the need for leave related to] caring for elderly parent(s) will increase.'' Doreen Stratton, Doc. 696 at 1. An employee agreed: ''There are multiple factors putting stress on the American family, making the FMLA a good thing for families with children. Also, millions of baby-boomers are getting old, many of them without adequate retirement funds—so we will be seeing more family caregivers, not fewer.'' An Employee Comment, Doc. 5473, at 1. As these comments show, the importance of the FMLA is growing for this key group of employees and their employers. As one commenter put it, ''In most families, since both parents have to work to support themselves and their children and perhaps their older parents, the more a company provides pay and good will towards a family['s] caretaking abilities, the more that employee will be loyal to the company.'' An Employee Comment, Doc. 5521, at 1.

In addition to these individual employee and employer comments, the American Federation of Labor and Congress of Industrial Organizations (''AFL–CIO'') conducted an ''online survey among members of Working America, the Federation's community-based affiliate in response to the RFI. Within a period of two weeks, over 1,660 members responded.'' Doc. R329A, at 6. As a result of their survey, several hundred personal experiences were included in an Appendix to the AFL–CIO's comment—a sampling of which is provided here:

- ''My daughter was mauled by a dog. I had to take 2 months of leave (permitted under FMLA). Had FMLA not been in place, I would have lost my job for sure.''
- ''FMLA has made a big difference to me. I have a chronic health condition along with being a single mother and have my aging mother living with me. I can't imagine not being able to use this so that I know that my job will still be there whether I have a [reoccurrence] of my health condition or like when my 4 year old broke his leg.''
- ''My step mother had a debilitating stroke. Since I work in social services, I was [the] best person in the family to assist her with setting up her benefits. My direct supervisor did not like it, but my request could not be denied. Human Resources was more than helpful in telling me how much vacation and sick time I had accrued. It was required that I use that up while I was on FMLA. I was paid for all but a week and a half of my leave. Without FMLA, I could not have taken the 5 weeks off work.''
- When my mother was diagnosed with lung cancer, my brother and I decided I would be the one to take her to all her appointments and therapy. I would have lost my job or had to leave it without FMLA. It was difficult for the people I worked with because it put a strain on the office, however, they were, for the most part, emotionally supportive as well.''
- ''My mother was diagnosed with cancer and she had a stroke that left her paralyzed and wheelchair bound. With the help of the FMLA, I was able to take her to her appointments and tell the doctors what was going on with her since I was her primary caregiver. I was able to be with her when she took her last breath and was grateful for the time I was able to [spend] with her until her death.''

Id. at 46–59.

Similarly, the Communications Workers of America submitted several hundred examples of their members' personal experiences with FMLA ''to illustrate the continued importance of the FMLA[.]'' Doc. R346A, at 16. A representative sample of those experiences follows:

- ''A Cingular employee with a good work record has Lupus which causes periodic flare-ups that prevent her from working and require weekly therapy and regular doctor visits. FMLA has allowed her to remain stress-free * * * because she does not need to worry about losing her job.''
- ''A Pacific Bell Telephone employee with chronic lower back pain that prevents sitting or walking when it flairs up has been able to take FMLA leave when these symptoms occur without facing discipline for absence issues. As a result, this employee remains a productive and committed employee.''
- ''A [Communications Workers of America] member reports that in 1995 his late wife was diagnosed with colon cancer. After she was operated on, she needed extensive chemotherapy. His employer allowed him to substitute paid leave for unpaid FMLA leave whenever he needed to go with his wife to chemotherapy treatments since she was unable to drive herself to or from these appointments. This made a big difference especially because some of the medical care was not covered by the employee's insurance.''
- ''An employee of AT&T has used FMLA leave to care for her husband, her son, her elderly mother and for her own serious health condition. She reports that she learned about the availability of FMLA leave from her union and the union representatives were very helpful to her in trying to understand complicated FMLA application forms and other related documents sent to her in connection with these leaves.''
- ''An employee of AT&T used FMLA leave five years ago when her father developed a brain tumor that ultimately took his life. She states that 'it was devastating to our family, but I am so grateful that, with the FMLA I was able to help care for him in our home and was by his side when he passed. This is how life and death should be. Losing the protections of FMLA would force us to have strangers care for our [loved] ones in their time of need.' ''

Id. at 16–42.

Numerous employees commented that requesting and using FMLA leave was a positive experience because their employers were helpful and straightforward in providing such leave. Several of these employees commented that their employers initially suggested they request FMLA leave and helped them through the process. *See, e.g.*, Employee Comments, Doc. 4734, at 1 (''My employer did not give me any difficulty in using my sick/personal time[.] * * * I spoke to my Human Resources person and she suggested I apply [for FMLA leave].''); Doc. 874, at 1 (an employee who needed leave to care for her mother in a different state ''first heard of FMLA when I contacted my HR office about my dilemma, and I was so amazed and relieved that such a worker-centric law actually existed! With the help of FMLA, I was able to spend a month in Michigan helping my Mom—away from my job—without having to worry that I would be fired.'').

Other employees observed that their employers put them at ease when they requested FMLA leave. Specifically, an employee recalled when her child became ill with a brain tumor that her ''company was very understanding about granting me [FMLA] leave. I felt very safe and secure knowing that I could take leave and still have my job when I returned.'' An Employee Comment, Doc. 95, at 1. Similarly, an employee said she was ''[s]o thankful when my employer informed me of this law because it gave my mom peace of mind knowing that I would be available for her when she needed me.'' An Employee Comment, Doc. 4773, at 1.

Often employees were thankful because their employers were sympathetic to their family needs while on FMLA leave. The National Association of Working Women provided the example of ''a 41-year-old single mother in Aurora, Colorado. The FMLA allows her to take off whenever her 11-year-old son * * * has an attack caused by his chronic asthma. 'When he does get sick, I have to be up practically 24 hours,' [the mother] says, praising her employer, Kaiser Permanente, and her supervisor for understanding her situation.'' Doc. 10210A, at 1. One employee said her employer's sympathy during FMLA leave prevented her from looking for new work: ''Thanks to the FMLA, I was able to take three months off work with full salary in order to take care of [my husband] when he was reduced to a state of complete dependency. * * * I was secure in the knowledge that I could come right back to my job, and I developed a keen sense of loyalty to my employer which has more than once prevented me from looking for work elsewhere.'' An Employee Comment, Doc. R62, at 1. Finally, one employee stated she did not find requesting FMLA leave to be ''cumbersome or unreasonable'' because her Human Resources department was ''very helpful with the entire process.'' An Employee Comment, Doc. 4720, at 1. Further, she noted that ''the process and leave itself [was a Godsend] as caring for our Mother was very, very stressful[.]'' *Id.*

Many comments recounted employer policies that go above and beyond what is required under the Act. *See, e.g.*, An Employee Comment, Doc. 5069, at 1 (employer ''gives paid medical leave based on how much time is medically necessary.''); Jill Ratner, President, The Rose Foundation for Communities and the Environment, Doc. 4877, at 1 (A non-profit foundation that provides ''one week of paid family leave (in addition to two weeks of paid sick leave) to all employees'' commented that ''providing family leave is critical to recruiting and retaining qualified staff, and to maintaining staff morale and effectiveness.''); An Employee Comment, Doc. 1106, at 1 (''Altogether, I was away from work for about two months or so. My employer, Monsanto, was very generous with me. In addition to granting the time off and guaranteeing I would still have my job when I returned, they paid sick leave during this period.''); An Employee Comment, Doc. 70, at 1 (The employer of an employee who had been employed for less than one full year when she needed FMLA leave to care for her sick mother ''essentially applied the FMLA rules anyway; they let me use all my vacation time and then gave me unpaid leave. I cannot tell you what a difference that made.''); National Employment Lawyers Association, Doc. 10265A, at 3 (An attorney association commented that one of her clients suffered from chronic fatigue syndrome, which shortened her work day by 1 to 2 hours, but ''her employer was very cooperative with her efforts to continue working by allowing her to use her FMLA [leave] in these short blocks of time and wasn't even really counting whether she was using up her FMLA leave.'').

A professor commented that her college provided leave periods in addition to FMLA leave, lasting the length of a full school term. An Employee Comment, Doc. R79A, at 1. ''I also underwent surgery, several cycles of adjuvant chemotherapy, and a series of medical tests for the management of my cancer and am currently considered to be cancer-free and doing well. These treatments were possible, not only because of my excellent medical coverage as a full-time university employee, but because I could take a one-term medical leave in the fall and still receive paychecks[.]'' *Id.*

Some employers also noted that making it easier on employees to use FMLA leave was a positive experience from their perspective. One employer commented:

> If I have an employee with a child or family member with a serious illness, and this employee is unable to be with that family member when needed, they are distracted at work and their productivity suffers. In contrast, if they are allowed time to take care of that family member, their productivity increases. They know what they have to accomplish and—sometimes by working at home, or working extra hours, or skipping lunch, or working exceptionally hard—they get it done. And in the end I have an extremely loyal employee.

Marie Alexander, President & CEO, Quova, Inc., Doc. 5291, at 1. A public sector employer commented that administering FMLA leave was ''no more difficult to navigate than any other labor oriented legislation. In fact, I find it very straightforward, and it has been a literal lifesaver for some of our people.'' Kevin Lowry, Nassau County Probation, Doc. 86, at 1. The commenter went on to say, ''In the long run, most people will appreciate the extra protection offered by the employer during a difficult time and will return as more motivated employees once the crisis has passed.'' *Id.* The benefit to employers of providing FMLA leave to employees was also the topic of another employer's comment: ''As a supervisor, FMLA allowed me to keep a good employee while she cared for her terminally ill husband. After he passed away, she came back to work and has continued to contribute to [the company] in an extremely valuable way.'' Chris Yoder, Doc. 922, at 1.

Some employees also noted that, upon returning from FMLA leave, they felt more productive at work and more loyal to their employer. One employee said, ''My mentor allowed me to use my own sick leave and vacation and then to hold my position without pay until after my mother passed and I was able to return to work. The course of my mother's illness was quick, and I was gone about six weeks total. When I returned to work, I was able to re-engage in it and be productive.'' An Employee Comment, Doc. 885, at 1. Another employee commented, ''I used FMLA three times in the last 9 years (with and without pay); each time I was very grateful to know that my job status was protected when I was out on leave. All three times I returned to work and

rededicated myself to my job. FMLA helped me, my family, and my loyalty and productivity in the workplace.'' An Employee Comment, Doc. R2, at 1.

A telecommunications employee also commented that taking FMLA leave allows her to be more productive: ''The FMLA has changed my life. It has saved my job. Without the intermittent leave, and my taking only 1.5 days maximum per month, I would be on a disability. When I do miss work, I work twice as hard to make up for the time I am gone. I actually produce more than those who don't take the FMLA time.'' An Employee Comment, Doc. 233, at 1. Another employee noted that FMLA leave is not ''charity'' but ''instead it safeguard[s] loyal employees who, because of unforeseen circumstances need a temporary helping hand.'' An Employee Comment, Doc. 4732, at 1. Further, the commenter noted, ''I have known a family which has benefited tremendously by the FMLA. After assistance, they have emerged once again into a productive, tax paying, exciting family that is contributing to our community.'' *Id.*

While other chapters of this Report detail areas where commenters indicate the FMLA may not work as well as it could, the comments in this chapter show the continued value to employees and employers of the FMLA leave entitlements. While employees were relieved at having available job-protected leave, they also often noted their increased loyalty to their employers after using periods of FMLA leave, especially where they felt their employers were sympathetic concerning the leave circumstances and helpful with the procedures for taking leave. Employers, as well as employees often noted increased productivity among employees returning from FMLA leave and, in some instances, provided greater benefits than those required by the Act. The value of FMLA leave was pointed out for all types of qualifying leave scenarios, but was particularly referenced in regard to employees of the ''sandwich generation'' who frequently find themselves caring for their own health needs, those of their children, and of their aging parents.

II. Ragsdale/Penalties

In *Ragsdale* v. *Wolverine World Wide, Inc.,* 535 U.S. 81 (2002), the Supreme Court held that the penalty provision in the Department's regulation at section 825.700(a) is invalid. That regulation states that ''[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.'' 29 CFR 825.700(a). The Court held the provision is invalid because, in some circumstances, it requires employers to provide leave in excess of an employee's 12-week statutory entitlement. Although the Court did not invalidate the underlying notice and designation provisions in the regulations, it made clear that any ''categorical penalty'' for a violation of such requirements would exceed the Department's statutory authority.

The Request for Information noted that a number of courts have invalidated a similar penalty provision found in section 825.110(d), which requires an employer to notify an employee prior to the employee commencing leave as to whether the employee is eligible for FMLA leave. If the employer fails to provide the employee with such information, or if the information is not accurate, the regulation bars the employer from challenging the employee's eligibility at a later date, even if the employee is not eligible for FMLA leave pursuant to the statutory requirements.

Therefore, the Department asked commenters what ''changes could be made to the regulations in order to comply with *Ragsdale* and yet assure that employers maintain proper records and promptly and appropriately designate leave as FMLA leave?'' The Department received a significant number of comments regarding this issue and related notice issues.

A. Background

The FMLA entitles eligible employees of covered employers to 12 weeks of leave per year for certain family and medical reasons. 29 U.S.C. 2612(a)(1). In order to allow employees to know when they are using their FMLA-protected leave, the regulations state that ''it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee.'' 29 CFR 825.208(a). More specifically, ''[o]nce the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave.'' 29 CFR 825.208(b)(1). *See also* 29 CFR 825.301(b)(1)(i) and (c). The employer's designation may be oral or in writing, but if it is oral, it must be confirmed in writing, generally no later than the following payday, such as by a notation on the employee's pay stub. 29 CFR 825.208(b)(2).

The categorical penalty provision of the regulations with regard to paid leave provides as follows:

> If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

29 CFR 825.208(c). *See also* 29 CFR 825.700(a) (''If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.'').

In *Ragsdale,* 535 U.S. 81, the Supreme Court considered a case in which the plaintiff had received 30 weeks of leave from her employer. At that point, her employer denied her request for additional leave and terminated her employment. She alleged that her employer violated section 825.208(a), which requires an employer to designate prospectively that leave is FMLA-covered and to notify the employee of the designation. Because her employer did not do so, she alleged that she was entitled under section 825.700(a) to an additional 12 weeks of FMLA-protected leave.

The Court found that this ''categorical penalty'' is ''incompatible with the FMLA's comprehensive remedial mechanism,'' which puts the burden on the employee to show that the employer interfered with, restrained, or denied the employee's exercise of FMLA rights, and that the employee suffered actual prejudice as a result of the violation. Ragsdale, 535 U.S. at 89. The Court observed that, according to the regulation, the ''fact that the employee would have acted in the same manner if notice had been given is, in the Secretary's view, irrelevant.'' *Id.* at 88. The Court also found that the regulation ''subverts the careful balance'' that Congress developed with regard to ''the FMLA's most fundamental substantive guarantee'' of an entitlement to a total of 12 weeks of leave, which was a compromise between employers who wanted fewer weeks and employees who wanted more. *Id.* at 93–94. Thus, the Court held that the penalty provision of section 825.700(a) is ''contrary to the Act and beyond the Secretary of Labor's authority.'' *Id.* at 84.

The Supreme Court did not invalidate the notice and designation provisions in the regulations. Indeed, the Court recognized that there may be situations where an employee is able to show that the employer's failure to provide the required notice of FMLA rights prejudiced the employee in a specific way (such as depriving the employee of an opportunity to take intermittent leave or to return to work sooner). The Court stated, however, that the Act's remedial structure requires a ''retrospective, case-by-case examination'' to determine ''whether damages and equitable relief are appropriate under the FMLA,'' based upon the steps the employee would have taken had the employer given the required notice, rather than a categorical penalty. *Id.* at 91. *See Sorrell* v. *Rinker Materials Corp.,* 395 F.3d 332, 336 (6th Cir. 2005) (remanding the case for a determination of whether the doctrine of estoppel bars the company from challenging the employee's entitlement to FMLA leave because the employer had unconditionally approved the leave request); *Duty* v. *Norton-Alcoa Proppants,* 293 F.3d 481, 493–94 (8th Cir. 2002) (holding that the employer was equitably estopped from asserting that the plaintiff had exhausted his 12 weeks of FMLA leave, based on a letter expressly informing him after 22 weeks of disability leave that he still had 12 weeks of FMLA leave left); *Wilkerson* v. *Autozone, Inc.,* 152 Fed. Appx. 444 (6th Cir. 2005) (based on the employer's statement that the employee had six weeks of post-partum FMLA leave, equitable estoppel applied because the employee reasonably relied on it and showed the requisite prejudice).

The *Ragsdal*e decision addressed only the penalty provision in section 825.700(a), which is applicable to both unpaid leave and paid leave (*Ragsdale* involved unpaid leave). The penalty provision in section 825.208(c) (applicable only to paid leave) is virtually identical. A number of courts have held that the rationale of the *Ragsdale* decision applies equally to section 825.208(c), and that an employee must show prejudice from the lack of notice to establish a violation of the Act. *See, e.g., Miller* v. *Personal-Touch of Va., Inc.,* 342 F. Supp. 2d 499, 513–14 (E.D. Va. 2004); *Donahoo* v. *Master Data Ctr.,* 282 F. Supp. 2d 540, 554–55 (E.D. Mich. 2003); and *Phillips* v. *Leroy-Somer N. Am.,* No. 01–1046–T, 2003 WL 1790941, *5–7 (W.D. Tenn. Mar. 28, 2003).

As discussed above, a number of courts also have found that the ''deeming'' provision in section 825.110(d) of the regulations is invalid and contrary to the statute. The FMLA establishes that employees are eligible for FMLA leave only if they have been employed by the employer ''for at least 12 months'' and have ''at least 1,250 hours of service with such employer during the previous 12-month period.'' 29 U.S.C. 2611(2)(A). The regulations generally require an employer to notify an employee whether the employee is eligible for FMLA leave prior to the employee commencing leave. If the employer confirms the employee's eligibility, ''the employer may not subsequently challenge the employee's eligibility.'' 29 CFR 825.110(d). Furthermore, ''[i]f the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.'' *Id.*

Thus, even if an employee fails to satisfy the statutory eligibility requirements, the regulation ''deems'' the employee to be eligible for FMLA-protected leave. The courts have held that this regulation is invalid. *See, e.g., Woodford* v. *Comty. Action of Greene County, Inc.,* 268 F.3d 51, 57 (2d Cir. 2001) (''The regulation exceeds agency rulemaking powers by making eligible under the FMLA employees who do not meet the statute's clear eligibility requirements.''); *Brungart* v. *BellSouth Telecomm., Inc.,* 231 F.3d 791, 796–97 (11th Cir. 2000), *cert. denied,* 532 U.S. 1037 (2001) (''There is no ambiguity in the statute concerning eligibility for family medical leave, no gap to be filled.''); *Dormeyer* v. *Comerica Bank-Ill.,* 223 F.3d 579, 582 (7th Cir. 2000) (''The statutory text is perfectly clear and covers the issue. The right of family leave is conferred only on employees who have worked at least 1,250 hours in the previous 12 months.'' Therefore, the Department ''has no authority to change the Act,'' as the regulation attempts to do, by making ineligible employees eligible for family leave).

The courts have concluded that an employee may pursue a case, based on the principle of equitable estoppel, where the employer's failure to advise the employee properly of his/her FMLA eligibility/ineligibility is determined to have interfered with the employee's rights, and the employee could have taken other action had s/he been properly notified. *See, e.g., Dormeyer,* 223 F.3d at 582 (''an employer who by his silence misled an employee concerning the employee's entitlement to family leave might, if the employee reasonably relied and was harmed as a result, be estopped to plead the defense of ineligibility to the employee's claim of entitlement to family leave.''); *Kosakow* v. *New Rochelle Radiology Assocs., P.C.,* 274 F.3d 706, 722–27 (2d Cir. 2001). *See also* Wage and Hour Opinion Letter FMLA2002–1 (Aug. 6, 2002).

B. Comments on Ragsdale: Notice and Designation Issues

A number of commenters addressed the *Ragsdale* categorical penalty issue and responded to the Request for Information's question regarding what ''changes could be made to the regulations in order to comply with *Ragsdale* and yet assure that employers maintain proper records and promptly and appropriately designate leave as FMLA leave?''

The National Coalition to Protect Family Leave stated that section 825.700(a) and the similar penalty provision in section 825.208 should be removed from the regulations, and that ''any 'penalty' that DOL wants to impose on employers for failure to follow certain notice obligations dictated by the regulations must be tailored to the specific harm suffered by the employee for failure to receive notice.'' National Coalition to Protect Family Leave, Doc. 10172A, at 43, The Coalition asserted that retroactive designation should be permitted, so that employees ''could receive the FMLA protections despite their failure to adequately communicate that the FMLA is at issue, and employers who inadvertently fail to timely designate leave can have the opportunity to count the absence toward the employee's FMLA leave bank. Retroactive designation should be permitted in all cases where the employee is eligible, the condition qualifies, and the employee has adhered to his/her FMLA notice obligations that FMLA leave is at issue.'' *Id.* at 44. *See also* Proskauer Rose LLP, Doc. 10182A, at 9 (the regulations should allow an employer ''who initially fails to designate a leave as FMLA leave, but nevertheless grants the employee the leave, to retroactively designate the leave as FMLA leave''); Coolidge Wall Co. LPA, Doc. 5168, at 1 (the regulations should state that an employer that has an FMLA policy in its handbook, for which an employee has acknowledged receipt, can send out the FMLA notice ''mid-leave and can retroactively count the employee's time''); Commonwealth of Pennsylvania, Doc. FL95, at 2–3 (retroactive

designation should be allowed ''when an employee's FMLA rights were provided during the period of absence,'' because the two-day verbal notification requirement is difficult to achieve, although the written notification/designation requirements ''usually can occur * * * within the timeframes prescribed by the Regulations'').

The Air Transport Association of American, Inc., and the Airline Industrial Relations Conference suggested that the regulations be revised in light of *Ragsdale*, because employers do not know which regulations they must follow and which are no longer valid, and employees who read them also are confused about which regulations their employers must follow. Doc. FL29, at 15. *See also* Association of Corporate Counsel, Doc. FL31, at 10 (section 825.700 should be deleted to clarify that an employer's failure to timely designate leave does not increase the statutory leave period).

United Parcel Service, Doc. 10276A, at 2, suggested that the Department should clarify in section 825.208 the effect of an employer's mistaken designation of FMLA leave, because some courts have held that the doctrine of equitable estoppel prevents an employer from denying protected leave based on a subsequent determination that the employee was not eligible. The United States Postal Service similarly suggested that both sections 825.700(a) and 825.208(c) should be revised to clarify that ''a technical violation of the notice provisions does not result in a windfall of surplus FMLA protection for an employee who suffered no harm as a result.'' Doc. 10184A, at 4. A large provider of human resources outsourcing services commented that ''by deleting the 'penalty' provision and simply reinforcing employer notification obligations,'' the Department would appropriately respond to *Ragsdale*. Hewitt Associates, Doc. 10135A, at 8. Hewitt stated that employers benefit by providing more notice because they: Educate employees about their rights, responsibilities, and benefits; maximize the likelihood that employees will return to work promptly; maintain or enhance their engagement; minimize the impact on other HR administrative processes; minimize the impact on business operations; and reduce available time off balances accurately. *Id.* at 7–8.

Finally, as discussed in detail in Chapter V, a number of commenters stated that the two-day time frame for designating leave is inadequate, or that the designation requirement should apply only when employees expressly request FMLA leave. The National Association of Convenience Stores suggested that, in light of *Ragsdale*, ''DOL should consider eradicating all formal employer designation requirements.'' Doc. 10256A, at 7.

Other stakeholders, however, presented views in support of the current notice and designation requirements and had suggestions for changes that would provide improved and prompt information to employees. One commenter stated that the data show that two days is sufficient to allow employers to review and respond to employees' leave requests. ''Most organizations spend only between thirty and 120 minutes of administrative time per FMLA leave episode to provide notice, determine eligibility, request and review documentation, and request a second opinion. Therefore, no change to the current two-day response requirement is warranted.'' National Partnership for Women & Families, Doc. 10204A, at 21 (citation omitted). That commenter also noted that while the Supreme Court struck down the ''categorical penalty'' in the current regulations, it left intact the requirement that employers designate leave, and it ''did not prohibit DOL from imposing any penalties on employers for failing to properly designate and notify employee about leave.'' *Id.* at 18. Therefore, in light of the overall purposes of the notice and designation requirements, this commenter suggested that any changes to the regulations should:

- ''Emphasize that the Court did not alter the obligation of employers to both designate leave promptly and notify employees of how that leave has been designated. Thus, employers must continue to adhere to these designation and notice requirements or risk penalties.''
- ''Reaffirm and modify current recordkeeping requirements that require employers to keep accurate and complete records of how leave has been designated, and when the employee was notified of the designation.''
- ''Prohibit employers from making any retroactive changes to how leave has been designated without notification and consultation with the employee, and require maintenance of records documenting such notification and consultation.''
- ''Establish new penalties for employer non-compliance that are not automatic, but can be imposed following a complaint by the affected employee and an independent determination of the harm caused by the employer's violation.''

Id. at 18–19. *See also* Letter from 53 Democratic Members of Congress, Doc. FL184, at 2 (noting that *Ragsdale* invalidated only the penalty provision of the regulations and that any changes in the regulations should be limited to remedying that problem and should go no further).

Another commenter suggested that ''fines should be imposed'' on employers that do not maintain accurate records, and they ''should not be able to retroactively change how leave was originally designated without notice and consultation with the employee.'' OWL, The Voice of Midlife and Older Women, Doc. FL180, at 2.

A number of commenters emphasized the hardships employees suffer when they do not know promptly whether the employer believes they are entitled to protected leave. Employees then either feel compelled not to take the time off that they need, or else they take off but are afraid because they do not know whether they will be subject to discipline for being off work. *See, e.g.*, Frasier, Frasier & Hickman, LLP, Doc. FL60, at 1–3. As discussed in detail in Chapter V, a number of commenters therefore suggested that employers be required to inform employees promptly when they are using FMLA leave.

Another commenter noted that his employer ''is able to delay, and many times deny, for many weeks and months the benefits and protections which the Act affords,'' because it repeatedly asks for more information on the certification form. An Employee Comment, Doc. 10094A, at 2. During this ''very lengthy approval process, the employee is subjected to attendance-related discipline when the absence should have been approved or at the very least be treated as 'pending.' '' *Id. See also* An Employee Comment, Doc. 5335, at 1 (noting that she had gone out on short-term disability leave for surgery but, despite her regular contact with the benefits specialist, she was not notified that the company had placed her on FMLA leave). This issue is addressed in more detail in Chapter VI relating to medical certifications.

C. Deeming Eligible Issues

A number of commenters also addressed issues related to the provision in 29 CFR 825.110(d) deeming employees eligible for FMLA leave if an employer either fails to advise them of their eligibility status within the allotted time period, or incorrectly advises them that they are eligible when they have not satisfied the statutory requirements of 12 months of employment and 1,250 hours of service in the preceding 12 months.

One commenter stated that ''[t]he Supreme Court's decision in the

Ragsdale case casts grave doubt on the validity of other categorical penalties in the Regulations.'' National Coalition to Protect Family Leave, Doc. 10172A, at 13. It noted that a number of courts have struck down both the provision in section 825.110(d) stating that an employer may not later challenge an employee's eligibility if it mistakenly confirms that an employee is entitled to leave, and the provision deeming an employee eligible if the employer fails to notify the employee that the employee is not eligible prior to the start of leave (if the employer had advance notice) or within two business days of receiving notice. This commenter stated that it ''urges DOL to delete the language in section 825.110(d) that [the] federal courts have invalidated.'' *Id.* at 14.

Another commenter stated that, in light of the *Ragsdale* decision, the penalty provision for an employer's failure to timely notify employees that they are eligible for FMLA leave should be deleted; however, the regulation should continue to require that the employer notify employees whether they are/are not eligible, but either delete the consequences from the regulation or incorporate the interference/estoppel theory approved by the Supreme Court in *Ragsdale.* ''That is, if the employee can demonstrate that the failure to provide notice caused actual harm to the employee's FMLA rights the employer's notice failure is actionable interference.'' Carl C. Bosland, Esq., Preemptive Workforce Solutions, Inc., Doc. 5160, at 2–3.

Another commenter suggested that, if an employer has a handbook, bulletin board, orientation materials, etc., that show employees were provided information about the FMLA, which leaves are protected, and how to apply for protected leave, ''the employer should be exempted from consequences under this part of the act.'' Ken Lawrence, Doc. 5228, at 1.

Hewitt Associates noted that while equitable estoppel provides some guidance, it does not provide a rule. ''In fact, an employer that wishes to 'undeem' a leave is now required to make a subjective review of the employee's circumstances (if the employer knows them) and analyze whether it would be fair to revoke the designation. * * * [R]evoking § 825.110(d) allows employers to correct their errors by undesignating these leaves but, considering the analysis required, at an overly burdensome administrative price. The Department should craft a bright-line rule that balances the right of employers to revoke an 'inappropriate' FMLA designation, with fairness to employees who have relied upon that designation.'' Hewitt Associates, Doc. 10135A, at 10. This commenter suggested a rule that both allows employers to count the time that an ineligible employee is permitted to remain on leave against that employee's eventual 12-week entitlement, and gives employees a ''grace period'' to return to work (the length of which would turn on circumstances such as the length of time left in the leave, the reason for the leave, travel, etc.). The commenter also would require the employer to provide an ''immediate and thorough notification to the employee'' explaining that the employee was not eligible for leave, how the absences would be treated, the length of the grace period, etc. *Id.* at 11.

As discussed in detail in Chapter V, a substantial number of employers emphasized the difficult and time-consuming nature of making eligibility determinations, with regard to calculating both the number of hours worked in the past 12 months and the amount of FMLA leave used. They objected to any revision to the regulations that would require employers to provide periodic reports to employees about the amount of FMLA leave they have remaining. *See, e.g.,* United Parcel Service, Doc. 10276A, at 7–8. On the other hand, a few employers noted that they use payroll tracking systems that tell them whether employees are eligible for FMLA leave.

Other commenters emphasized the importance to employees of knowing promptly whether they are eligible for leave, and they suggested that the FMLA regulations should encourage employers to provide accurate, thorough and timely information about FMLA eligibility and procedures. As discussed in Chapter V, these commenters emphasized that many employees still do not know whether they are protected by the FMLA; they do not have information about their leave options; and they do not know whether their leave is being designated as FMLA leave. Therefore, a number of commenters suggested that the Department should consider regulations that require employers to provide notice to employees, when they have worked for one year and on an annual basis, explaining their eligibility status, their leave entitlement, and the procedures for applying for FMLA leave. *See, e.g.,* American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 40.

III. Serious Health Condition

The Department asked two questions in its Request for Information about the definitions of serious health condition contained at 29 CFR 825.114: (1) ''Section 825.114(c) states '[o]rdinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.' Have [the] limitations in section 825.114(c) been rendered inoperative by the regulatory tests set forth in section 825.114(a)?''; and (2) ''Is there a way to maintain the substantive standards of section 825.114(a) while still giving meaning to section 825.114(c) and congressional intent that minor illnesses like colds, earaches, etc., not be covered by the FMLA?''

The regulatory definition of serious health condition is central to the FMLA because the primary reason that people take FMLA leave is to attend to their own or a family member's health needs. *See* Westat, ''Balancing the Needs of Families and Employers, Family and Medical Leave Surveys, 2000 Update,'' January 2001, at 2–5 (hereinafter ''2000 Westat Report'') (83.3% of employees report ''own health'' or health of parent, child, or spouse as reason for taking leave); *see also* National Coalition to Protect Family Leave, Doc. 10172A, Darby Associates, Attachment at 10 (''The [employee's] own health * * * was the predominant reason for leave[.]'').[3] The Department received an overwhelming response to these questions. In order to fully understand these comments, though, and to give them some context it is necessary to explain the regulatory history of the definition of serious health condition.

A. History and Background

1. The Family and Medical Leave Act of 1993

Under the Act, an employee may be entitled to FMLA leave for any one of the four following reasons:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the

[3] Westat is a statistical survey research organization serving agencies of the U.S. Government, as well as businesses, foundations, and state and local governments. These surveys were commissioned by the Department of labor in 2000 as an update to similar 1995 surveys ordered by the Commission on Family and Medical Leave, which was established by the FMLA.

employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1). The Act defines a serious health condition as ''an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.'' 29 U.S.C. 2611(11). The term ''continuing treatment'' is not defined by the statute. The FMLA expressly grants to the Secretary of Labor the authority to ''prescribe such regulations as are necessary to carry out [the Act].'' 29 U.S.C. 2654.

The legislative history of the Act states that ''[w]ith respect to an employee, the term 'serious health condition' is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery.'' H. Rep. No. 103–8, at 40 (1991); S. Rep. No. 103–3, at 28 (1993). The scope of coverage intended by ''serious health condition'' is not unlimited, however:

> The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. * * * It is intended that in any case where there is doubt whether coverage is provided by this act, the general tests set forth in this paragraph shall be determinative.

Id. The House and Senate Committee Reports also list the types of illnesses and conditions that would likely qualify as serious health conditions:

> Examples * * * include but are not limited to heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.

H. Rep. No. 103–8, at 40 (1991); S. Rep. No. 103–3, at 29 (1993). The committee reports state, ''All of these conditions meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery.'' *Id.* The reports further explained that these covered conditions either involve inpatient care or significant continuing treatment. *See id.* (''For example, someone who suffers a heart attack generally requires both inpatient care at a hospital and ongoing medical supervision after being released from the hospital. * * * Someone who has suffered a serious industrial accident may require lengthy treatment in a hospital and periodic physical therapy under medical supervision thereafter.'').

Significantly, the committee reports characterize covered FMLA conditions as ones that are not only serious but also cause the employee to be absent from work: ''With respect to an employee, the term 'serious health condition' is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work[.]'' H. Rep. No. 103–8, at 40; S. Rep. No. 103–3, at 28. ''All of these health conditions require absences from work[.]'' H. Rep. No. 103–8, at 41; S. Rep. No. 103–3, at 29.

2. Department of Labor Regulations (1993–1995)

The Act, including the definition of serious health condition described above, was enacted on February 5, 1993. Congress gave the Department 120 days to promulgate regulations under the new statute. *See* 29 U.S.C. 2654.

Pursuant to the Act, the Department promulgated interim regulations on June 4, 1993, which became effective August 5, 1993 (the effective date of the Act). The Department then received public comments on the regulations and used the comments to further refine the regulations. Final regulations were issued on January 6, 1995. These final regulations, adopted pursuant to this notice-and-comment rulemaking, established the comprehensive framework that exists today for determining a serious health condition.

The final rulemaking yielded six separate definitions of serious health condition that exist today. A statutory definition of serious health condition that involved only two parts (inpatient care or continuing treatment) has thus been expanded to six separate and distinct regulatory tests for determining a serious health condition. Giving meaning to the broad and undefined statutory term ''continuing treatment'' presented a daunting task for the Department. Moreover, the Department had to be careful to ensure the definition covered every type of serious health condition that Congress intended to cover while not extending the Act's protections to those conditions Congress intended to exclude.

The first regulatory definition in the regulations is a stand-alone definition from the statute—''inpatient care (i.e., an overnight stay) in a hospital.'' This is followed by five separate definitions for ''continuing treatment,'' all of which also qualify as serious health conditions. *See* 29 CFR § 825.114(a)(1)–(2). One of these five definitions is ''incapacity due to pregnancy,'' which is a discrete definition clearly articulated in the legislative history (''ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, * * * the need for prenatal care, childbirth, and recovery from childbirth.'').

Of the four remaining definitions of serious health condition, stakeholders have focused significantly on one definition:[4]

(i) A period of incapacity of more than three consecutive calendar days * * * that also involves:

(A) Treatment two or more times by a health care provider * * * or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

29 CFR 825.114(a)(2)(i)(A)–(B). This is an objective definition of continuing treatment the Department established based in part on state workers' compensation laws and the Federal Employees' Compensation Act (''FECA''), which apply a three-day waiting period before compensation is paid to an employee for a temporary disability. *See* 60 FR 2180, 2192 (Jan. 6, 1995). ''A similar provision [to FECA] was included in the FMLA rules; a period of incapacity of 'more than three days' was used as a 'bright line' test based on references in the legislative history to serious health conditions lasting 'more than a few days.' '' 60 FR at 2192.

This objective test changed little during the rulemaking process despite the numerous proposed revisions submitted to the Department. These comments received in response to the interim regulations represented a multitude of permissible alternative directions the Department might have gone with this test, but were rejected as the Department adhered to its original

[4] Stakeholders did also comment significantly on the definition of a ''chronic'' serious health condition contained at 29 CFR 825.114(a)(2)(iii), which is discussed in Chapter IV.

standard, which is reflected in the current regulations stated above. It is worth examining what some of those comments were to the original rulemaking record to better inform the comments received to the current RFI.

First, several parties contended that the period of incapacity—whatever the exact length of days—should be judged by ''absence from work'' as opposed to calendar days. 60 FR at 2192. Some stakeholders to the rulemaking noted that the Department's proposed ''calendar day'' rule contradicted the legislative intent (reflected in the committee reports) that ''the employee must be absent from work for the required number of days[.]'' *Id.* at 2192. Another commenter noted that under the three-calendar-day rule, employers would have no way of verifying incapacity because a single absence on a Friday followed by a weekend of incapacity could qualify as a serious health condition. *See id.* Other commenters similarly favored the workday schedule because it was more compatible with other sick leave and short-term disability programs and ''removes any doubt as to whether an employee was otherwise incapacitated and unable to work during days the employee was not scheduled to work.'' *Id.* The Department originally chose ''calendar days'' in the interim regulations. After receiving comments, the Department chose, for two policy reasons, to retain calendar days as opposed to work days: ''The Department has * * * concluded that it is not appropriate to change the standard to working days rather than calendar days because the severity of the illness is better captured by its duration rather than the length of time necessary to be absent from work.'' *Id.* at 2195. The Department further explained: ''[A] working days standard would be difficult to apply to serious health conditions of family members or to part-time workers [who might be incapacitated but not necessarily absent from work].'' *Id.*

Second, there was also a broad range of suggestions as to what length or type of incapacity was appropriate for defining a serious health condition. Some comments rejected any fixed day limitation at all, stating that a minimum durational limit had been specifically rejected during a committee markup of the bill. *See id.* at 2192. Still others suggested that three days was ''unreasonably low and trivialized the concept of seriousness[.]'' *Id.* ''Fifteen commenters suggested extending the three-day absence period to 5, 6, 7, or 10 days[,] * * * two weeks[,] * * * or 31 days[.]'' *Id.* Other commenters suggested eschewing a strict day standard in favor of adopting each individual state's waiting period for workers compensation benefits or, alternatively, the EEOC's definition of disability. *See id.* at 2193. The Department rejected these various proposals in favor of its original standard: ''Upon review, the Department has concluded that the 'more than three days' test continues to be appropriate. The legislative history specifically provides that conditions lasting only a few days were not intended to be included as serious health conditions, because such conditions are normally covered by employers' sick leave plans.'' *Id.* at 2195.

The Department did make one change of note in the definition of serious health condition, however. After the 1993 interim regulations were promulgated, several commenters urged ''clarifications [that would] exclude from the definition [of serious health condition] minor, short-term, remedial or self-limiting conditions, and normal childhood or adult diseases (*e.g.*, colds flu, ear infections, strep throat, bronchitis, upper respiratory infections, sinusitis, rhinitis, allergies, muscle strains, measles, even broken bones).'' 60 FR at 2193. Still others suggested that the Department expressly list every ailment that would qualify as a serious health condition. *See id.* While the Department declined to provide a ''laundry list of serious health conditions,'' 60 FR at 2195, we did enumerate in the final regulations examples of ailments that customarily would not be covered by the Act: ''Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.'' 29 CFR § 825.114(c). This language would become the subject of much reported confusion in the regulated community (reflected in, among other things, the many comments on this subject submitted in response to the RFI).

3. Wage and Hour Opinion Letters

In 1995, shortly after the regulations became final, the Department provided its initial interpretation of the serious health condition objective test when responding to an employer's objections that the definition in sections 825.114(a)(2)(i)(A)–(B) did not reflect the intent of the Act's authors. The Department's response reflects an ongoing struggle to reconcile this objective test in the regulatory definition (more than three calendar days of incapacity plus treatment) with the legislative intent also reflected in the regulations that common conditions like colds and flus not be covered by the Act.

The Department's opinion letter response in 1995 stated that a minor illness such as the common cold could not be a serious health condition because colds were on the regulatory list of non-covered ailments. ''The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications).'' Wage and Hour Opinion Letter FMLA–57 (Apr. 7, 1995). More than a year and a half later, however, the Department reversed course, stating that Wage and Hour Opinion Letter FMLA–57 ''expresses an incorrect view, being inconsistent with the Department's established interpretation of qualifying ''serious health conditions'' under the FMLA regulations[.]'' Wage and Hour Opinion Letter FMLA–86 (Dec. 12, 1996). In the second letter, the Department stated that such minor illnesses ordinarily would not be expected to last more than three days, but if they did meet the regulatory criteria for a serious health condition under section 825.114(a), they would qualify for FMLA leave. Complications, per se, need not be present to qualify as a serious health condition if the objective regulatory tests of a period of incapacity of ''more than three consecutive calendar days'' and a ''regimen of continuing treatment by a health care provider'' are otherwise met. *See id.* In reversing its position in this second opinion letter, the Department explained that the regulations reflect the view that, ordinarily, conditions like the common cold and flu would not routinely be expected to meet the regulatory tests. But such conditions could qualify under FMLA where the objective tests are, in fact, met in particular cases. *See id.* ''For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, *e.g.*, a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying 'serious health condition' for purposes of FMLA.'' *Id.*

4. United States Court of Appeals Decisions

Employers challenged the Department's objective regulatory definition of serious health condition in two U.S. Courts of Appeals. In both cases, the regulatory test was upheld as a permissible legislative rule pursuant to a congressional delegation of authority under the Act. *See Thorson* v. *Gemini, Inc.,* 205 F.3d 370 (8th Cir. 2000); *Miller* v. *AT&T Corp.,* 250 F.3d 820 (4th Cir. 2001). The Eighth Circuit in *Thorson* found the statutory term ''serious health condition'' was not precisely defined in the statute and legislative history: ''[W]e do not see th[e] legislative history as Congress speaking 'directly' to the question of what constitutes a 'serious health condition.' '' *Id.* at 381. Thus, the court deferred to the Department's reasonable legislative rule implementing the statute: ''DOL's objective test for 'serious health condition,' which avoids the need for employers—and ultimately courts—to make subjective decisions about statutory 'serious health conditions,' is a permissible construction of the statute.'' *Id.* The Court acknowledged that this test might result in findings of serious health conditions for ''minor illnesses'' that Congress did not intend to cover, but that ''the DOL reasonably decided that such would be a legitimate trade-off for having a definition of 'serious health condition' that sets out an objective test that all employers can apply uniformly.'' *Id.*

The Fourth Circuit even more squarely and directly upheld the objective test in the regulations because the plaintiff in that case was suffering from the flu—an illness listed in the regulations at 825.114(c) (reflecting legislative history) as an example of an illness that is generally not a serious health condition. The Fourth Circuit directly confronted the tension between the objective test and the list of ailments:

> There is unquestionably some tension between subsection (a), setting forth objective criteria for determining whether a serious health condition exists, and subsection (c), which states that certain enumerated conditions ''ordinarily'' are not serious health conditions. Indeed, that tension is evidenced by Miller's illness. Miller was incapacitated for more than three consecutive calendar days and received treatment two or more times; thus, she satisfied the regulatory definition of a serious health condition under subsection (a). But, the condition from which Miller suffered—the flu—is one of those listed as being ''ordinarily'' not subject to coverage under the FMLA.

Id. at 831. The Court concluded—even without deferring to the second Wage and Hour opinion letter—that ''§ 825.114(c) is properly interpreted as indicating merely that common ailments such as the flu will not qualify for FMLA leave because they generally will not satisfy the regulatory criteria for a serious health condition.'' *Id.* at 832. However, ''[s]ection 825.114(c) simply does not automatically exclude the flu from coverage under the FMLA. Rather, the provision is best read as clarifying that some common illnesses will not ordinarily meet the regulatory criteria and thus will not be covered under the FMLA.'' *Id.*

Having concluded the objective test was the dispositive one, the *Miller* court, like the *Thorson* court, upheld the regulatory definition as consistent with legislative intent. The court noted that these regulations were promulgated pursuant to an express delegation from Congress and should be given controlling effect ''unless arbitrary, capricious, or manifestly contrary to statute.'' *Id.* at 833 (quotations omitted). The court stated that ''when a regulatory choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or the legislative history that the accommodation is not one that Congress would have sanctioned.'' *Id.* (quotations omitted). The court held that the Department clearly was within its statutory purview in this case, stating: ''Consistent with the statutory language, the regulations promulgated by the Secretary of Labor establish a definition of ''serious health condition'' that focuses on the effect of an illness on the employee and the extent of necessary treatment rather than on the particular diagnosis. This policy decision is neither unreasonable nor manifestly inconsistent with Congress' intent to cover illnesses that 'require[ ] that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery' and involve 'continuing treatment or supervision by a health care provider.' '' 250 F.3d at 835 (citations omitted). Finally, like the Eighth circuit, the Fourth Circuit noted:

> It is possible that the definition adopted by the Secretary will, in some cases—and perhaps even in this one—provide FMLA coverage to illnesses Congress never envisioned would be protected. We cannot say, however, that the regulations adopted by the Secretary are so manifestly contrary to congressional intent as to be considered arbitrary.

Id.

B. Request for Information Comments and Recommendations

The responses to the RFI demonstrate that the definition of serious health condition continues to be a source of concern in the regulated community in terms of its scope and its meaning. While the Department asked only two narrow questions about the objective test and the list of ailments, commenters to the Request for Information voiced a wide array of opinions about the regulatory test in general.

A common theme the Department heard from various parties was that the regulatory definition of serious health condition is vague and/or confusing. The American Academy of Family Physicians stated: ''The definition of a serious health condition within the Act creates confusion not only for the administrators of the program and employers but also for physicians. Requiring a physician to certify that a gastrointestinal virus or upper respiratory infection is a serious health condition in an otherwise healthy individual is incongruous with medical training and experience. * * * [Moreover, t]he categories of 'Serious Health Conditions' are overly complicated and * * * contradictory.'' Doc. FL25, at 1. The American College of Occupational and Environmental Medicine agreed: ''The term 'serious health condition' is unnecessarily vague. Employees, employers and medical providers would be well served if the FMLA were to more clearly define the criteria for considering a health condition serious.'' Doc. 10109A, at 2. Other commenters echoed this same concern: ''Uniformly, employers have found the definition of 'serious health condition' and the criteria for determining whether or not an employee has a 'serious health condition' to be extremely broad and very confusing.'' ORC Worldwide, Doc. 10138A, at 2. ''This [serious health condition] definition is widely considered to be vague and overly broad, and has caused unnecessary confusion.'' Florida Power & Light Company, Doc. 10275A, at 2. ''What constitutes a serious health condition? The definition is not clear.'' City of Philadelphia, Doc. 10058A, at 1. ''The current definition is so vague that it is nearly impossible to define a condition that does not qualify as a serious medical condition.'' Northern Kentucky Chamber of Commerce, Doc. 10048A, at 2.

Commenters often pointed to the language in section 825.114(c) regarding minor ailments as the primary source of definitional confusion. Whereas the first

part of the regulatory definition of serious health condition in subparagraph (a)(2) provides objective standards for leave (irrespective of the person's medical diagnosis) in terms of ''days'' and ''incapacity'' and ''health care provider'' visits, this language in subparagraph (c) suggests the opposite: excluding common illnesses by diagnosis/name without regard to seriousness. The American Bakers Association stated: ''[The definition of serious health condition] has also caused unnecessary confusion for employers who rely on regulatory language that states, 'Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease etc. are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.' 29 CFR 825.114(c).'' American Bakers Association, Doc. R354A, at 4. The Association of Corporate Counsel made a similar point: ''[T]he Department should clarify its guidance in section [825.114](c) on when conditions such as the common cold, the flu, earaches, upset stomach, minor ulcers, headaches, and routine dental or orthodontia problems could be considered as serious health conditions. The current regulation indicates that such conditions should not normally be considered serious health conditions.'' Doc. FL31, at 14.

Overall, it is probably fair to characterize the comments from employer groups about the regulatory definition of ''serious health condition'' as having written ''serious'' out of serious health condition. For example, the University of Minnesota stated:

> The current definition of ''serious health condition'' is broad enough to cover minor illnesses that were not intended to be covered by the Act. * * * The University's experience indicates that the regulatory tests set forth in section 825.114(a) of the FMLA regulations renders the limitations in section 825.114(c) inoperative. Specifically, the test set forth in section 825.114(a)(2)(i) (period of incapacity lasting more than three days) is broad enough to cover minor illnesses, like the ones referenced in section 825.114(c). Such minor illnesses are regularly the subject of FMLA leave requests. Because physician certifications seldom use terms like ''common cold'', ''upset stomach'', ''ear ache'', etc., the University does not feel it can deny the requests, even when the University is convinced the illness is minor. As indicated in section 825.114(c), such minor illnesses were not intended to be covered by the Act.

University of Minnesota, Doc. 4777A, at 1–4. ''Please redefine serious medical condition to cover truly serious needs, not the common flu.'' Debbie Robbins, Human Resources, City of Gillette, Doc. 5214, at 1. ''[T]he intent of the regulations was not to find conditions such as the flu, earaches, headaches, and upset stomach qualifying; however, as a result of DOL opinion letters it is practice for FMLA to be granted for these conditions when the regulatory criteria defining a serious health condition [are] met.'' Carle Clinic Association, Doc. 5449A, at 1. ''The DOL needs to limit the definition of serious health condition to what it was originally intended by Congress. For example, while a common cold or flu were never intended to be serious health conditions, in case law courts have essentially done away with all the exclusions from the original definition by stating that 'complications' (without defining this) could cause virtually anything (a cold, an earache, a cut on finger) to become a serious health condition.'' Coolidge Wall Co. LPA, Doc. 5168, at 1. ''As [the definition of a 'serious health condition'] has been interpreted, a common cold or flu bug lasting three days creates a FMLA qualifying event. * * * As it is, a 'runny nose' for three days would qualify as long as you saw the doctor for it. To call a 'common cold' a serious health condition significantly devalues the FML Act.'' Mark Costa, Human Resources Director, Team 1 Michigan, Doc. 5172, at 1. ''[T]he current Regulations seemingly extend coverage to considerably more than just serious health conditions and, in practice, the general definition often swallows up the so-called 'minor ailment exception.' '' Proskauer Rose LLP, Doc. 10182, at 5. ''Contrary to what Congress intended, the DOL regulation bypasses 'serious' in 'serious health condition' by assuming a condition is serious if an employee can get a physician to certify [that] he/she cannot work for three or more days and that he/she has seen a health care provider at least once and was prescribed continuing treatment by that health care provider, or that the employee has seen a health care provider twice regardless of whether any continuing treatment was prescribed.'' Southwest Airlines Co., Doc. 10183A, at 9.

The Department also received many comments from employees and employee groups, however, who felt that the objective test is a good, clear test that is serving its intended purpose. ''[T]he current regulations are crafted appropriately to provide guidance on what constitutes a serious health condition without imposing overly rigid criteria that could hinder the ability of workers to take leave when necessary.'' National Partnership for Women & Families, Doc. 10204A, at 7. ''[N]o definition, if it is to be effective, can impose precise categories for every health condition. The practical reality is that serious health conditions will differ from person to person. Thus, the regulations must necessarily have the flexibility to be applied to different individual circumstances.'' Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 4. A letter from 53 Democratic Members of Congress also lauded the current definition of serious health condition as both expansive and flexible. The letter cited congressional intent of a ''general test'' that defines serious health condition: ''We urge the Department to adhere to that test. Ultimately, Congress and the Department are not physicians, and we cannot evaluate every medical condition or necessary course of treatment. The presence of a serious health condition is something that is readily determined by medical professionals[.]'' Letter from 53 Democratic Members of Congress, Doc. FL184, at 2. ''To protect employers from employee abuse of this provision, the regulations establish an objective criteria to be used to determine whether conditions presented qualify for leave. This criteria creates a standard that can be applied in individual cases with sufficient flexibility to adjust for differences in how individuals are affected by illness. It also specifies that routine health matters cannot be considered serious health conditions, unless complications arise.'' Families USA, Doc. 10327A, at 3.

The AFL–CIO emphasized that the current objective test in the regulations best reflects congressional intent to cover health conditions that have a ''serious'' effect on the individual regardless of the label of the impairment or illness. *See* Doc. R329A, at 21–24. ''The regulations correctly do not define serious health condition by relying on nonexhaustive [e]xamples of serious health conditions that Congress provided in the legislative history to the Act * * * [but rather by defining] a serious health condition as an illness, injury or impairment, or physical condition that requires either inpatient care * * * or continuing treatment by a health care provider. * * * [W]e believe that the brightline tests set forth in Section 825.114(a) continue to provide the best means of determining what qualifies as a serious health condition.'' *Id.* at 22, 24 (quotation marks and

citations omitted). The Coalition of Labor Union Women concurred: ''Not only does this definition establish an objective basis for determining when an individual employee will and will not qualify for leave, but it also recognizes that every individual is different and thus likely to experience a particular medical condition differently from others. Our members have described various medical problems that affected them or their family members and reported how many supervisors or managers express a biased attitude toward these medical conditions based on a stereotypical view of the condition.'' Doc. R352A, at 3. Moreover, the Communication Workers of America provided a relevant example of a worker being uniquely affected by a common illness: ''An employee of Verizon experienced an extreme allergic reaction to poison oak which made it impossible for her to sit or perform regular job functions for a week. The FMLA protected her during this period.'' Doc. R346A, at 12–13.

Finally, the Legal Aid Society pointed out that after Wage and Hour Opinion Letter FMLA–86 (Dec. 12, 1996), the meaning of ''serious health condition'' should be perfectly clear to the regulated community. It simply may not be as ''serious'' as some would like:

> With all due respect, there should not be any significant confusion over this definition. It is clearly defined in the regulations. Perhaps the term ''serious health condition'' is somewhat of a misnomer because it may cause the uneducated employer to assume that the medical condition must be sufficiently grave to warrant leave. However, the educated and compliant employer will be familiar with this key regulation. Indeed, the regulations make this definition quite clear, and should be used as a road map for ascertaining whether a medical condition constitutes a ''serious health condition'' within the meaning of FMLA. Moreover, the regulations make it perfectly clear that an employer is required to ''inquire further'' should it need more information to make this decision.

The Legal Aid Society-Employment Law Center, Doc. 10199A, at 2.

There was also no shortage of answers to the two questions we asked in the RFI: whether the limitations in section 825.114(c) have been rendered inoperative by the regulatory tests set forth in section 825.114(a), and whether there is a way to maintain the substantive standards of section 825.114(a) while still giving meaning to section 825.114(c) and congressional intent that minor illnesses like colds, earaches, etc., not be covered by the FMLA. Below are some of the most common answers and suggestions we received.

1. Section 825.114(c) Imposes no Independent Limitation on Serious Health Condition and Therefore Need Not Be Changed

One common suggestion proffered for reconciling sections 825.114(a)(2) and (c) is to construe the list of ailments in subsection (c) as imposing no limitations on the definition of serious health condition. ''We do not agree * * * that Section 825.114(c) places 'limitations' on Section 825.114(a)'s regulatory tests.'' American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 21. The AFL–CIO noted that Congress did not express a specific intention to exclude ''minor illnesses like colds, earaches, etc.,'' but rather to exclude from serious health condition only ''short-term conditions [whatever named] for which treatment and recovery are very brief[.]'' American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 21 n.34 (quoting S. Rep. No. 103–3, at 28). Thus, ''subsection (c) [only] clarifies that certain conditions are not serious health conditions for FMLA purposes unless they meet all of the regulatory measures of subsection (a). * * * [T]hese examples do not modify or limit the objective tests set forth in subsection (a)[.]'' *Id.* at 23.

These commenters believe section 825.114(c) is merely an illustrative list of conditions that usually would not qualify as serious health conditions, but that the objective test is what matters and what is applied: ''Section 825.114(c) of the regulations includes a list of conditions that ordinarily would not be considered serious health conditions, such as the common cold, the flu, earaches, or an upset stomach. But the regulation on its face also makes clear that complications can arise to make what is usually a routine health matter much more serious.'' National Partnership for Women & Families, Doc. 10204A, at 8. ''The list of conditions set out in 825.114(c) is useful in setting out what 'ordinarily' would not be a qualifying serious health condition[.] * * * But the operative word in 825.114(c) is 'ordinary.' While these conditions would not 'ordinarily' constitute a serious health condition, there are extraordinary situations where these conditions do just that. In determining what those situations are, all employers have to do * * * is apply 'the general tests' * * * that were incorporated into the Department's regulations at 825.114(a).'' Association of Professional Flight Attendants, Doc. 10056A, at 2 (citations omitted). ''The existing regulations properly define 'serious health condition' by applying objective criteria, including the duration of an illness and the number of treatments, to a worker's individual case, rather than categorically excluding any set of health conditions from FMLA coverage.'' Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 3. ''As long as a diagnosis meets the 'objective criteria' of subsection (a), then subsection (c) makes it clear that the employee has a 'serious health' condition that qualifies for FMLA leave.'' American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 23.

This view, commenters maintained, is the correct interpretation of the Act: ''The statute itself recognizes the need for such flexibility. Congress expressly chose to forego excluding any conditions from the definition of a serious health condition and instead defined a serious health condition according to objective criteria.'' Women's Employment Rights Clinic, Golden Gate University School of Law, Doc. 10197A, at 5.

Commenters favoring a flexible definition of ''serious health condition'' generally believed no changes to the regulatory definition are necessary. ''In light of [our] experience, we do not believe that there is any need to retreat from the existing regulatory definition of a 'serious health condition.' '' Communication Workers of America, Doc. R346A, at 7. ''We urge DOL to retain the regulatory language in 29 CFR 825.114(a) and not to alter those provisions so that conditions like earaches, flus, and similar illnesses can never constitute a serious health condition.'' Women's Employment Rights Clinic, Golden Gate University School of Law, Doc. 10197A, at 5. ''We strongly oppose any efforts to restrict or narrow the definition of a serious health condition. The FMLA enables eligible workers to take family or medical leave for serious health conditions, and its regulations establish objective criteria to be used to determine whether conditions qualify for leave. While the regulations set parameters to help define serious health conditions, they do not include an exhaustive list of conditions deemed 'serious' or 'not serious.' '' National Partnership for Women & Families, Doc. 10204A, at 7. ''Imposing additional requirements on the nature or length of treatment, or the duration of incapacity, will inevitably exclude, with no basis whatsoever, serious medical conditions from the ambit of the FMLA. The Department should resist making any changes in the definition of serious health condition.'' American Federation

of Labor and Congress of Industrial Organizations, Doc. R329A, at 24. ''I strongly oppose any changes to eligibility standards that would impose additional barriers for workers seeking FMLA leave, [and] regulatory revisions that would scale back the definition of 'serious health conditions' covered under the act[.]'' Judith Stadman Tucker, The Mothers Movement Online, Doc. 4766, at 1. ''It is especially important to me that the definition of 'serious health condition' is not narrowed and that leave remains flexible.'' An Employee Comment, Doc. 4790, at 1. ''Altering the definition [of serious health condition to ten days or more] will leave out numerous serious conditions from pneumonia to appendicitis where a person could be treated and be back on the job under 10 days. We are concerned that altering the definition of a serious health condition will remove much needed job protection for millions of Americans when they need it most.'' Women's City Club of New York, Doc. 10003A, at 1. ''We are strongly opposed to any revisions to the regulation that would narrow the current definition. As the regulation is currently written, it adequately addresses the fact that some conditions (e.g., a head cold) can grow into a serious health condition needing repeated treatment and an absence from work of more than three days.'' University of Michigan's Center for the Education of Women, Doc. 10194A, at 1. ''Imposing categorical changes to the definition of serious health condition, such as increasing the required number of days of incapacity, could have a devastating impact on employees.'' Service Employees International Union District 1199P, Doc. FL104, at 2.

2. Section 825.114(c) Should be Converted into a Per Se Rule.

Other commenters took essentially the opposite tack: that the congressional intent to exclude minor illnesses (reflected in section 825.114(c)) has been rendered inoperative by the objective test and that the Department should breathe life into subsection (c) by making it more of a per se rule as it was interpreted by Wage and Hour Opinion Letter FMLA–57 (Apr. 7, 1995). Employers were largely in agreement that the regulatory list of ailments has been rendered inoperative: ''[T]he limitations in Section 825.114 (c) have been rendered inoperative by the regulatory test in Section 825.114(a) largely by the interpretation of the Department in holding that even minor illnesses can meet the definition of 'serious health condition.' '' ORC Worldwide, Doc. 10138A, at 2. ''Section 825.114(c) * * * has been rendered effectively inoperative by the regulatory tests set forth in Section 825.114(a). * * * Wage and Hour letter of interpretation of December 1996 expanding 'serious health condition' to include colds and flu further erodes Section 825.114(c)'s potency as a brightline standard for what does not constitute a 'serious health condition.' '' U.S. Chamber of Commerce, Doc. 10142, at 9. Some commenters pointed to legislative history from 1990–1991 that shows Congress expressly considered ailments like colds and flus and intended them not to be covered:

> The bill we are talking about requires medical certifications of serious illnesses. We are not talking about a child with a cold. We are not talking about a parent with the flu. We are talking about a child with cancer who must have radiation treatments. We are talking about an elderly parent recovering from a stroke who needs home care.

Pilchak Cohen & Tice, P.C., Doc. 10155A, at 8 (quoting Senate hearing). These commenters also cited to similar words spoken by a co-sponsor of the FMLA: ''We're talking about a seriously ill child, not someone who has a cold here.'' *Id.* at 8 (quoting statement of Senator Dodd at Senate hearing).

This group of stakeholders suggested that unless verifiable medical complications arise, the health conditions in the section 825.114(c) list—such as colds and flus—should never qualify as serious health conditions. ''[T]he easiest solution to this dilemma is to rescind opinion letter FMLA–86 and carve minor illnesses out of section 825.114(c). This carve-out should include a list of example ailments that do not qualify as serious health conditions absent serious complications—in much the same way opinion letter FMLA–57 attempted to do. This list should, at a minimum, include the common cold, the flu, earaches, an upset stomach, minor ulcers, headaches, routine dental or orthodontia problems, and periodontal disease.'' Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 2. ''[Fairfax County Public Schools] urges the department to return to its earlier interpretations, which emphasize that minor ailments do not qualify as 'serious.' Section 825.114(a) should be modified so that it no longer contradicts section 825.114(c). * * * Additional examples of minor, nonqualifying illnesses would be a useful addition to this subsection.'' Fairfax County Public Schools, Doc. 10134, at 1. ''[Section] 825.114(c) should be clarified in that even where the common cold results in more than three consecutive days of missed work or school, it is not considered incapacitating or otherwise within FMLA's protections.'' Pilchak Cohen & Tice, P.C., Doc. 10155A, at 9. The Pilchak law firm further reasoned that if a cold or flu became truly incapacitating, ''the illness would typically elevate to an ailment that is indeed within the FMLA's contemplation. For example, a common cold should never be an FMLA qualifying condition. However, if it progressed to pneumonia, then this is the type of incapacitating condition within the FMLA's contemplation.'' *Id.* at 9. ''The substantive standards of section 825.114(a) cannot be maintained while giving meaning to section 825.114(c), and the legislative intent that not all conditions are covered cannot be secured unless and until section 825.114(c) is revised to state that, 'Unless complications arise, the common cold, the flu, ear aches, upset stomach, periodontal disease, and similar conditions are not serious health conditions and do not qualify for FMLA leave.' Absent such a revision, the DOL must further define other terms in Section 825.114(c), such as 'treatment.' '' Fisher & Phillips LLP, Doc. 10262A, at 5. ''[W]hen Congress passed FMLA, its intent was not to cover short-term illnesses where treatment and recovery are brief. By listing examples of conditions that would generally qualify and conditions that would generally be excluded, employers could reduce the use of FMLA leave for minor conditions in which treatment and recovery are brief. The Department should generally exclude from the list of conditions minor conditions such as colds, minor headaches, and flu and provide an improved definition of 'chronic conditions.' '' National Business Group on Health, Doc. 10268A, at 2. *See also* Small Business Administration Office of Advocacy, Doc. 10332A, at 4–5 (collecting various proposals to exclude minor illnesses by name).

3. ''More Than Three Days'' Of Incapacity Should be Changed From Calendar Days to Work Days.

Another suggestion offered to give meaning to subsection (c) was to change the period of incapacity in the objective test from ''calendar'' days to ''business'' days. ''The current regulations of the Department of Labor allow for protected leave when there is a 'more than three-day incapacity,' this should be defined as a 'more than three-day absence from work.' '' Ken Lawrence, Doc. 5228, at 1. ''My suggestion is that FMLA leave should have a waiting period, just like a disability plan. * * * Most truly serious health conditions, as defined by the act, last longer than 5 consecutive

business days and would warrant the need for the employee to be absent from work.'' Cheryl Rothenberg, Human Resources Specialist, Doc. 4756, at 1. ''[W]e suggest * * * [u]sing work days, rather than calendar days allows the employer to have actual knowledge of the employee's incapacity * * * [I]t is difficult for the employer to verify employee incapacity over the weekend or to have knowledge sufficient to know that the employee might be in need of FMLA leave.'' Foley & Lardner LLP, Doc. 10129A, at 2. ''The current * * * 'more than three-day incapacity' * * * should be defined as a 'more than three-day absence from work.' '' Bob Kiefer, Baldor Electric, Doc. 5141, at 1. ''Redefine a period of incapacity to mean a period of more than five work days or seven consecutive calendar days, instead of the current just more than 3 days of 'incapacity, before an employee is qualified for FMLA leave.'' U.S. Chamber of Commerce, Doc. 10142A, at 9. ''We recommend that the definition be changed to 'three work days.' Health conditions that occur 'over the weekend' or other time off should * * * not be considered.'' Lorin Simpson, Manager of Operational Systems & Labor Relations, Utah Transit Authority, Doc. 10249A, at 1. ''[W]e request that the Department amend this provision to require an absence for a specified length of 'consecutive scheduled work days' rather than 'consecutive calendar days.' Employers are most likely to be unaware of employees' sicknesses over a weekend so when employees take FMLA leave at the beginning of a workweek, this places a hardship on employers. With this clarification, employers will have advance notice of an employee taking FMLA leave.'' National Business Group on Health, Doc. 10268A, at 7. ''[I]f the three-day standard is maintained, this should be defined as three scheduled work days[.]'' The Miami Valley Human Resource Association, Doc. 10156A, at 3. ''I think it would help if the criteria for incapacity were 5 work days as opposed to three calendar days. * * * [Five] days would be consistent with most short term disability waiting period requirements and with many waiting period time frames for indemnity payments for workers compensation. (Kentucky has a 7 day waiting period prior to the start of workers comp indemnity payments.)'' Sharon Pepper, Doc. 5325, at 1.

4. The ''Treatment Two Or More Times by a Health Care Provider'' Must Occur During the Period of Incapacity.

Many commenters suggested the Department maintain the substantive language of both regulatory sections but explicitly adopt a recent United States Court of Appeals interpretation of the regulations that the ''treatment two or more times by a health care provider'' in subsection 825.114(a)(2)(i)(A) must occur during the period of ''more than three days'' incapacity. *See Jones* v. *Denver Pub. Sch.*, 427 F.3d 1315, 1323 (10th Cir. 2006) (''[U]nder the regulations defining 'continuing treatment by a health care provider,' the '[t]reatment two or more times' described in 825.114(a)(2)(i)(A) must take place during the 'period of incapacity' required by 825.114(a)(2)(i).''). ''The Regulations need to be clarified to state that each examination must occur during the period of incapacity that has resulted in an employee's absence from work.'' South Central Human Resource Management Association, Doc. 10136, at 4. ''WMATA proposes that an individual's illness or incapacity require the treatments by a health care provider to occur during the period of incapacity (rather than, for example, weeks later) in order to qualify as a serious health condition.'' Washington Metropolitan Area Transit Authority, Doc. 10147A, at 2. ''We urge the Department to * * * require the employee or covered family member to be treated on two or more occasions during the period of incapacity and delete the reference to treatment on one occasion plus a regiment of continuing treatment.'' The Miami Valley Human Resource Association, Doc. 10156A, at 3.

5. The Period of Incapacity Should Be Increased From ''More Than Three Days'' to a Greater Number of Days

A number of stakeholders suggested reconciling the two regulatory provisions by simply tightening the requirements for qualifying for a serious health condition under the objective test. The primary suggestion (though by no means the only one) was to increase the minimum number of days an employee needs to be incapacitated to qualify for a serious health condition. Stakeholders suggested changing the current regulatory threshold of ''more than 3 days'' to as many as ''10 days or more.'' Miles & Stockbridge, P.C., Doc. FL79, at 2. ''I would like to see the definition changed to require someone to miss work for at least a full week before it would qualify as FMLA, requiring 4 full days is at least a start.'' Ed Carpenter, Human Resources Manager, Tecumseh Power Company, Doc. R123, at 1. ''[We] would recommend that the Department expand the more than three-day period in 825.114(a)(2)(i) to more than seven days. This would eliminate most minor illnesses and would also mirror more closely what employers have in their short-term and sick leave plans.'' ORC Worldwide, Doc. 10138, at 2. ''Increasing the time to at least five work days would help in eliminating some * * * minor illnesses from coverage. Thus, the burden on physicians and employers would be reduced without significant impact upon employees with a serious medical situation.'' American Academy of Family Physicians, Doc. FL25, at 1.

Oxbow Mining suggested that '' 'serious health condition' should be a period of incapacity of no fewer than ten (10) consecutive work days as defined by an individual's work schedule.'' Doc. 10104, at 1. The Society for Human Resource Management and the U.S. Chamber of Commerce both proposed that the required incapacity continue for a minimum of five business days or seven consecutive calendar days. *See* Society for Human Resource Management, Doc. 10154A, at 4; U.S. Chamber of Commerce, Doc. 10142A, at 9. ''MedStar Health requests that this regulatory test be modified to utilize a more than five calendar days of incapacity requirement.'' MedStar Health Inc., Doc. 10144, at 8. ''Incorporate a longer period for the time of incapacitation to five (5) days.'' Kim Newsom, Personnel Director, Randolph County, North Carolina, Doc. 4764, at 1. *See also* Edison Electric Institute, Doc. 10128A, at 3 (''In order to limit FMLA leave to those conditions that are truly serious in nature, we believe the regulations should require a period of incapacity of more than five calendar days, the length of a typical workweek, before the condition may constitute a serious health condition.'').

Other stakeholders suggested ranges in their comments. Foley & Lardner stated the Department should ''extend the number of days of incapacity required to qualify as a 'serious health condition[ ]' * * * from the current 'more than three day' period to five, seven or ten consecutive work days[, which] would exclude most common, non-serious conditions, such as flu, bronchitis, sinus infections and similar common illnesses.'' Doc. 10129A, at 1. The Proskauer Rose law firm advocated ''the extension of the three-day period of incapacity requirement to a five or ten day period of incapacity requirement.'' Doc. 10182, at 6. ''The definition should be revised so that the period of incapacity is at least five consecutive days or the average waiting period provided by employer short-term disability periods.'' Detroit Medical Center, Doc. 10152A, at 2.

IV. Unscheduled Intermittent Leave

The Department asked several questions in the Request for Information about the use of the FMLA for unscheduled intermittent leave.[5] This type of leave has long been a matter of particular concern for employers and employees alike, as shown by previous stakeholder input and public commentary presented during congressional hearings, as well as comments filed with OMB concerning the costs and benefits of regulations. The RFI sought comments on the following issues, among others:

- How the FMLA affects the ability of employers to enforce attendance policies;
- Whether unscheduled intermittent FMLA leave presents costs or benefits different from those associated with regularly scheduled leave;
- Whether the duration of FMLA leave affects the manner in which employers cover the work of employees taking leave;
- Whether and to what extent employees misuse unscheduled intermittent leave;
- How best to accommodate employers' operational concerns and employees' interests in legitimate unscheduled intermittent leave;
- Whether and to what extent concerns arise regarding employees not providing prompt notice when taking unscheduled intermittent leave;
- Whether and to what extent the use of unscheduled intermittent leave affects employee morale and productivity; and
- Whether the availability of intermittent leave reduces employee turnover.

Based on the number and tone of the comments the Department received, these questions, along with several related issues involving unscheduled intermittent leave, remain at the forefront of the debate regarding the FMLA and its regulations. The responses to the RFI generally fall into two categories: comments highlighting the disruption that unscheduled intermittent leave causes in the workplace, particularly when that leave is taken in a manner perceived by employers as ''abusive''; and comments emphasizing the importance of this kind of leave for workers with certain types of chronic ailments. For example, according to one law firm, ''[B]y far, the most problematic type of FMLA leave is unscheduled, intermittent leave due to chronic serious health conditions.'' Foley & Lardner LLP, Doc. 10129A, at 3.[6] Many employers echoed this view, indicating that unscheduled intermittent leave due to chronic conditions results in decreased productivity, is difficult to manage, and is ripe for ''misuse.'' Yellow Book USA assessed the effects of unscheduled intermittent leave as follows:

> The use of unscheduled, intermittent FMLA leave has a drastic negative impact on productivity and profits for employers. Larger employers, specifically, have a greater financial burden. Employers need to add additional staff in the Human Resources department to track the intermittent absence time used. Additionally, employers need to hire additional management staff to manage the employees on intermittent leave. Larger employers are forced to provide training to managers on a constant basis. Due to the unscheduled nature of intermittent FMLA leave, productivity is greatly impacted. The costs are many. Employers incur unexpected overtime costs, lost sales, missed deadlines, additional administrative costs and negative employee morale. From my experience, I can estimate that 30 intermittent FMLA leaves cost the company $40,000 annually.

Doc. 10021A, at 4; *see also* National Association of Manufacturers, Doc. 10229A, at 9–10 (''Intermittent leave is the point in the FMLA where all the unintended harmful consequences of the law come together to cause an economic nightmare for manufacturers: unchallengeable ailments, unassailable and unannounced absences, and unending burdens with no prospect of a remedy.'').

Offering a very different perspective, many employees and/or their representatives commented that intermittent leave is expressly permitted by the FMLA and that employees who experience unscheduled absences due to chronic conditions are precisely those most in need of the FMLA's protections. The AFL-CIO stated:

> Congress explicitly provided that employees have the right to take leave ''intermittently or on a reduced leave schedule when medically necessary.'' * * * The availability of intermittent leave is crucial for families who struggle to balance work and family demands and is necessary for employees who suffer from chronic health conditions or who must provide care for family members with chronic illnesses. Congress's concern in 1995 for the difficult choices employees must make when faced with a healthcare crisis is even more relevant today: A growing number of employees find themselves in the ''sandwich generation,'' faced with the dual responsibilities of caring for children and for elderly parents.

Doc. R329A, at 30. The Legal Aid Society's Employment Law Center shared similar concerns, asking the Department to ''please be mindful of the employee who, in an ideal world, would not suffer from such devastating illnesses that wreck havoc on their own lives. Employees, too, struggle with chronic and episodic illnesses. The FMLA was specifically designed to provide leave in these instances.'' Doc. 10199A, at 5.

The Association of Professional Flight Attendants described chronic health conditions typically causing episodic periods of incapacity as perhaps the most important FMLA issue for its members, making the following observation:

> Under [the employer's] no-fault absenteeism policy, these shorter, but perhaps more frequent and unscheduled absences are just as likely (and indeed more likely) to result in the kind of threat to an employee's job security that the FMLA was designed to protect against * * * But the availability of FMLA leave for chronic conditions resulting in episodic periods of incapacitation is of critical importance to flight attendants, in large part because of the environment in which they work.
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> * * *
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> Many workers suffer from a variety of incapacitating health conditions—*e.g.*, irritable bowel syndrome—that have required treatment over a long period of time, for ten or more years, and which result in periodic incapacitating episodes, but who are otherwise fully capable of performing even the most rigorous kind of work. It does no good to advise these employees, as [the employer] does, to apply for block leave under 825.114(a). While the employee can be expected to experience a number of

[5] Commenters tended to use the terms ''unscheduled'' and ''unforeseeable'' to mean essentially the same thing: arising suddenly and with little or no opportunity for advanced notice.

[6] Many of the same commenters who expressed concerns with unscheduled intermittent leave report little or no concerns with scheduled leave, even when taken intermittently. Sun Microsystems wrote:

> When an employee notifies his/her manager that he/she is going out on a planned, intermittent leave there is usually an opportunity to: review the employee's revised work schedule needs during this leave; identify the work load requirements during the leave; and determine the most effective way to get the work completed given the available resources. This is the optimal scenario whereby the employee and his/her manager have the opportunity to create a plan that meets both of their needs, the needs of other employees and provides a smoother transition for the employee. On the other hand, unplanned intermittent leave, which may be unavoidable with some medical conditions is a significantly greater burden on the employer and co-workers.

Doc. 10070A, at 2. *See also* City of Portland, Doc. 10161A, at 2 (''An employee who is absent for frequent short periods of intermittent leave presents far greater challenges, including last minute staffing adjustments, abuse of leave issues and negative impacts on employee morale.''). These differences are reflected in certain survey results from the Society for Human Resource Management, which found that ''71 percent of respondents stated that they have not experienced challenges in administering FMLA leave for the birth or adoption of a child [but] 60 percent of SHRM members reported that they experienced challenges in granting leave for an employee's chronic condition.'' Society for Human Resource Management, Doc. 10154A, at 2.

incapacitating episodes over the course of the year (as in the case of migraines), it is unlikely that any one episode would last for more than three days. But employees who suffer from these recurring bouts of the same incapacitating health condition (whatever its cause) are not like employees who suffer the occasional cold or flu. The few absences experienced as a result of such common illnesses (once every two or three years) are unlikely to jeopardize an employee's job. But for the employee who suffers from a chronic recurring condition, they could experience three or four or even five unplanned absences a year, and their jobs could be jeopardized—but for the enactment of the FMLA.

Association of Professional Flight Attendants, Doc. 10056A, at 7, 9.

As already mentioned in Chapter I, the Department received many comments to the RFI from employees discussing how they were able to take FMLA leave at crucial times in their work lives and how critically important they viewed the FMLA in providing them job security when they needed it most. At the same time, the Department received many other comments from employers discussing their perceptions that the FMLA at times creates situations where some employees can misuse the rights or privileges established under the FMLA. In this chapter, we address the various issues raised in the comments related to unscheduled intermittent leave in three parts. We begin by providing the statutory and regulatory background, addressing the concepts of chronic serious health conditions, intermittent leave, and leave that is not foreseeable. Next, we discuss comments concerning the workplace consequences of unscheduled intermittent leave, including scheduling problems where employees taking intermittent leave provide little or no notice, loss of management control resulting from perceived employee ''abuse,'' and the impact on employee morale and productivity. Finally, we examine comments addressing the benefits to employees of the availability of unscheduled intermittent leave.

A. Background

Employers and employees made frequent reference in their comments to coverage of chronic conditions under the definition of serious health condition. Both groups recognize that chronic conditions are a primary reason for unscheduled intermittent absence under the FMLA. Three legal concepts underpin the debate regarding unscheduled intermittent leave: Chronic serious health conditions, intermittent leave, and leave that is not foreseeable. Together, the interaction of these facets of the FMLA and its regulations give rise to the issues addressed in this chapter.

1. Chronic Serious Health Conditions

There is no definition or specific mention of a ''chronic'' serious health condition in the Act. The House and Senate Committee Reports do, however, refer to conditions where ''the underlying health condition or treatment for it requires that the employee be absent from work on a recurring basis * * * [A] patient with severe arthritis may require periodic treatment such as physical therapy.'' H. Rep. No. 103–8, at 40 (1991); S. Rep. No. 103–3, at 29 (1993). Because of this and other legislative history, the Department created a separate serious health condition definition (one of the six different definitions mentioned in Chapter III, which addresses serious health conditions) for ''chronic'' conditions. The interim 1993 regulations defined a serious health condition, in part, as a condition involving ''[*c*]*ontinuing treatment* by (or under the supervision of) a health care provider for a chronic or long-term condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days.'' 29 CFR 825.114(a)(3) (1993). ''Continuing treatment'' was further defined as:

(1) The employee or family member in question is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider or to a nurse or physician's assistant under direct supervision of the health care provider.

(2) The employee or family member is treated for the injury or illness two or more times by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider, or is treated for the injury or illness by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider—for example, a course of medication or therapy—to resolve the health condition.

(3) The employee or family member is under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured. Examples include persons with Alzheimer's, persons who have suffered a severe stroke, or persons in the terminal stages of a disease who may not be receiving active medical treatment.

Id. § 825.114(b)(1)–(3).

The preamble to the interim regulations explained the creation of a separate ''chronic'' serious health condition that does not involve incapacity per se:

Because the statute permits intermittent leave or leave on a ''reduced leave schedule'' in cases of medical necessity, it is also clear that the Act contemplates that employees would be entitled to FMLA leave in some cases because of doctor's visits or therapy—*i.e.*, that the absence requiring leave need not be due to a condition that is incapacitating at that point in time. Thus, the legislative history explains that absences to receive treatment for early stage cancer, to receive physical therapy after a hospital stay or because of severe arthritis, or for prenatal care are covered by the Act. Therefore, the regulations provide that a serious health condition includes treatment for a serious, chronic health condition which, if left untreated, would likely result in an absence from work of more than three days, and for prenatal care.

58 FR 31794, 31799 (June 4, 1993). The preamble also explained that for certain chronic conditions, continuing treatment can include continuing supervision, but not necessarily active care, by a health care provider:

For any condition other than one that requires inpatient care, the employee or family member must be receiving continuing treatment by a health care provider. * * * In addition, there was concern about persons who have serious, chronic conditions such as Alzheimer's or late-stage cancer, or who have suffered a severe stroke, who obviously are severely ill but may not be receiving continuing active care from a doctor. Therefore, the rule encompasses such serious conditions which are under continuing supervision by a health care provider.

Some may argue that this approach may encompass health conditions that are not really serious, while others may view the approach as excluding certain situations that were intended to require the granting of FMLA leave. However, the Department believes the regulation's definition is most consistent with the statute and legislative history.

Id.

Under the final 1995 regulations, a chronic serious health condition was defined as any period of incapacity or treatment for such incapacity that: (1) ''[r]equires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider''; (2) ''[c]ontinues over an extended period of time (including recurring episodes of a single underlying condition)'' and (3) ''[m]ay cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, etc.).'' 29 CFR 825.114(a)(2)(iii)(A)–(C). As restructured, the final regulation did not retain from the interim regulation the requirement that, but for treatment, more than three days of incapacity would result. Nor did it retain the requirement of ''continuing supervision'' by a health care provider, instead requiring only ''periodic visits''

to the health care provider. The final regulations also created separate categories of serious health conditions for conditions that are long-term and for which treatment is not effective, and for conditions that would likely result in a period of incapacity in excess of three days without treatment. *See id.* § 825.114(a)(2)(iv)–(v).

The Department described its treatment of chronic conditions as a reasonable approach to the unusual circumstances that surround chronic serious illnesses that often cause only episodic periods of incapacity:

> The Department concurs with the comments that suggested that special recognition should be given to chronic conditions. The Department recognizes that certain conditions, such as asthma and diabetes, continue over an extended period of time * * *, often without affecting day-to-day ability to work or perform other activities but may cause episodic periods of incapacity of less than three days. Although persons with such underlying conditions generally visit a health care provider periodically, when subject to a flare-up or other incapacitating episode, staying home and self-treatment are often more effective than visiting the health care provider (*e.g.*, the asthma sufferer who is advised to stay home and inside due to the pollen count being too high). The definition has, therefore, been revised to include such conditions as serious health conditions, even if the individual episodes of incapacity are not of more than three days duration.

60 FR 2180, 2195 (Jan. 6, 1995).

The Department explained in the preamble to the final rule the nature of the comments received on the interim rule that had prompted restructuring the portion of the definition addressing chronic conditions. Some had contended that the duration of the absence was not always a valid indicator of serious health conditions that are very brief (*e.g.*, a severe asthma attack that is disabling but requires fewer than three days for treatment and recovery to permit the employee's return to work), or that the duration is simply irrelevant if a condition is sufficiently severe or threatening. Additional comments contended that seriousness and duration do not necessarily correlate, particularly for people with disabilities; that a fixed time limit fails to recognize that some illnesses and conditions are episodic or acute emergencies that may require only brief but essential health care to prevent aggravation into a longer term illness or injury, and thus do not easily fit into a specified linear time requirement; and that establishing arbitrary time lines in the definition only creates ambiguity and discriminates against those conditions that do not fit the average. *See id.* at 2192.

A number of other comments stated that the interim rule definition was too restrictive and recommended that it be expanded to specifically include chronic illnesses and long-term conditions that may not require inpatient care or treatment by a health care provider. Other commenters took issue with the definition's characterization of ''continuing treatment'' for a chronic or long-term condition that is ''incurable,'' contending that curability is not a proper test for either a serious health condition or continuing treatment, that curability is ambiguous and subject to change over time, and that many incurable disabilities require continuing treatment that has nothing to do with curing the condition (*e.g.*, epilepsy, traumatic brain injury, and cerebral palsy, conditions for which training and therapy help restore, develop, or maintain function or prevent deterioration). *See id.* at 2193.

In response to the comments received, the Department also modified and separated the portion of the interim rule's definition pertaining to long-term conditions by deleting the reference to the condition being incurable. Instead, the Department required that the condition involve a period of incapacity that is permanent or long-term and for which treatment may not be effective, but for which the patient is under the supervision of a health care provider rather than receiving active treatment. ''Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.'' 29 CFR 825.114(a)(2)(iv). The Department also created a separate definition to address serious health conditions that are not ordinarily incapacitating (at least at the current state of the patient's condition), but for which multiple treatments are being given because the condition would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, and listed as example conditions ''such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), [and] kidney disease (dialysis).'' *Id.* § 825.114(a)(2)(v). Multiple treatments for restorative surgery after an accident or other injury were also specifically cited. The previous requirement that the condition be chronic or long-term was deleted from this section because cancer treatments, for example, might not meet that test if immediate intervention occurs.

Comments received from employers in response to the RFI emphasize how commonplace chronic conditions have become under the FMLA and how difficult it is for employers to determine or to monitor ''incapacity'' when self-treatment is involved. *See* United States Postal Service, Doc. 10184A, at 4, 8–9 (Out of ''1,077,571 instances where FMLA leave was requested and approved'' resulting in over 2 million hours of protected FMLA leave taken, ''leave taken intermittently for chronic conditions accounts for the largest category of FMLA conditions and constitutes almost 38% of all FMLA cases for 2006.''); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 15 (''Of the six situations that fall within the current definition of 'serious health condition,' the 'chronic' conditions create the most problems for employers[.] The Act was never intended to cover sporadic absences from work on a permanent basis for the entire work life of an employee.''); Brian T. Farrington, Esq., Doc. 5196, at 1 (''The most troublesome part of the current regulations is the definition of a 'chronic' health condition. Under the current regulation, the only right the employer has to challenge or question an employee claiming a chronic health condition under 29 CFR 825.114(a)(2)(iii) is to go through the process described in 825.307(a). Once the existence of the condition has been established, the employee can then take off any time, with little or no notice, claiming a manifestation of the chronic condition, and the employer is powerless either to verify or control that absence.'').[7]

2. Intermittent Leave

The second legal concept central to understanding the present debate regarding unscheduled intermittent leave is the increment in which employees may use leave. The Act provides for the taking of leave in small

[7] Other comments to the RFI suggest that the Department arguably has rendered the ''multiple treatments'' component of the definition of serious health condition—29 CFR 825.114(a)(2)(v)—unnecessary. *See, e.g.*, Association of Corporation Counsel, Doc. FL31, at 14 (''[T]he inclusion in 29 CFR 825.114(a)[2](v) of conditions that, if left untreated, could become serious is unnecessary and should be eliminated. Any period of absence needed to receive multiple treatments for a condition that could result in a period of incapacity for more than three days would likely fall under the definition of chronic health condition in section (iii). Indeed, the illnesses listed in the regulation (cancer, arthritis, and kidney disease) would be chronic health conditions.''); American Academy of Family Physicians, Doc. FL25, at 1 (''The categories of 'Serious Health Condition' are overly complicated and, in some cases, contradictory. For instance, category 6—'Multiple Treatments (Non-Chronic Conditions)' goes on to list as examples chronic conditions like cancer and kidney disease.'').

blocks, or intermittently, in certain situations:

> IN GENERAL.—Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 103(b)(5), leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

29 U.S.C. 2612(b)(1). Although the Act specifies that an employee's FMLA leave entitlement shall not be reduced ''beyond the amount of leave actually taken,'' it does not specify what increment can be used to measure that amount. As set forth in the final regulations: ''There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less.'' 29 CFR 825.203(d).

Comments submitted before the final regulations proposed a variety of changes to the rule, but none was accepted. Many comments from employers ''urged that the taking of intermittent leave in increments of one hour or less was too burdensome'' and attempted to limit the blocks of leave available to minimum amounts such as ''half-days (four hours) or full days[.]'' 60 FR at 2201. Still other commenters suggested ''that the amount of intermittent leave available be limited to four weeks of the 12 week total available in any 12 months.'' *Id.* at 2202. The Department rejected any minimum limitations on intermittent leave beyond the units of time captured by an employer's payroll system because ''it seemed appropriate to relate the increments of leave to the employer's own recordkeeping system in accounting for other forms of leave or absences.'' *Id.* The Department explained this position on the basis that the statute makes no provision for limiting the increment of leave and that ''otherwise employees could be required to take leave in amounts greater than necessary, thereby eroding the 12-week leave entitlement unnecessarily.'' *Id.* Moreover,

> [p]ermitting an employer to impose a four-hour minimum absence requirement would unnecessarily and impermissibly erode an employee's FMLA leave entitlement for reasons not contemplated under FMLA . . . . An employee may only take FMLA leave for reasons that qualify under the Act, and may not be charged more leave than is necessary to address the need for FMLA leave. Time that an employee is directed by the employer to be absent (and not requested or required by the employee) in excess of what the employee requires for an FMLA purpose would not qualify as FMLA leave and, therefore, may not be charged against the employee's FMLA leave entitlement.

Id. at 2236.

In rejecting a four-hour minimum for intermittent leave in the preamble to the interim regulations, the Department suggested that such a limitation was unnecessary. The Department stated: ''There are other protections for employers in the statute; for example, if leave is foreseeable, an employee is required to try to schedule the leave so as not to unduly disrupt the employer's operation[.]'' 58 FR at 31801. The Department further predicted that incidents of unscheduled intermittent leave would be unusual: ''[I]t is considered unlikely that an employee would have several short instances of intermittent leave on an emergency basis which qualify as serious health conditions.'' *Id.*. Thus, the Department did not envision how commonplace unscheduled intermittent leave would become, at least as is now reflected in many of the comments submitted in response to the RFI. For example, the United States Postal Service reported to the Department that, out of 179,370 FMLA certifications and 2 million days of FMLA protected leave in 2006, almost 38% of all leaves were chronic and intermittent, and ''76.8% of all FMLA leave hours associated with a chronic condition were unscheduled.'' Doc. 10184A, at 9.

3. Leave That Is Not ''Foreseeable''

The third facet of the FMLA that contributes to the issues concerning unscheduled intermittent leave is the concept of leave that is not ''foreseeable.'' The Act expressly provides than an employee must give 30 days notice if the need for FMLA leave is foreseeable. If 30 days' notice is not possible, the employee must give ''such notice as is practicable.'' 29 U.S.C. 2612(e)(2)(B).

The Department's regulations on foreseeable leave mirror this language:

> An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

29 CFR 825.302(a). The regulations then define ''as soon as practicable'' to mean ''as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case.'' *Id.* § 825.302(b). In the case of ''foreseeable leave where it is not possible to give as much as 30 days notice, ''as soon as practicable'' ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.'' *Id.* The regulations on unscheduled leave similarly require that ''an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case.'' *Id.* § 825.303(a). As with foreseeable leave where 30 days notice is not possible, ''it is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.'' *Id.*

Some courts have found the Department's regulations difficult to interpret:

> Except for the 30-day notice provision, [the regulations] do not clearly explain when leave is viewed as ''foreseeable'' or ''unforeseeable.'' For example, if an employee learns of the need for leave only a day before the workday begins is the need for leave viewed as ''foreseeable'' or ''unforeseeable''? What about a half-day? Or just two hours?

Spraggins v. *Knauf Fiber Glass,* 401 F. Supp. 2d 1235, 1239 (M.D. Ala. 2005); *see also Cavin* v. *Honda of Am. Mfg., Inc.,* 346 F.3d 713, 719 (6th Cir. 2003) (''The regulations do not so explicitly discuss employer notice procedures in the context of an employee's unforeseeable need for leave, noting only that when an employee requires emergency medical leave, an employer cannot require advance written notice pursuant to its internal rules and procedures.'').

In a January 15, 1999 opinion letter deriving from the regulatory language discussed above, the Department rejected an employer's attendance policy that ''assess[ed] points against an employee who fails to report within one hour after the start of the employee's shift that the employee is taking FMLA intermittent leave, unless the employee

is unable to report the absence due to circumstances beyond the employee's control.'' Wage and Hour Opinion Letter FMLA–101 (Jan. 15, 1999). The Department deemed this policy non-compliant, stating:

> The company's attendance policy imposes more stringent notification requirements than those of FMLA and assigns points to an employee who fails to provide such ''timely'' notice of the need for FMLA intermittent leave. Clearly, this policy is contrary to FMLA's notification procedures which provide that an employer may not impose stricter notification requirements than those required under the Act (§ 825.302(g)) and that FMLA leave cannot be denied or delayed if the employee provides timely notice (under FMLA), but did not follow the company's internal procedures for requesting leave.

Id. The letter went on to provide guidance regarding how the notice provision works:

> For example, an employee receives notice on Monday that his/her therapy session for a seriously injured back, which normally is scheduled for Fridays, must be rescheduled for Thursday. If the employee failed to provide the employer notice of this scheduling change by close of business Wednesday (as would be required under the FMLA's two-day notification rule), the employer could take an adverse action against the employee for failure to provide timely notice under the company's attendance control policy.

Id.

As a result of this letter, an employee must now be allowed two full days to report an unscheduled absence regardless of the facts and circumstances of the employee's individual case.[8] What began as an illustrative outer limit of one or two working days notice by the employee to the employer of the need for leave has in effect evolved into the rule that an employee with a chronic condition can miss work without notifying the employer in advance of the need for leave and, in fact, notify the employer of this event two days later. ''[The regulatory notice provisions have] been applied by the Department * * * to protect employees who provide notice within two days, even if notice could have been provided sooner under the particular facts and circumstances.'' National Coalition to Protect Family Leave, Doc. 10172A, at 27.

B. Workplace Consequences of Unscheduled Intermittent Leave

The comments received in response to the RFI reflect the tension and complexity surrounding the workplace issues related to unscheduled intermittent leave: tension because these issues ultimately require striking the appropriate balance between an employee's ability to take job-protected leave due to unforeseen circumstances and an employer's ability to schedule its work; complexity because reaching that balance also involves considering, at a minimum, the FMLA's notice provisions, the definition of ''chronic'' serious health condition, the minimum permissible leave increments, and the interaction between the FMLA and an employer's own attendance-related policies.

The Society for Human Resource Management commented on the effect of unscheduled intermittent leave on employers:

> Intermittent leave initially was intended to permit scheduled leave for planned medical treatments or physical therapy. Since the FMLA's enactment, however, regulatory interpretations of a ''serious health condition'' have brought many chronic conditions under that umbrella, thus enabling some employees to expand FMLA protections to the point of abuse * * * For instance, if an employee is approved for intermittent FMLA leave related to a chronic episodic condition for which there is no date certain when leave will be needed (arthritis and allergies), the employee may take unscheduled leave whenever s/he likes without further medical substantiation that the condition actually incapacitated the employee on each leave date. Under this frequent scenario, the employer has no ability to require confirmation that the employee was actually ill each time leave is taken. Conversely, if an employee attempts to take sick leave for a non-FMLA qualifying condition, the employer can require medical substantiation for each absence and can discipline the employee if medical or other substantiation for each absence is not provided, specifically based on employer policies.

Doc. 10154A, at 8.

In contrast, the comments submitted to the RFI on behalf of employee representatives suggested a markedly different view. For example, the AFL–CIO stated:

> [T]he regulations currently permit employers to discipline employees, even when they are eligible for leave, if they fail to follow the rules. Employees are required to make reasonable efforts to schedule intermittent leave so as not to ''disrupt unduly the operations of the employer.'' 29 U.S.C. 2612(e)(2)(a); 29 CFR 825.117. Employees must also give advance notice of thirty days before taking leave, or at least give notice as soon as practicable. 29 U.S.C. 2612(e)(2)(b) (2002); 29 CFR 825.302 (a)–(b). If an employee could have given proper notice but did not, the employer may delay the commencement of leave for thirty days until after notice. *See Gilliam v. United Parcel Serv., Inc.,* 233 F.3d 969, 971 (7th Cir. 2000) (employer entitled to delay leave 30 days where employee did not give notice of intent to take paternity leave until day after child's birth). *See also Kaylor* v. *Fannin Reg'l Hosp., Inc.,* 946 F. Supp. 988, 998 (1996) (''It is plaintiff's failure to adhere to the FMLA procedures for informing his employer of intermittent leave that is ultimately fatal to his claim.''). An employer may deduct points under an attendance control policy from an employee who could have given advance notice and failed to comply with FMLA regulations. Dep't of Labor Op. Ltr. FMLA–101 (Jan. 15, 1999).
>
> * * *
>
> There is no empirical evidence of widespread abuse of intermittent leave, and the current regulations provide employers with procedures to ensure that only eligible employees take intermittent leave, that the leave taken is medically necessary, and that leave is scheduled at convenient times and as far in advance as possible.

Doc. R329A, at 33.

The comments in response to the RFI focused on the following workplace consequences of unscheduled intermittent leave: (1) Scheduling problems caused by employee absences with little or no notice, (2) loss of management control, and (3) impact on employee morale and productivity. We address these issues in turn.

1. Scheduling Problems Where Employees Taking Intermittent Leave Provide Little or No Notice

A number of comments identify the root of the problems with unscheduled intermittent leave as the Department's interpretation of the notice requirement, particularly the amount of notice an employee must give to his or her employer when the employee seeks FMLA protection for unscheduled leave. *See, e.g.*, Southwest Airlines Co., Doc. 10183A, at 6–7; College and University Professional Association for Human Resources, Doc. 10238A, at 7–8.

As mentioned above, Wage and Hour Opinion Letter FMLA–101 interpreting the regulations at 29 CFR 825.302 and 825.303 has given rise to an understanding in the regulated community that employers (1) are prevented from disciplining any employee for failing to comply with a policy that requires advance notice of the need for leave and (2) are required to treat leave as FMLA-protected as long as the employee provides the employer with ''notice'' within two days after the

[8] As one commenter stated, ''Not only are employers'' routine call-in procedures subordinated to the FMLA rule allowing notice 'within one or two working days of learning of the need for leave' (29 CFR 825.303(a)), another provision of the FMLA regulations, 29 CFR 825.208(e)(1), expands the time period to allow an employee to notify the employer that his or her absence was FMLA-protected up to two days after returning to work, even if the employee could have followed normal call-in procedures or provided notice earlier. This is another procedure that makes no sense in the context of intermittent leave for a chronic condition.'' National Association of Manufacturers, Doc. 10229A, at 12.

absence. As explained by the National Coalition to Protect Family Leave:

The phrase ''as much notice as is practicable'' is not well-defined. The current phrase puts employers in the difficult position of having to approve leaves where questionable notice has been given. The current regulatory definition—within one or two business days—has been applied by the Department to both foreseeable and unforeseeable leaves, and to protect employees who provide notice within two days, even if notice could have been provided sooner under the particular facts and circumstances. *See* Opinion Letter No. 101 (FMLA) (1/15/99) (proposed attendance policy, which would require employees taking intermittent FMLA leave to report absence within one hour after start of employee's shift unless employee was unable to do so because of circumstances beyond employee's control, violated FMLA because employees have two days to notify employer that absence is for FMLA-covered reason).

National Coalition to Protect Family Leave, Doc. 10172A, at 27. *See also* Temple University, Doc. 10084A, at 6.

Employer commenters to the RFI were nearly unanimous in their understanding that the FMLA permits an employee to wait until two days after an absence to advise his or her employer of the need for FMLA leave. This understanding, according to the commenters, combines with other issues—*e.g.*, the definition of serious health condition, the minimum period for intermittent leave, and the inability to request additional medical information—to create a situation where employers lose much of their ability to manage their business:

The DOL regulations at 29 CFR 825.203 require employers to permit employees to take leave in the ''shortest period of time the employer's payroll system uses to account for absences of leave, provided it is one hour or less.'' Many employers have payroll systems capable of accounting in increments as small as six minutes. Tracking FMLA leave in such small increments is extremely burdensome—particularly with respect to exempt employees, whose time is not normally tracked. In addition, CUPA–HR members have had difficulties scheduling around intermittent leave because it is hard to find a replacement worker for small increments of time and the regulations do not require employees to provide any advance notice of the need for leave. The DOL Opinion Letter FMLA–101 (January 15, 1999) exacerbates this problem by stating that an employer must accept notice of need for leave up to two days following the absence. These problems are evidenced by the overwhelming majority of respondents to our membership survey that reported problems with FMLA administration. More than 80 percent of respondents reported problems with tracking intermittent leave and close to 75 percent reported problems with notice of leave and unscheduled absences.

College and University Professional Association for Human Resources, Doc. 10238A, at 7–8.

Throughout the comments, employers explained why they believe the ''two day rule'' is impractical and tantamount to eliminating the ability of employers to adequately staff their shifts and/or discipline employees for violating standard workplace rules. The ''two day rule'' is thus described as unworkable:

[T]he DOL's informal practice of allowing employees to give their employers notice of FMLA leave up to two business days after the fact facilitates abuse * * * [T]his ''two-day'' practice of the DOL is also an arbitrary, unreasonable standard[.] * * * The DOL's two-day notice practice is not a promulgated regulation or rule, and indeed the DOL's practice conflicts with the FMLA and DOL's own regulations[.] * * * The DOL's informal two-day notice practice improperly allows an employee to remain silent and provide no notice to his/her employer for up to two full business days, even when the employee has the knowledge and means to give timely notice to their employer. As such, the DOL's informal two-day notice practice is an arbitrary standard that fails to recognize an employer's legitimate operational need for timely notice and that contradicts with an employee's statutory duty to provide such notice as is practicable.

Southwest Airlines Co., Doc. 10183A, at 6–8.

Employers also identified as an area of concern the closely related issue of their inability to enforce routine call-in procedures. Section 825.302(d) of the regulations, which addresses the issue of advanced notice in the context of foreseeable leave, provides:

An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

29 CFR 825.302(d).

A comment from Wolf, Block, Schorr and Solis-Cohen identified what it believes to be the problems associated with section 825.302(d):

Another area of FMLA abuse involves the DOL regulations' limits on an employer's ability to require employees to comply with their customary call-out procedures. This is of particular concern for employees taking intermittent leave.

* * *

[Section 825.302(d)] has been interpreted by the DOL to limit an employer's ability to impose a call-in procedure (e.g. requiring employees to call in and report their absence within 1 hour of their start time) on employees who are absent from work for an FMLA related reason where the call-in procedure is more onerous [than] the verbal and written notice procedures set forth in 29 CFR §825.303. The inability of an employer to insist that employees on FMLA leave comply with a call-in procedure, such as in the previous example, invites abuse from employees who are medically approved for intermittent FMLA leave and, subsequently, give their employer little or no notice leading up to their sporadic absences.

Wolf, Block, Schorr and Solis-Cohen, Doc. 10093A, at 2.

Employers asserted that the call-in procedures, which are enforced routinely outside the FMLA context, are often critical to an employer's ability to ensure appropriate staffing levels. The Ohio Department of Administrative Services commented that:

Many state agencies have a call-in procedure that requires employees to personally call within a certain period of time prior to the shift if they will be unexpectedly absent that day. For agencies that employ this procedure, the advanced ''call-in'' serves as a crucial element of their attendance program, and enables the agency to adjust schedules and personnel to cover the absent worker's duties and responsibilities. This procedure is especially critical in institutional agencies that provide direct care and supervision of inmates or patients.

Doc. 10205A, at 3.

Employer commenters, however, were clear in their belief that the Department's interpretations have severely limited those employers who need to know in advance of any absence and have opened the door for misuse of FMLA leave:

[T]he current FMLA regulations reduce the effectiveness of [call-in procedures], as agencies are prohibited under the regulations from requiring advance notice of the employee's need for FMLA leave. Once an employee receives a certification for an ongoing chronic condition, leave can be taken on numerous occasions intermittently for the same condition and without advance notice. * * * This restriction leads to a greater potential for abuse, as employees may be tempted to use their certifications to justify tardiness. Current FMLA regulations require an employee to give notice of the need for FMLA leave ''as soon as is practicable,'' which usually means within a day or two of learning of the need for leave.

Id. See also National Association of Manufacturers, Doc. 10229A, at 4, 12 (''65 percent of the requests received for intermittent leave were made either on the day of the leave, after the leave was taken, or without any notice. * * * [E]mployees with unscheduled intermittent leave routinely ignore mandatory shift call-in procedures (even if they are fully able to comply), wait two working days, as permitted by 29

CFR 825.303(a), and then report their absence as FMLA-qualifying'').

Wage and Hour Opinion Letter FMLA–101, discussed above, allows employers to discipline employees for failure to follow employer notice policies only where those policies are less stringent than the FMLA's notice requirements.

> The employer, however, could impose a penalty, *i.e.*, assign points under its customary attendance control policy, in a situation where the employee was in the position of providing advance notice, absent extenuating circumstances, of the need for FMLA leave and failed to provide the notice in accordance with FMLA's requirements and the company's notification policy, if less stringent than FMLA's. Under this circumstance, the provisions of § 825.302(d) would not apply because of the employee's failure to provide timely notice based upon FMLA's requirements (§§ 825.302(a) and (b)).

Wage and Hour Opinion Letter FMLA–101 (Jan. 15, 1999).

This issue of an employer's ability to enforce its own notice policies for employees taking leave has been litigated in the federal courts with varying results.[9] Two appellate courts have addressed whether the application of employer policies requiring employees to notify a specific individual or office when requesting a leave of absence violates the FMLA and have reached differing results. In *Cavin* v. *Honda of America Manufacturing, Inc.*, 346 F.3d 713 (6th Cir. 2003), the U.S. Court of Appeals for the Sixth Circuit addressed an employer policy requiring an employee to formally request a leave of absence from a specified department within three workdays of the first day missed. The employee called daily to report his absences to the employer's security office, but failed to comply with the requirement to notify the correct department of his need for a leave of absence in a timely manner. The Sixth Circuit concluded that the employer's policy did not comply with the FMLA, holding that ''employers cannot deny FMLA relief for failure to comply with their internal notice requirements' as long as the employee gives timely notice pursuant to the FMLA. *Id.* at 723. In denying the employer's ability to enforce its workplace rule, the court determined that ''[i]n permitting employers to develop notice procedures, the Department of Labor did not intend to allow employers in effect to undermine the minimum labor standard for leave.'' *Id.* at 722.

In *Bones* v. *Honeywell Int'l., Inc.*, 366 F.3d 869 (10th Cir. 2004), the Tenth Circuit took a different approach, allowing an employer to enforce its own internal requirements governing whom an employee must contact regarding her absence. In *Bones*, the employee was terminated because she failed to report to work or to call her supervisor for three days. On the second day of her absence, she requested a leave of absence from the employer's medical department; the employer's policy, however, expressly stated that employees were required to follow the call-in procedure and that contacting the medical department was not sufficient. *Id.* at 875. The court did not directly address whether the employee had provided sufficient notice under the FMLA, finding that the issue had been waived. *Id.* at 877. The court went on to note, however, that ''Bones was terminated because she did not comply with Honeywell's absence policy; she would have been terminated for doing so irrespective of whether or not these absences were related to a requested medical leave.'' *Id.* at 878.

2. Loss of Management Control

Employers commented frequently regarding what they see as the difficulty in maintaining control over the workplace when, in the employers' view at least, employees ''abuse'' unscheduled intermittent leave in order to achieve some privilege or advantage to which they are not entitled. *See*, *e.g.*, National Association of Manufacturers, Doc. 10229A, at 4 (''As currently interpreted by DOL, the FMLA has become the single largest source of uncontrolled absences and, thus, the single largest source of all the costs those absences create: missed deadlines, late shipments, lost business, temporary help, and over-worked staff.''). The commenters assert that because employers' ability to use call-in procedures and other attendance control mechanisms is severely limited where the FMLA is involved, and because the FMLA allows few options for determining whether a specific instance of leave use is appropriate, situations arise where certain employees do as they wish, ignoring the employers' rules, schedules, and staffing decisions. As described by one attorney:

> In my practice, by far the biggest problem we face with the FMLA is intermittent leave * * * These employees typically use their intermittent leave in small increments day-to-day. Especially when based on the need to care for others or highly subjective factors, this leave is neither scheduled in advance nor susceptible of being scheduled. The end result is employees who, under the auspices of FMLA, we must * * * allow to come and go as they please without any regard for our business needs. From both a legal and practical point of view, the employer is at the mercy of the employee. As a practical matter, there is no effective or legally ''safe'' way for an employer to regulate or verify the legitimacy [of] an employee's use of intermittent leave.

Peter Wright, Esq., Doc. 4760, at 1.

One employer made the following observation:

> The most difficult and burdensome part of the FMLA is the intermittent FMLA. Many employees will request FMLA as soon as they are placed in the discipline system for attendance. Health care providers will complete the forms for some for any reason the employee requests. The provider does this in such a vague manner i.e. ''chronic condition, unknown or lifetime length, unknown frequency that may prevent them from coming to work, may cause them to be late leave early or not be able to attend without notice.'' This gives the employee the right to come and go as they please without giving the company the right to question or discipline.

FNG Human Resources, Doc. FL13, at 2.

Although not strictly limited to unscheduled intermittent leave use, a number of comments noted that employers cannot enforce their attendance policies—particularly ''no fault'' attendance policies—against employees on FMLA leave, which results in inconsistent treatment of those absent for non-FMLA-qualifying reasons. The Society for Human Resource Management summarized the issue:

> Moreover, some employers' sick or personal leave policies penalize repeated absences, even illness-related absences, which do not qualify for FMLA protection. (These are commonly called ''no-fault'' policies.) For a non-FMLA qualifying

[9] Cases addressing employer policies have involved three types of employer policies. The first group involves employer policies requiring the employee to report an absence within a specific time frame (frequently one hour prior to the start of the employee's shift). These types of employer policies present the clearest potential for conflict with the FMLA notice regulations. *Compare Spraggins* v. *Knauf Fiber Glass GmbH, Inc.*, 401 F.Supp. 2d 1235 (M.D. Ala. 2005) (holding that employer could enforce rule requiring employees to call in one hour prior to their shift unless it was impracticable for them to do so), *with Mora* v. *Chem-Tronics, Inc.*, 16 F.Supp. 2d 1192 (S.D. Cal. 1998) (holding that employer's policy requiring employees to call 30 minutes prior to the start of their shift, regardless of circumstances, conflicts with FMLA notice provision). The second group involves employer policies requiring employees to call a specific office or individual to report an absence. *See infra* (discussion of *Cavin* v. *Honda of Am. Mfg., Inc.*, 346 F.3d 713 (6th Cir. 2004), and *Bones* v. *Honeywell Int'l, Inc.*, 366 F.3d 869 (10th Cir. 2004)). The final group of cases involves employer policies applied during the course of an employee's FMLA leave. *See, e.g., Callison* v. *City of Philadelphia*, 430 F.3d 117 (3d Cir. 2005) (upholding application of employer policy requiring employees on paid sick leave to call in when leaving home); *Lewis* v. *Holsum of Fort Wayne, Inc.*, 278 F.3d 706 (7th Cir. 202) (upholding application of three-day no-call/no-show rule); *Gilliam* v. *UPS*, 233 F.3d 969 (7th Cir. 2000) (upholding application of three-day no-call rule).

condition, the employer can discipline and even terminate an employee who is repeatedly absent. This follows from the principle that regular attendance is generally required of every job and is essential to productive and smooth operations. With an FMLA-qualifying condition, however, the employer may not discipline the employee for any absences, no matter how frequent, unless and until the employee's leave entitlement is exhausted.

Society for Human Resource Management, Doc. 10154A, at 8.

The Edison Electric Institute was able to quantify the effect this position (and other FMLA-related positions) has had on its attendance:

In the year 1987 our sick leave usage averaged 89.2 hours per employee. In 1990 we implemented a No-Fault Modified Attendance Policy (point system) to control employee attendance. After the policy was in place for three years the sick leave usage dropped 70% (from 89.2 hours to 27.2 hours). However, since FMLA went into effect in 1993, sick leave usage has steadily increased each year. At the end of 2006 the average hours used per employee escalated to 78.2. This is a 188% increase over a thirteen year period. * * * We attribute most of this increase to the FMLA. Under the existing regulations 29 CFR 825.220(c) employers cannot use the taking of FMLA leave as a factor in employment actions, i.e., No-Fault Attendance policies.

Edison Electric Institute, Doc. 10010A, at 1.

The types of scenarios identified by employers as subject to ''abuse'' through the improper use of unscheduled intermittent leave include, among other things: (1) Employees using leave to cover for simple tardiness or a desire to leave work early, and (2) employees seeking to alter their work schedule through securing a different shift.

a. Arriving Late/Departing Early

Many employer commenters suggested that employees use unscheduled intermittent leave as a pretext to cover for their tardiness or to leave work early for reasons unrelated to a serious health condition. *See* Southwest Airlines Co., Doc. 10183A, at 4; Air Conference, Doc. 10160A, at 11 (''Under the current regulations, an employee could be tardy by nearly two hours every scheduled workday for an entire year and never exceed his allotment * * * [S]ome employees use this loophole to leave work early every day to be at home when their healthy children arrive home from school.''; ''[M]any employees use intermittent leave to cover for tardiness, creating a scheduling and attendance reliability issue for airlines.''); Cummins Inc., Doc. 10340A, at 2 (''Our payroll system allows for increments as few as three minutes, and one facility had over 200 incidents of three minute FMLA uses in 2005. We strongly suspect that our incidents of three minute FMLA leave are used to excuse tardiness rather than true FMLA leave.''); DST Systems, Doc. 10222A, at 1 (''Increasing increment allowed may reduce inappropriate use of the FMLA which can be misused for late arrivals/tardiness instead of a legitimate FMLA reasons.''); Methodist Hospital, Thomas Jefferson University Hospital, Doc. FL76, at 1 (''Having a major medical problem like surgery and receiving block time off without repercussion is not the issue. Intermittent leave on the other hand has created a hiding place for Employees who have absence issues. * * * Facilities are not looking to punish cancer patients who need chemotherapy on a weekly basis; we do need to question Employees that have intermittent problems on snow days when they call in for ''intermittent leave'' and hospitals have to struggle in providing last minute staffing.'').

b. Obtaining a Preferred Shift

A number of commenters stated that some employees misuse the FMLA rules to secure for themselves a preferred schedule in the form of a shift different from the one legitimately assigned by the employer. *See*, *e.g.*, Southwest Airlines Co., Doc. 10183A, at 2, 4 (''Far too many employees misuse unscheduled, intermittent FMLA leaves to set their preferred rather than assigned work schedules; to work shifts paying overtime but no show regular pay shifts; to get excused absences that would otherwise violate attendance rules; * * * FMLA usage plummets on December 25 Christmas Day each year when triple overtime is paid[.] * * * FMLA usage is near its peak the day before Christmas and jumps the day after, but somehow nearly all those employees who have been out on FMLA feel better on Christmas day and are able to come to work.''); Roger Bong, Doc. 6A, at 4 (''We even had one individual during our busy period of time (where overtime was abundant) come in four hours before the start of their shift (2 hours at double time and 2 hours at time and one half) and then at the start of their regular shift go home on FMLA. In that way she would earn seven (7) hours of pay and leave while not working the shift (2nd shift) that she hated.''); Air Conference, Doc. 10160A, at 4. (''[E]very airline has numerous examples of workers who bid a full-time, 40-hour week schedule, entitling them to maintain all corresponding full-time benefits, but who then cut short most work days with intermittent leave. In other instances, reservation agents have been known to miss their regular shift —forcing the carrier to call-in another worker with overtime pay— and then report into work later that day for an overtime shift that pays a higher premium.'').

A number of commenters expressed concern that compliance with the FMLA's intermittent leave provisions—particularly when taken for a chronic condition—often converted a full-time position into a permanent, part-time position:

DOL takes the view that an employee is entitled to an FMLA reduced schedule due to a serious health condition regardless of the fact that the condition is permanent and it is unlikely that the employee will return to full-time employment. (DOL Opinion Letter-97, July 10, 1998) If an employee has a reduced schedule with one full day off per week due to FMLA, this arrangement can go on indefinitely. This results, in effect, in the creation of a new part-time position * * *. [An employee can refuse] reasonable accommodation under the American[s] with Disabilities Act (ADA) but instead chose to continue with * * * reduced schedule under FMLA * * *. The regulations should not permit this.

Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A at 3. *See also* Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 4 (''The issue here is that some intermittent FMLA leaves almost default into light duty assignments because supervisors must reassign work that the frequently-absent employee is responsible for to ensure that deadlines are met and services are provided to customers.''); Madison Gas and Electric Company, Doc. 10288A at 2 (''Offering an employee the possibility of 12 weeks of intermittent, unscheduled absences makes the employer vulnerable to the discretion of the employee. An employee taking advantage of this provision can essentially work part-time, but reap the benefits of a full-time employee.''); Air Conference, Doc. 10160A at 11 (''Some employees use this regulation to effectively convert a fulltime position to part-time when part-time work is not otherwise available or to receive a shift which they do not have the seniority to hold under a collectively-bargained seniority system.'').[10]

[10] Several comments, in making this point, noted that it is possible for a ''full-time'' employee to use FMLA leave intermittently under these circumstances and not exhaust his or her yearly leave entitlement. For example, 12 weeks times 40 hours per week = 480 hours of intermittent FMLA leave entitlement per year, divided by 52 weeks = 9.2 hours of intermittent FMLA leave per week, divided by 5 days per week = 1.8 hours per day.

Comments from the University of Minnesota noted similar problems:

Dealing with such situations is extremely difficult. Supervisors do not know if the employee will come in to work on any given day. They do not know if the employee will work an entire shift. Employees will simply notify their supervisors, in many cases after the fact, that they have experienced symptoms and cannot come in to work, or must leave work early. A comment by a supervisor regarding a performance issue may result in the employee excusing himself/herself for the rest of the day. Without proper notice, a supervisor cannot make plans for a replacement * * *. Nonetheless, the current statutory and regulatory provisions provide employers with few options.

University of Minnesota, Doc. 4777A, at 2.

3. Impact on Employee Morale and Productivity

A very large number of comments addressed the effect that the FMLA (and unforeseeable intermittent leave in particular) has had on employee morale. The Department received comments emphasizing the positive aspects of the FMLA on employee morale and retention, as well as the negative impact on employee morale and productivity.

a. Viewpoint: the FMLA Improves Employee Morale and Retention

Most of the comments addressing the FMLA's positive impact on employee morale focus on the FMLA generally. Several of the commenters who described the FMLA's positive impact on morale relied on the 2000 Westat Report. *See, e.g.*, Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A at 8 (''The 2000 Westat Study found that 89% of employers reported that the FMLA has had either a positive or neutral effect on employee morale. The survey also reported that, of those who have taken on added duties when a co-worker has taken FMLA leave, over four in five (85%) say the impact on them was neutral or positive.''); The Human Rights Campaign, Doc. 10179A, at 2 (same); 9to5, National Association of Working Women, Doc. 10210A, at 2 (''And more than 4 in 5 employees who have taken on added duties when a co-worker has taken FMLA leave say that the impact on them was neutral or positive.'').

According to the Women's Employment Rights Clinic:

Studies clearly suggest that workplace flexibility, such as leaves for family obligations, increases employee retention * * *. [O]ther findings ''strongly suggest that employers who provide greater opportunities for flexible work arrangements, have supervisors who are more responsive to the personal and family needs of employees, and create a workplace culture that is more supportive of the worklife needs of employees have employees who are more satisfied with their jobs, more committed to their employers, and more likely to plan to stay with their current employers. Interestingly, none of these work-life supports necessarily impose direct costs upon employers, in contrast with conventional benefits.''

Doc. 10197A, at 7–8 (citation omitted). *See also* Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 8 (''The law promotes workforce stability by helping employees retain their jobs when an emergency strikes. We believe the FMLA is essential to greater employee retention and to reducing employee turnover, and it is crucial to preserve FMLA's protections in their entirety.'').

A number of commenters focused on the benefits directly enjoyed by the employer:

Based on recent research, it is clear that the FMLA contributes to a more stable economy and workforce by helping employers retain their employees and reduce turnover. In the 2000 Westat study, 98 percent of employees taking FMLA leave returned to work after taking that leave. And of the employers who experienced cost savings due to the FMLA, more than three-quarters attributed their savings to decreased turnover. The Employment Policy Foundation reports that the average cost of employee turnover is 25 percent of an employee's total compensation. Not only does the FMLA support families, it also supports businesses. The FMLA has reduced these costs by creating an effective mechanism for employees to retain their jobs.

Families USA, Doc. 10327A, at 6 (footnotes omitted). *See also* The Human Rights Campaign, Doc. 10179A, at 2 (''Many companies and states know from experience that providing a safety net for all families is a good business decision.''); 9to5, National Association of Working Women, Doc. 10210A, at 2 (''The Family Medical Leave Act is a win-win for employees and employers.'').

Several comments from employees opined that the causes of decreased employee morale are not so much the result of the FMLA, but rather the employer's failure to manage effectively:

The primary method for covering for employees on FMLA leave is to assign their work to co-workers. Reportedly, this method of getting the work done has a negative affect on the morale of the employees who pick up the slack for their absent co-workers. Employers should not rely on co-workers to cover for absent employees as a matter of course. Rather, co-workers should be used to pick up the slack when no other option is available. Most employees will need to take FMLA leave at some point during their career, and good management practices dictate that employers recognize this eventuality and plan for it.

Center for WorkLife Law, Doc 10121A, at 7.

b. Viewpoint: Unforeseeable Intermittent Leave Negatively Affects Employee Morale and Productivity

In contrast to the comments emphasizing the morale-related benefits of the FMLA generally, several employers commented that when co-workers perceive employees to be ''abusing'' the FMLA, morale and productivity suffer. As described by the Pennsylvania Turnpike Commission:

FMLA leave when abused/misused affects morale negatively. We have received phone calls from both employees and managers who are frustrated that an employee(s) at their work location call off for FMLA so they can be off for holidays and weekends. These call-offs may interfere with another employee's vacation request, requiring them to come to work while another employee uses their FMLA. We have heard these type of holiday/vacation FMLA requests called ''get-out-of-jail-free'' cards because there is no recourse that we have as an employer to enforce these types of abuses/misuses of leave. Employees will request a vacation day, and if that request is denied, they often call in sick for FMLA that day. Some employees have even bragged to others how easy it is to get the extra time off and how they use this time for vacation or other non-FMLA reasons.

Doc. 10092A, at 8. *See also* Dover Downs Hotel & Casino, Doc. 10278A, at 2 (''Here is an example of what occurs on a REGULAR basis. An employee requests a vacation at the last minute as she received an unexpected invitation for a week at the beach. The manager denies the request, citing the numerous others who were granted vacation for the week in question. The manager simply cannot afford to allow one more person to take that week off as it would incur overtime for others to cover for this one. This employee chooses to head to the beach anyway and calls the manager, citing only those magic words 'FMLA'. In this true scenario, we were inconvenienced—as were the employees who had to work overtime to pick up extra hours to cover for this employee.'').

This sentiment is echoed in the comments of the National Coalition to Protect Family Leave:

The Coalition believes that the availability of FMLA leave can increase morale in the workplace, if the leave is used in accordance with the spirit and intent of the Act. Employees who take FMLA leave are generally satisfied, for not only are the employees able to retain their benefits, but

they also have job security. However, FMLA can also lead to low morale and decreased productivity in the workplace. When employees take unscheduled intermittent leave and even scheduled leave in large blocks of time, the morale and productivity may decline for the remaining employees. The employees who report to work must cover for their colleagues who take FMLA leave, often resulting in overtime. Both employers and employees have expressed concerns regarding the abuse of FMLA leave and, thus, the employees who report to work are the ones who suffer.

Doc. 10172A, at 51. *See also* Bendix Commercial Vehicle Systems, Doc. 10079A, at 4, 11 (''[FMLA leave] has a positive impact when it is believed to be used appropriately; however, when it is believed to be being abused, it has a very negative [effect]. It can build animosity towards coworkers for not pulling their weight, towards the employer because we are allowing the employee to abuse the FMLA and won't do anything about it.''; ''This means that coworkers have to be asked to do more to cover for the person who took the intermittent FMLA. This can create morale issues—employee not pulling their own weight.'').

Some employers report that employees themselves also identify morale issues associated with their co-workers' use of FMLA:

There is a menacing, intangible cost to abuse of intermittent FMLA: it wears out fellow employees who must cover shifts and trips for those abusing FMLA. It dampens workplace morale and teamwork * * *. In 2006, Southwest employees * * * were asked what one thing they would change * * *. In response, employees provided hundreds of unsolicited comments about FMLA abuse and its negative [effect] on morale.

Southwest Airlines Co., Doc. 10183A, at 6.

Morale—Employees that are not utilizing the unforeseen, intermittent leave report feeling cheated. They come to work on time and work 40 hours each week. When they need time off, they utilize their vacation time. They also report that employees on unforeseen, intermittent leave indicate that they can and will abuse the system when they want to. As a result, more and more employees are applying for unforeseen, intermittent leave so they can take time off of work whenever they choose.

Yellow Book USA, Doc 10021A, at 1. *See also* An Employee Comment, Doc. 136, at 1 (''We have a serious problem with this where I work. There are several people who do take advantage of the system to the point where it is a problem for the other workers. There is no way for them to stop or control this either as they call in for 2 days, then are back before required to bring in a doctor's excuse.'').

Other commenters addressed the perception of ''abuse'' of the FMLA by leave-takers or the overall ''costs'' of the FMLA. A postal employee commented ''it seems to me many employees abuse the system * * *. I don't think the employees lie about illnesses, but they milk the system to stay home as much as possible.'' An Employee Comment, Doc. 188, at 1. An employee at a unionized factory commented that he had witnessed ''a lot of abuse'' of FMLA which created morale issues as well as additional costs to the company. An Employee Comment, Doc. 195, at 1. However, an employee in the transportation industry noted, ''I do see people occasionally abuse sick leave but those people would abuse it regardless of FMLA.'' An Employee Comment, Doc. 4684, at 1.

Several commenters contended that misuse of intermittent leave has a negative effect on employee retention and turnover. For example:

[I]t is common that morale problems begin to appear among the employees (collectively and individually) who are left to deal with an ''intermittent'' abuser in their production area and have to continually pick up the slack; however, while this last group may perhaps receive some benefit via overtime as a result, the more common result is diminishing morale which often results in increased turnover.

Krukowski & Costello, S.C. (on behalf of Legislative Committee of the Human Resource Management Association of Southeastern Wisconsin), Doc. 10185A, at 8.

Additional comments in response to the RFI described the impact of unforeseeable intermittent leave on employee morale:

[T]he availability of FMLA improves the morale of the employees that use it, while negatively affecting the employees who do not. Everyone knows the day may come when we all may need to use it; however, the fact that every individual has the ability to be certified and then be able to miss up to twelve weeks in a twelve-month period is very disheartening. There are individuals who will exhaust the twelve weeks and then miraculously can come to work everyday thereafter and once eligible, complete a new certification and start the [vicious] cycle all over again. We have no evidence that it improves employee retention, however, employees that already have attendance problems find themselves with a serious health condition and are then able to continue to miss work but are able to be excused instead.

AM General LLC, Doc. 10073A, at 2–3. *See also* Spencer Fane Britt & Browne LLP, Doc. 10133C, at 19–20.

C. The Importance of Unscheduled Intermittent Leave to Employees

Many commenters addressed the need for unscheduled intermittent leave. For example, one commenter described her personal experiences with her daughter's chronic, serious health condition:

My daughter had a major asthma attack which caused a bronchial infection, swelling and bacteria in her throat * * *. [N]one of my daughter's doctors have told her how many times she needed to see them. I'm quite sure if they knew the answer, it would have been written * * *. No one is capable of predicting an asthma attack or the severity of the attack; I just would like the assurance of knowing that if or when the situation should arise, I have the time off required to handle her needs without the threat of being * * * terminated.

An Employee Comment, Doc. 4395, at 1. Another commenter described her experience:

In 2003, my mother was diagnosed with end stage renal failure and had to immediately begin receiving dialysis treatments three times a week. Since then, I have been working a reduced work schedule which allows me to be able to help my mom with transportation to/from her treatments, doctor appointments, errands, etc. * * *. I was so thankful when my employer informed me of this law because it gave my mom peace of mind knowing that I would be available for her when she needed me. By me working only 32 hrs a week, instead of the normal 40 hr workweek, I have been able to act [as] an advocate/liaison for my mom with all of her doctors, specialists and treatments that she's had to endure. Most importantly, it has allowed for my mom to feel independent with my help. I know that if the FMLA act [wasn't] around, I would be losing a lot of time and money with my employer and my mom would probably be a burden to the society and maybe even be living in a rest home somewhere * * *. My mom will need dialysis treatments indefinitely but I end up taking leave without pay for most of the year[.]

An Employee Comment, Doc. 4773, at 1.

The AFL–CIO comments also included statements from individual employees detailing the importance of intermittent FMLA leave to affected workers:

Many of the responses to Working America's 2007 online survey on FMLA stressed the importance of intermittent leave. A Human Services Supervisor in Easton, Pennsylvania, relied on intermittent leave to care for his terminally ill father:

By using the intermittent leave provisions of FMLA, I was able to help care for my Dad in the final stages of his terminal cancer, in his own home. I was grateful that he was able to spend his last days in the comfort of his house, as he desired, while I was able to maintain my employment status, which I desperately needed for my own family. Weakening this law, will only lead to the

further breakdown of already stressed family support systems.

A payroll and benefits administrator in Euclid, Ohio also cares for a sick parent:

My mother suffered a severe stroke 4 years ago. I use FMLA time to care for her at home and keep her out of a nursing home. I have two siblings who help with her care, so I only have to take intermittent leave. It's hard enough to care for a disabled parent without having to worry about losing your job * * *. It would break my heart and my mother's if I had to put her in a nursing home. The government should be finding ways to make it easier to take this leave, not make it harder.

American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 30–31 (citation omitted).

The Center for WorkLife Law expressed its belief in the importance of unforeseeable intermittent leave for chronic conditions to working Americans:

Recent studies show that 65 percent of families with children are headed by two working parents or a single parent. One in four employed men and women has elder care responsibilities and one in 10 employees is a member of the ''sandwich generation'' with both child care and elder care responsibilities. For those working caregivers with a seriously ill child or family member, medical emergencies are a way of life. Intermittent FMLA leave allows these employees to be available to their families when they are needed most without the stress of losing their jobs. We cannot emphasize strongly enough that the availability of intermittent FMLA leave is critical for eligible employees caring for an ill child, spouse or parent with a serious chronic illness.

Doc. 10121A, at 5 (emphasis in original) (footnotes omitted).

V. Notice: Employee Rights and Responsibilities

The Department noted in its Request for Information that one consistent concern expressed by the employee representatives during stakeholder meetings was that employees need to be better aware of their rights under the FMLA. Awareness of FMLA rights and responsibilities is critical to fulfilling the goals of the statute, yet it has been a challenge since the inception of the FMLA. Employees learn of their rights and responsibilities through the notice provisions of the FMLA and its implementing regulations. The Department sought information in response to several questions concerning the notice provisions and how those provisions relate to employee awareness of their rights and responsibilities:

- Whether employees continue to be unaware of their rights under the Act and, if so, what steps could be taken to improve this situation.
- The Department noted that employers have reported that some employees do not promptly notify their employers when they take unforeseeable FMLA leave and requested information on the prevalence and causes of employees failing to notify their employers promptly that they are taking FMLA leave and suggestions as to how to improve this situation.
- What methods are used to notify employees that their leave has been designated as FMLA leave? What improvements can be made so that employees have more accurate information on their FMLA balances?
- Does the two-day timeframe for providing notification to employees that their FMLA leave request has been approved or denied provide adequate time for employers to review sufficiently and make a determination?

A. Background

The Act places notice obligations on both employers and employees. The notice provisions are scattered throughout the regulations, which further define the statutory requirements and also include additional notice obligations.

1. Employer Notice Requirements

The FMLA mandates that covered employers affirmatively notify their employees of their rights under the Act:

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge.

29 U.S.C. 2619(a). ''Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.'' 29 U.S.C. 2619(b).

In addition to the statutory posting requirement, the Department of Labor regulations flesh out employers' obligations to inform employees of their FMLA rights and responsibilities. *See generally* 29 CFR 825.300–825.301. In addition to repeating the statutory requirements, section 825.300 of the regulations requires some degree of bilingual or multilingual notice: ''Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in which the employees are literate.'' 29 CFR 825.300(c).

Section 825.301 sets forth additional employer notice requirements, requiring the inclusion of information on the employee's FMLA rights and responsibilities and the employer's policies regarding the FMLA in the pertinent employee handbook or through other means if the employer does not have such formal written policies. 29 CFR 825.301(a)(1)–(2).

The notice requirements set forth in section 825.301 derive from notice provisions found throughout the regulations. Within a reasonable time after the employee has provided notice of the need for leave, the employer shall provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining the consequences of a failure to meet these obligations. The written notice must be provided in a language in which the employee is literate and must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see § 825.310);

(vi) the employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see Sec. 825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see § 825.214 and 825.604); and

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

29 CFR 825.301(b)(1). ''The specific notice may include other information—*e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so.'' 29 CFR 825.301(b)(2). ''The notice shall be given within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible.'' 29 CFR 825.301(c). The written notification to the employee that

the leave has been designated as FMLA leave ''may be in any form, including a notation on the employee's pay stub.'' 29 CFR 825.208(b)(2).

2. Employee Notice Requirements

The FMLA also imposes a requirement on employees to notify their employers of the need for FMLA leave. The statute requires that in the case of foreseeable leave due to the birth of a son or daughter or the placement of a son or daughter with the employee for adoption or foster care, ''the employee shall provide the employer with not less than 30 days notice before the date the leave is to begin * * * except that if the date of birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.'' 29 U.S.C. 2612(e)(1). The same standard applies to foreseeable leave based on planned medical treatment for a serious health condition of the employee or the employee's spouse, son, daughter, or parent. 29 U.S.C. 2612(e)(2).

''When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances.'' 29 CFR 825.303(a). ''An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. * * * However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.'' 29 CFR 825.302(d).

While the statute and its implementing regulations require the employee to provide notice of the need for leave, employees are not required to specifically request FMLA leave. The ''employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed[.]'' 29 CFR 825.302(c), 825.303(b). However, the regulations also state that ''[a]n employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine the leave qualifies under the Act. * * * In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave a FMLA leave.'' 29 CFR 825.208(a)(1).

B. Awareness of Rights

The 1995 Commission on Leave Report found that 41.9% of employees at covered establishments had not heard of the FMLA. The 2000 Westat Report found that 40.7% of covered employees had not heard of the FMLA and nearly half the employees did not know whether the law applied to them. *See* 2000 Westat Report, at 3–8 and 3–9. One commenter cited these percentages and expressed a continuing concern that employees are not aware of their rights. National Partnership for Women & Families, Doc. 10204A, at 17.

Increasing employee and employer awareness of FMLA rights and responsibilities continues to be a challenge. *See* Madison Gas and Electric Company, Doc. 10288, at 3 (''Employees tend to be uninformed about many legal rights or employer benefit provisions. Employees seek 'just in time' information when they really need it.''). *See also* An Employee Comment, Doc. 10336A, at 12 (''People generally do not understand the law. If you address an employer's human resources department, you can leave even more confused * * *. Overall, employee rights are not disclosed clearly to employees.''); Zimbrick Inc., Doc. FL125, at 9 (''Some employees are aware and others are not. However, this is no different than any other areas.''); An Employee Comment, Doc. 4646, at 1 (''[I]f my coworker did not inform me of FMLA I know I would have lost my job.''). One employer suggested that employees may be unaware of their FMLA rights due to the timing of when they receive information about FMLA. ''If employees continue to be unaware of their FMLA rights, it may be because most employers will cover this at orientation. On the first day of the job, new employees are nervous and are overwhelmed with paperwork and work rules. Since FMLA won't affect them until they have in the requisite 12 months with the company, they may shove that information to the back burner.'' Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1.

It appears that employees are not the only ones who could benefit from increased awareness of FMLA. An employee who took FMLA leave for the adoption of a daughter and later sued his employer for interfering with his FMLA rights and terminating his employment in violation of the FMLA stated that ''Not only was I unaware of my [FMLA] protected status, but neither was my management as they testified in court. [Company Name] did not meet their obligation to thoroughly explain FMLA leave to management and therefore they failed to provide adequate protection to their employees.'' An Employee Comment, Doc. 167A, at 2. The Legal Aid Society-Employer Law Center commented:

> Awareness of one's FMLA's rights in the workplace is woefully absent. In my experience, most litigation has been the result of supervisors who are simply ignorant about FMLA, its intended purpose and basic protections, and then, with no training or information, improperly deny FMLA leave to eligible employees with a legitimate serious health condition. Invariably, in every case that I have litigated, the key supervisor did not know that: (1) FMLA provides 12 weeks of leave for an eligible employee; (2) the leave can be taken on an intermittent basis; (3) existing health care coverage continues while an employee is on leave; (4) an employee has the right to be reinstated to her same or comparable job upon expiration of the leave; and (5) an employee who exercises their right to take FMLA leave may not [be] subject to retaliation.

Doc. 10199A, at 3–4. *See also* Center for WorkLife Law, Doc. FL64, at 6 (''Some employers fail to inform eligible employees about their right to take FMLA leave because of the employers' or their managers' own lack of knowledge or understanding of the law.'').[11]

Other comments from employees and employee groups reported that many employees have some general awareness of the FMLA but do not know what the law is (*e.g.*, whether it extends beyond leave for birth of a child) or whether it applies to them. A survey conducted by AARP of workers age 50 and over

[11] Private sector supervisors are subject to individual liability under the FMLA and therefore may be held liable if they violate an employee's FMLA rights. *See* 29 U.S.C. 2611(4)(A)(ii)(I); 29 CFR 825.104(d). The Department is aware, however, that there is a conflict in the circuits and in the lower courts regarding whether public agency supervisors can also be held individually liable under the FMLA. *Compare Modica* v. *Taylor,* 465 F.3d 174, 186 (5th Cir. 2006) (''The most straightforward reading of the text compels the conclusion that a public employee may be held individually liable under the FMLA.'') and *Darby* v. *Bratch,* 287 F.3d 673, 681 (8th Cir. 2002) (''It seems to us that the plain language of the statute decides this question * * * This language plainly includes persons other than the employer itself. We see no reason to distinguish employers in the public sector from those in the private sector.'') *with Mitchell* v. *Chapman,* 343 F.3d 881, (6th Cir. 2003) (''Our independent examination of the FMLA's text and structure reveals that the statute does not impose individual liability on public agency employers.''), *cert. denied,* 124 S. Ct. 2908 (2004) and *Wascura* v. *Carver* 169 F.3d 683, 686 (11th Cir. 1999) (holding based on the similarity of the definition of ''employer'' under the FMLA and the FLSA, and circuit precedent interpreting the term under the FLSA, that public officials are not individually liable under the FMLA).

revealed that, although 91 percent were generally aware of the FMLA, only 50 percent of those workers reported that they first learned of the FMLA through their employer, suggesting that ''more can be done to improve employer-employee communication[.]'' AARP, Doc. 10228A, at 3. A survey of Working America members by the AFL–CIO similarly showed that 53.9 percent of respondents were informed about their FMLA rights by their employers. *See* Doc. R329A, at 7. The survey also showed that 68 percent of the respondents had taken unpaid leave to care for themselves or a spouse, child, or parent during an illness, but did not know whether it was considered FMLA leave. *Id.* at 40.

Still other stakeholders report that employees' awareness of their FMLA rights is not lacking. For example, the National Coalition to Protect Family Leave stated that ''Coalition members believe that, in many cases, employees are well aware of their FMLA leave rights. Among unionized employers, coalition members report that unions routinely inform their members of their FMLA rights.'' Doc. 10172A, at 39. One law firm representing employers agreed. Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 5 (''Today, 13 years after the Act's passage, employees are very savvy about their FMLA rights—it's the rare employee who does not know of the FMLA.''). Other stakeholders echoed the sentiment: ''As indicated by the high usage of FMLA by employees at most of our member airlines, employees are fully aware of the rights available to them under this popular Act.'' *See* Air Transport Association of America, Inc., and Airline Industrial Relations Conference, Doc. FL29, at 9. *See also* MedStar Health Inc., Doc. 10144, at 15 (asserting that ''employees are not only aware of but, also, well educated on their FMLA rights''); National Association of Convenience Stores, Doc. 10256A, at 8 (''today's employees are aware of their rights and obligations under FMLA long before they are hired'').

Suggestions we received for increased awareness include outreach efforts, public campaigns, increased dissemination of materials in both English and Spanish, on-line tools, and development of user-friendly FMLA materials that could be widely disseminated. *See* National Partnership for Women & Families, Doc. 10204A, at 17; Families USA, Doc. 10327A, at. 4. One union stated that the ''posting requirements for employers under FMLA do not go far enough in that they do not actively educate employees on their rights under FMLA. In addition to posting FMLA basic facts as required by the regulation, employers should be required to give the information to employees, in writing, once they become eligible under the regulations with that employer. Contact phone numbers for the employer as well as detailed appeals process afforded to the employee should be provided, as well as recourse information for possible retaliatory practices by the employer.'' United Transportation Union, Doc. 10022A, at 2.

Another union recommended that ''employees should be expressly notified of their right to take intermittent leave.'' International Association of Machinists and Aerospace Workers, Doc. 10269A, at. 2. ''This has proven a real problem for some of our members * * * An employee who suffers from a condition that is still being diagnosed, but doctors believe it is either lupus, a connective tissue disorder or rheumatoid arthritis, arrived late to work due to her condition on a number of occasions. This employee was completely unaware that she could take FMLA on an intermittent basis. She thought if she took any FMLA leave, she would have to stop working altogether, something her illness did not necessitate and something she could not afford to do.'' *Id.* at 2–3. The Legal Aid Society-Employment Law Center also stated that few employers effectively advise employees about their rights and options under the FMLA. *See* Doc. 10199A, at 4. Therefore, when ''a supervisor denies a legitimate leave, uninformed employees must make the difficult decision to take the leave in spite of the supervisor's denial and risk losing their jobs.'' *Id.* This commenter suggested that employers provide employee training so that the workers understand their rights.

The AFL–CIO suggested that the Department should consider regulations that require ''employers to provide an individualized notice provision to employees on an annual basis,'' and referred to another commentator who suggested requiring notice to employees at the point of hiring and annually thereafter. Doc. R329A, at 40. The Communication Workers of America reiterated that employees should receive documents that ''explain their annual leave entitlement and the process for making application for FMLA leave.'' Doc. R346A, at 9. It suggested that employers could improve employees' awareness of their rights, as well as inform them of their individual eligibility status, by taking steps such as producing an annual FMLA document for them. One employee recommended that a ''manager and/or HR should formally contact the employee and notify them of the options available under FMLA. This should include a description of the protection and a review of what the employee needs to do to qualify for this protection (if anything). Employees should be clearly made aware of their obligations to the employer. Employees should be instructed when protection begins, when paid leave begins and ends (ie. paid vacation until it is used up), and protection should be defined.'' An Employee Comment, Doc. 167A, at 2–3.

The National Employment Lawyers Association similarly asserted that the regulations should require employers to take steps to provide workers with adequate information regarding their rights and responsibilities. *See* Doc. 10265A, at 4. One of its members suggested requiring employers to have such information in their handbooks and/or requiring employers ''to produce a written statement of rights and responsibilities to an employee upon that employee's first anniversary (if no handbook is issued).'' *Id. See also* Coalition of Labor Union Women, Doc. R352A, at 2–3 (noting that many employees are not aware of their FMLA rights, and that employers do not provide them with the required information).

C. Employee Notice

As previously explained, employees have the responsibility to notify their employers of the need for FMLA leave; however employees are not required to expressly request FMLA leave or invoke their FMLA rights. A great deal of anecdotal information was provided concerning notices provided by employees as well as several suggestions on this subject.

1. Notice of the Need for Leave: Timing and Information Provided

Stakeholders offered several possible explanations for employees failing to provide notice of their need for leave, ranging from the employee's relationship with his/her supervisor to not wanting the absence to count as FMLA:

> It appears that reasons for employees failing to notify their employer in advance of FMLA leave-qualifying events vary depending upon the medical situation and the employee's personality and relationship with his/her supervisor. For example, some employees discuss the possibility of surgery or childbirth informally with co-workers and then neglect to submit formal documentation in a timely manner perhaps assuming that the informal break room discussions are sufficient; other employees do not want supervisors or management to be aware of medical issues until the very last minute and

then provide only a bare minimum of information.

Another reason for delays is that employees seem to think that they can retroactively document most absences, whether foreseeable or not, and frequently submit the documentation after their return to work. Since in many cases these employees used accrued leave to cover their absences, it is often in the employer's interest to also designate the absence as FMLA leave whenever the employee provides the documentation of qualification.

It also appears that employees who have the option of using other accrued paid leave often do not mention the reason for that leave in order to avoid the absence being charged concurrently to FMLA leave. Employees without other leave options are very quick to request FMLA leave even for doubtful absences.

Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 5. *See also* Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1 (''As an H.R. Specialist that handles FMLA, I can tell you that we have had employees with a foreseeable leave that did not notify us of their need for leave. Some employees have scheduled surgery and used vacation time. We are unaware of it unless there are complications. * * * Many of our employees are very private of their medical needs, as they should be.''); Zimbrick Inc., Doc. FL125, at 10 (''We see several causes [for employee's failing to notify employer]: (1) Employees' lack of knowledge about FMLA; (2) employees don't anticipate the need (for example[:] employee takes off on Friday to have surgery but due to medical complications can't return to work on Monday); [and] (3) employees who know FMLA is 12 weeks and they try to scam the system by using vacation and sick time up first and then want 12 more weeks off.''). One stakeholder cited the need to provide medical certification of the serious health condition as a reason employees do not request FMLA leave. *See* FNG Human Resources, Doc. FL13, at 3 (''Employees refuse to request FMLA because some medical providers either refuse to complete the paperwork, complete it incorrectly or incompletely, or charge the patient up to $50 to complete the required certification. Employees would rather do without the hassle, request sick pay for the days they are out, regardless of severity of their illnesses.'').

Some commenters do not see problems with employee notification as mentioned in the RFI and suggested maintaining the status quo. ''Clearly, employees should notify their employers about their need for leave as quickly as is reasonably possible, but it also is important to ensure that employees are not penalized unfairly when confronted with unexpected emergencies. We believe the regulations strike an appropriate balance to allow employees to take leave in emergency situations, and also to provide employers with information about the need for leave in a prompt manner.'' National Partnership for Women and Families, Doc. 10204A, at 19. *See also* OWL, The Voice of Midlife and Older Women, Doc. FL180, at 2 (''OWL believes that the current notice from employee to employer in unforeseeable leave situations is adequate.'').

The majority of stakeholders offering information on this topic, though, highlighted the problems they see with the sufficiency of information provided by employees in notifying employers of the need for FMLA leave. ''[E]mployees who call in because of their own or a family member's medical condition do not necessarily provide sufficient information for an employer to make such a determination. Since what constitutes ''sufficient'' information is not clearly defined anywhere in the regulations, both employees and employers face difficulties in meeting their rights and responsibilities under the FMLA.'' National Coalition to Protect Family Leave, Doc. 10172A, at 39–40. *See also* National Retail Federation, Doc. 10186A, at 16 (''Certain retailers report that paperwork is often not provided in a timely manner because the employee has failed to adequately communicate the reason prompting the leave request or has not shared the information with an appropriate manager.''); Jackson Lewis LLP, Doc. FL71, at 9 (''Much of the frustration employers experience in administering FMLA leaves stems from the difficulty employers have in ''spotting'' FMLA qualifying absences. Employers are not ''mind readers'' and they often refrain from asking employees why they are absent for fear that they may invade an employee's medical privacy. It also is naive to think that employers can effectively train front line supervisors on the myriad of health conditions and personal family emergencies that might qualify for FMLA protection.''); Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 4 (''The first concern in this area relates to the type of notice an employee must provide to obtain FMLA leave. * * * Instead, they simply need to request time off and provide a reason for their request.''); National Association of Convenience Stores, Doc. 10256A, at 5 (''Employee notice is often vague or non-existent, forcing employer representatives to make a discretionary ''judgment call'' in questionable situations time and time again.'').

The timing of employee notification of the need for leave was also mentioned by employers and employer representatives as a problem in their administration of the FMLA, particularly—as discussed in greater detail in Chapter IV—employee notice with respect to intermittent leave. ''The last issue has to do with the fact that we are often not notified that an employee is out for a serious health condition until after they return to work and then we are unable to ask for medical documentation.'' Jan M. Gray, Benefits Coordinator, Spokane County, Doc. 5441A, at 1. *See also* Suzanne Kilts, Doc. 5204, at 1 (''On our intermittent FMLA employees, we have had several occasions where the employee does not call in for his FMLA absence until minutes before their shift start. * * * Just last week I had an FMLA call off at 9:05 a.m. in the morning. That's 2 hours and five minutes after their shift is to start.''); The Pennsylvania Turnpike Commission, Doc. 10092, at 6 (''The issue of [employees] failing to notify their supervisors promptly that they are taking FMLA leave is very prevalent in our company. Some employees that are approved for intermittent FMLA simply don't show up for work, and then email or call their supervisor when the work day is almost over to inform them that they are taking FMLA. This is extremely frustrating as an employer, and there does not ever seem to be a valid reason that the employee could not notify the supervisor earlier.'').

2. Commenter Recommendations

The Department also asked for suggestions on how to improve the reported situation of employees not promptly providing notice to their employers of their need for unforeseeable FMLA leave. One commenter suggested ''shifting the burden to the employee to request the leave be designated as FMLA leave in writing.'' *See* Miles & Stockbridge, P.C., Doc. FL79, at 5. Other commenters suggested not only written leave requests but also that leave requests specifically mention FMLA. ''It would eliminate many disputes if an employee were required to request leave in writing or to follow up an oral request with a written request within a reasonable time (such as within two work days after returning to work in the case of intermittent leave, or five work days after requesting leave in the event of unforeseen continuous leave). * * * It would help both parties immensely if

the employee were required to mention the FMLA when making such a request.'' South Central Human Resource Management Association, Doc. 10136A, at 14; *see also* Spencer Fane Britt & Browne LLP, Doc. 10133C, at 39 (same). ''Especially for intermittent use, require that employee provide specific FMLA notice when absences are necessary, relieving employer from identifying possible need of FMLA with timely designation based on limited information provided by employee[.]'' DST Systems, Inc., Doc. 10222A, at 4.

Other stakeholders expressed a desire for more information from employees, but stopped short of suggesting a requirement that the employee must specifically ask for FMLA leave. ''Employees should be required to specify the purpose of any instance of FMLA leave, such as a doctor's appointment, physical treatment, etc. so employers can assess veracity when employees appear to be abusing the leave policy.'' U.S. Chamber of Commerce, Doc. 10142A, at 11. *See also* Williams Mullen, Doc. FL124, at 2 (''DOL should implement detailed regulations which provide necessary language or actions that must be taken by employees to put their employers on notice of their intent to take FMLA leave.''); Association of Corporate Counsel, Doc. FL31, at 8 (''The DOL should revise its regulations * * * by making clear that an employee's notice to the employer must go beyond merely requesting leave and must provide a basis for the employer to conclude that the requested leave is covered by the FMLA.''). However, some employers advocated for a requirement that employees specifically request FMLA leave, suggesting that the regulations should apply ''to only those employees who request FML coverage.'' Edison Electric Institute, Doc. 10010A, at 3. *See also* Spencer Fane Britt & Browne LLP, Doc. 10133C, at 42 (employers who have a written FMLA policy should receive ''safe harbor'' protection and be permitted to enforce procedural requirements such as that FMLA leave requests be in writing, that the FMLA be specifically mentioned, and that the requests go to a particular centralized source).

Several stakeholders recommended allowing employers to enforce employee compliance with established attendance and leave notification procedures, particularly with respect to intermittent unscheduled FMLA leave. ''The regulations should expressly provide that the employer may enforce any generally applicable leave notification or call-off requirements, even if the FMLA is also involved.'' Ohio Public Employer Labor Relations Association, Doc. FL93, at 4. *See also* Association of Corporate Counsel, Doc. FL31, at 10 (''DOL should * * * make clear that an employee may be subject to an employer's disciplinary process for failure to provide timely notice or to comply with the employer's written notification policy.''); Miles & Stockbridge, P.C., Doc. FL79, at 4 (''A possible remedy * * * would be to require an employee taking intermittent leave to provide notice of the need to take intermittent leave consistent with the employer's call out procedures and/or sick leave/absentee policy. Additionally, at the time of the employee's call, the employee should be required to indicate that the reason for the absence is because of the FMLA qualifying chronic condition.''); National Association of Convenience Stores, Doc. 10256A, at 5 (''Employers should also have the flexibility to impose more stringent internal notice requirements upon employees, and to impose leave forfeiture provisions for their non-compliance.''); University of Wisconsin-Milwaukee, Doc. 10098A, at 4 (''Requiring employees to comply with regular attendance policies unless there is a 'medical' emergency would be one way to rectify the problem of employees failing to notify the employer of the need for unforeseeable leave. Intermittent, unscheduled FMLA does not necessarily imply a 'medical emergency' which makes regular notification impossible.''); American Electric Power, Doc. FL28, at 2–3 (''The regulations should be reformed to allow employers to enforce attendance policies that require employees to observe reasonable reporting-off protocols, including policies that require employees to report off to their direct supervisors or to a designated person in human resources.'').

D. Employer Notification That Leave Is FMLA-Qualifying

In order to allow employees to know when they are using their FMLA-protected leave, the regulations state that ''it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee.'' 29 CFR 825.208(a). It is the Department's intent that such designation occur ''up front'' whenever possible, to eliminate protracted ''after the fact'' disputes. *See* 60 FR 2180, 2207–08 (January 6, 1995).[12] Notification that the leave is FMLA-qualifying and the specific notice required to be provided by employers are essential means by which employees learn of their FMLA rights and obligations. Several employers provided information on this topic.

With regard to the notice procedures employers actually use, one commenter stated that its notification procedures are ''working quite well,'' because it includes FMLA information during new employee orientation and has trained its supervisory workforce to recognize potential covered absences. FNG Human Resources, Doc. FL13, at 4. It stated that supervisors notify the personnel office, which mails out contingent FMLA notices and certification paperwork with instructions on how to have it completed, and the notice includes a statement of all employee rights and responsibilities. This employer allows employees 20 days to return the certification forms (more than the required 15 days), in order to cover mailing time and because some medical providers have a slow completion rate. Once the paperwork is received, ''we keep both the employee and supervisory personnel abreast of updates and approvals.'' *Id.*

The Pennsylvania Turnpike Commission stated that its ''process works great for our company and everyone is kept abreast of their FMLA status.'' The Pennsylvania Turnpike Commission, Doc. 10092A, at 5–6. It described that when it receives a certification form, employees are sent a letter stating whether the leave is approved or denied, with a starting date and expiration date if approved. It reminds the employee's supervisor a week prior to the expiration date, who

[12] In general, employers are required to designate leave as FMLA within two days of learning that the leave is being taken for an FMLA-covered purpose. *See* 29 CFR 825.208(b)(1). The regulations prohibit employers from retroactively designating leave as FMLA if they could have properly determined the status of the leave at the time the employee either requested or commenced the leave. *See* 29 CFR 825.208(c); *but see supra* Chapter II (discussing status of penalty provision of section 825.208(c) in light of the Supreme Court's decision in *Ragsdale*). The regulations do allow for retroactive designation, however, if the employer learns after an employee's leave has begun that the leave is for an FMLA-covered purpose. *See* 29 CFR 825.208(d). Similarly, if an employer knows the reason for the leave but is unsure whether it qualifies for FMLA protection, or if the employer has requested but not yet received certification of the need for leave, the employer may preliminarily designate the leave as FMLA-covered. *See* 29 CFR 825.208(e)(2). If upon receipt of the requested information the employer determines that the leave is FMLA protected, the preliminary designation becomes final. *Id.* If the additional information does not confirm that the absence was for an FMLA-covered reason, the employer must withdraw the preliminary designation and notify the employee. *Id.* Finally, if the employer does not learn that leave was taken for an FMLA-covered purpose until the employee returns from leave, the employer may, within two business days of the employee's return, designate the leave retroactively as covered by the FMLA. *See* 29 CFR 825.208(e)(1).

reminds the employee that the leave is expiring. If the employee needs additional leave, the employee recertifies.

The Ohio Department of Administrative Services similarly noted that it understands that an employee's awareness of FMLA rights and responsibilities ''is critical to fulfilling the goals of the statute,'' and therefore employees are given notice of the State's FMLA policy upon their hire and notices also are posted. Doc. 10205A, at 4. The State also notifies employees of their rights verbally within two days of designating leave as FMLA leave, and confirms the designation in writing by the following payday. Employees receive notice the first time they are granted FMLA leave in each six-month period. The State noted that sending a letter to employees with chronic conditions every time they request FMLA leave for such a condition could ''serve as an additional opportunity for communication,'' but it believes that such notice would be very burdensome. *Id.* at 5. The State also supported eliminating the requirement to notify employees that their leave will be counted as FMLA leave when an employee has requested FMLA leave in writing or a verbal request has been appropriately documented. *See id.*

One commenter stated that it also advises employees verbally that their leave is FMLA-qualifying and then follows up with a letter. ''If they have already used some FMLA in the last 12 months, I will include in the letter the amount of leave still available to them. In the case of intermittent leave I will carefully explain our rolling 12 month period and give them a copy of the attendance controller on which I recorded their leave and, again, carefully explain that on the anniversary date of time used, that amount will become available for them to use.'' Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1.

Another commenter stated that it notifies employees that their leave has been designated as FMLA leave by sending the employees a letter confirming that their rights under the FMLA have been reviewed and the leave conditionally designated, pending proper doctor certification. Franklin County Human Resources Department, Doc. FL59, at 7. The University of Washington noted that it mails a written notification to eligible employees after a health-related three-day absence. *See* University of Washington, Doc. FL17, at 2–3.

The National Coalition to Protect Family Leave stated that many of its members follow the regulations for designating leave at sections 825.301(b) (specific notice of rights and responsibilities) and 825.208(b)(2) (payroll stub or other written designation). However, it stated that some employers are not aware of both provisions, and that the designation process is confusing when an employer provisionally designates leave when the employer does not have sufficient information to make a final determination within two days. The Coalition suggested that the regulations should allow the ''official 'designation' notice to be sent to employees after sufficient information is received from the employee to make a determination whether the leave qualifies for FMLA protections as part of the section 825.301 notice obligations (rights and responsibilities requirement). No further designation should be required. Employers should simply have the obligation to provide the employees with FMLA usage information on request[.]'' National Coalition to Protect Family Leave, Doc. 10172A, at 42.

One commenter suggested, as a possible improvement that would allow employees to receive more accurate information on their FMLA leave balances, that employees should keep their own records and also ask ''the employer for a copy of their FMLA records and report any discrepancies within a specified amount of time to be resolved.'' Bendix Commercial Vehicle Systems LLC, Doc. 10079A, at 9. Another commenter similarly suggested that employers should be required ''to make a good faith effort to provide employees with information about their eligibility status and FMLA leave balances within a reasonable amount of time, upon request by an employee[,]'' but employees also should be required to track their own hours and notify the employer if they dispute the employer's data. Spencer Fane Britt & Brown LLP, Doc. 10133C, at 43. This commenter contended that an employee's FMLA rights should be ''no greater than they would otherwise be if the employer either fails to provide the information or inadvertently provides inaccurate information.'' *Id.*

E. Timing Issues

The Request for Information sought comments on whether the two day time frame for employers to notify employees that their request for FMLA leave has been approved or denied was adequate.

The majority of comments on this topic indicated that the current two-day time frame was too restrictive. *See, e.g.*, United Parcel Service, Doc. 10276A, at 10 (''In most cases, the initial notification of an absence or need for leave is received by front-line management, who conveys the information up the chain of command and to the local HR representative, who notifies the FMLA administrator, who is ultimately responsible for making a determination. It is not unusual for it to take one to two business days just for the right personnel to receive the information, much less make a determination and communicate it back to the employee.''); Courier Corporation, Doc. 10018A, at 4 (''The two-day timeframe is way too short for notifying employees about their leave request, since as employers we are often chasing information from the employee or physician.''); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 42 (''For most employers, this is virtually impossible. Although most employers designate leave within a reasonable time frame, it is usually well outside the two-day time frame, thus creating a risk that the designation will be ineffective.''). Employers suggested varying timeframes to replace the two-day limit. *See, e.g.*, Fisher & Phillips LLP, Doc. 10262A, at 15 (fifteen days from receipt of a certification form); National Coalition to Protect Family Leave, Doc. 10172A, at 48 (ten business days); Association of Corporate Counsel, Doc. FL31, at 11 (five working days); Courier Corporation, Doc. 10018A, at 4 (five days); United States Postal Service, Doc. 10184A, at 5 (same); Northrop Grumman Newport News Shipbuilding and Dry Dock Company, Doc. FL92, at 3 (same); Spencer Fane Britt & Browne LLP, Doc. 10133, at 42 (suggesting a reasonableness standard).

One employer stated that while some decisions can be made in two days, even a week might not be sufficient in other cases, depending upon the amount of information supplied by an employee and whether clarification is needed from the health care provider. *See* Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1. Other commenters similarly stated that the two-day time frame for providing notification to employees that FMLA leave has been approved or denied is inadequate, ''as there are many factors which result in delays in both obtaining information and processing requests.'' Hinshaw & Culbertson LLP, Doc. 10075A, at 5.

With regard to possible alternative requirements, Jackson Lewis suggested employers should not be required to designate absences as FMLA-qualifying within two days, ''as long as the employee is receiving the protections of the FMLA[,]'' and that a regulation could allow employers to preliminarily

designate absences as FMLA-qualifying, subject to the ''employees ''opting out'' of FMLA leave'' or the employer establishing that the condition does not qualify. Doc. FL71, at 8. The commenter stated this ''would bring greater certainty and closure to absence management for absences by imposing a periodic ''employee-employer'' reconciliation of FMLA leave.'' *Id.* at 9. Alternatively, Jackson Lewis suggested that a regulation could ''require that employers advise employees in general notices that they must specifically request FMLA leave for all absences of less than one week in duration,'' and that employers should be allowed ''to designate retroactively absences that initially were not classified by either the employer or employee as FMLA but would, in retrospect, qualify as intermittent leave under the FMLA.'' *Id. See also* Fairfax County Public Schools, Doc. 10134A, at 3–4 (in order to focus on the outcome [12 weeks of leave] rather than the application process, employers could be required to notify employees annually that, if they have one year of service and 1,250 hours, they are entitled to FMLA leave and then the burden should be on employees to contact the designated official to apply).

Another commenter suggested that, because employers experience problems with giving proper notice when employees do not provide prompt and proper notice of their need for leave, ''DOL should implement detailed regulations which provide necessary language or actions that must be taken by employees to put their employers on notice of their intent to take FMLA leave. As a result, employers will be significantly better equipped to execute their responsibilities under the Act, including, but not limited to notifying employees that the leave in question will count as FMLA leave.'' Williams Mullen, Doc. FL124, at 2. *See also* Miles & Stockbridge, P.C., Doc. FL79, at 5 (designation difficulties could be eliminated by requiring employees ''to request the leave be designated as FMLA leave in writing'' either prior to or within three days of the absence); Betsy Sawyers, Director, Human Resources Department, Pierce County, Washington, Doc. FL97, at 4 (responsibility for requesting FMLA leave should be shifted to employee so employer does not have to ''second guess or request additional explanation from the employee'' or, alternatively, broaden an employer's ability to retroactively designate FMLA leave to include entire period of leave). Another commenter noted that it would like the regulations to provide further guidance on making retroactive FMLA designations when an employee has initial absences that do not qualify for FMLA leave, but the health condition develops over a period of time. City of Eugene Human Resource & Risk Services, Doc. 10069A, at 1.

Another commenter emphasized the hardships employees suffer when they do not know promptly whether the employer believes they are entitled to protected leave. The commenter stated that companies do not respond within the required two business days, so employees either do not take the time off that they (or their family members) need, or else they take off but are afraid because they do not know whether they will be subject to discipline for being off work. Frasier, Frasier & Hickman, LLP, Doc. FL60, at 1–3. The commenter gave an example of an employee who was not advised of his FMLA leave status until approximately 60 days after he submitted a certification form. This commenter suggested finding some means of making employers respond timely to requests for leave. Similarly, the International Association of Machinists and Aerospace Workers suggested that employers should be ''required to promptly inform workers when they are using their FMLA leave, and to provide copies of FMLA leave balances,'' rather than putting this burden on employees, because employees can be confused as to which days their employer has counted as FMLA leave and which it has not. Doc. 10269A, at 3. *See also* 9to5, National Association of Working Women, Doc. 10210A, at 3 (same).

One commenter noted that ''[m]istakes about an employee's eligibility under the FMLA can be costly for both employers and employees. Certainty in this area is critical.'' National Multi Housing Council and National Apartment Association, Doc. 10219A, at 2. However, other comments indicate that certainty may be difficult to achieve promptly. For example, the Ohio Department of Administrative Services noted that, because the 1,250 hours of work test involves distinguishing between active work and paid time off, such as vacation time, sick leave, bereavement leave, holidays, personal leave, etc., ''eligibility determinations continue to bring confusion to employers and their managers. In light of the difficult fact patterns that oftentimes accompany eligibility determinations, the State of Ohio recommends that the Department implement a ''safe harbor'' provision to exempt employers from penalties when employers follow the regulatory requirements and make a good faith eligibility determination that is later overturned by a court or other authoritative body.'' Ohio Department of Administrative Services, Doc. 10205A, at 1. (Penalties arising from an employer's failure to follow the regulatory requirements concerning notice are addressed in Chapter II of the Report.).

AVAYA Communication similarly noted that calculating the 1,250 hours of work is a time consuming process for employers, and that ''it is difficult to obtain an accurate number of hours worked in time for the notification letter to go out promptly.'' Doc. FL33, at 1. Therefore, the commenter recommended allowing employers a grace period within which to determine whether employees are eligible for leave. Another commenter believed that employers should simply have to advise an employee who does not have the requisite 1,250 hours of service of that conclusion, and the employer should not be required to advise the employee when s/he will be eligible for FMLA leave because that timing is difficult to predict. Pilchak Cohen & Tice, P.C., Doc. 10155A, at 5. *See also* United Parcel Service, Doc. 10276A, at 7–8 (objecting to any revision to the regulations that would require ''employers to provide periodic or on-demand updates about the amount of FMLA leave remaining to employees'').

On the other hand, another commenter noted that it uses a tracking program related to its payroll system that tells it whether ''the employee has been employed one year, worked 1250 hours in the prior twelve months, and the number of weeks they are eligible [based on] any previous leaves associated with FMLA. A notice is sent to the employee within 48 hours of their request.'' AM General LLC, Doc. 10073A, at 2. Another employer similarly stated that it determines whether employees are eligible by running a report through the payroll system to track the number of hours worked in the past 12 months, but then spends ''an unusual amount of time'' determining how much FMLA leave the employee already has used. Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 1.

One law firm suggested that the Department's regulations may be the cause of employer confusion over their notice responsibilities. ''The Regulations include several notice obligations, which we believe are not all necessary and have simply created more FMLA paperwork than is really necessary.'' Spencer Fane Britt & Browne LLP, Doc. 10133C at 41. ''The

Regulations do not include in one provision all of the applicable time frames and when they apply. Employers struggle over provisions requiring preliminary designations, final designations, when designations can be made retroactively, whether to designate leave as FMLA leave when an incomplete certification is returned, and when the ''two-day'' designation rule applies.'' *Id.* at 41–42.

Finally, 53 Democratic Members of Congress recognized the potential for confusion concerning employer notice obligations.

> The Department mentions a few of the notice issues that have arisen under the FMLA. While it is true that the statute is not perfectly clear in elaborating the notice obligations of employees and employers under the FMLA, it is not clear that the Department can fully resolve the issues through revisions in regulation alone. It would be helpful for the Department to ask Congress to clarify how the notice motions of the Act apply. The law or the regulations should put forth a clear and commonsense regime by which employers would notify workers of their rights and responsibilities under the Act, workers would be required to notify their employers of their need to take FMLA leave, and employers would be required to notify workers of their approval or denial of FMLA leave as well as the term of any approval or reasons for any denial and appeal rights. Clearer notice requirements would also resolve any issues related to the ''duration'' of leave.

Letter from 53 Democratic Members of Congress, Doc. FL184 at 3.

On the other hand, a few commenters indicated that the two-day time frame is adequate. One commenter stated that the ''two-day rule is not an issue when you are aware of a possible FMLA event on the first day of eligibility[,]'' because the contingent notice can be mailed or handed to the employee immediately, but problems arise when the possible FMLA coverage is not known until later, such as when the employee returns to work. FNG Human Resources, Doc. FL13, at 5. However, this employer allows the employee to apply at that time and gives them the paperwork immediately. The National Partnership for Women & Families noted the current data does not support an increase in the time period beyond the two days provided. *See* National Partnership for Women & Families, Doc. 10204A, at 21 (''Most organizations spend only between thirty and 120 minutes of administrative time per FMLA leave episode to provide notice, determine eligibility, request and review documentation, and request a second opinion. Therefore, no change to the current two-day rule response requirement is warranted.'') (footnote omitted). Notably, Unum Group, a provider of Federal and state FMLA administration services, stated that ''[t]he two-day timeframe for providing notice to an employee of his/her eligibility for FMLA leave is sufficient.'' *See* Doc. 10008A, at 3. At the end of 2006, Unum Group reported having 95 customers located throughout all 50 states and administering leaves for a total employee population of 585,157. *Id.* at 1.

VI. The Medical Certification and Verification Process

The Department asked several questions in the Request for Information regarding the medical certification and verification process. This chapter addresses the Department's request for comments on the following issues: whether the regulatory restriction in section 825.307(a) that permits an employer to contact the employee's health care provider for purposes of clarification and authentication only through the employer's health care provider results in unnecessary expense or delay and what are the benefits of the restriction; whether the optional model certification form (WH–380) seeks the appropriate information and how it could be improved; whether the general 30-day period for recertification set forth in section 825.308 is an appropriate time frame; whether second opinions should be allowed on recertifications; and whether employers should be allowed to request a fitness for duty certification for an employee returning from intermittent leave. This chapter also addresses other comments received regarding the medical certification process including comments related to the Health Insurance Portability and Accountability Act of 1996 (''HIPAA''), Pub. L. 104–191, a law that was discussed in Request for Information but was not directly referenced in any specific questions.

A. Statutory and Regulatory Provisions Regarding Medical Certification and Verification

The medical certification process implicates several statutory and regulatory provisions under the FMLA. While the Act does not require employers to obtain medical certification in support of an employee's request for leave, if an employer chooses to do so, it is limited in what medical information it may seek as well as the process it must go through to obtain that information.

1. Statutory Provisions Regarding the Medical Certification and Verification Process

Employers have the option of requiring employees who request leave due to their own serious health condition or to care for a covered family member with a serious health condition to support their need for leave with a certification issued by their (or their family member's) health care provider. *See* 29 U.S.C. 2613(a).[13] The information necessary for a sufficient certification is set forth in section 103 of the Act. See 29 U.S.C. 2613(b). The statute states that a medical certification ''shall be sufficient'' if it states the following: the date the condition commenced; the probable duration of the condition; ''appropriate medical facts'' regarding the condition; a statement that the employee is needed to care for a covered family member or a statement that the employee is unable to perform the functions of his/her position (as applicable); dates and duration of any planned treatment; and a statement of the medical necessity for intermittent leave and expected duration of such leave. *Id.*

In cases in which the employer has reason to doubt the validity of the certification provided by the employee, the statute allows the employer to require the employee to obtain a second opinion from a health care provider of the employer's choice and at the employer's expense. *See* 29 U.S.C. 2613(c). Where the first and second opinions differ, the employer may require the employee to obtain a binding third opinion from a health care provider selected jointly by the employer and employee (and paid for by the employer). *See* 29 U.S.C. 2613(d). Finally, the statute allows the employer to require the employee to provide subsequent recertifications from the employee's health care provider on a reasonable basis. *See* 29 U.S.C. 2613(e).

In addition to the certification of the need for leave due to the employee's or a covered family member's serious health condition, the statute also allows employers to require certification of the employee's ability to return to work following leave for his or her own serious health condition as a precondition to job restoration under certain circumstances. *See* 29 U.S.C. 2614(a)(4). An employer's request for a return-to-work certification must be pursuant to a uniformly applied practice or policy. *Id.* Where an employee's

[13] The certification provision does not apply to requests for leave to care for a healthy newborn or newly placed child under 29 U.S.C. 2612(a)(1)(A) and (B).

return to work is governed by the terms of a collective bargaining agreement or State or local law, however, the FMLA does not supersede those procedures. *Id.*

2. Regulatory Provisions Regarding the Medical Certification and Verification Process

The regulations flesh out the procedures employers must follow when utilizing the tools provided them in the Act for verifying an employee's need for FMLA leave. In general, sections 825.305 and 825.306 address the initial medical certification, section 825.307 sets forth the employer's options for verifying the information in the initial certification, section 825.308 details the employer's right to seek subsequent recertification, and sections 825.309 and 825.310 address the employer's ability to require certification of the employee's ability to return to work following FMLA leave due to their own serious health condition.

Section 825.305 requires an employer to notify the employee in writing if the employer is going to require medical certification for the leave (subsequent requests for recertification may be oral). *See* 29 CFR 825.305(a). Section 825.305 also sets forth the general rule that employers must allow employees at least 15 calendar days to provide the certification and that, where time allows, employees should provide the certification prior to the commencement of foreseeable leave. *See* 29 CFR 825.305(b). While employers are generally expected to inform employees that certification will be required at the time the leave is requested or, if the leave is unforeseen, within two business days of the leave commencing, employers may request certification at a later time if they have reason to question the appropriateness or duration of the leave. *See* 29 CFR 825.305(c). Employers are required to inform employees of the consequences of not providing the requested certification and to advise the employee if the certification is incomplete and allow an opportunity for the employee to cure any deficiency. *See* 29 CFR 825.305(d). If the employer's sick leave plan's certification requirements are less stringent and the employee or the employer exercises the option to substitute paid sick leave for unpaid FMLA leave, the employer may only require compliance with the less stringent certification requirements of the paid leave plan. *See* 29 CFR 825.305(e).

Section 825.306 of the regulations sets forth the information required for a complete certification, which may be provided on the Department's optional WH–380 form or any other form containing the same information. *See* 29 CFR 825.306. Section 307 governs the employer's ability to seek clarification and authentication of, and a second and/or third opinion on, the employee's medical certification. *See* 29 CFR 825.307. This section makes clear that an employer may not require information beyond that set forth in section 306, but that the employer's health care provider may seek clarification or authentication of the information in the certification from the employee's health care provider with the employee's permission. *See* 29 CFR 825.307(a). Section 307 also makes clear that where an employee's FMLA leave is also covered by workers' compensation, the employer may follow the workers' compensation procedures if they allow for direct contact with the employee's health care provider. *See* 29 CFR 825.307(a)(1). If the employer has reason to question the validity of the certification, the employer may require the employee to obtain a second opinion at the employer's expense and with a health care provider selected by the employer. *See* 29 CFR 825.307(a)(2). If the second opinion conflicts with the employee's original certification, the employer may require the employee to obtain a binding third opinion at the employer's expense from a health care provider selected jointly by the employer and the employee. *See* 29 CFR 825.307(c). If it is ultimately determined as a result of the second and/or third opinion process that the employee is not entitled to FMLA-protected leave, the leave shall not be designated as FMLA-covered and the employer may treat the leave under its established policies. *See* 29 CFR 825.307(a)(2).

Section 308 of the regulations sets forth the conditions under which an employer may request recertification of the employee's (or covered family member's) serious health condition. *See* 29 CFR 825.308. Generally, employers may not request recertification more often than once every 30 days and only in connection with an absence. Where the initial certification indicates a minimum period of incapacity in excess of 30 days, recertification may not be requested until the initial period of incapacity indicated has passed. *See* 29 CFR 825.308(b)(1). In all instances, employers are allowed to request recertification if there is a significant change in circumstances regarding the leave or if the employer receives information that casts doubt on the employee's stated reason for the absence. *See* 29 CFR 825.308(a)–(c). Employers must allow employees at least 15 days to provide recertification. *See* 29 CFR 825.308(d). Recertifications are at the employee's expense and completed by the employee's health care practitioner. Employers are not permitted to request second opinions on recertifications. *See* 29 CFR 825.308(e).

Finally, sections 825.309 and 825.310 of the regulations govern requirements for the employee's return to work. Employers may require employees to report periodically on their intention to return to work. *See* 29 CFR 825.309(a). If an employee states an unequivocal intention not to return to work the employer's obligations under the FMLA cease. *See* 29 CFR 825.309(b). Where an employee needs more or less leave than originally requested, the employer may require the employee to provide notice of the changed circumstances within two business days where foreseeable. *See* 29 CFR 825.309(c). Employers may have a uniformly applied policy of requiring similarly situated employees who take leave for their own serious health condition to submit certification of their ability to return to work. *See* 29 CFR 825.310(a). Such certification need only be a simple statement of the employee's ability to work. *See* 29 CFR 825.310(c). The employer's health care provider may contact the employee's health care provider, with the employee's permission, to clarify the return-to-work certification but may not request additional information and may not delay the employee's return to work. *Id.* The employee bears the cost of providing the return to work certification. *See* 29 CFR 825.310(d). Where state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall apply. *See* 29 CFR 825.310(b). Employers are required to provide employees with advance notice of the requirement to provide a return-to-work certification. *See* 29 CFR 825.310(e). Where an employee has been given appropriate notice of the requirement to provide a return-to-work certification, the employee's return from leave may be delayed until the certification is provided. *See* 29 CFR 825.310(f). Return-to-work certifications may not be required for employees taking intermittent leave. *See* 29 CFR 825.310(g). Employers may not require a second opinion on return-to-work certifications. *See* 29 CFR 825.310(e).

B. Comments Regarding the Medical Certification and Verification Process

1. Medical Certification Process

Both employers and employees expressed frustration with the medical

certification process. As discussed below, employers generally expressed frustration with their ability to obtain complete and clear certifications. Employees expressed frustration with employers determining that a certification is incomplete but not informing the employee what additional information is necessary to satisfy the employer's concerns. Some commenters noted that these repeated requests for additional information are causing tension in the doctor/patient relationship. Overall, the comments make clear that the certification process is a significant source of friction between employees and employers: The two groups, however, attribute the source of the friction to very different causes.

a. Complete Certifications

Multiple employers commented that a complete certification should require not just that the certification form is filled-out, but that meaningful responses are given to the questions. *See, e.g.*, Jackson Lewis LLP, Doc. FL71, at 5 (''The rule prohibiting employers from asking any additional information once an employee submits a completed medical certification ignores the reality that a technically 'completed' certification may offer little insight into the need for FMLA leave, much less the medical necessity for leave on an intermittent basis.''); National Coalition to Protect Family Leave, Doc. 10172A, at 47 (''If health care providers * * * do not provide direct responses to the questions, the regulations should be modified to specify that the certification is not considered 'complete' for purposes of the employee's certification obligations, thereby not qualifying the employee for FMLA leave.''); South Central Human Resource Management Association, Doc. 10136, at 11 (''We recommend the Regulations make clear that a 'complete' certification is required, that meaningful answers have to be furnished for all questions, and that a certification is 'incomplete' if a doctor provides 'unknown' or 'as needed' to any question.''). A commenter who had represented several employees in FMLA suits disagreed, however, stating that ''in order to avoid protracted litigation over these issues, once completed and signed by a physician, the model certification form should be considered final and binding.'' Kennedy Reeve & Knoll, Doc. 4763A, at 14.

Commenters' frustration with vague and nonspecific responses on certifications was greatest in regard to certifications for intermittent leave due to chronic conditions. *See, e.g.*, Federal Reserve Bank of Chicago, Doc. FL56, at 2 (''We often see health care providers list the duration of an employee's chronic condition as 'indefinite' or 'lifetime' and indicate that the frequency of the episodes of incapacity as 'unknown.' This makes it very difficult to manage employee attendance.''); City of Portland, Doc. 10161A, at 2 (''The certifications, particularly for chronic conditions, are often so vague as to be useless.''); South Central Human Resource Management Association, Doc. 10136, at 11 (''If a doctor cannot venture an estimate as to how often an employee will have a true medical need to be absent, we question whether the doctor is competent to evaluate the condition.''); Society for Human Resource Management, Doc. 10154A, at 8 (''Notations such as 'lifetime,' 'as needed,' or other similarly vague statements ought not suffice. Health care providers in particular should be required to provide as much detail as possible on the total amount of intermittent leave that is needed or allow employers to deny the leave.''). The American Academy of Family Physicians, however, noted that such responses are appropriate in some circumstances:

> Intermittent leave is problematic for the certifying physician and employer. Employers have noted that with respect to the frequency of the episode of incapacity, the physician might write ''unknown.'' Employers argue that this leaves them in the difficult position of guessing about the employee's regular attendance. However, the frequency of incapacity in chronic conditions such as migraine headaches is not predictable, making ''unknown'' the appropriate answer to the question. * * * It is worth noting that despite medical advances, absolute cures do not exist for all conditions making the duration of these conditions ''indefinite'' or ''lifetime'' from the current medical perspective.

American Academy of Family Physicians, Doc. FL25, at 2–3. Other commenters echoed the point that specific estimates of the frequency and duration of intermittent leave due to the flare-up of a chronic condition cannot always be made. *See, e.g.*, An Employee Comment, Doc. 4668, at 1 (''The Doctor should simply state that the person has a covered condition and how long the person will need to take time off and when, if known. If unknown the Doctor should be able to say just that.''); Association of Professional Flight Attendants, Doc. 10056A, at 10 (recounting employee's sending over 25 pages of medical documentation in an effort to satisfy employer's questions regarding frequency and duration of need for leave due to chronic conditions); Mark Blick DO, Rene Darveaux MD, Eric Reiner MD, Susan R. Manuel PA–C, Doc. FL292, at 1 (''The form also asks us to estimate how often a patient may need to miss work and then wants patient to fill a new form if they miss more than we estimate. Unfortunately, we in health care do not have a crystal ball to know the precise number of days patients may miss.''). As the Communication Workers of America noted, when it comes to the frequency and duration of leave due to a chronic condition employers are searching for certainty in response to a question which asks the health care provider for an estimate. Doc. R346A, at 10 (''The current certification form recommended by DOL makes it clear that the doctor is being asked to estimate the likely frequency and duration of any absences ('probable duration' 'likely duration and frequency'), yet many employers seem to expect a definitive prediction and deny leaves that exceed the estimates provided on the original certification form.'').

b. Incomplete Certifications

Multiple commenters also expressed frustration with what they perceived to be the open-ended nature of the certification process and sought clarification of how many opportunities an employee must be provided to cure a defective certification. *See, e.g.*, Waste Management, Inc., Doc. 10240A, at 2 (''The current regulation is open to interpretation regarding when information is due and how much additional time should be afforded to employees who do not share the FMLA certification forms timely.''); Ken Lawrence, Doc. 5228, at 1 (''At the present time the employee is really not limited to any particular time (could be months) if they are making 'good faith' efforts to obtain the certification.''); Federal Reserve Bank of Chicago, Doc. FL56, at 2 (''There should be an absolute cut off when an employer can require the employee to submit a completed certification form and the consequence of not meeting that deadline is that the absence(s) is not covered by the FMLA.''); Society for Human Resource Management, Doc. 10154A, at 18 (''HR professionals often have difficulty in determining how many times an employer must give an employee an opportunity to 'cure' a deficiency, and how long to allow them to provide such a complete certification.''). Commenters also sought clarification regarding the consequences to the employee if leave is taken during the certification process but a complete and sufficient certification is not ultimately provided.

Delaying a leave for the tardy return of a completed certification is meaningless because by the time the delayed certification has been returned, the employee has likely already taken leave (perhaps for weeks) and the employer can only revoke the FMLA designation for time already taken. The situation is exacerbated because the employer cannot reduce any of the employee's FMLA balance despite the fact the employee was absent. As a result, the employee is rewarded by having the opportunity to take more than 12 weeks of leave in that given year. While the employer technically could terminate or discipline the employee for this non-FMLA time already taken, in all likelihood employers would be concerned that such an action would run afoul of the law's sweeping prohibitions from interfering with, restraining or denying an employee's leave.

Hewitt Associates, Doc. 10135A, at 19; *see also* United Parcel Service, Doc. 10276A, at 11 (''The remedy specified in the regulations for an employee's failure to provide adequate notice is to deny or delay the employee's leave, but in these cases, leave has already been taken.''); Foley & Lardner LLP, Doc. 10129A, at 4 (''The provision does not explain how long the delay may last or what the consequences of a 'delay' can be.''); Sherman & Howard L.L.C., Doc. 10252A, at 1 (''The regulations should make clear that if an employee does not ultimately qualify for FMLA leave, or fails to provide medical certification to support the requested leave, the employee's absence will be unprotected. This means that the employer may appropriately enforce its attendance policy which may result in disciplinary action being taken against the employee.'').

c. Employer Requests for Additional Information

Employee commenters expressed related frustrations with the certification process. In particular, several commenters stated that employers repeatedly reject certifications as incomplete without specifying what additional information is necessary, leading to a prolonged and frustrating back-and-forth process. *See, e.g.*, International Association of Machinists and Aerospace Workers, Doc. 10269A, at 4 (''We have many members who have their doctors fill out the paper work only to be told it is not properly filled out. The employee fixes that problem and the Company tells them there is another problem with the paper work. This occurs over and over until finally the doctor or the employee, or both give up.''); Association of Professional Flight Attendants, Doc. 10056A, at 18 (''[I]t is simply unfair to send FMLA leave requests back to the employees and their treating health care providers for more medical facts, without ever indicating what kinds of additional medical facts are required before the employer will make a determination of medical eligibility or medical ineligibility.''). The commenters noted that these repeated requests for additional information force the employee to make additional visits to his or her health care provider (resulting in additional missed work and expense) and discourage the employee from pursuing FMLA protection. *See, e.g.*, Association of Professional Flight Attendants, Doc. 10056A, at 12 (''[T]he Company's decision to challenge somewhat routinely the health care provider's estimate of frequency and duration imposes substantial burdens on the employee—both in terms of the cost of a second or third visit to the doctor's office, and in terms of the time required to complete what is becoming a paperwork nightmare.''); An Employee Comment, Doc. 4395, at 1 (recounting her personal experience with repeated employer requests for additional information regarding her daughter's medical condition); An Employee Comment, Doc. 4668, at 1 (''It should not be up to the employer to nitpick a request for FMLA coverage.'').[14] Commenters noted that repeated requests for additional information were creating tension between employees and their health care providers. *See* International Association of Machinists and Aerospace Workers, Doc. 10269A, at 4 (''Some doctors refuse to fill out the exact same paperwork every 30 days, particularly for life-long chronic conditions like colitis or migraines.''); Kennedy Reeve & Knoll, Doc. 4763A, at 15 (''I have been hearing more and more stories of doctors refusing to fill out the forms, thereby leaving the employee without recourse.''); Lucy Walsh, Director, Human Resources, Providence Health Ministry, Doc. 10064A, at 1–2 (''Some physicians have absolutely refused to deal with the forms at all which leaves both the employee and employer in a dilemma.''); Coalition of Labor Union Women, R352A, at 5 (''Many doctors are refusing to complete duplicative paperwork, resulting in leave denials that must be either appealed or pursued through the contract's grievance procedures.'').

Some commenters viewed repeated employer requests for additional medical information as an inappropriate attempt by the employer to substitute its determination of the seriousness of the employee's health condition for the employee's health care provider's judgment. *See* Coalition of Labor Union Women, Doc. R352A, at 4 (''We have heard disturbing reports from our members that many employers are often 'second-guessing' the diagnoses of workers' doctors and other health care providers by insisting on additional certifications or challenging intermittent leave requests if the doctor's estimate of the likely time needed is exceeded even by one or two days or in some minor respect. We believe that DOL should issue a strong reminder that employers are obligated to utilize the second opinion process established in the regulations.''); Communications Workers of America, Doc. R346A, at 7 (''In CWA's experience, many employers evidence their distaste for FMLA leaves by needlessly quarreling with the information provided by health care providers in support of the employee's request for leave or 'second-guessing' the doctor under the guise of 'clarifying' the information provided on the form.''); Association of Professional Flight Attendants, Doc. 10056A, at 15 (identifying ''employer's rejection of [FMLA] applications based on its medical staff's disagreement with the health care provider's estimate of duration and frequency, or treatment plan, without invoking the second doctor review'' as one of three primary concerns with medical certification process).

Not all commenters, however, felt the current certification process needed to be revised. One commenter noted that the current certification process works well in its workplace.

We have trained our supervisory workforce to recognize even the slightest possibility of a covered absence. The supervisory personnel notify H.R. to mail out contingent FMLA notice and we include Certification paperwork with instructions on how to have it completed. We immediately place the employee on possible FMLA pending the receipt of certification paperwork. The notice covers all provisions of FMLA and necessary steps to rights and responsibilities. We actually give the employees 20 days to return the certification to cover the mailing time and some providers' slow completion rate. Once all certification paperwork is received we keep both the employee and supervisory personnel abreast of updates and approvals.

FNG Human Resources, Doc. FL13, at 4; *see also* Legal Aid Society—Employment Law Center, Doc. 10199A,

[14] Several commenters also expressed concern that health care providers are charging employees to complete the certification form (and, in some cases, to respond to employer requests for clarification). *See, e.g.*, Sun Microsystems, Inc., Doc. 10070A, at 2 (reporting that their employees have been charged between $25 and $200 to fill out a medical certification); FNG Human Resources, Doc. FL13, at 3–4 (employees charged up to $50 for certification); Shelly Johnson, Oklahoma State University, Doc. 5185, at 1 (same).

at 3 (''It is the [certification procedure] that establishes the objective basis for leave based upon the informed opinion of the health care provider of the employee or family member. Despite this useful, practical, and commonsense system that was designed to evaluate whether any condition constitutes a 'serious health condition,' many employers refuse to use it or use it improperly.''). Several commenters suggested that there was no need to change the current certification procedure. *See, e.g.*, National Partnership for Women & Families, Doc. 10204A, at 19 (''The existing regulations appropriately balance a worker's interest in a manageable certification process that does not impose unreasonable burdens, with the employer's interest in the accurate certification of medical conditions.''); Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 6 (same); Center for Law and Social Policy, Doc. 10053A, at 4 (same); OWL, The Voice of Midlife and Older Women, Doc. FL180, at 2 (opposing any change in certification rules).

2. Employer Contact With Employee's Health Care Provider—Process and Privacy Concerns

Both employers and employees commented extensively on the subject of employer contact with the employee's health care provider. Section 825.307(a) of the regulations requires that employers may contact the employee's health care practitioner for clarification of the medical certification only with the employee's consent and the contact must be made through a health care practitioner. The employer may not use the clarification process to request additional information beyond the information required in the initial certification. *See* 29 CFR 825.307(a). In general, employers were frustrated with the regulatory restrictions on contact with the employee's health care provider and employees were concerned that any changes to the current process would impinge on their medical privacy.

a. Requirement That Employer Communicate Through a Health Care Provider

Many employers commented that the requirement that they communicate only through a health care practitioner resulted in significant cost and delay. *See, e.g.,* Milwaukee Transport Services, Inc., Doc. FL80, at 3 (''In 2006 alone, MTS spent $23,000.00 for the services of a designated health care provider because it was not itself permitted under the FMLA regulations to ask questions which that provider was then forced to ask on its behalf.''); City of Portland, Doc. 10161A, at 2 (''The Act requires employers to use the employee as an intermediary to communicate with doctors or incur substantial costs hiring additional doctors to consult with employee physicians or, in narrow circumstances, to give second and third opinions. Greater flexibility in obtaining information for medical certification would streamline FMLA approvals.''); Hewitt Associates, Doc. 10135A, at 15 (''The employer's engagement of its own health care provider is expensive, takes additional time and ultimately delays the decision to approve or deny a leave request. Moreover, in cases when the employer simply wants clarification on the amount of time off required, it provides no true benefit to either the employer or the employee.''). The AFL–CIO, however, commented that ''[a]ny expense caused by the requirement that employers use their own health care professional to contact the employee's treatment provider, rather than making contact directly, is necessary to the preserve employee privacy.'' Doc. R329A, at 42.

Some commenters suggested that employers' expenses could be reduced by permitting registered nurses to contact the employee's health care provider. *See, e.g.,* United Parcel Service, Doc. 10276A, at 8–9 (noting that even employers that have nurses on their staff are required to hire a health care provider to comply with section 825.307(a) of the regulations); MedStar Health, Inc., Doc. 10144A, at 16–17 (same); Manufacturers Alliance/MAPI, Doc. 10063A, at 7 (suggesting inclusion of RNs, LPNs, and physician's assistants under the term ''health care provider''); *see also* American Academy of Physician Assistants, Doc. 10004A, at 1 (suggesting that definition of health care provider in regulations should be broadened to include physician assistants). The Coalition of Labor Union Women, however, objected to broadening the definition of health care providers allowed to contact the employee's treating physician, noting that its members ''complain that employers use nurses or physician's assistants who are not adequately trained and who repeatedly challenge their doctor's diagnoses and predictions of leave duration and frequency, leading to the need for additional certifications and forcing the employee to take personal leave time to obtain new paperwork.'' Coalition of Labor Union Women, Doc. R352A, at 6. Other commenters suggested that their human resources professionals could more efficiently clarify the certification with the employee's health care provider because they were both better versed in the FMLA and more familiar with the employee's job duties and the work environment than the employer's health care provider. *See, e.g.,* Association of Corporate Counsel, Doc. FL31, at 10 (''[T]he employer's staff members—often its Human Resources employees—are usually more knowledgeable about the specific job requirements and other information that may be relevant or helpful to the employee's health care provider in making his/her assessment.''); Milwaukee Transport Services, Inc., Doc. FL80 at 3–4 (same). One commenter, however, suggested that it was appropriate that medical inquiries be handled by medical professionals. *See* Unum Group, Doc. 10008A, at 3 (''The regulatory requirement that the employee's health care provider be contacted only through the employer's health care representative is beneficial in that it not only protects the privacy of employees but also ensures that medical information discussed and terminology used while clarifying and authenticating complete medical certifications are understood and correctly interpreted.'').

Employers also expressed frustration with the scope of information they could request when clarifying a medical certification. *See* Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 6 (''The requirement to have another health care provider contact the submitting health care provider, and then only for clarification of the form, not for additional information, unnecessarily complicates and lengthens the approval process, often beyond the length of the absence itself.''); Jackson Lewis LLP, Doc. FL71, at 5 (''The rule prohibiting employers from asking for any additional information once an employee submits a completed medical certification ignores the reality that a technically 'completed' certification may offer little insight into the need for FMLA leave, much less the medical necessity for leave on an intermittent basis.''). Several employee commenters, however, asserted that employers are already using the clarification process improperly to seek additional information beyond that included in the certification form or even to challenge the employee's health care provider's medical judgment. *See* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied

Industrial and Service Workers International Union, Doc. 10237A, at 4 (''It has been our experience that some employers contact the health care provider and attempt to reschedule appointments, ask questions that go beyond the certification of serious health condition at issue, or even try to get the health care provider to change the medical certification, all without employee consent.''); Communications Workers of America, Doc. R346A, at 10 (''In CWA's experience, there is currently widespread non-compliance with the intent of the current regulation [29 CFR 825.307] limiting employer contact with employee health care providers to those circumstances where 'clarification' or 'authentication' are necessary.'').

b. Requirement of Employee Consent for Contact

Several commenters asserted that the requirement that an employer obtain employee consent prior to contacting the employee's health care provider makes it extremely difficult for employers to investigate suspected fraud related to medical certifications. *See, e.g.*, Robert Haynes, HR-Compliance Supervisor, Pemco Aeroplex, Inc, Doc. 10100, at 1 (noting difficulty in investigating fraud when employee's consent is necessary for the employer to authenticate form with employee's health care provider); Ohio Public Employer Labor Relations Association, Doc. FL93, at 5–6 (same); United States Postal Service, Doc. 10184A, at 15 (suggesting that a ''simple and fair way to remedy this problem is to allow an employer to make contact with the provider for the purpose of confirming authenticity''); Taft, Stettinius & Hollister LLP, Doc. FL107, at 6 (''Where authenticity is suspect, the employer's inquiry is not medically related but rather, is intended to determine whether the employee's health care provider issued the certificate and that it has not been altered. In such circumstances, the restrictions contained in Section 825.307(a) serve no useful purpose, impose unnecessary expense on employers, and are not justified by any language in the Act.''). Honda suggested that the regulations should distinguish between contacts by the employer to confirm administrative details and contacts related to substantive medical discussions: ''[T]he FMLA Regulations should be amended to permit the employer to contact the employee's health care provider's office to confirm date, time and place of appointments, but not permit the employer to discuss the medical facts, the need for leave and the frequency and duration of leave with the employee's health care provider.'' Honda, Doc. 10255A, at 11–12. Other commenters suggested that the process for seeking medical information under the FMLA should be consistent with the procedure set forth under the Americans with Disabilities Act. *See infra* Chapter VII.

c. Employee Privacy Concerns

Finally, many commenters expressed concern that any changes to the regulations governing contact between their employers and their health care providers would compromise their right to medical privacy. *See, e.g.*, An Employee Comment, Doc. 4019, at 1 (''I also oppose any regulatory changes that would allow employers to directly contact a worker's health care provider, which unnecessarily violates the worker's right to keep medical information confidential.''); 9to5, National Association of Working Women, Doc. 10210A, at 4 (''We also oppose any regulatory changes that would allow employers to directly contact a worker's health care provider, which unnecessarily violates the worker's right to keep medical information confidential.''); Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 6 (same); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Doc. 10237A, at 4 (same). Another commenter stated, ''[w]orkers have the right to keep their medical information confidential and not have irrelevant health status information affect their employers' decisions.'' Families USA, Doc. 10327A, at 5. Moreover, the National Partnership for Women and Families noted that the Department already considered issues relating to the employer's need for medical information and the employee's right to medical privacy and struck the appropriate balance back in 1995 with the final regulations: ''DOL has already considered comments regarding concerns about an employer's ability to obtain medical information from a health care provider. The interim [1993] FMLA regulations entirely prohibited an employer from contacting the health care provider of the employee or the employee's family member. In response to a number of comments, * * * DOL amended the regulations to allow an employer's health care provider to contact an employee's or a family member's health care provider to clarify or authenticate the information in this medical certification. In arriving at this compromise, DOL limited this contact to an employer's health care provider to protect the privacy interests of employees and their families and ensure that their medical information was only being shared between medical professionals.'' Doc. 10204A, at 20 (footnotes omitted); *see also* Service Employees International Union District 1199P, Doc. FL104, at 5 (same); American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 42–43 (same).

3. Interaction of Health Insurance Portability and Accountability Act and Medical Certification Process

As noted in the Request for Information, the most significant law passed since the FMLA with regard to employee medical information is the Health Insurance Portability and Accountability Act (''HIPAA''). HIPAA addresses in part the privacy of individually identifiable health information. The Department of Health and Human Services (''HHS'') issued regulations found at 45 CFR Parts 160 and 164 that provide standards for the privacy of individually identifiable health information. The HIPAA regulations do not impede the disclosure of protected health information for FMLA reasons if the employee has the health care provider complete the medical certification form or a document containing the equivalent information and requests a copy of that form to personally take or send to the employer. HIPAA regulations, however, clearly do come into play if the employee asks the health care provider to send the completed certification form or other medical information directly to the employer. In such situations, HIPAA will generally require the health care provider to first receive a valid authorization from the employee before sending the information to the employer.

There is no requirement under the FMLA that employees sign a release allowing employers to access their medical information. In the preamble to the final regulations, the Department specifically rejected the idea of requiring employees to execute a medical release as part of the certification process as unnecessary. *See* 60 FR 2180, 2222 (Jan. 6, 1995) (''The Department has not adopted the suggestion that a waiver by the employee is necessary for FMLA purposes. The process provides for the health care provider to release the information to the patient (employee or family member). The employee then releases the information (form) to the employer. There should be no concern

regarding ethical or confidential considerations, as the health care provider's release is to the patient.''). Employers, however, always have the statutory right under the Act to obtain sufficient medical information to determine whether an employee's leave qualifies for FMLA protection, and it is the employee's responsibility to ensure that such information is provided to the employer. If an employee does not fulfill his or her obligation to provide such information upon the employer's request, the employee will not be entitled to FMLA leave. *See* 29 CFR 825.307–825.308; Wage and Hour Opinion Letter FMLA–2004–2–A (May 25, 2004). Some commenters believe that the HIPAA regulations restricting the flow of medical information from health care providers to third parties have created tension with the employer's right to medical information under the FMLA and have caused difficulties for employees seeking to exercise their FMLA rights. *See, e.g.*, Krukowski & Costello, S.C. (on behalf of Legislative Committee of the Human Resource Management Association of Southeastern Wisconsin), Doc. 10185A, at 3 (''[W]hen an employer may attempt to ascertain the true nature of any given absence, the employee then uses HIPAA as a shield designed to prevent the employer from obtaining any further information in order to clear up any ambiguities (or discover potential abuses).''); Methodist Hospital, Thomas Jefferson University Hospital, Doc. FL76, at 2 (''With HIPAA regulations physicians are reluctant to share information with Employers who are trying to accommodate Employee medical conditions to minimize absence.''); American Academy of Family Physicians, Doc. FL25, at 3 (''We agree with comments that the Health Insurance Portability and Accountability Act (HIPAA) has created confusion about the disclosure of information on the FMLA form. As employers are not covered entities, disclosure directly to the employer is prohibited without an authorization by the patient.'')

Several commenters reported that they have experienced increased difficulties with obtaining medical certifications from health care providers as a result of HIPAA. *See, e.g.*, AIG Employee Benefit Solutions' Disability Claims Center, Doc. 10085A, at 2–3 (''More than one Provider has written 'HIPAA' across the Form and returned it.''); Briggs & Stratton Corporation, Doc. FL37, at 4 (''[M]any physicians still insist that they are prohibited by HIPAA from responding to questions on the Certification.''). As a result of these difficulties, several commenters—including some medical providers—suggested that employees be required to sign a release as part of the certification requirement allowing the employer to communicate directly with the employee's health care provider. *See, e.g.*, American Academy of Family Physicians, Doc. FL25, at 3 (''The specific information required by the FMLA certification form and lack of an authorization on the form releasing the information may lead to inadvertent HIPAA violations. We would recommend the addition of an authorization to release medical information to the certification form which would allow the patient to indicate their authorization to release information to a family member or directly to the employer.''); Ed Carpenter, Human Resource Manager, Tecumseh Power Company, Doc. R123, at 1 (certification process would be made easier if employee signed a release allowing the employer to contact employee's health care provider); Williams Mullen, Doc. FL124, at 3 (''DOL should coordinate HIPAA and FMLA issues, including medical certifications with HIPAA waivers, to make the process of medical information consistent.''). Other commenters, however, objected to requiring employees to provide medical releases in exchange for requesting FMLA leave. *See* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, at 4 (''The USW asks the DOL to clarify that employees are not required to provide a release of medical information to the employer as a condition of applying for or receiving FMLA leave.'').

Finally, some commenters suggested that the protections afforded to employee medical information by HIPAA have obviated the need for employers to get employee consent for clarification of FMLA certifications. *See* Ohio Public Employer Labor Relations Association, Doc. FL93, at 6 (''With HIPAA laws protecting confidential medical information, the excessive restrictions found in 29 CFR 825.307 are unnecessary and should be removed.''); Taft, Stettinius & Hollister LLP, Doc. FL107, at 5 (''HIPAA and similar laws provide ample protection for personal health data and the employee's health care provider can always refuse to disclose information if he or she considers a request for clarification to implicate privacy issues.''); Hewitt Associates, Doc. 10135A, at 15 (''[G]iven HIPAA concerns, it's likely that the employee will still have a check over the process as the health care provider would require the employee's permission before he or she would speak with the employer.''); *see also* National Retail Federation, Doc. 10186A, at 17 (''The professional standards binding health care providers serve as a sufficient ''check'' on the scope of the inquiry.'').

4. Recertification and Second and Third Opinions

The medical verification process does not end with the initial medical certification. Employers who question the validity of an employee's medical certification have the right to require a second opinion from a health care provider of their choosing. *See* 29 CFR 825.307. Where the second opinion conflicts with the initial certification, the regulations allow the employer to obtain a final and binding third opinion from a jointly-designated health care provider. *See id.* Additionally, employers have the right to require employees to provide subsequent recertification for conditions that persist over time. *See* 29 CFR 825.308. The Request for Information sought comments regarding several aspects of the recertification and second opinion processes. Comments were sought regarding the time frame for recertification and the requirement that requests for recertification be made only in connection with an absence. Comments were also sought on whether the second and third opinion process should be extended to apply to recertifications in addition to the initial certification.

a. Timing of Recertifications

Several commenters recommended that employers should be allowed to seek recertification every thirty days regardless of the minimum duration of the need for leave set forth in the certification. *See, e.g.*, United Parcel Service, Doc. 10276A, at 11 (''As currently drafted, [the] language permits employees to evade the 30-day recertification requirement by having their health care provider specify a longer period of time.''); University of Minnesota, Doc. 4777A, at 1 (''In all cases, employers should have the right to request recertification from an employee on FMLA leave every thirty days.''); Carolyn Cooper, FMLA Coordinator, City of Los Angeles, Doc. 4709, at 1 (''A remedy to this manipulation or gaming of the medical certification restriction pertaining to intermittent/reduced work schedule leaves is to allow employers to request recertification every 30 days, regardless

if the duration indicated in the initial medical certification is greater than 30 days.''). The National Coalition to Protect Leave made a related point that recertifications should be permitted every thirty days irrespective of whether there was an absence during that period. *See* National Coalition to Protect Family Leave, Doc. 10172A, at 49 (''Employers should always be allowed to obtain recertification every 30 days as long as the initial certification indicates the leave needed is ongoing; the right of an employer to request recertification in such circumstances should not be limited to whether an employee had an 'absence.'); *see also* Hewitt Associates, Doc. 10135A, at 17 (''Simplify § 825.308 by deleting the requirement that employers can only request recertification 'in connection with an absence' allowing employers to ask for a recertification every 30 days.'').

Many of the commenters seeking more frequent recertifications cited the desire to control unforeseen, intermittent absences due to chronic conditions. *See* Pierce Atwood, LLP (on behalf of Maine Pulp & Paper Association), Doc. 10191A, at 2–3 (''Given the fact that intermittent leave is widely abused, employers need more flexibility to request recertification for intermittent leave than for serious health conditions that render the employee unable to work for the full 12 weeks.''); Nancy Dering Martin, Deputy Secretary for Human Resources and Management, Commonwealth of Pennsylvania, Doc. FL95, at 4 (''Also, because of the potential for abuse, we recommend Section 825.308 be further revised to allow employers to require a medical excuse indicating the time of the appointment or treatment when leave is used intermittently, the absence is unexpected, or the employer suspects abuse.''); Milwaukee Transport Services, Doc. FL80, at 2 (''One regulatory change that would assist employers such as MTS in curbing intermittent leave abuse would involve revising the current recertification regulation, 29 CFR [§] 825.308, by allowing an employer to require medical documentation of the need for intermittent FMLA leave on any occasion on which such leave is taken.''). Several of these commenters suggested that employers should be allowed to obtain medical verification of each intermittent absence even if that verification were more summary than a recertification. *See* Northrup Grumman Newport News Shipbuilding and Dry Dock Company, Doc. FL92, at 2 (''A rule could be added to require employees to provide documentation from the healthcare provider each time they exercise intermittent leave, documenting specifically that the intermittent condition prevented attendance at work.''); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 32 (''The employee should not be permitted to be the only party who determines the medical necessity of an absence on any particular day. * * * If an employee is ill enough to miss work, the employee should be required to visit or at least consult by phone with his/her doctor.''); Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 4 (''We suggest as an alternative an amendment to the regulations so that an employer can request documentation from the employee's health care provider pursuant to a uniformly applied policy for similarly-situated employees for any unforeseen, intermittent absence of less than a work day due to a chronic serious health condition.'').

Employee commenters objected to more frequent recertifications, however, because of the additional burden placed on employees. *See, e.g.*, International Association of Machinists and Aerospace Workers, Doc. 10269A, at 4 (''[O]ur members find that the requirement to recertify every thirty days is incredibly burdensome. * * * [I]t is very expensive for employees to get re-certifications. Some employees, particularly in rural areas, have to travel long distances to even see their doctors. It is ironic that often these employees actually have to miss more work time just to get the recertification.''); An Employee Comment, Doc. 4738, at 1 (''For an employer to repeatedly request for recertifications every 30 days, for an chronic Asthmatic who has an unforeseeable mild flare-up that can be taken care of with prescription medication, seems unreasonable and repetitious.''); Kennedy Reeve & Knoll, Doc. 4763A, at 17 (''The frequency with which some employers are requiring notes and recertification is both logistically (due to the availability of doctor's appointment times) and financially burdensome on the employee and physician.''); An Employee Comment, Doc. 4582, at 1 (''[E]ven though my mother's illness is terminal and my father's condition is considered lifetime, I still am required to fill out forms and have a doctor sign them every 3 months. The physician's office now charges me $20 for each form I have to have them sign. As you can imagine, this takes a lot of time and money.'').

Physicians also objected to allowing recertifications every 30 days for conditions that are medically stable: ''This is a burden to physicians who spend time completing the form to indicate that a chronic condition is still being managed. It would lessen this burden to allow recertification only for those conditions which are not categorized as chronic care or permanent disability.'' American Academy of Family Physicians, Doc. FL25 at 3; *see also* Mark Blick DO, Rene Darveaux MD, Eric Reiner MD, Susan R. Manuel PA–C, Doc. FL292, at 1 (''One employer requires us to complete the form every 60 days (ATT/SBC), one employer every 90 days and another every year. Chronic conditions extending a patient's lifetime such as diabetes and hypertension are not going to change and there is no reason the form has to be updated multiple times throughout the year.''). Another commenter suggested that employers are abusing the recertification process and using repeated requests for recertification to discourage employees from taking FMLA leave:

> [E]mployees bear the expense and burden of having to secure re-certifications and run the risk of denials if health care providers do not cooperate (or fail to do so in the relatively short time required by the employer), even though the serious and chronic nature of their medical condition is well documented. In fact, we believe that, in some work locations, these re-certification requests are thinly veiled efforts to discourage employees from taking intermittent FMLA leave and/or to retaliate against them for needing to do so.

Communications Workers of America, Doc. R346A, at 12.

b. Second and Third Opinion Process

Several employers commented on the expense involved in the second and third opinion process. *See, e.g.*, Honda, Doc. 10255A, at 11 (''Based upon Honda's experience, second and third opinions average over $700 per second or third opinion, and cost the employees their time.''); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 25 (''Second and third opinions have proven expensive and difficult to obtain.''); Yellow Book USA, Doc. 10021A, at 2 (asserting that second opinions are so expensive they are not used); Zimbrick, Inc., Doc. FL125, at 12 (''We have not requested a second opinion. The cost, time and negative impact on employee morale is prohibitive.''). Other commenters noted practical concerns regarding finding physicians to perform second opinions. *See, e.g.*, United States Postal Service, Doc. 10184A, at 19 (''We are experiencing increasing difficulty finding physicians who will perform a second opinion medical exam. Although we do not keep numbers on refusal rates, our national FMLA coordinators

regularly voice concerns about this problem.''); Foley & Lardner LLP, Doc. 10129A, at 5 (''Our experience shows that second opinions are rarely used due to delay inherent in locating a health care provider and scheduling an examination and due to the expense associated with obtaining these opinions.''); Coolidge Wall Co., Doc. 5168, at 1 (''Even in larger cities it can be difficult to find doctors in a specialty who are willing to do FMLA second opinion examinations.''); FNG Human Resources, Doc. FL13, at 5 (''Requesting a second opinion is neither economically feasible nor beneficial in our area. We do not find healthcare providers willing to state that another provider is incorrect in his/her diagnosis.'').

Some commenters suggested that employers should be allowed to use doctors with whom they have relationships for second opinions because these health care providers are more familiar with the work environment and job requirements. *See, e.g.*, Air Conference, Doc. 10160A, at 13 (''[O]ur member carriers have developed relationships with health care providers who understand our industry and operating environment and who are very familiar with the essential functions of airline jobs.'').

Two commenters expressed frustration that even where the second and third opinion process resulted in a determination that the employee was not entitled to FMLA leave, employees have attempted to subvert the process by submitting a new certification for the same condition thus initiating the review process anew. *See* United States Postal Service, Doc. 10184A, at 19 (''[A] number of employees * * * subsequently submit a new medical certification from their original health care provider which counters the information in that second/third opinion. The employees then argue that the employer must go through the second opinion process again.''); Exelon, Doc. 10146, at 6 (''Even if both the second and third opinion providers disagree with the employee's own provider, after the process has been concluded, the regulations do not preclude the employee from submitting a new certification to support a new absence, and subsequent absences, from work for the same medical condition for which a second and third opinion were obtained.'').

c. Expanding Second Opinions to Recertification

Despite employer frustrations with the costs and utility of the second and third opinion process, however, some employers sought to expand the use of the process to recertifications. *See, e.g.*, National Coalition to Protect Family Leave, Doc. 10172A, at 49 (''Permitting second and third opinions [on recertifications] will provide substantial benefits to both employers and employees. Employers will not have to incur the unnecessary expense of obtaining second and third opinions based on a doubtful initial certification unless a pattern of abuse in fact develops without losing the opportunity to challenge the certification at a later date. Employees will also benefit, since they will not have to go for second and third opinions if they do not abuse FMLA leave even if their original medical certification creates doubt as to the validity of the need for leave.''); United States Postal Service, Doc. 10184A, at 17 (''[A] second opinion should be allowed during the lifetime of an employee's condition, so long as there is reason to doubt the validity of the information in the certification.''); Air Conference, Doc. 10160A, at 13 (''Second and third opinions should also be available to employers on a medical recertification.'').

Commenters noted that the statute is silent as to the availability of second opinions on recertification and argued that the Department should not prohibit their use by regulation. *See* City of New York, Doc. 10103A, at 9 (''Under 29 CFR 825.308(e), employers are specifically barred from seeking a second or third opinion on a recertification. The FMLA, however, does not bar an employer from seeking additional opinions for a subsequent recertification.''); National Coalition to Protect Family Leave, Doc. 10172A, at 49 (''Subsection 29 CFR 825.308(e) prohibits employers from obtaining second and third opinions in connection with recertifications despite the fact that no statutory prohibition exists with regard to such requests.''); Association of American Railroads, Doc. 10193A, at 4 (noting that the prohibition on second and third opinions on recertification is not based on the Act). Other commenters, however, viewed the statutory silence differently, arguing that the statute only provides for second opinions on the initial certification and therefore they should not be permitted on recertification. *See* American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 44; National Partnership for Women & Families, Doc. 10204A, at 22–23 (''The regulations do not allow employers to request second opinions for medical recertifications because the statute itself only provides for second opinions in the context of initial certifications.''). Honda urged that the Department's 2005 opinion letter concerning reinitiating the medical certification process on an annual basis, and with it the availability of the second opinion process, be incorporated into the regulations. *See* Honda, Doc. 10255A, at 15; *see also* American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 44 (''[T]he regulations currently permit employers to reinitiate the medical certification process twelve months after leave commences, including requests for second and third opinions, regardless of past certification for the same health condition.''); Wage and Hour Opinion Letter FMLA–2005–2–A (Sept. 14, 2005).

The United States Postal Service argued that allowing second opinions on recertifications would ultimately inure to the benefit of employees. *See* Doc. 10184A, at 19 (''When an employer knows that it has the option of a second opinion if later needed, it is more likely to allow the protection at the outset even in instances where it may have some concern about the certification. The employee will be more content, as the leave request is quickly approved and he/she is spared a second medical exam.''). The National Partnership for Women & Families disagreed, however, stating that the extension of the second and third opinion process to recertifications would burden employees. *See* Doc. 10204A, at 22–23 (''[A]llowing employers to request second opinions on recertifications would unfairly burden employees for taking leave to which they are entitled.'').

d. Adequacy and Use of Current Medical Verification Process

Finally, some commenters suggested that, if properly used, the recertification and second and third opinion processes set forth in the current regulations provided employers with ample tools to control FMLA leave usage.

> At present, we believe that the regulations provide a manageable balancing of the employer's need for accurate information demonstrating that the leave is covered by the Act and the employee's important privacy interest. The regulations also establish a clear framework within which to evaluate leave requests when good faith questions arise—the second and third opinion process. Because of the concerns that this existing process is not being followed by many employers, we urge DOL to take steps to evaluate whether that process is being utilized appropriately.

Coalition of Labor Union Women, Doc. R352A, at 6; *see also* 9to5, National Association of Working Women, Doc. 10210A, at 4 (''Robust employer

safeguards already exist in the current regulations. Employers are allowed to ask for second and third opinions from alternate doctors for an FMLA request. Employers have always had the ability to handle suspicious patterns of time off, just like any other personnel problem.''); Kennedy Reeve & Knoll, Doc. 4763A, at 14–15 (''Instead of utilizing the certification process and the second and third opinion process within the regulations, many employers are now choosing to forgo some or all of those processes, and instead litigating these issues at a high price to everyone, including the courts. In order to avoid costly litigation and in order to provide more stability in the administration of leaves of absences, the regulations should require the use of a consistent form and also require the utilization of the regulatory enforcement procedures[.]'').

5. Medical Certification of the Employee's Ability To Return To Work (''Fitness for Duty Certifications'')

Section 825.310 of the regulations allows employers to require medical certification of the employee's fitness to return to work under certain circumstances. Section 825.310(g), however, bars employers from seeking a fitness for duty certification from employees returning to work after taking intermittent leave. *See* 29 CFR 825.310(g). The Request for Information sought comments on the benefits and burdens of removing this restriction and allowing fitness for duty certifications for employees returning from intermittent leave.

Many commenters questioned the rationale for the different treatment the regulations accorded to different types of leave and argued that safety concerns support requiring fitness for duty certifications for intermittent leave.

> Exempting chronic conditions from return to work clearance seems to make little sense because those conditions are just as likely as any other to compromise the health or safety of the workforce. Indeed, some chronic conditions are even more likely to give rise to a justifiable need for return to work clearance than the other serious health conditions under the FMLA. For example, an employer may have little concern about the clerical assistant returning to work after giving birth, but far more (and legitimate) concern about allowing a utility worker to return after a series of epileptic seizures on the job.

United States Postal Service, Doc. 10184A, at 20; *see also* Honda, Doc. 10255A, at 14 (''Not permitting fitness-for-duty medical forms for FMLA Intermittent Leaves puts employers and employees at risk. Such a prohibition creates an exception to most employers' policies or practices when an employee has been incapacitated for any medical reason for more than a brief period.''); MGM Mirage, Doc. 10130A, at 10 (''Quite simply, an employee places his/her physical condition at issue by requesting FMLA leave. This is true regardless of whether the employee was absent as result of continuous or intermittent leave.'').

Some employers noted that the particular safety concerns inherent in their workplaces necessitated that they obtain clear information regarding an employee's ability to safely return from leave. *See* Union Pacific Railroad, Doc. 10148A, at 6 (noting that clear information regarding their employees ability to work is critical as ''those very employees are entrusted with jobs that affect the safety and security of the general public''); Honda, Doc. 10255A, at 14 (''In manufacturing, many of the jobs include safety-sensitive duties. Therefore, the current regulation prohibiting a fitness-for-duty form for intermittent leaves puts the employee and his/her co-workers at risk and requires the employer to assume a legal risk for liability, if there is an accident caused by the reinstated employee.''); City of New York, Doc. 10103A, at 7 (''Fitness for Duty Certifications for employees in safety-sensitive positions who are intermittently absent should be an option for employers. For example, if a sanitation worker responsible for driving a two-ton truck on public roadways takes intermittent leave to treat high blood pressure, a fitness for duty certification should be required before the employee is restored to the position which carries an extreme responsibility to the public.''). These employers suggested that the FMLA return to work process undercuts legitimate employer safety programs. For example, the Maine Pulp & Paper Association submitted the following statement:

> Employees in the paper industry routinely work with hazardous materials in close proximity to heavy machinery. Forcing employers to accept the employee's medical provider's simple statement that the employee ''is able to resume work,'' or worse, in the case of an intermittent leave-taker, accept the employee's word alone with no medical verification whatsoever jeopardizes the safety of co-workers and increases exposure to expensive workers' compensation claims. MPPA's members have strong safety programs which should not be undercut by administrative requirements of the FMLA.

Pierce Atwood, LLP (on behalf of Maine Pulp & Paper Association), Doc. 10191A, at 4.

Several employers suggested the Department should delete or revise this section of the regulations so that employers would have the same right to seek fitness for duty certifications from employees returning to work from intermittent leave. *See, e.g.*, Willcox & Savage, Doc. 10088A, at 6; Foley & Lardner LLP, Doc. 10129A, at 5; National Coalition to Protect Family Leave, Doc. 10172A, at 50. The National Partnership for Women & Families, however, argued that requiring employees returning from intermittent leave to provide fitness for duty certifications—which are to the employee's expense—would significantly undermine the statutory purpose behind allowing employees to take intermittent leave. *See* Doc. 10204A, at 23 (''Any benefit to the employer of obtaining fitness for duty statements from intermittent leave-takers is far outstripped by the unwarranted burden that such a change in the regulations would impose on employees. * * * The intermittent leave option helps to take some of the financial strain off employees by enabling them to continue to earn a paycheck while addressing serious health or family needs, and allows employees to preserve as much of the twelve weeks of leave as possible.'') (footnotes omitted). The AFL–CIO also noted that ''[r]equiring employees who take intermittent leave to present fitness for duty certifications for potentially every absence is burdensome and unnecessary.'' Doc. R329A, at 44. *See also* National Business Group on Health, Doc. 10268A, at 4 (''It would be an administrative headache to require a fitness for duty statement from an employee who is absent intermittently. The added paperwork to cover this would be overly burdensome.''); Kennedy Reeve & Knoll, Doc. 4763A, at 18 (''[T]he logistical impossibility and financial burdens of allowing employers to require fitness-for-duty statements for each and every day of absence make such a policy not feasible.''). In an attempt to address the costs concern, one commenter suggested that employers bear the cost for fitness for duty certifications when the employee is returning from intermittent leave. *See* United Parcel Service, Doc. 10276A, at 6.

Finally, some commenters commented that the return to work process under the FMLA conflicted with the return to work process under the ADA, with the latter providing a better model because it allows both more substantive information and physical examinations. *See infra* Chapter VII.

6. WH–380 Form

The Department provides an optional model certification form titled ''WH–380'' to assist employers who require employees to provide medical certification of their need for FMLA leave. The form can be used for initial certification or recertification, as well as for second and third opinions. While employers may use a form other than the WH–380, they may not require information beyond what is required by the sample form. 29 CFR § 825.306(b). The Request for Information sought comments on how this form is working and what improvements could be made to it to facilitate the certification process.

Several commenters expressed frustration with the current form, finding it overly long and complicated. *See, e.g.*, American Academy of Family Physicians, Doc. FL25, at 2 (''The form WH–380 is overly complicated and confusing in its format.''); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 27 (''DOL's prototype medical certification form * * * is confusing to employers, employees, and health care providers.''); United Parcel Service, 10276A, at 10 (''The current WH–380 form is poorly drafted and confusing.''); Courier Corporation, Doc. 10018A, at 3 (''We feel the Certification of Health Care Provider (Optional Form WH–380) is far too vague.''); Association of Corporate Counsel, Doc. FL31, at 10 (''The current form is confusing and often results in incomplete or vague responses by health care providers that are insufficient to assess the employee's eligibility for leave or the timing of the leave.'').

Several commenters suggested that the form could be simplified if it was broken into multiple forms, with separate forms either for intermittent and block leave, or for leave for the employee and leave for the employee's family member. *See, e.g.*, Yellow Book USA, Doc. 10021A, at 3 (suggesting separate forms for block and intermittent leave); National Counsel of Chain Restaurants, Doc. 10157A, at 16 (suggesting separate forms for employee and family members); Indiana University, School of Medicine, Department of Orthopedic Surgery, Doc. FL70, at 1 (same); Ohio Department of Administrative Services, Doc. 10205A, at 6 (same). Spencer Fane recommended that the Department actually develop four different versions of the form for: ''(a) Continuous leave for employee's own serious health condition; (b) continuous leave for serious health condition of a family member; (c) reduced schedule/intermittent leave for employee's own serious health condition; and (d) reduced schedule/intermittent leave for serious health condition of a family member.'' Doc. 10133C, at 32.

Commenters also suggested ways to make the current form more useful to employers and easier for health care providers to understand and to complete. *See, e.g.*, Courier Corp., Doc. 10018A, at 4 (Suggesting that the ''form could be modified to be in more of a checkbox format, that might facilitate the physician's office in actually completing it more fully and providing better information for the employer to evaluate the need for leave.''); United States Postal Service, Doc. 10184A, at 12 (advocating elimination of serious health condition checklist in favor of description of medical facts); National Coalition to Protect Family Leave, Doc. 10172A, at 47 (''DOL can make the form more user-friendly by streamlining the information requested instead of asking the health care providers to respond to a page and a half of specific questions.'') (footnote omitted). A physicians group suggested that use of a standard form, as opposed to individual employer variations, would reduce the burden on health care providers. *See* American Academy of Family Physicians, Doc. FL25, at 2; *see also* Kennedy Reeve & Knoll, Doc. 4763A, at 14 (''The model certification form must be simplified, and then it must be the required form for employers to use.'').

Several commenters suggested that the Department ''allow an employer the option of identifying key job skills and tasks, similar to the [ADA], to allow the doctor to make a more informed decision about the necessity of leave with respect to the specified essential job functions[.]'' U.S. Chamber of Commerce, Doc. 10142A, at 8; *see also* United States Postal Service, Doc. 10184A, at 14 (form should include ''a statement that the provider has been informed of the employee's essential job functions''). Another commenter, however, noted that the FMLA regulations already permit employers to ''include a job description with the medical certification form given to the treating physician'' but that few employers utilize this process. Kennedy Reeve & Knoll, Doc. 4763A, at 5.

Commenters also suggested that the WH–380 should include a diagnosis, something that was included in the form published with the interim FMLA regulations but was removed from the form when the regulations were finalized. *See* Preamble to Final FMLA Regulations, 60 FR 2180, 2222 (Jan. 6, 1995) (''The regulation and form no longer provide for diagnosis.''); *see also* South Central Human Resource Management Association, Doc. 10136A, at 11 (''an employer should be permitted to obtain diagnosis and prognosis''); Detroit Medical Center, Doc. 10152A, at 2 (''It is critical that the regulations and WH–380 form be changed to require actual diagnoses to determine whether an employee's absences correlate with the medical certification.''). One such commenter stated that ''the FMLA's current restriction on obtaining a diagnosis creates an unnecessary and awkward limitation on the employee's health care provider in completing the medical certification form and the employer's health care provider in seeking clarification of information contained in that form. Generally, meaningful communications between the health care providers cannot take place without some discussion about the actual diagnosis, particularly if second and third opinions are involved.'' MedStar Health, Inc., Doc. 10144A, at 17.

Finally, some commenters noted that the WH–380 does not include all of the information that an employer is entitled to under the Act. Importantly, multiple commenters noted that the current form does not require the health care provider to certify the medical necessity for intermittent leave, which is a statutory requirement for the taking of such leave. *See* 29 U.S.C. § 2612 (b); *see also* National Coalition to Protect Family Leave, Doc. 10172A, at 47 (''In the case of intermittent leave, the medical necessity for the intermittent or reduced schedule also should be specified in accordance with 29 CFR § 825.117 (not currently asked on the model form).''); Society for Human Resource Management, Doc. 10154A, at 18 (same); American Electric Power, Doc. Fl28, at 5 (''Unfortunately, the statutory requirement that 'medical necessity' be demonstrated by employees seeking intermittent leave has been effectively eliminated by the Department's regulations.''). Another commenter noted that the current form also does not solicit the information necessary to allow employers to determine whether an employee is entitled to FMLA leave to care for a child who is 18 years old or older. Honda, Doc. 10255A, at 13 (suggesting that in order for employers to determine whether an adult child is covered under the FMLA the form should be amended to include: ''[1] Whether the adult child has a physical or mental disability; [2] Whether the physical or mental disability has caused the child to be incapable of self-care; and [3] A checklist of 'activities of daily living' and 'instrumental activities of daily

living' that the adult child cannot perform.'').

VII. Interplay Between the Family Medical Leave Act and the Americans With Disabilities Act

The Department's Request for Information noted that several organizations had reported the FMLA's ''interaction with other laws,'' including Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101–12117, 12201–12213 (1994) (''ADA''), was a ''potential source of confusion.''[15] In seeking comments on section 825.307 of the FMLA implementing regulations, which permits an employer to contact the employee's health care provider for purposes of clarification and authentication only through the employer's health care provider and only with the employee's permission, the Department specifically asked how this provision ''[should] be reconciled with the [ADA], which governs employee medical inquiries and contains no such limitation on employer contact?'' Although not directly mentioning the ADA, the Department also asked for information relating to the ''implications of permitting an employer to modify an employee's existing job duties to meet any limitations caused by the employee's serious health condition as specified by a health care provider, while maintaining the employee's same job, pay, and benefits.''

The ADA, which is enforced by the United States Equal Employment Opportunity Commission (''EEOC''), the Department's Office of Federal Contract Compliance Programs, and the Department of Justice, prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating in employment against qualified individuals with disabilities. *See* 42 U.S.C. 12101–12117, 12201–12213. The statute includes an affirmative obligation to provide reasonable accommodation to the known disability of a qualified applicant or employee, unless doing so would pose an ''undue hardship.'' *See* 42 U.S.C. 12112 (b)(5)(A). Under the ADA, an employee who needs medical leave related to his or her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause an ''undue hardship'' on the employer's business operations. *See* EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (hereafter, ''EEOC Reasonable Accommodation Guidance''), at Question 21. The FMLA, enforced by the Department's Wage and Hour Division, entitles ''eligible'' employees of covered employers up to 12 weeks of unpaid, job-protected leave each year–with continuation of group health insurance coverage under the same conditions as prior to leave–for specified family and medical reasons, including the employee's own serious health condition. *See* 29 U.S.C. 2612, 2614(c). The FMLA does not include a provision for ''reasonable accommodation,'' nor does it limit the availability of leave to situations where the employee's absence would not cause an ''undue hardship'' for the employer. Nonetheless, one of the stated purposes of the FMLA is to allow an employee to take reasonable leave for medical reasons ''in a manner that accommodates the legitimate interests of employers.'' 29 U.S.C. 2601(b).

While both statutes provide employees with job-protected medical leave, as the FMLA's legislative history makes clear, ''the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA].'' S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). Indeed, the two Acts have distinctively different purposes: the ADA is intended to ensure that qualified individuals with disabilities are provided with equal opportunity to work, while the FMLA's purpose is to provide reasonable leave from work for eligible employees. *Compare* 42 U.S.C. 12101 *and* 29 CFR 1630.1 (Title I of the ADA requires equal employment opportunity for qualified individuals with disabilities) *with* 29 U.S.C. 2601(b) (one of the purposes of the FMLA is ''to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition''). Recognizing this fact, section 825.702(a) of the FMLA implementing regulations provides that ''[a]n employer must therefore provide leave under whichever statutory provision provides the greater rights to employees.'' *See also* EEOC, Fact Sheet: The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (hereafter, ''EEOC FMLA and ADA Fact Sheet''), at Question 17.

Moreover, an FMLA ''serious health condition'' is not necessarily an ADA ''disability.'' An ADA disability is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. *See* 42 U.S.C. 12102(2). While some conditions that qualify as serious health conditions under the FMLA may be ADA disabilities (*e.g.*, most cancers and serious strokes), other qualifying serious health conditions under the FMLA may not be ADA disabilities. For example, periods of incapacity due to a routine broken leg or hernia could qualify as an FMLA serious health condition, but not be a qualifying disability under the ADA because the impairment is not substantially limiting. Similarly, incapacity due to pregnancy (*e.g.*, severe morning sickness) qualifies as a serious health condition under the FMLA, but may not be a disability under the ADA because the condition is not long-term or permanent. *See* EEOC FMLA and ADA Fact Sheet, at Question 9.

Despite the different purposes and scope of the two statutes, the FMLA and its implementing regulations borrow several important concepts from the ADA. For example, the Department relied on ADA concepts when defining one of the qualifying reasons for medical leave under the FMLA—because of an employee's own serious health condition. The statutory provision governing this issue provides that leave is available ''because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.'' 29 U.S.C. 2612(a)(1)(D). The implementing regulations provide that leave entitlement accrues under this provision ''where a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position,'' as provided for under the ADA and the EEOC's regulations. 29 CFR 825.115. Under the ADA, a qualified individual with a disability is defined as an individual who, with or without reasonable accommodation, can perform all of the ''essential functions'' of the position in question. *See* 42 U.S.C. 12111(8). The ADA implementing regulations define essential functions as the ''fundamental job duties'' of the employment position. 29 CFR 1630.2(n).

The intersection of the ADA and the FMLA, and its implications for employees and employers, was the subject of much discussion by respondents to the Department's RFI.

[15] Several commentators have called the intersection of the ADA, the FMLA, and workers' compensation laws the ''Bermuda triangle of employment laws'' because, while all three address employers' obligations towards employees with certain medical conditions, the responsibilities imposed by each are overlapping but distinctively different. Lawrence P. Postol, ''Sailing the Employment Law Bermuda Triangle,'' The Labor Lawyer, Vol. 18, No. 2 (Fall 2002); Peter A. Susser, Family and Medical Leave Handbook, Vol. 6, No. 4, p. 7 (July 1998).

The comments focused on five broad areas of interplay between the two statutes, discussed in greater detail below: (1) The interaction between the FMLA employee notice provisions and the ADA prohibitions on medical inquiries; (2) obtaining medical information under the FMLA and the ADA; (3) confirming that an employee is fit to return to work after medical leave under the FMLA and the ADA; (4) offering light duty, modified work or transfers/reassignments under the FMLA and the ADA; and (5) permitting ''reasonable leave for medical reasons'' under the FMLA and the ADA.

A. The Interaction of the FMLA Employee Notice Provisions and the ADA Medical Inquiry Prohibitions

Under section 825.302 of the FMLA implementing regulations, an employee must provide notice ''sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.'' The request may be verbal and the employee need not specifically mention the FMLA. *See* 29 CFR 825.302(c). The regulations permit an employer to ''inquire further'' about an employee's medical condition where insufficient information is initially provided. *Id.* The ADA, however, strictly proscribes the circumstances under which employers may make medical inquiries of employees, including those without ADA disabilities, providing that:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. 12112(d)(4)(A); *see also* 29 CFR 1630.14(c).[16] The ADA also prohibits discrimination in employment against individuals who are ''regarded as'' having an impairment by their employer. 42 U.S.C. 12102(2)(c) and 12112(a).

The Department received comments from employers and their representatives suggesting that employees need to be further educated about their obligations under the FMLA to provide appropriate information about why leave is needed so that employers can fulfill their obligations under the Act if the leave is potentially FMLA-covered without violating the ADA's restrictions on medical inquiries or running the risk that they will be deemed to have ''regarded'' someone as disabled. More than one commenter noted that an employee's failure to provide adequate FMLA notice can place employers in an unreasonable situation. For example, the National Coalition to Protect Family Leave stated that employers often have been required to '''read between the lines' by grasping unspoken behavioral clues that an employee may need [FMLA] leave,'' which places ''employers—and their front-line managers—in the impossible position of having to navigate between compliance with the FMLA * * * and compliance with the [ADA] which restricts medical inquiries of employees and prohibits employers from 'regarding' individuals as disabled.'' Doc. 10172A, at 31–32. A law firm representing employers echoed similar concerns. Schwartz Hannum PC, Doc. 10243A, at 7 (cases reasoning that ''unusual behavior'' may itself constitute notice to employer of need for FMLA leave ''impose an unreasonable expectation upon managers and human resources personnel * * * such employer representatives must be able to intuit when an employee's body language or behavior suggests that an FMLA leave may be appropriate.'').

Still another commenter noted that ''[e]mployers are wary of asking too many questions for fear of violating complicated limitations of the ADA.'' Employers Association of New Jersey, Doc. 10119A, at 7. This commenter stated that ''employers err on the side of caution and grant many questionable FMLA requests to ensure the employee's rights are not violated.'' *Id.* at 8; *see also* National Public Employer Labor Relations Association, Doc. R358A, at 10 (suggestion in section 825.302 that employers may ''inquire further'' about an employee's medical condition when insufficient information is provided ''flies in the face of what human resources managers have trained supervisors not to do under other federal laws,'' such as the ADA).

B. Obtaining Medical Information Under the FMLA and the ADA

While an employer's obligation to provide medical leave under both the FMLA and the ADA are triggered by similar employee notice provisions, the approach an employer must follow to obtain appropriate medical information to support the need for leave varies depending on whether the employee's request is covered by the FMLA or the ADA. The statutory provisions of the ADA outline the factors to be considered when determining whether a reasonable accommodation must be granted (42 U.S.C. 12111(10)) and the types of medical inquiries and examinations that may be made (42 U.S.C. 12112(d)), but do not specify a particular process for considering an employee's request for reasonable accommodation. The EEOC's implementing regulations and interpretative guidance suggest that an employee and employer engage in an ''interactive process'' designed to confirm that the employee has an ADA-covered disability and to identify an effective accommodation for the employee's specific limitations. *See generally* 29 CFR Part 1630 and Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act (''This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with a disability.''). As part of this process, the employer may request reasonable documentation about the nature, severity, and duration of the employee's impairment, and the extent to which the impairment limits the employee's ability to perform daily activities when the disability or the need for accommodation is not known or obvious. *See* EEOC Reasonable Accommodation Guidance, at Question 6; EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (hereafter, ''EEOC Disability-Related Inquiries Guidance''), at Question 7. If the initial information provided is insufficient, the EEOC encourages the employer to ''consider consulting with the employee's doctor (with the employee's consent).'' EEOC Disability-Related Inquiries Guidance, at Question 11.

The FMLA, after appropriate notifications, allows the employer to require that the employee submit a certification from his/her heaLth care provider to support the need for FMLA leave. If the employer questions the validity of the employee's certification, the employer may require second and/or third medical opinions to resolve the situation. See 29 U.S.C. 2613. The FMLA medical certification process prohibits an employer from contacting an employee's health care provider directly and restricts the scope and timing of information requests. See 29

[16] EEOC Enforcement Guidance expressly provides that the ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities, such that ''[a]ny employee * * * has a right to challenge a disability-related inquiry or medical examination that is not job-related and consistent with business necessity.'' EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, at General Principles Section.

CFR 825.303–825.311; (*See also* Chapter V for a discussion of employee notification rights and responsibilities and Chapter VI for a full discussion of the FMLA medical certification and verification process.).

Commenters routinely noted these differences between the ADA and the FMLA, and the difficulties caused when leave requests triggered obligations under both statutes. *See* International Foodservice Distributors Association, Doc. 10180A, at 2 (''The severe limitations on inquiries of healthcare providers certifying the presence of serious health conditions—more extreme than under the ADA or state workers' compensation laws—should be revisited.''). Several of these commenters stated that the ''FMLA restrictions particularly are problematic when employers face a request from an employee that triggers obligations under both the FMLA and ADA, given that the latter requires the employer to engage in interactive processes to accommodate the employee.'' Temple University, Doc. 10084A, at 10; United States Postal Service, Doc. 10276A, at 9–10 (''When an FMLA-qualifying 'serious health condition' is also a potential 'disability' under the ADA, [section 825.306's] restriction on medical information is in conflict with the ADA interactive process, which allows—and arguably requires—an employer to gather far more medical information regarding an employee so that it can make an informed decision regarding possible accommodations.''). Another commenter argued that the FMLA process ''places artificial restrictions on access to necessary information regarding an employee's serious health condition. The limitations imposed by the FMLA regulations go far beyond those imposed in such acts as the [ADA] and clearly fail to balance both employer and employee rights under the FMLA.'' MGM Mirage, Doc. 10130A, at 7; *see also* U.S. Chamber of Commerce, Doc. 10142A, at 7 (''Employers found that the burdens to obtaining medical information under the FMLA are significantly greater'' than inquiries under the ADA).

Several commenters contrasted employees' obligations under the FMLA medical certification process with employees' obligations under the ADA interactive process. *See, e.g.*, Pilchak Cohen & Tice, P.C., Doc. 10155A, at 23 (''employees should have a duty to cooperate with the employer, as they do under the ADA''). A law firm reported that its employer clients feel that their hands are tied when employees fail to complete and return FMLA medical certification forms. Proskauer Rose, Doc. 10182A, at 2. This commenter stated that, ''[w]ith the frequent overlap between FMLA and employer-provided leave, and the interplay with disability discrimination and workers compensation laws, many employers are reluctant to risk disciplining an employee for the administrative failure to timely comply with the provision of information needed to make an FMLA eligibility determination.'' *Id.*

Commenters also noted that the two statutes allow employers to obtain different information regarding an employee's medical condition, with the ADA generally permitting a broader exchange of information. *See, e.g.*, South Central Human Resource Management Association, Doc. 10136A, at 11 (''The ADA allows an employer to obtain all relevant medical information in determining whether a 'disability' exists. The same approach should be used under the FMLA.''); *see also* MedStar Health, Inc., Doc. 10144A, at 17 (allow ''employers' health care providers to obtain information regarding the actual diagnosis of an employee's serious health condition,'' as is currently permitted under the ADA). Still other commenters suggested that the Department ''allow an employer the option of identifying key job skills and tasks, similar to the [ADA], to allow the doctor to make a more informed decision about the necessity of leave with respect to the specified essential job functions.'' U.S. Chamber of Commerce, Doc. 10142A, at 8; *see also* United States Postal Service, Doc. 10184A, at 14 (form should ''include a statement that the provider has been informed of the employee's essential job functions'').

Information received in response to the Department's RFI suggests that one particularly problematic area for many employers is that the FMLA prohibits direct employer contact with the employee's health care provider, while the ADA does not. *Compare* 29 U.S.C. 2613 *with* EEOC Disability-Related Inquiries Guidance, at Question 11. Several commenters noted that the FMLA ''limitations associated with the clarification process were created solely by the regulations. Such limitations contradict what was expressly addressed and permitted by Congress when enacting the ADA just three years before the FMLA.'' The National Coalition to Protect Family Leave, Doc. 10172A, at 46; *see also* Temple University, Doc. 10084A, at 10 (The FMLA restrictions on direct doctor contact are ''purely a product of the regulation.''). One commenter summed up the difficult position it believes this places employers in:

> If an employee requests reasonable accommodation under the ADA in connection with or before an FMLA request, therefore, the Company lawfully may have direct contact with the employee's health care provider. In those cases, the rule that an employer may contact * * * the provider directly for one purpose but not for the other confuses employees and their providers. As well, whenever the Company contacts a provider for ADA purposes during the certification process, there is an inherent risk that the contact could be challenged as unlawful under the FMLA.

Progressive, Doc. FL2, at 4.

A number of retailers reported that this limitation ''poses one of the biggest obstacles to preventing FMLA misuse and abuse. It also creates a conundrum for compliance-minded employers who are concerned about violating the FMLA when fulfilling their obligations under the ADA.'' National Retail Federation, Doc. 10186A, at 17. Furthermore, some commenters felt that the prohibition against contact with the health care provider is unnecessary. One public employer asserted:

> Comparison with the [ADA] demonstrates that these additional barriers are not necessary. The ADA, like the FMLA, requires employers to review an employee's medical information and make determinations about the employee's ability to work based on that medical information. The type of medical information reviewed under both statutory schemes is similar. Additionally, the employer's staff members reviewing FMLA requests may also be responsible for making determinations regarding employee ADA accommodation requests.

City of New York, Doc. 10103A, at 8; *see also* Edison Electric Institute, Doc. 10128A, at 9 (''Our experience has shown no negative consequences of direct contact between employers and their employees' health care providers in the ADA context.''); Clark Hill PLC, Doc. 10151A, at 3–4 (Because the ADA ''clearly allows employers to make such job related inquiries to a health care provider on their own* * *. [t]he added burden of hiring a health care provider is not necessary''). Comments from the National Retail Federation also reflect this view:

> Employers know based on the conversations they have with health care providers during the ADA process that the clarification and additional information they need usually does NOT require the involvement of another health care professional. The need to follow-up with the health care provider presents an exception and is borne out of legitimate needs, such as to gain a better understanding of an employee's condition, to determine if the employee qualifies, and if so, what should the employer reasonably expect with respect to intermittent absences and to curb abuse.

National Retail Federation, Doc. 10186A, at 17.

These commenters, and numerous others, suggested that the Department ''allow employers to contact the health care provider to confirm that appointments or treatments are being scheduled when least disruptive to operations * * * and for the purposes of clarification and to verify authenticity of the certification.'' Commonwealth of Pennsylvania, Doc. 10042A, at 4; *see also* City of Philadelphia Personnel Department, Doc. 10058A, at 2 (arguing that Department should permit Human Resource department to contact employee's doctor ''when medical certification is vague and needs clarification'' in same way practice is ''currently permitted under the ADA''); Frost, Brown, Todd, LLC, Doc. 10137A, at 2 (eliminate barrier on direct doctor contact as ''unnecessary and unjustified'' given that such contact is permitted under ADA and most state workers' compensation laws); International Public Management Association for Human Resources and International Municipal Lawyers Association, Doc. R350A, at 4 (allow employers to communicate directly with health care providers, as is permitted under ADA).

Other commenters suggested that employers be permitted to require that an employee provide a limited release allowing the disclosure of sufficient medical information to confirm the need for leave, as is permitted by the ADA. Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 4 (suggesting that employers be allowed to require that employees seeking FMLA leave sign release authorizing employer to submit list of questions to employee's health care provider as is permitted by ADA); *see also* United States Postal Service, Doc. 10184A, at 16–17 (noting that such an approach would be consistent with the ADA where it is ''well settled law that an employee who refuses to provide an employer with sufficient medical information under the ADA can be denied the accommodation the employee seeks''). For a fuller discussion of comments relating to medical releases and medical certification forms generally, see Chapter VI.

More generally, many of the commenters stated that the FMLA certification process could be improved if a more interactive process, similar to that provided for under the ADA, was adopted. *See, e.g.*, Fairfax County Public Schools, Doc. 10134A, at 4–5 (ADA interactive process is ''much better model'' and FMLA ''regulations should encourage free communication in order for the parties to have a common understanding of medical limits and leave requirements''); Manufacturer's Alliance/MAPI, Doc. 10063A, at 7 (suggesting that ''the ADA informal interactive process used to gather information on an employee's medical condition should be adopted under the FMLA''); Society for Human Resource Management, Doc. 10154A, at 17 (''By reconciling the processes permitted by the ADA with the FMLA, needless time and expense associated with the FMLA approval process will be eliminated.''); National Association of Manufacturers, Doc. 10229A, at 9 (''The ADA model should be adopted for the FMLA[.]''). A human resource management association stated that an interactive process would work better than the ''exchange of paper'' process currently in place under the FMLA:

> While we understand the goals reflected by the FMLA, perhaps it would be less burdensome if employers were allowed to be involved in the back-and-forth discussion between the employee and physician as opposed to stressing the exchange of paper similar to the ''interactive process'' line of cases that has developed under the ADA * * *. When family and medical leave is properly certified, it is our experience that the leave is typically granted; however, when the circumstances surrounding the leave are less than clear or the doctor's certification is less than straightforward, the employer is in a no-win situation.

Krukowski & Costello, S.C. (on behalf of Legislative Committee of the Human Resource Management Association of Southeastern Wisconsin), Doc. 10185A, at 4.

Commenters suggested a number of potential benefits that might flow from implementing similar processes for obtaining medical information under the ADA and FMLA. The City of New York stated that more consistent procedures would allow employers ''to make informed decisions in a timely manner'' and reduce administrative compliance burdens by allowing ''staff members who review both FMLA- and ADA-related requests * * * to apply a similar inquiry procedure to both types of situations.'' Doc. 10103A, at 9. Another commenter stated that adopting similar processes would eliminate confusion between the FMLA and ADA guidelines for medical inquiries and interactive discussion. Northern Kentucky Chamber of Commerce, Doc. 10048A, at 7. The Ohio Department of Administrative Services believed such a change would ''diminish the requirement that the doctor correct vague or incomplete paperwork.'' Doc. 10205A, at 4–5. Another commenter suggested that the need for a second opinion examination would be reduced by incorporating ADA concepts into the FMLA certification process. *See* Pilchak Cohen & Tice, P.C., Doc. 10155A, at 22. A health care provider argued that coordinated procedures for obtaining medical information under the FMLA and the ADA would reduce employer costs of providing FMLA leave. MedStar Health, Inc., Doc. 10144A, at 17 (current rule creates an ''unnecessary cost for employers, even for those with in-house employee health offices that are staffed by nurses but do not have a nurse practitioner or other FMLA health care provider'').

The AFL–CIO, however, argued that the clear distinctions between the ''reasonable accommodation'' provisions of the ADA and the ''leave provisions'' of the FMLA made the different procedures under each statute for obtaining medical information appropriate:

> Since only ''known physical or mental limitations'' trigger an employer's obligation to make reasonable accommodation under the ADA (§ 12112(b)(5)(A)), it is reasonable for employers to have direct contact with employees' health care providers in certain limited situations. An ADA employer may require detailed medical knowledge of an employee's disability in order to accommodate that disability in the workplace. Furthermore, it is advantageous for employees with disabilities if their employers understand their limitations.
>
> The same concerns are not present with respect to FMLA medical determinations—employers are not required by the FMLA to make changes in the workplace to accommodate the serious health conditions of employees, and they therefore need less information than employers under the ADA in order to fulfill their statutory obligations. In the FMLA context, an employer does not need access to information beyond a doctor's certification of the factors establishing the presence of a serious health condition under the statute and a doctor's estimate of likely absences or duration of treatment.

American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 42–43. The National Partnership for Women & Families also opined that the FMLA and the ADA raise different privacy concerns and thus that a different approach to protecting medical privacy is appropriate under the FMLA. *See* Doc. 10204A, at 21 (''The privacy concerns regarding employers' access to medical information are heightened in the context of the FMLA because the FMLA governs the employer's access not only to the medical information of employees, but also to the medical information of employees' family members. This provides justification for additional caution in insuring the

privacy of medical information under the FMLA.'').

C. Confirming That an Employee Is Fit To Return To Work After Medical Leave Under the FMLA and the ADA

Under the ADA, an employer may require an employee returning from medical leave to provide a doctor's note, as long as it has a policy or practice of requiring all employees to do so, and may require an employee to submit to a fitness for duty examination when the ''employer has a reasonable belief that an employee's present ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat.'' EEOC Disability-Related Inquiries Guidance, at Questions 15 and 17. The FMLA regulations, on the other hand, prohibit an employer from obtaining (except when governed by a collective bargaining agreement or State or local law) a fitness for duty examination when an employee returns from an intermittent leave absence, even if the request would be permitted under the ADA. *See* 29 CFR 825.310(g). The same section allows employers to require a fitness for duty certification pursuant to a uniformly applied policy, but limits that certification to a ''simple statement'' of an employee's ability to return to work and places limitations on an employer's communications with the employee's health care provider regarding the employee's ability to return to work that are not present under the ADA. 29 CFR 825.310(c).

As noted in Chapter VI, numerous commenters questioned the FMLA restrictions on fitness for duty certifications, with many arguing that the current process compromises legitimate safety concerns. Several of these commenters stated that the FMLA fitness for duty provision ''conflicts with that permitted under the ADA,'' with the latter allowing both more substantive information and physical examinations. National Coalition to Protect Family Leave, Doc. 10172A, at 50; *see also* Fisher & Phillips LLP, Doc. 10262A, at 17–18 (''Employers must be permitted to verify FMLA leave and fitness for duty in the same way they currently verify other absences due to illness.''). An employer's association that commented on the different standards under the ADA and the FMLA stated that, ''an employer is more aware of the inherent duties of a job than the employee's health care provider. Yet [under the FMLA], the employer may not delay the employee's return to work while contact with the health care provider is being made.'' Employers Association of New Jersey, Doc. 10119A, at 8–9. This commenter suggested that the Department adopt the reasonable belief standard used under the ADA so that employers could seek fitness for duty certifications for FMLA leave in all instances, and using the same processes, permitted by the ADA. *Id.*

Several commenters representing employees cautioned that altering the fitness for duty certification procedures under the FMLA would place an ''unwarranted burden'' on employees. *See, e.g.*, National Partnership for Women & Families, Doc. 10204A, at 23. For a fuller discussion of employee comments relating to this issue, see Chapter VI.

D. Offering Light Duty, Modified Work, or Transfers/Reassignments Under the FMLA and the ADA

One of the qualifying reasons for medical leave under the FMLA is for an employee's own serious health condition. The FMLA implementing regulations provide that an employee is entitled to leave under this provision ''where a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of'' the ADA and the EEOC's regulations. 29 CFR 825.115.[17] The regulations prohibit employers from modifying an employee's job functions to preclude the taking of FMLA leave. 29 CFR 825.220(b)(2), *see also* 825.702(d)(1). The FMLA permits the temporary reassignment of employees needing intermittent or reduced schedule leave ''that is foreseeable based on planned medical treatment'' under certain circumstances. *See* 29 U.S.C. 2612(b)(2).

Under the ADA, an employer must provide reasonable accommodation, including job restructuring, to qualified individuals with disabilities. *See* 42 U.S.C. 12111(9); 29 CFR 1630.2(o). Under EEOC Enforcement Guidance, an employer is not required to eliminate an ''essential function'' of a position, but may do so if it wishes. ''This is because an individual who is unable to perform the essential functions, with or without reasonable accommodation, is not a ''qualified'' individual with a disability within the meaning of the ADA.'' *See* EEOC Reasonable Accommodation Guidance, General Principles Section. Moreover, the employer has the ''ultimate discretion'' to choose among reasonable accommodations as long as the chosen accommodation is effective. EEOC Reasonable Accommodation Guidance, at Question 9. In certain situations, employers must offer light duty or reassignment to qualified individuals with disabilities as a reasonable accommodation. *See, e.g.*, EEOC, Enforcement Guidance: Workers' Compensation and the ADA (hereafter, ''EEOC Workers' Compensation Guidance''), at Questions 27 and 28 (discussing employer's obligation to provide light duty work); EEOC FMLA and ADA Fact Sheet, at Question 13 (discussing employer's obligation to reassign employee to vacant position).

A number of commenters discussed the different treatment afforded modified work, light duty, and transfers/reassignments under the FMLA and the ADA. While commenters sometimes used these terms interchangeably, this Chapter treats each issue separately. This is because each may impose different obligations and restrictions on employers under the ADA and the FMLA. Thus, for the Department's purposes, the discussion of modified job duties generally refers to situations where an employer wishes to modify an employee's job duties in his or her existing job, and particularly to the suggestion by commenters that employers should be permitted to remove one or more essential job functions in lieu of providing FMLA leave. The discussion of the treatment afforded ''light duty'' under the FMLA and ADA refers to particular positions created specifically for the purpose of providing work for employees who are unable to perform some or all of their normal duties. It is important to note, however, that the term ''light duty'' also is used by some employers to refer to situations whereby employees are excused from performing certain job functions of their normal job or are assigned to any less demanding position. The discussion below concerning transfers or reassignments is intended to cover those situations whereby an employer reassigns an employee to an alternative position, which need not be, and often is not, part of the employer's ''light duty'' program.

1. Modifying Job Duties

The FMLA regulations prohibit employers from ''changing the essential functions of [the employee's] job in order to preclude the taking of leave.'' 29 CFR 825.220(b)(2). Many employers expressed support for changing the regulations to allow ''an employer to

[17] As discussed later in this chapter, the Department received comments suggesting that the Department's regulation is inconsistent with the ADA. Under the ADA, an employee is entitled to reasonable accommodation only if he or she has a covered disability and is qualified to perform (with or without an accommodation) all of the essential functions of his or her position. Only those physical or mental impairments that ''substantially limit'' one or more major life activities are covered disabilities under the ADA.

modify an employee's job duties in his/her existing job—including removal of essential job functions—in lieu of FMLA leave.'' National Coalition to Protect Family Leave, Doc. 10172A, at 36 (emphasis in original); *see also* College and University Professional Association for Human Resources, Doc. 10238A, at 9 (allowing modification of job duties in employee's existing job allows for ''greater flexibility to meet staffing needs''); National Retail Federation, Doc. 10186A, at 14–15 (''return[ing] an associate with a non-occupation illness or injury to work in a manner that is consistent with restrictions is not unfriendly to the employee and is consistent with the statutory intent of FMLA''); DST Systems Inc. Doc. 10222A, at 3 (''Modifications enable an employee to continue work and avoid the need for FMLA leave, thus eliminating the burden on fellow employees and the employer, and loss of active employment for the employee''). These commenters suggested that ''an employee who can perform an essential function with an accommodation, or by virtue of the elimination of that task for the period he or she is unable to perform it, should not be permitted to reject the accommodation and pursue FMLA leave. This result is contrary to the legislative intent of FMLA, which was passed to protect employees who had to miss work rather than employees who merely chose to miss work because they prefer to avoid it.'' National Association of Convenience Stores, Doc. 10256A, at 2–3; *see also* Fisher & Phillips LLP, Doc. 10262A, at 6 (same).

Commenters supporting this view argued that ''[a]llowing this would benefit both employers and employees. The more options employees have to remain at work, the less likely they are to exhaust their leave rights and, more importantly, their rights to reinstatement.'' National Coalition to Protect Family Leave, Doc. 10172A, at 36–37. A number of employers felt that requiring modified work would be particularly helpful in situations where the ''employee has requested intermittent leave to be taken on an unplanned, unscheduled basis.'' Bendix, Doc. 10079A, at 8; *see also* The Retail Industry Leaders Association, Doc. 10259A, at 3–4 (same); Detroit Medical Center, Doc. 10152A, at 3 (same). A university employer stated that allowing an employer to modify essential functions of an employee's job may be a better alternative than placing the employee on leave, as it allows the employer ''greater flexibility to meet staffing needs, while also providing the employee with protections. It also would better rationalize the FMLA with accommodation provisions of the [ADA] and the light duty provisions of workers' compensation laws.'' Temple University, Doc. 10084A, at 8–9; College and University Professional Association for Human Resources, Doc. 10238A, at 9 (same). As one law firm noted, ''[a]n employee at work performing his or her job is certainly preferable to their not being at work at all. This option would also benefit employees to the extent that they would now have the opportunity to continue receiving pay.'' Fisher & Phillips LLP, Doc. 10262A, at 11.

A group representing 5,000 physicians and other health care professionals specializing in the field of occupational and environmental medicine stated that employers should be ''encouraged in the FMLA to assist the employee to consider alternatives for a better health solution than taking time off from work.'' The American College of Occupational and Environmental Medicine, Doc. 10109A, at 2. Another commenter noted it could not see any ''negative effect'' to allowing an employer to alter the essential functions of an employee's job but thought it was unlikely that ''most employers would ever take this opportunity, as most are loathe to concede that essential functions may not really be essential.'' Kennedy Reeve & Knoll, Doc. 4763A, at 12.

A number of employee organizations expressed concern about any change to the FMLA scheme that would require employees to accept an employer's offer of modified work in lieu of leave. As the National Partnership for Women and Families stated:

> One bedrock principle of the FMLA is the right of an eligible employee to take a specified amount of leave for family or medical reasons and then return to the same or equivalent job. To the extent the RFI is considering a change in the regulations to require an employee to accept an employer's offer to make modifications to the employee's existing job to accommodate a serious health condition, we believe such a change would be inconsistent with the express language and intent of the FMLA. We also would oppose any effort to penalize an employee who declined to accept such a position, except as currently permitted by law. The law entitles eligible employees to take up to twelve weeks of family or medical leave, and nothing in the statute, regulations, or legislative history suggests that an employee should lose the right to determine whether or not to take leave if an employer modifies the employee's job duties.

National Partnership for Women & Families, Doc. 10204A, at 16; Families USA, Doc. 10327A, at 5; *see also* American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 35 (''[N]either the statute nor the regulations provides a basis for treating a modified position as the equivalent of FMLA leave. An employee who accepts a modified job does not forfeit his or her entitlement to a full 12 weeks of leave if the employee remains unable to perform the essential functions of the unmodified job.'').

Some employers also expressed concern about the implications of eliminating essential job functions. A state employer, who opposed any requirement that employers modify essential job functions under the FMLA, expressed concern that such a proposal would not be cost effective, require significantly more documentation, and cause ''further confusion'' between the FMLA and the ADA. The Commonwealth of Pennsylvania, Doc. 10042A, at 2; *see also* The Pennsylvania Turnpike Commission, Doc. 10092A, at 5 (permitting employers to modify existing job duties would ''add to the existing confusion of FMLA and [ADA] regulations''). Another state employer thought that it would be ''unduly burdensome to require employers to also modify job duties for employees with serious health conditions'' because employers already were legally obligated to provide modified work under workers' compensation laws and the ADA. City of Portland, Office of Management and Finance, Doc. 10161A, at 5. A business organization in Northern Kentucky did not believe that permitting an employer to change the essential functions of a job would be of ''significant value.'' Northern Kentucky Chamber of Commerce, Doc. 10048A, at 4–5. This organization felt that permitting such a practice would likely add increased administrative burdens, cause further conflict between the ADA and the FMLA, and require increased communications with supervisors to ensure that all assigned work met the employee's restrictions, among other issues. *See id.* at 4–5; *see also* National Business Group on Health, Doc. 10268A, at 5 (''implications of modifying an employee's job duties include higher budgeted costs, peer dissatisfaction, and the administrative difficulty of moving an employee to a temporary position''); Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 3 (modifying an employee's existing job duties would allow employees to collect the same pay and benefits while no longer doing an equivalent job and cause employees to provide their physicians ''with reasons why they

could not do the most disliked portion of their jobs'').

A health system consisting of multiple hospitals in the Washington, D.C., metropolitan area expressed concern that modifying one or more essential job functions in lieu of providing leave under FMLA might mean that an employer would be required to modify those same functions as a reasonable accommodation under the ADA, when it otherwise would not be required to do so.

> In keeping with the approach under the [ADA] that essential job functions need not be modified in order to accommodate an employee's disability, such modifications should not occur to accommodate an employee's serious health condition under the FMLA. Both laws serve an important purpose in accommodating employees for the ultimate objective of having them perform the essential job functions. Thus, nothing should detract from determinations made regarding the essential job functions as necessary and central to a job position. Additionally, it is important to note that if employers modify essential job functions for FMLA purposes, they have potentially obligated themselves to doing so under the ADA.

MedStar Health, Inc., Doc. 10144A, at 14–15. As another employer noted, removing essential job functions for FMLA purposes ''could lead to an argument that these functions are not that essential, and that the employer should be required to remove them from the position's job duties altogether as an accommodation'' under the ADA. Washington Metropolitan Area Transit Authority, Doc. 10147A, at 4; *see also* Madison Gas and Electric Company, Doc. 10288A, at 3 (''An employer may be hesitant to modify an employee's existing job duties due to the implications of the [ADA].''). The health care employer felt that ''[t]his would be an undesirable result for employers seeking to reasonably facilitate and manage ADA-related job accommodations.'' MedStar Health, Inc., Doc. 10144A, at 14–15. Another company, Zimbrick, Inc. stated the following:

> Because FMLA and ADA overlap, modifying existing job duties essentially creates a temporary accommodation which could become permanent. From a business perspective, why would we want to pay an employee performing only part of the essential functions the same as someone who performs all of them?

Doc. FL125, at 1.

The EEOC also stated that ''such an alteration to the FMLA rule could raise new ADA issues related to essential functions and reasonable accommodation.'' United States Equal Employment Opportunity Commission, Doc. 10234A, at 3. In its comments, the EEOC acknowledged that the ADA permits, but does not require, an employer to modify or remove essential job functions. The Commission noted, however, that it has not yet provided guidance on ''whether an employer's reasonable accommodation duty [under the ADA] could be satisfied by reallocating essential functions with the express purpose of precluding leave as a reasonable accommodation.'' *Id.*

2. Offering Light Duty Work

A number of organizations also commented on the differences between the FMLA's and ADA's treatment of light duty work. Section 825.220(d) of the FMLA regulations provides that an employee may voluntarily accept a ''light duty'' assignment while recovering from a serious health condition, but cannot be coerced to do so. When an employee accepts a light duty assignment, the time spent working in the light duty position does not count against his or her FMLA leave entitlement. Under the FMLA, the employee's right to be restored to the same (or equivalent) position held prior to the start of the leave, however, expires after a cumulative period of 12 weeks of leave and light duty work. 29 CFR 825.220(d); *see also* Wage and Hour Opinion Letter FMLA–55 (March 10, 1995). By contrast, under the ADA, an employer does not have to create a light duty position for an individual with a disability but, if a vacant, light duty position already exists, the employer must reassign the individual with a disability to the position if there is no other effective accommodation available and the reassignment would not pose an undue hardship. *See* EEOC, Workers' Compensation Guidance, at Questions 27 and 28. In addition, if the only effective accommodation available is similar or equivalent to a light duty position, an employer must provide that accommodation, absent undue hardship. *See* EEOC, Workers' Compensation Guidance, at Question 27.

Nearly all respondents to a survey conducted by a human resource association in Ohio ''believed employees requesting leave for their own serious health conditions should be required to accept light duty work consistent with their medical restrictions, if offered.'' Miami Valley Human Resource Association, Doc. 10156A, at 6–7. The National Association of Convenience Stores, the U.S. Chamber of Commerce, the Society for Human Resource Management, the College and University Professional Association for Human Resources, and others agreed. *See* National Association of Convenience Stores, Doc. 10256A, at 2–3; U.S. Chamber of Commerce, Doc. 10142A, at 11; Society for Human Resource Management, Doc. 10154A, at 9; College and University Professional Association for Human Resources, Doc. 10238A, at 9; American Bakers Association, Doc. R354A, at 4; American Hotel & Lodging Association, Doc. R366A, at 3; National Public Employer Labor Relations Association, Doc. R358A, at 8. Employers who supported this proposal believed that ''[i]n many cases, light duty may be a better alternative than placing the employee on leave, as it allows the employer greater flexibility in meeting its staffing needs. Such a change also would better rationalize the FMLA with the accommodation provisions of the [ADA] and the light duty provisions of many workers' compensation laws.'' College and University Professional Association for Human Resources, Doc. 10238A, at 9. Other commenters stated that it ''is unnecessary, and often ill-advised, to allow an employee to refuse light duty * * * Experience has shown that employees with minor injuries generally recover more quickly if they are working, gradually returning to their former capabilities.'' Society for Human Resource Management, Doc. 10154A, at 9; *see also* The Retail Industry Leaders Association, Doc. 10259A, at 3–4 (same).

Several employers supporting mandatory light duty work thought that such work should count against an employee's 12-week FMLA entitlement. *See* National Association of Convenience Stores, Doc. 10256A, at 2–3; Fisher & Phillips LLP, Doc. 10262A, at 6; American Bakers Association, Doc. R354A, at 4 (Department should clarify that ''time spent in light duty work away from the employee's usual job counts against the 12 weeks of FMLA entitlement for all purposes''). As one employer noted, ''light duty should count against an employee's FMLA leave entitlement and reinstatement rights. Otherwise, the employer ends up essentially making reasonable accommodations for FMLA even if the condition is not an ADA-qualifying disability.'' Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 4.

On the other hand, some employers thought light duty should not count against the employee's FMLA leave entitlement. A survey conducted by a national law firm revealed that 66% of the almost 150 individuals who responded on behalf of their companies did not believe that light duty work should be counted against an

employee's FMLA leave entitlement. ''The vast majority of respondents felt that light duty is generally the result of a work injury or occupational injury and is better dealt with through the ADA or workers' compensation. Most respondents stated that with light duty, an employee is usually working and therefore not on leave.'' Hinshaw & Culbertson LLP, Doc. 10075A, at 4; *see also* MedStar Health, Inc., Doc. 10144A, at 14 (''When an employee works, even in an alternate light duty capacity, he/she is not absent under the meaning of the FMLA.'').

A number of organizations representing employees also opposed permitting an employer to modify an employee's existing job in lieu of providing leave. *See, e.g.*, American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 34 (''treating light duty work as the equivalent of FMLA leave falls squarely'' within statutory prohibition making it unlawful to interfere with, restrain, or deny exercise of right to take FMLA leave and conflicts with regulatory provision concerning waiver of FMLA rights). Several of these commenters thought that counting light duty as FMLA leave would be unfair to employees because ''[i]f an individual is at work, even if the duties have been modified to address the employee's illness or care giving responsibilities, he or she is still engaging in productive activity for the employer.'' University of Michigan Center for the Education of Women, Doc. 10194A, at 2; *see also* Families USA, Doc. 10327A, at 4–5 (''opposes any reduction in FMLA leave for time spent working in a ''light duty'' position.''); Coalition of Labor Union Women, Doc. R352A, at 4–5 (''counting ''light duty'' work as FMLA leave is not appropriate and runs counter to the intent of the statute'').

3. Standards for Transferring/Reassigning Employees

The Department also received comments regarding the differing standards under the FMLA and the ADA for transferring or reassigning employees to alternative positions. The FMLA provisions regarding transfers to an alternative position, discussed more fully in Chapter VIII, generally permit the employer to temporarily transfer an employee who needs foreseeable intermittent or reduced schedule leave for planned medical treatment to an alternative position with equivalent pay and benefits. The position must be one for which the employee is qualified and which better accommodates recurring periods of leave. *See* 29 U.S.C. 2612(b)(2). (See also Chapter IV discussing unscheduled intermittent leave.). Under the ADA, part-time work or occasional time-off may be a reasonable accommodation. As a general matter, transfer is the accommodation of last resort under the ADA. However, if, or when, an employee's need for part-time work or reduced hours in his or her current position creates an undue hardship for an employer, the employer must transfer the employee to a vacant, equivalent position for which the employee is qualified, unless doing so would present an undue hardship for the employer. If an equivalent position is not available, the employer must look for an equivalent position at a lower level. Further accommodation is not required if a lower level position is also unavailable. *See* EEOC FMLA and ADA Fact Sheet, at Question 13. Employers who place employees in lower level positions are not required to maintain the employee's salary at the level of the higher grade, unless the employer does so for other employees. *See* EEOC Technical Assistance Manual § 3.10.5.

As discussed more fully in Chapter VIII, a number of commenters suggested that the FMLA regulations should be amended so that employers may transfer employees who request unscheduled or unforeseeable intermittent leave. Some commenters supporting reassignment argued that employers should be permitted to temporarily transfer an employee to an alternative position in ''all cases involving intermittent leave or reduced leave schedules.'' United Parcel Service, Doc. 10276A, at 5. Still other commenters suggested that employers should be allowed, in certain circumstances, to permanently reassign employees needing unforeseeable intermittent leave due to a chronic condition. *See* Betsy Sawyers, Director, Human Resources Department, Pierce County, Washington, Doc. FL97, at 4. Many employers that supported reassignment urged that a process similar to that provided under the ADA be adopted, whereby reassignment ''could be conditioned on the employer's determination that unscheduled leave could not be continued without jeopardizing the essential functions of the job. After making such a determination, the employer could reassign the employee to a position that better accommodated intermittent attendance.'' Fairfax County Public Schools, Doc. 10134A, at 3; *see also* National Council of Chain Restaurants, Doc. 10157A, at 10–11 (FMLA should ''accommodate employers in a manner similar to the ADA,'' by permitting the employer to transfer a manager needing unscheduled intermittent FMLA leave ''to a lesser management or a non-management position that better accommodates the employer's needs''). As one employer stated, this approach ''would provide employers with more flexibility in accommodating the employee's need for leave while enabling the employer to better manage the workforce.'' Exelon, Doc. 10146A, at 8.

A law firm suggested that employers also be permitted to reduce the employee's pay and benefits upon transfer, as is permitted for reassignments under the ADA. *See* Pilchak Cohen & Tice, P.C., Doc. 10155A, at 12.[18] Another commenter also recommended that the employer ''be allowed to adjust the employee's compensation and benefits so that they are commensurate with the position into which the employee is being moved.'' National Council of Chain Restaurants, Doc. 10157A, at 10–11. The law firm supporting this approach explained that, otherwise, the provisions for transferring employees under the FMLA are ''inherently unrealistic'' because the ''employee would always prefer to be transferred to a position with less responsibilities and less duties, but with equal pay and benefits.'' Pilchak Cohen & Tice, P.C., Doc. 10155A, at 12.

E. Permitting ''Reasonable Leave for Medical Reasons'' Under the FMLA and the ADA

An employee is entitled to reasonable accommodation, including medical leave, under the ADA only if he or she has a covered disability and is qualified to perform (with or without an accommodation) the essential functions of the position. 42 U.S.C. 12112(b)(5)(A); *see generally* EEOC Reasonable Accommodation Guidance. Only those physical or mental impairments that ''substantially limit'' one or more major life activities are covered disabilities under the ADA. *See* 42 U.S.C. 12102(2)(A). Moreover, an employer is not required to provide any accommodation that would pose an ''undue hardship'' on the operation of the employer's business. *See* 42 U.S.C. 12112(b)(5)(A); 29 CFR 1630.9. ''Undue hardship'' means significant difficulty or expense and refers not only to financial difficulty, but also to requested accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter

[18] While the FMLA permits the temporary reassignment of employees needing intermittent or reduced schedule leave ''that is foreseeable based on planned medical treatment'' under certain circumstances, the statute expressly requires that the alternative position have equivalent pay and benefits. 29 U.S.C. 2612(b)(2).

the nature or operation of the business. *See* 42 U.S.C. 12111(10); 29 CFR 1630.2(p). An employer also is not required to eliminate an essential function of an employee's position when providing accommodation under the ADA. *See generally* EEOC Reasonable Accommodation Guidance.[19]

One of the stated purposes of the FMLA is to permit employees to take reasonable leave for medical reasons ''in a manner that accommodates the legitimate interests of employers.'' 29 U.S.C. 2601(b). The statute entitles employees to FMLA leave for (among other qualifying reasons) a serious health condition that makes them unable to perform the functions of their position. *See* 29 U.S.C. 2612(a)(1)(D). The FMLA implementing regulations adopt the ADA ''essential function'' concept in explaining when an eligible employee is entitled to leave for his or her own serious health condition. Under section 825.115, leave may accrue to an eligible employee ''where a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position.'' 29 CFR 825.115. Other provisions of the FMLA allow an employee to take leave intermittently or on a reduced schedule. *See* 29 U.S.C. 2612(b); 29 CFR 825.203–825.205. Unlike the ADA, however, neither the FMLA regulations nor the statute limits the availability of such leave to situations where the employee's absence does not impose an ''undue hardship'' on the employer.

A number of commenters believed that the FMLA regulations should be revised to incorporate the ADA concept of ''substantially limited'' in working. As a group of human resource professionals stated:

> The Act seems to suggest that an employee is only entitled to FMLA leave for a serious health condition when the condition makes the employee totally unable to work. The Regulations have gone one step further and state that an employee is entitled to FMLA leave if he/she is unable to perform just one essential job function. * * * Employees should only be able to take FMLA leave if they are substantially limited in their ability to perform essential job functions.

South Central Human Resource Management Association, Doc. 10136A, at 18; *see also* Baldor Electric Company, Doc. 10320A, at 2 (leave should only be allowed when a person cannot perform the majority of the essential functions). According to another employer, ''the current regulatory framework allows for leave when an employee is unable to perform only one essential function of his or her job, even if there are ten other essential functions of the job that the employee is able to perform. This conflicts with the provisions of the [ADA].'' Verizon, Doc. 10181A, at 7.[20]

Commenters also routinely contrasted an employer's ability to manage absenteeism under the FMLA and the ADA, particularly in situations where an individual takes unscheduled intermittent leave. A law firm representing employers summarized the inconsistencies between the two statutes:

> The [FMLA] Regulations clearly state that the ADA definition of ''essential job functions'' is to be used under the FMLA. 29 CFR 825.115. Although attendance is an essential job function under well-established ADA case law, the Regulations ignore the case law and permit employees to maintain unacceptable attendance records on a permanent basis. In fact, the FMLA Regulations permit employees with permanent chronic conditions to be absent with impunity for approximately 25% of a work year. * * * The ADA, on the other hand, does not protect an employee with a disability who cannot maintain an acceptable attendance record.
>
> The courts have consistently and uniformly held that attendance is an essential job function and that a continuous or reduced schedule leave of a reasonable duration are reasonable accommodations under the ADA. * * *. [T]he FMLA was intended to cover a temporary emergency or critical need for medical leave, not a permanent non-emergency or non-critical need for medical leave.

Spencer Fane Britt & Browne LLP, Doc. 10133C, at 9; *see also* South Central Human Resource Management Association, Doc. 10136A, at 13 (noting inconsistency between ADA and FMLA treatment of attendance and stating that FMLA regulations ''permit chronic absenteeism problems whereas the ADA does not''); United States Postal Service, Doc. 10184A, at 24 (''Pursuant to the ADA, an employer is not required to accommodate chronic absenteeism or allow employees to work on a part-time schedule while encumbering a full-time position. Yet the FMLA requires an employer to do just that.''); Association of Corporate Counsel, Doc. FL31, at 2–3 (suggesting, when discussing employer's ability to control absenteeism under FMLA, that ''current regulations protect employee behavior that the Federal Courts and the EEOC have concluded is not only unreasonable but also inconsistent with the essential needs and expectations of employers''). For a full discussion of comments regarding the impact of unscheduled intermittent leave on attendance, see Chapter IV.

To address these concerns, a significant number of employers and organizations representing employers suggested that intermittent or reduced schedule medical leave should not be required under the FMLA when it presents an ''undue hardship'' or means that the employee cannot perform the essential functions of the position, as would be the case under the ADA.

> [P]rovisions could be added to the FMLA and its regulations to take into account the impact of intermittent leave on the employer. The ADA utilizes reasonableness and undue hardship standards when assessing employee requests for accommodations. Under the ADA, an employer is not required to fundamentally alter the nature of a position in order to accommodate an employee's

[19] The EEOC has stated that ''in some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation.'' EEOC Reasonable Accommodation Guidance, at Question 24. Numerous court decisions have held that the ADA does not protect individuals who have ''erratic, unplanned absences.'' *EEOC* v. *Yellow Freight Sys., Inc.,* 253 F.3d 943, 948 (7th Cir. 2001) (''our court, and every circuit that has addressed this issue has held that ''in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs.''); *accord Brenneman* v. *MedCentral Health System,* 366 F.3d 412 (6th Cir. 2004); *Mason* v. *Avaya Communications, Inc.,* 357 F.3d 1114 (10th Cir. 2004); *Nesser* v. *Trans World Airlines, Inc.,* 160 F.3d 442, 445 (8th Cir.1998); *Hypes* v. *First Commerce Corp.,* 134 F.3d 721 (5th Cir.1998); *Lyons* v. *Legal Aid Soc'y,* 68 F.3d 1512, 1516 (2d Cir.1995); *Tyndall* v. *Nat'l Educ. Ctrs.,* 31 F.3d 209, 213 (4th Cir.1994); *Carr* v. *Reno,* 23 F.3d 525, 530 (D.C. Cir.1994); *cf. Nesser* v. *Trans World Airlines, Inc.,* 160 F.3d 442, 445 (8th Cir.1998); *Hypes* v. *First Commerce Corp.,* 134 F.3d 721 (5th Cir.1998); *Lyons* v. *Legal Aid Soc'y,* 68 F.3d 1512, 1516 (2d Cir.1995); *Tyndall* v. *Nat'l Educ. Ctrs.,* 31 F.3d 209, 213 (4th Cir.1994); *Carr* v. *Reno,* 23 F.3d 525, 530 (D.C. Cir.1994); *cf. Humphrey* v. *Memorial Hospitals Ass'n,* 239 F.3d 1128 (9th Cir. 2001) (noting ''that although excessive or unscheduled absences may prevent an employee from performing the essential functions of his job and thereby render him not otherwise qualified for purposes of the ADA, regular and predictable attendance is not per se an essential function of all jobs''); *Ward* v. *Mass. Health Research Inst.,* 290 F.3d 29 (1st Cir. 2000) (while ''regular and reliable schedule may be an essential element of most jobs, resolution of the issue in each case requires a fact-intensive inquiry into the pattern of the attendance problem and the characteristics of the job in question''); *see also David* v. *Florida Power & Light Co.,* 205 F.3d 1301 (11th Cir. 2000) (holding that overtime, like job presence, can be an essential function of a job).

[20] In the process of finalizing the FMLA implementing regulations, the Department received comments questioning whether section 825.115 was intended to mean that an eligible ''employee must be found unable to perform each and every essential function (i.e. all), or only any single one, or some of several of the essential functions' in order to take FMLA leave due to his or her own serious health condition. The Department made clear in the preamble to its Final Rule that ''[t]his section was intended to reflect that an employee would be considered ''unable to perform the functions of the position'' * * * if the employee could not perform any *one* (or more) of the essential functions.'' 60 FR 2179, 2196 (Jan. 6, 1995).

disability. The FMLA and its regulations should include similar considerations. An employer should not be required to grant a request for intermittent leave if the request fundamentally alters the nature of the employee's position (i.e., effectively changes the start or end time for the position, allows the employee to excuse himself/herself from work without notice, excuses the employee from performing essential duties, excuses the employee from the requirement to work overtime, etc.). An employer should not be required to grant a request for intermittent leave if there is no reasonable way to cover the employee's work duties (e.g., because of the nature of the position; because the employee cannot provide reasonable advance notice of the leaves; because the leaves are frequent).

University of Minnesota, Doc. 4777A, at 3; *see also* National Retail Federation, Doc. 10186A, at 11 (''One suggestion is that intermittent leave should not be required where the unpredictable or short-term nature of the absences impose undue hardship or mean that the employee cannot perform the essential functions of the job.''); National Council of Chain Restaurants, Doc. 10157A, at 10 (''same defenses available under the ADA [*e.g.*, undue hardship] should be available'' when employee is unable to perform essential functions); Texas Parks and Wildlife Department, Doc. 10253A, at 1 (allow employers to consider business necessity when intermittent leave extends beyond one year or 480 hours of leave); International Public Management Association for Human Resources and International Municipal Lawyers Association, Doc. R350A, at 3 (summarizing survey of local, state, and federal government employers, including respondent's suggestion that ''an ADA-type exception be made if the need for intermittent leave will pose an undue hardship on the employer''). One commenter suggested that amending the FMLA to include ''undue hardship'' and ''direct threat'' defenses would import the ''important balance between employee and employer rights found in the ADA'' to the FMLA and make the two laws better integrated. Pilchak Cohen & Tice, P.C., Doc. 10155A, at 18.

While not specifically addressing the inclusion of an ''undue hardship'' defense under FMLA, several commenters representing employees indicated that they ''strongly oppose any reconsideration of the FMLA that would serve to limit FMLA's scope or coverage.'' American Federation of State, County and Municipal Employees, Doc. 10220A, at 1. A membership organization affiliated with the AFL-CIO expressed concern about the impact ''scaling back'' FMLA protections would have. They noted that, at each FMLA workshop they conducted, ''attendees repeatedly told us that, without the protections offered by the FMLA, many would have been out of work and without crucial healthcare benefits, due to their employers' very strict absence policies.'' Coalition of Labor Union Women, Doc. R352A, at 2. The National Partnership for Women & Families, while acknowledging that ''situations involving unscheduled leave may present unique challenges for both employees and employers,'' argued that limiting the availability of unscheduled leave ''would be inconsistent with the very purpose of the FMLA'' which provides for unscheduled leave because ''it is impossible to plan or script every situation where family or medical leave is needed.'' Doc. 10204A, at 12.

VIII. Transfer to an Alternative Position

The RFI did not specifically ask questions about an employer's ability to transfer an employee to an ''alternative position'' but the Department received many unsolicited comments on this topic. Under the Act, an employer may transfer an employee to an ''alternative position'' with equivalent pay and benefits when the employee needs to take intermittent or reduced schedule leave ''that is foreseeable based on planned medical treatment[.]'' 29 U.S.C. 2612(b)(2). This statutory provision was intended ''to give greater staffing flexibility to employers by enabling them temporarily to transfer employees who need intermittent leave or leave on a reduced leave schedule to positions more suitable for recurring periods of leave. At the same time, it ensures that employees will not be penalized for their need for leave by requiring that they receive equivalent pay and benefits during the temporary transfer.'' 60 FR 2180, 2202 (Jan. 6, 1995).

Section 825.204 of the regulations explains more fully when an employer may transfer an employee to an alternative position in order to accommodate intermittent leave or a reduced leave schedule. Section 825.204(a) sets the general parameters for the transfer: ''If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, * * * the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.'' 29 CFR 825.204(a).

Section 825.204(d) prohibits an employer from ''transfer[ing] the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee.'' Section 825.204(e) limits the length and circumstances of the transfer: ''When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position, no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he/she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.'' 29 CFR 825.204(e). Unlike a ''light duty'' assignment under section 825.220 of the regulations, a transfer to an alternative position does not require the employee's consent. *Cf.* 29 CFR 825.220(d) (light duty) (''[Regulations do] not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ''light duty'' assignment while recovering from a serious health condition[.]'').

A. Department's Regulations Only Permit Transfer Where Employee Needs Intermittent Leave or Leave on a Reduced Leave Schedule That Is Foreseeable Based on Planned Medical Treatment.

A significant number of commenters questioned why the regulations permit an employer to transfer an employee only when the employee's need for leave is foreseeable based on planned medical treatment as opposed to a chronic need for unforeseeable leave. These stakeholders noted as an initial matter that the statute is silent on the issue. ''We recognize that while the statute allows an employer to transfer an employee taking intermittent or reduced schedule leave for planned medical treatment, * * * it is silent on taking unforeseeable intermittent leave or foreseeable leave unrelated to treatment.'' Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 3. It is the regulations, commenters contended, that prohibit a transfer in the unforeseeable intermittent context. ''As presently drafted, § 825.204 only permits employers to transfer an employee to an alternative equivalent position where the employee's need for intermittent leave is 'foreseeable based on planned medical treatment.'" United Parcel Service, Doc. 10276A, at 5. ''Section 825.204 allows an employer to transfer an employee to an alternative

position where the leave is foreseeable based on planned medical treatment for the employee or a family member.'' Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 3. Moreover, Ford & Harrison noted a recent Sixth Circuit case, which stated that the Department's regulations allow ''an employer [to] * * * transfer an employee only when the need for the intermittent leave is foreseeable.'' Doc. 10226A, at 6. *See Hoffman* v. *Professional Med Team,* 394 F.3d 414, 421, n.11 (6th Cir. 2005) (transfer of employee with chronic condition requiring unforeseeable leave likely prohibited by sections 825.204(a), (c), and (d)).

Many commenters saw no practical basis for differentiating between foreseeable and unforeseeable need for leave in this context. ''We do not see any basis for distinguishing between foreseeable vs. unforeseeable leaves for purposes of such temporary transfers.'' United Parcel Service, Doc.10276A at 5. Similarly, another commenter stated:

> [Section 825.204 provides n]o similar option * * * for employers to transfer or otherwise alter the duties of an employee who needs unscheduled or unforeseeable intermittent leave. Even if the employee's unscheduled intermittent absences may result in substantial safety risks to the public or co-employees, or could cause serious disruption to the operations of the employer, such employee's duties or position cannot be altered as a result of the unscheduled intermittent leave.

The Southern Company, Doc. 10293A, at 3. Another company echoed the same concern that under the current regulatory scheme ''[e]mployers do not have [the option] to transfer or otherwise alter the duties of an employee who needs unscheduled or unforeseeable intermittent leave.'' Edison Electric Institute, Doc. 10128A, at 6.

In fact, many employers reported that the underlying rationale for the transfer provision—to provide ''greater staffing flexibility'' while maintaining the employee's same pay and benefits—is best served where the employee's need for leave is unforeseeable. ''[I]f there is to be such a distinction, then a strong argument can be made that the DOL and Congress got it exactly backwards. Indeed, it is much easier for employers to arrange temporary coverage of an employee's normal job duties where the intermittent leaves occurs on a regular and foreseeable schedule, than it is to accommodate an employee with a chronic condition with unforeseeable flare-ups[.]'' United Parcel Service, Doc. 10276A, at 5. Other commenters agreed:

> Employers report that it is most often the employees whose intermittent or reduced leave schedule is unforeseeable who cause the most disruption in the workplace. For example, an employee works on an assembly line in a factory that runs on a 24-hour basis in three shifts. The employee has been approved to take intermittent leave to accommodate migraines and has been calling in sick on a relatively frequent, but unforeseeable basis (*e.g.*, approximately three times a month), giving only about an hour notice before the start of his shift. Good attendance is essential to this position because an absence can hold up the entire production line.

Ford & Harrison LLP, Doc. 10226A, at 6. ''The most complicated part of intermittent leave * * * occurs with unplanned intermittent leave * * * [A]ccommodating late arrivals or even early departures to satisfy the requirements of an intermittent leave can create problems in the workplace, including overburdening other workers and creating a sense of inequity and frustration.'' Leonard, Street and Deinard, Doc. 10330A, at 2.

Other commenters criticized the entire idea of ''alternative positions'' as unrealistic and/or problematic. For example, one law firm stated that ''alternative positions'' are a fiction:

> Alternative positions do not exist in the real world. [The regulations] provide that in a reduced schedule situation, ''an [employer] may assign an employee to an alternate position with equivalent pay and benefits that better accommodate the employee's intermittent or reduced leave schedule.'' * * * When this provision is pointed out, the overwhelming majority of employers I work with just laugh. Employers simply do not have ''alternative positions'' hanging around which they can simply slot someone into. Most FMLA-covered companies are small and medium sized. They do not have hundreds of positions. This was a regulatory provision written without understanding of the real world. Real companies are trying to run lean. They do not [have], and cannot afford to create, an extra position which is not needed. So, the ''alternative position'' provision is generally useless.

Boardman Law Firm, Doc. FL4, at 2. Even where an alternative position exists to which an employee on intermittent leave may be assigned, problems can arise. ''Employees on unpredictable intermittent leave who have been placed in lower-level positions on a temporary basis can degrade morale of other employees in the same positions. The other employees in the same positions may earn lower wages than the employees on FMLA leave, but those other employees are held to higher attendance standards, absent their own need for FMLA leave.'' North Dakota Society for Human Resource Management State Council, Doc. FL90 at 3. ''[T]he regulation that permits an employer to transfer an employee to another position which better accommodates the intermittent leave is inherently unrealistic. Is there any doubt that an employee would always prefer to be transferred to a position with less responsibility and less duties, but with equal pay and benefits? And, would an employee placed into such a position of equal pay and benefits, but with less responsibilities and duties, have any motivation to get better?'' Pilchak Cohen & Tice, P.C., Doc. 10155A, at 12.

B. Recommendations From the Regulated Community

Most stakeholders who submitted comments on this subject agreed that the regulations should be revised to permit employee transfers in the case of either foreseeable or unforeseeable leave: ''This section should be amended to permit the transfer to an alternative position for unforeseen intermittent absences or foreseen intermittent absences unrelated to medical treatment. * * * In the absence of such an amendment, prohibiting such transfers often creates undue hardship to our organization's ability to provide patient care or other services and does not further the purposes of the FMLA.'' Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 3. ''The FMLA regulations should be clarified to ensure that the employer may transfer the employee to a position that better accommodates an unforeseeable intermittent leave schedule.'' Ford & Harrison LLP, Doc. 10226A, at 6. ''DOL should revise § 825.204 to permit temporary transfer in all cases involving intermittent leave or reduced leave schedules.'' United Parcel Service, Doc. 10276A, at 5. ''Section 825.204 should be modified to allow an employer to transfer an employee who requires unscheduled intermittent leave to an alternative position with equivalent pay and benefits or to otherwise alter such employee's job duties (e.g., assign to another shift) in order to better accommodate the periods of intermittent leave. Such a modification would allow an employer to determine how to best accommodate the employee's periodic and unforeseen absences to minimize the disruption in the workplace and perhaps avoid a safety risk to others, while at the same time allow the employee to perform the essential functions of the position to the best of his or her ability.'' The Southern Company, Doc. 10293A, at 3. ''Employers should be provided with greater flexibility to temporarily transfer

employees to positions that better accommodate intermittent and reduced schedule absences.'' Taft, Stettinius & Hollister LLP, Doc. FL107, at 3. ''The employer should be permitted to move an employee on intermittent leave * * * to another position with the same salary and benefits, if in such a position the leave would be less disruptive. * * * [P]ermitting the employer flexibility to relocate an employee at the same salary and benefits * * * would help to address the difficulties employers have in addressing demands for intermittent leave for chronic illnesses.'' Leonard, Street and Deinard, Doc. 10330A, at 2. ''[T]he employer should be able to place employees whose restrictions only require some additional rest periods, or less strenuous work, into other slots, without requiring time off.'' Indiana Chamber of Commerce, Doc. 10170A, at 3. ''Employers should be able to reassign an employee on intermittent leave, without loss to the hourly pay rate or degradation in assignment, to a position schedule that would be more conducive to an intermittent schedule without fear of retaliation claims. Employees would still be returned to the same or similar job assignment at the end of the FMLA leave.'' County of Placer, Doc. 10067A, at 3.

Some employers felt the move should be potentially permanent where the employee's schedule cannot meet the employer's need:

> Where regular and predictable attendance is an essential function of a position, and the employee occupying that position has a chronic medical condition that the physician has determined will never allow regular and predictable attendance, the Employer should be allowed to accommodate that employee by permanently transferring him/her to an alternative position or, if no alternative is available, to separate the employee from the position that requires regular and predictable attendance, even if the employee has not exhausted the 12 weeks of FMLA leave.

Betsy Sawyers, Director, Human Resources Department, Pierce County, Washington, Doc. FL97, at 4. The Fairfax County Public Schools echoed this theme: ''[I]t would be helpful if the regulations would allow the employer to reassign the employee after a specified period of unscheduled intermittent leave, such as two or three months. Reassignment could be conditioned on the employer's determination that unscheduled leave could not be continued without jeopardizing the essential functions of the job. After making such a determination, the employer could reassign the employee to a position that better accommodated intermittent attendance.'' Doc. 10134A, at 3. In a different but related context, Ford & Harrison made the same suggestion: ''[An] employee works in [a] position at the * * * factory. The employee sees a posting for an opening for the assembly line position for which good attendance is essential and requests a promotion or transfer to that position. If the employee is otherwise qualified for the position, but for the employee's attendance issues due to the intermittent FMLA leave, the regulations should be clarified to ensure that the employer be allowed to deny the promotion/transfer without risking a claim of FMLA retaliation or interference with the employee's FMLA rights on the grounds that the employee's current position better accommodates an unforeseeable intermittent leave schedule.'' Ford & Harrison LLP, Doc. 10226A, at 6.

The Southern Company noted that permitting transfers of employees who need unforeseeable leave would be consistent with the spirit of the FMLA, given the pay and benefits safeguards built into the transfer provision. ''All the safeguards that currently exist in Section 825.204 (i.e., equivalent pay and benefits, transfer may not work a hardship on employee, and restoration rights at the end of the necessity of the leave) would be applicable to ensure that the employee's rights to take FMLA leave will not be deterred in any way. Accordingly, modifying Section 825.204 to encompass intermittent unscheduled leave would be consistent with the FMLA's stated purpose ''to entitle employees to take reasonable leaves for medical reasons * * * in a manner that accommodates the legitimate interests of employers.'' The Southern Company, Doc. 10293A, at 3. Edison Electric agreed that this was a reasonable solution under the Act: ''Such a modification [to the regulations for unscheduled intermittent leave] would allow an employer to determine how to best accommodate the employee's periodic and unforeseen absences to minimize the disruption in the workplace and perhaps avoid a safety risk to others, while at the same time allowing the employee to perform the essential functions of the position to the best of his or her ability.'' Doc. 10128A, at 7. *But see* Brian T. Farrington, Esq., Doc. 5196, at 1 (''Th[e] [intermittent absence] problem is particularly acute when the employee performs an important or unique function, and repeated absences can put the employer in a very difficult situation. In such a case, transferring the employee to another position * * * doesn't solve the problem. The employee is needed in his/her principal position, not some alternative job.'').

On the other hand, some commenters pointed out the potential downside of permitting employers to unilaterally modify jobs. ''Allowing employers to modify employee's job duties to temporarily meet limitations may be acceptable until the employee recovers fully. However, the potential for employer's modification being sub-par, demoralizing and unfair is very, very high.'' An Employee Comment, Doc. 10336A at 26. The AFL–CIO, moreover, encouraged employers to use the tools they currently have to reach a mutually agreeable solution: ''We encourage employers to consider whether job modifications will permit employees to remain at the workplace under mutually agreeable arrangements.'' Doc. R329A, at 36.

IX. Substitution of Paid Leave

The Department requested input on three issues related to the substitution of paid leave provisions: (1) The impact of the prohibition under section 825.207 on ''applying [employers'] normal leave policies to employees substituting paid vacation and personal leave for unpaid FMLA leave[;]'' (2) how the ''existence of paid leave policies affect[s] the nature and type of FMLA leave used[;]'' and (3) whether ''employers allow employees to use paid leave such as sick leave to cover short absences from work (such as late arrivals and early departures) for FMLA covered conditions[.]''

Section 102(c) of the Act provides that FMLA leave is, as a general rule, unpaid leave. Section 102(d) addresses circumstances in which an employee may substitute (*i.e.*, use concurrently) accrued paid leave for the unpaid FMLA leave period. *See* 29 U.S.C. 2612(d); 29 CFR 825.207(a). Under this section of the FMLA, an ''employee may elect, or an employer may require, the employee to substitute'' accrued paid leave for the employee's FMLA leave. *See* 29 U.S.C. 2612(d)(2); 29 CFR 825.207(a). That is, the law provides employees the option to take their accrued paid leave concurrently with their FMLA leave in order to mitigate their wage loss. If an employee elects not to substitute accrued paid leave, however, the employer has the right to require such substitution. Where either the employee or the employer elects to substitute accrued paid leave, the employee will be entitled to FMLA protection during the period in which paid leave is substituted.

The underlying reason for an FMLA request determines the types of available accrued paid leave that may be substituted. If the requested FMLA leave

is for the birth of a child, placement of a child for adoption or foster care, or to care for a spouse, child or parent who has a serious health condition, employees may choose to—or be required by their employers to—substitute any accrued vacation, personal (including leave available leave under a ''paid time off'' plan) or family leave (subject to limitations). *See* 29 U.S.C. 2612(d)(2)(A)-(B); 29 CFR 825.207(b), (e).

When employees seek FMLA leave to care for their own or a qualifying family member's ''serious health condition,'' accrued paid medical, sick, vacation or personal leave may be substituted. *See* 29 U.S.C. 2612(d)(2)(B); 29 CFR 825.207(c). The substitution of accrued medical/sick leave for FMLA leave is limited to circumstances that meet the requirements of the employers' existing medical/sick leave policies. *See* 29 U.S.C. 2612(d)(2)(B); 29 CFR 825.207(c). Employers are not required to ''provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.'' 29 U.S.C. 2612(d)(2)(B). Essentially, employers may maintain medical/sick leave policies distinct and separate from FMLA leave, and will not be required to provide paid leave where the reason for the leave is not covered by their policy (*e.g.*, if the employer's plan allows the use of sick leave only for the employee's own condition, the employer is not required to allow an employee taking FMLA leave to care for a child to use sick leave). As the regulations state, ''an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.'' *See* 29 CFR 825.207(c).

The regulations specifically prohibit employers from placing any restrictions or limitations on employees' accrued vacation or personal leave, however, or any leave earned or accrued under ''paid time off'' plans. *See* 29 CFR 825.207(e). Additionally, the regulations provide that, if neither the employee nor the employer chooses to substitute paid leave, the employee ''will remain entitled to all paid leave'' previously accrued or earned. *See* 29 CFR 825.207(f).

The regulations also address how FMLA entitlements are applied when employees qualify for both FMLA leave and payments under a non-accrued paid benefit plan, such as leave provided under a temporary disability or workers' compensation plan. *See* 29 CFR 825.207(d). Specifically, the regulations provide that when employees are on leave under a short-term disability or workers' compensation plan, the choice to substitute paid leave for unpaid FMLA leave is inapplicable, because such benefit plans already provide compensation and the leave therefore ''is not unpaid.'' *See* 29 CFR 825.207(d)(1)–(2). To the degree that the underlying condition for which the employee is receiving workers' compensation or short-term disability pay also qualifies as a serious health condition under the FMLA, an employer may designate FMLA leave to run concurrently with the employee's workers' compensation or disability leave. *See id.; see also Repa* v. *Roadway Express, Inc.,* 477 F.3d 938, 941 (7th Cir. 2007) (''Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement.''). If the requirements to qualify for disability plan payments are more stringent than those of the FMLA, the employee may either satisfy the more stringent plan standards or instead choose not to receive disability plan payments and use unpaid FMLA leave or substitute available accrued paid leave. *See* 29 CFR 825.207(d)(1).

Under section 825.207(h), if the employer's notice or certification procedural standards for taking paid leave are less stringent than the general FMLA requirements and such paid leave is substituted for the FMLA leave, the employee may be required to meet only the less stringent requirements. However, if ''accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program.'' 29 CFR 825.207(h). Further, where employees comply with the applicable less stringent requirements, employers may not deny or limit FMLA leave. *Id.* Nevertheless, as the preamble to the 1995 Final Rule noted, employers may revise any such less stringent notice or certification requirements so that their paid leave programs correspond to the FMLA requirements, or may treat paid and unpaid leave differently. *See* 60 FR 2180, 2206, Jan. 6, 1995. Comments regarding the effects of these regulatory provisions on employers' paid leave policies are also discussed in Chapter IX.B.1.

Lastly, the regulations provide that compensatory time off, available to state and local government employees under section 7(o) of the Fair Labor Standards Act (''FLSA''), is not considered a ''form of accrued paid leave.'' *See* 29 CFR 825.207(i). Employees may request to take accrued compensatory time in lieu of FMLA leave, but employers may not require its substitution.[21] If compensatory time is used in lieu of FMLA leave, employers may not count it against employees' FMLA entitlement. *Id.*

In response to the RFI, the Department received many comments related to the general impact of the substitution of paid leave provisions. The RFI also generated comments on how these provisions interact with employer policies regarding paid leave and other workplace benefits, such as temporary or short-term disability leave, leave under workers' compensation plans, and collectively bargained leave benefits. Some commenters also addressed the impact of the substitution of leave provisions on the requirements of certain other state and federal laws.

A. General Impact of the Substitution of Paid Leave Provisions

Several employee advocacy groups noted that the ability to substitute paid leave for an otherwise unpaid FMLA leave period is a critical factor in employees being able to utilize FMLA leave. According to these commenters, the substitution of paid leave provisions are ''essential to workers' ability to exercise their rights under the law. Few workers can afford to take extended periods of leave without pay.'' *See* Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 4. *See also* Center for Law and Social Policy, Doc. 10053A, at 3 (same); Service Employees International Union, Local 668 Pennsylvania Social Services Union, Doc. FL105, at 3 (''Permitting workers to use their accrued paid leave as wage replacement * * * makes it possible for them to take time off to address critical family and medical issues.'').

The AFL–CIO also noted that the lack of paid leave ''presents a significant obstacle for those who cannot afford to take FMLA leave,'' as shown by the 2000 Westat Report, which found that

[21] ''Compensatory time off'' is paid time off accrued by public sector employees in lieu of ''immediate cash payment'' for working in excess of the applicable maximum hours standard of the FLSA. 29 CFR 553.22(a). Compensatory time must be earned at a rate of not less than ''one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA.'' 29 CFR 553.22(b). Police, firefighters, emergency response personnel, and employees engaged in seasonal activities may accrue up to 480 hours of compensatory time, while other public sector employees may accrue up to 240 hours. *See* 29 CFR 553.24.

the most commonly noted reason for not taking leave was inability to afford it. Doc. R329A, at 28–29. The Coalition of Labor Union Women similarly noted that ''a disturbing number of workers are unable to take advantage of FMLA leave because it is not paid and they cannot afford to lose time away from paying jobs.'' Doc. R352A, at 4. Allowing the substitution of paid leave has ''helped many employees cope with personal and family health emergencies,'' without which they ''would have faced a terrible choice between their health needs and their job security,'' while allowing such flexibility ''promotes worker morale and productivity.'' *Id. See also* International Association of Machinists and Aerospace Workers, Doc. 10269A, at 2; 9to5, National Association of Working Women, Doc. 10210A at 3; National Partnership for Women & Families, Doc. 10204A, at 9–10; Families USA, Doc. 10327A, at 3–4. Moreover, the Coalition of Labor Union Women made the point that, because paid leave is available only when already provided by employers, the employers have already determined that such paid leave ''will not have an adverse impact on their business * * * and does not create undue hardships for the employer.'' *See* Doc. R352A, at 4.

The National Business Group on Health similarly stated that allowing paid leave and FMLA leave to run simultaneously both ''protects employees' incomes during periods of serious illness and maximizes the flexibility in the design of employer leave policies.'' Doc. 10268A, at 7. The Maine Department of Labor asserted that allowing substitution helps everyone: employees living paycheck-to-paycheck, who ''cannot afford to take unpaid leave without risking the loss of housing, heat, food[;]'' employers, who would suffer lost productivity if employees continued to work while ill; the public sector, because employees otherwise would have ''to rely more and more on public resources to cope[;]'' and the health care system, because employees otherwise would work until their condition became worse and more expensive to treat. Doc. 10215A, at 3.

Not all commenters uniformly supported the substitution of paid leave, however. Some employers commented that the substitution of leave provisions contribute to increased FMLA leave at otherwise popular vacation or personal leave times. Another commenter noted that it is not just holidays or high demand periods but that the ''employee is more likely to use FMLA leave for the employee's own serious health condition when the employee is receiving a paid sick or disability benefit * * * without a financial impact, some employees have little to no incentive to work and actually have an incentive not to work, since the employer cannot discipline them for using job protected FMLA leave[.]'' Exelon, Doc. 10146A, at 6. The substitution provisions can thus leave an employer in a quandary: ''While some may think the solution is to reduce or eliminate paid sick or disability benefits or to make the standards for receiving such benefits more stringent to avoid FMLA leave abuse, doing so penalizes the vast majority of employees who use sick days or disability benefits only when they are truly unable to work due to illness or injury.'' *Id.*

As noted in other chapters of this Report, many commenters discussed the idea that the different treatment experienced by employees based on the type of leave requested may have a substantial effect on employee morale and productivity. A comment from the Indiana State Personnel Department noted that problems arise when employers require substitution of paid leave for FMLA leave. *See* Doc. 10244C, at 2 (employees who saved and maintained leave balances become angry when forced to use accrued leave as employees ''feel they are being penalized for working overtime without taking leave''). While not directly addressing morale concerns, the Ohio Department of Administrative Services noted in a similar vein that some state agencies reported that employees take advantage of FMLA leave only when they had exhausted all of their accrued paid leave and were in jeopardy of disciplinary action. *See* Doc. 10205A, at 3. Thus, according to the comment, FMLA was used as a last resort when employees no longer had paid time off. In response to the problem, the Ohio Department of Administrative Services adjusted its leave policies to allow individual state agencies to require substitution of paid leave. *Id.*

B. Effect on Workplace Benefits and Policies

Responses to the RFI indicated a variety of workplace benefits are affected by substitution of paid leave. Employers' policies pertaining to employer-provided paid leave plans are impacted, as are benefit plans such as workers' compensation and short term disability, as well as existing collective bargaining agreements. Some government employers also commented on the impact of the inability to substitute compensatory time off for FMLA leave.

1. Effect on Employer Policies

Many employers commented that the regulations force employers to treat employees seeking to use accrued paid leave concurrently with FMLA leave more favorably than those who use their accrued paid leave for other reasons. The Madison Gas and Electric Company, for example, stated that ''during 'peak' or 'high demand' vacation periods, employees may request FMLA leave causing the employer to deny other employees their scheduled leaves due to staffing level concerns based on business needs.'' Madison Gas and Electric Company, Doc. 10288A, at 1. The United Parcel Service concurred: ''The applicable DOL regulation * * * states that no limitation may be placed by the employer on substitution of paid vacation or personal leave for FMLA leave * * *. Indeed, as written, this regulation would even trump vacation picks conducted according to collectively bargained seniority provisions; an employee with little seniority could, if on FMLA leave during a 'plum' vacation week, substitute otherwise unavailable paid vacation time for his or her unpaid FMLA leave.'' Doc. 10276A, at 3–4 (citation and quotation marks omitted). Some employers provided specific examples of this phenomenon:

> Deer hunting, if you happen to work for someone, usually calls for the individual to request and receive approval to use vacation and or personal leaves of absences during the Deer Hunting season. These requests escalate geometrically during the deer hunting season. Usually approvals for these days off are made using some kind of seniority provisions. Employees who can not get approval can circumvent the ''written in cement'' policies by securing a Family doctor to provide FMLA documentation for [a serious health condition].

Roger Bong, Doc. 6A, at 3. Another employer stated, ''We have had an employee request a week of vacation during the holidays and the request was denied because we had so many other employees off. Then the employee just called off for the entire week using FMLA, and then went on her vacation to Florida.'' Vicki Spaulding, Akers Packaging Service, Inc., Doc. 5121, at 1. *See also* National Coalition to Protect Family Leave, Doc. 10172A, at 5 (''The Department has * * * established preferential rights to employees taking FMLA leave by effectively mandating that employers waive normal vacation and personal leave policies. In fact, nothing in the Act requires preferential treatment for FMLA leave users.''); Temple University, Doc. 10084A, at 5.

As previously noted, section 825.207(e) provides that accrued paid vacation or personal leave may be substituted for any FMLA leave, and an employer may not place any limitations on this substitution right. The preamble to the 1995 Final Rule stated, for example, that an employer could not limit the timing during the year in which paid vacation leave could be substituted, or require an employee to use such leave in full day increments or a week at a time, even if it normally restricted paid vacation in such ways. *See* 60 FR 2180, 2205, Jan. 6, 1995. Opinion letters relating to the substitution of paid vacation or personal leave have clarified that such leave is ''accrued'' and thus available for substitution only when the employee has earned it and is fully vested in the right to use it during the leave period. *See* Wage and Hour Opinion Letters FMLA–81 (June 18, 1996); FMLA–75 (Nov. 14, 1995); and FMLA–61 (May 12, 1995). In contrast to vacation leave, the regulations clarify that substitution of paid sick or medical leave is authorized only ''to the extent the circumstances meet the usual requirements for the use of sick/medical leave.'' 29 CFR 825.207(c).

The College and University Professional Association of Human Resources suggested employers should be allowed to apply their normal leave policies to all types of paid leave, including vacation and personal leave, in order to ease administrative and paperwork burdens and to eliminate the preferential treatment it believes is afforded to employees seeking FMLA leave over employees requesting vacation or personal leave. Doc. 10238A, at 6. *See also* Ohio Public Employer Labor Relations Association, Doc. FL93, at 5; Temple University, Doc. 10084A, at 5.

The National Retail Federation suggested clarifying the meaning of ''personal leave'' under section 825.207. Doc. 10186A, at 8. The Miami Valley Human Resource Association requested clearer guidelines that instruct employers as to when they are allowed to deny employees' substitution of paid leave, if they fail to follow employers' leave notification policies. Doc. 10156A, at 4.

The National Coalition to Protect Family Leave commented that many employers are providing general paid time off (''PTO'') benefits to employees—which are provided in a single amount of paid leave to be used for any reason—instead of the more traditional paid leave policies for vacation and medical/sick leave. *See* Doc. 10172A, at 23. The comment noted that the regulations still speak in terms of paid personal or vacation leave, thus prohibiting employers from applying ''their normal leave rules to the substitution of such leave for unpaid FMLA leave, even when using PTO in connection with an illness.'' *Id.* PTO plans generally allow for employees to take paid leave for any reason, as long as company procedures are satisfied.

A law firm commented that ''substitution of paid leave should not nullify an employer's right to require medical certification'' where the employer maintains a PTO plan. Fisher & Phillips LLP, Doc. 10262A, at 6. Section 825.207(h) states that if ''accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program.'' 29 CFR 825.207(h). PTO plans, however, do not distinguish between sick pay and vacation pay and generally have no ''sick leave'' medical documentation requirement. Thus, according to Fisher & Phillips, an employer should not be prohibited from requiring a medical certification form to determine whether the leave qualifies as FMLA leave ''simply because its paid time off program does not require it.'' *Id.* The firm further stated:

> Essentially, employers with more generous leave programs are often disadvantaged by that generosity, as their employees are more likely to use leave if it is paid. Again, that generosity should not impose an obstacle to employer efforts to determine whether the absence qualifies for FMLA to begin with, or to enforce its paid time off programs consistently.

Id. at 7. The National Coalition to Protect Family Leave agreed that employers with generous PTO plans are restricted by the regulations and suggested such treatment could result in employers reducing paid leave. *See* Doc. 10172A, at 23.

A comment from a law firm stated that, in terms of tracking FMLA leave, a double standard exists under the regulations. Spencer Fane Britt & Browne LLP, Doc. 10133C, at 50. Many employers allow employees to take non-FMLA leave only in increments that are longer than the time periods used for pay purposes. *Id.* The firm expressed a concern, however, that such a policy may constitute ''retaliation'' under the FMLA regulations, even though it is allowable for non-FMLA leave. For example, an employer may normally only allow employees to use paid leave in four-hour increments, but if the employee is only away from work for 1.5 hours for an FMLA reason, there is a question as to how much time the employer may charge against the employee's paid leave balance. *Id.* The comment concludes, ''[i]t is inherently unfair to provide employees with FMLA absences with greater benefits than they would otherwise have.'' *Id.*

On the other hand, the AFL–CIO commented that Congress placed no limitations on an employee's right to substitute paid vacation or personal leave, noting that ''the Department specifically rejected proposals to limit employees' substitution rights'' when promulgating the FMLA final rules, based on the statutory language. *See* American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 27–28. The AFL–CIO also noted that the prohibition on employer limitations applies only to vacation and personal leave, and that employers remain free to apply their normal rules to the substitution of paid sick leave.

2. Benefit Plans: Short-Term Disability and Workers' Compensation

As indicated above, the choice to substitute accrued paid leave is inapplicable when employees receive payments from a benefit plan that replaces all or part of employees' income. *See* 29 CFR 825.207(d). As the preamble to the 1995 Final Rule explained, if an employee suffers a work-related injury or illness, the employee may receive workers' compensation benefits or paid leave from the employer, but not both. 60 FR 2180, 2205, Jan. 6, 1995. Thus, when such an injury or illness also qualifies under the FMLA and the employee is receiving workers' compensation benefits, the employer may not require the employee to substitute paid vacation or sick leave, nor may the employee elect to receive both payments. *See id.* However, the time the employee is absent from work counts against the employee's FMLA entitlement. *See* 60 FR at 2205–06. *See also* Wage and Hour Opinion Letter FMLA2002–3 (July 19, 2002) (allowing FMLA leave to run concurrently with workers' compensation is expressly allowed under the regulations, but receipt of workers' compensation payments prohibits the substitution of other accrued paid leave).

One Employee Relations Manager noted a similar rule applicable under some employers' disability leave policies, pursuant to which ''the employees' use of vacation and other earned time with pay to cover a personal illness may exclude them from qualifying for paid short-term disability

benefits offered by the employer.'' Cindy S. Jackson, Employee Relations/ Labor Relations Manager, Cingular, Doc. 5480, at 1. A case manager from St. Elizabeth Medical Center, in Edgewood, Kentucky, indicated employees who take FMLA leave for their own serious health condition often qualify for short term disability payments after using a required amount of paid time off. *See* Doc. 10071A, at 3–4. Another employer from Huntington, Indiana said many of its employees on FMLA leave eventually qualify for short term disability, resulting in payments during leave. Bendix Commercial Vehicle Systems LLC, Doc. 10079A, at 3. According to this commenter, ''if FMLA were required to be paid by the employer, you would see a lot more use of the intermittent, specifically abuse of FMLA.'' *Id.* An HR manager agreed, commenting that an employee who took FMLA leave concurrently with short-term disability leave ''allegedly for a painful and permanent spinal condition, is now heading up the company baseball team.'' *See* Debra Hughes, HR Manager, Doc. 2627A, at 2; *see also* Roger Bong, Doc. 6A, at 3.

Another commenter felt that the regulations ''created a substantial, unintended burden by prohibiting the substitution of accrued, paid leave'' during an FMLA leave period that ran concurrently with paid leave taken under a workers' compensation or a state-mandated disability plan. *See* Employers Association of New Jersey, Doc. 10119A, at 3. This commenter also suggested that employers requiring substitution of paid leave could run afoul of the regulations when employees qualify under a state's mandatory, non-occupational, temporary disability plan; it also pointed out that many employees actively seek the substitution of their accrued paid leave because temporary disability plans only pay a portion of their salary. *Id* at 4.

The United Steelworkers also commented on the relationship between short-term or other disability leave and leave under the FMLA, stating that some employers may incorrectly ''tell their employees they cannot receive income replacement under the [short term disability] plan and be on FMLA-protected leave at the same time'' and thus incorrectly advise employees that they waive their FMLA protections by going on paid disability leave. *See* Doc. 10237A, at 3. To avoid this confusion, the United Steel Workers recommended that the Department ''use the rulemaking process to clarify that employers must treat family/medical leave and short-term disability as separate and independent sources of protection.'' *Id.*

Some comments also found difficulties in the way substitution of paid leave provisions are carried out by employers or objected to substitution more generally. The United Transportation Union, Florida State Legislative Board commented that the problem with the substitution of paid leave is that employers can force employees to use their hard-earned vacation and personal leave. *See* Doc. 10022A, at 2. The commenter labeled it an ''unfair and burdensome practice.'' *Id.*

3. Collective Bargaining Agreements

The substitution of paid leave provisions also interact with existing collective bargaining agreements (''CBAs''). One union commented that employers attempt to circumvent collective bargaining agreements by relying on their statutory right to substitute paid leave, while ignoring their contractual obligations. *See* United Transportation Union, Florida State Legislative Board, Doc. 10022A, at 2. A law firm representing several train and rail unions also noted such a trend: ''Notwithstanding the CBAs' unequivocal mandate that employees are entitled to use their paid leave at the time they choose and not at a time chosen by the carriers, the carriers in 2004 began to, and now routinely, require employees to use their paid leave whenever they exercise their statutory right to FMLA leave—thus usurping the employees' collectively-bargained right to choose when and for what purpose to use paid leave.'' Zwerdling, Paul, Kahn & Wolly, P.C., Doc. 10163A, at 2. The comment concluded that ''the statute may not be used as a tool to avoid compliance'' with the parties' prior agreements. *Id.*

Another commenter raised the same issue, noting that this dispute has arisen in the railroad context where several railroad employers have claimed that FMLA gives them the authority to diminish the rights afforded to employees under their existing contracts to decide when and in what manner to use their paid leave. *See* Guerrieri, Edmond, Clayman & Bartos, P.C. (on behalf of several labor unions in the railroad, airline, bus, and other industries), Doc. 10235A, at 2.[22] This commenter also noted that the Department considered and addressed the issue of collective bargaining agreements in the preamble to the 1995 regulations: ''At the same time, in the absence of other limiting factors (such as a State law or applicable collective bargaining agreement), where an employee does not elect substitution of appropriate paid leave, the employee must nevertheless accept the employer's decision to require it.'' *Id.* at 3 (citation omitted).

This law firm also noted that a 1994 Wage and Hour opinion letter further clarifies ''that a collective bargaining agreement [can] limit an employer's ability to require use of paid leave in conjunction with FMLA leave.'' *Id.* at 3. *See* Wage and Hour Opinion Letter FMLA–33 (March 29, 1994) (''With reference to your constituent's concerns pertaining to paid vacation and sick leave, an employer may require an eligible employee to use all accrued paid vacation or sick leave for the family and medical leave purposes indicated above before making unpaid leave available. However, section 402 of FMLA does not preclude the union's right to collectively bargain greater benefits than those provided under the Act. In this instant case, the subject union could negotiate that substitution of accrued paid leave is an election of the employee only.'').

Further, the commenter referred to the ongoing litigation on this issue and urged that any regulatory action taken by the Department be consistent with this position. Guerrieri, Edmond, Clayman & Bartos, P.C. (on behalf of several labor unions in the railroad, airline, bus, and other industries), Doc. 10235A, at 3–4. *See Bhd of Maintenance of Way Employees* v. *CSX Transp., Inc.,* 478 F.3d 814 (7th Cir. 2007). In *CSX,* a group of rail carriers required employees to substitute accrued paid leave for family or medical leave covered by the FMLA, relying upon their FMLA right to do so. The carriers required substitution for intermittent leave for the employee's own condition, but they did not require substitution when an employee used a block of FMLA leave for his or her own serious health condition. The plaintiffs, a collection of rail unions, challenged the action on the grounds that an existing CBA precluded involuntary substitution of paid leave. They claimed that when a CBA gives employees greater rights than the FMLA, the Act does not supersede such contractual rights. The court held that while employers generally are permitted to require substitution of paid leave, the FMLA does not authorize rail carriers that are

[22] *See also* Jeanne M. Vonhof & Martin H. Malin, What a Mess! The FMLA, Collective Bargaining and Attendance Control Plans, 21 Ill. Pub. Employee Relations Rep. 1 (Fall 2004) (discussing FMLA and collective bargaining agreements from perspective of labor arbitrators, noting that regulations allow parties to bargain for specific rights, especially option to manage when substitution of paid leave is permitted).

subject to the Railway Labor Act (RLA) to do so when that would violate a CBA and the RLA's prohibition against making unilateral changes in working conditions.

The AFL–CIO—in addition to adopting the comments of other unions on this issue—asserted that employers cannot require employees to substitute paid leave for FMLA leave in a manner that contravenes existing CBAs, whether those agreements are subject to the RLA or the National Labor Relations Act. *See* Doc. R329A, at 29. The AFL–CIO stated that ''the Department should make no changes in its regulations governing substitution of paid leave for FMLA leave in the collective-bargaining context.'' *Id.*

On the other hand, the Union Pacific Railroad Company noted that its Train and Engine Service employees have an FMLA leave rate that is five times higher than its other employees. *See* Doc. 10148A, at 2–3. The employer stated that there is no obvious reason for this disparity, such as a higher injury rate. ''The only significant differences between the Train and Engine Service employee populations and all others are: 1) The schedules or lack thereof (most T&E employees have no set schedule but rather work on call * * *); and 2) Union Pacific does not require T&E employees to substitute paid leave for FMLA absences of less than 12 hours because paid leave cannot be granted to these employees in smaller increments under their collective bargaining agreements.'' *Id.* at 2. Union Pacific explained, for example, that when a T&E employee who is called to duty states that s/he has a migraine and cannot report for two hours, no paid leave is substituted. Employees working under other collective bargaining agreements where Union Pacific can require substitution for less than full day increments are more reluctant to use FMLA leave unless absolutely necessary, because they do not want to decrease their accrued paid leave. *See id.* Three years of employer-collected data show that a ''disproportionately high number of FMLA absences among Train and Engine Service employees are in increments of less than 12 hours.'' *Id.*

4. Compensatory Time Off

As noted above, subject to the provisions of section 7(o) of the FLSA, state and local government employers may provide employees with compensatory time off at time and one half for each hour worked in lieu of paying cash for overtime. The FMLA regulations at 29 CFR 825.207(i) specifically prohibit employers from counting compensatory time off against an employee's FMLA entitlement.

One commenter noted the inconsistency in the regulations regarding the use of compensatory time off, stating ''[w]hile an employer cannot compel the use of compensatory time, if an employee asks to use it to cover a FMLA absence, the time off should count against the FMLA entitlement. If compensatory time is allowed to be taken in lieu of FMLA leave, the regulations should require employees to take the compensatory time at either the beginning or end of the leave.'' City of Portland, Doc. 10161A, at 4. *See also* Washington Metropolitan Area Transit Authority, Doc. 10147A, at 3 (regulation ''discourages employers from working with employees to minimize the negative financial impact of unpaid leave at times when employees are most in need'').

X. Joint Employment

A. Statutory Background

The FMLA covers an employer in the private sector engaged in commerce or in an industry or activity affecting commerce if it employs 50 or more employees for each working day in 20 or more calendar workweeks in the current or preceding calendar year. *See* 29 U.S.C. 2611(4). An employee of an FMLA-covered employer is ''eligible'' for the benefits of the FMLA if the employee has worked for the employer for at least 12 months, for at least 1,250 hours of service during the preceding 12-month period, and is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. 29 U.S.C. 2611(2).

Despite the plain wording of these definitions a number of questions have arisen as to their meaning, such as how to treat employees with no fixed worksite, employees who are jointly employed by two or more employers, employees of temporary help companies, and others. The Department included the topics of employer coverage and employee eligibility in its RFI. In particular, the RFI noted that the Court of Appeals in *Harbert* v. *Healthcare Services Group, Inc.,* 391 F.3d 1140 (10th Cir. 2004), partially invalidated 29 CFR 825.111(a)(3), which states that when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee has been assigned or to which the employee reports.

B. Department of Labor Regulations

Section 825.104(c) of the regulations addresses who is the employer where more than one entity is involved, such as in an ''integrated employer'' situation. It provides that the ''determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality.'' 29 CFR 825.104(c)(2). Factors considered in determining whether two or more entities are an integrated employer include the degree of common management, interrelation between operations, centralized control of labor relations, and common ownership/financial control.

The Department stated in the preamble to the final rule that the ''integrated employer'' test is not a new concept, but rather it is based on established case law arising under Title VII of the Civil Rights Act of 1964 and the Labor Management Relations Act.

Section 825.106 of the regulations implements how the Department views employer coverage and employee eligibility in the case of joint employment. It provides that where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. For example, where the employee performs work which simultaneously benefits two or more employers, and there is an arrangement between employers to share an employee's services or to interchange employees, a joint employment relationship generally will be considered to exist. *Id.* § 825.106(a). The regulations further provide:

> (b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a secondary employer.
>
> (c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the ''primary'' employer include authority/ responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

Id. § 825.106(b)–(c). Under section 825.106(d), employees jointly employed by two employers must be counted by

both employers in determining employer coverage and employee eligibility. Thus, for example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. Although job restoration is the primary responsibility of the primary employer, the secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, and thus may not interfere with an employee's attempt to exercise rights under the Act, or discharge or discriminate against an employee for opposing a practice that is unlawful under FMLA. *See* 29 CFR 825.106(e).

With regard to the term ''worksite,'' the legislative history states that it is to be construed in the same manner as the term ''single site of employment'' under the Worker Adjustment and Retraining Notification (''WARN'') Act, 29 U.S.C. 2101(a)(3)(B), and the regulations under that Act (20 CFR Part 639). *See* S. Rep. No. 103–3, at 23 (1993), H.R. Rep. No. 103–8(I), at 35 (1993). Accordingly, the FMLA regulations define the term ''worksite'' in those cases in which the employee does not have a fixed place of employment by using language that is very similar to the WARN Act definition in 20 CFR 639.3(i)(6). Section 825.111 provides as follows:

> (2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, *etc.*, the ''worksite'' is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, *etc.* If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, *etc.*, from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their ''worksite.''

29 CFR 825.111(a)(2).

When applying the employee eligibility test (*i.e.*, the 50 employees/75 miles test) to employees of temporary help offices and others who are jointly employed by two or more employers, however, the regulation provides that ''the employee's worksite is the primary employer's office from which the employee is assigned or reports.'' 29 CFR 825.111(a)(3).

C. Wage and Hour Opinion Letter

In Wage and Hour Opinion Letter FMLA–111 (Sept. 11, 2000), the Department considered the application of the FMLA regulations' ''integrated employer'' test and ''joint employment'' tests in sections 825.104 and 825.106 to a ''Professional Employer Organization'' (PEO). The PEO in question had established a contractual relationship with its clients under which it established and maintained an employer relationship with the workers assigned to the clients (who were leased worksite employees provided via the contract with the client) and assumed substantial employer rights, responsibilities and risks. Specifically, the PEO assumed responsibility for personnel management, health benefits, workers' compensation claims, payroll, payroll tax compliance, and unemployment insurance claims. Moreover, the PEO had the right to hire, fire, assign, and direct and control the employees.

Based on the facts described in the incoming letter, the Opinion Letter found that ''it appears'' the PEO is in a joint employment relationship with its clients for these reasons:

> 1. The PEO is a separately owned and a distinct entity from the client as it is under contract with the client to lease employees for the purpose of handling ''critical human resource responsibilities and employer risks for the client.''
> 2. The PEO is acting directly in the interest of the client in assuming human resource responsibilities.
> 3. The PEO appears to also share control of the ''leased'' employee consistent with the client's responsibility for its product or service.

Based on the specified responsibilities, the Opinion Letter stated that ''it would appear that'' the PEO is the ''primary'' employer for those employees ''leased'' under contract with the client. Thus, the PEO would be responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same or equivalent job upon return from leave. The ''secondary employer'' (*i.e.*, the client) would be responsible for accepting the employee returning from FMLA leave in place of a replacement employee if the PEO chooses to place the employee with the client. The Opinion Letter concluded that the client, as the ''secondary'' employer, whether a covered employer or not under the FMLA, is prohibited from interfering with a ''leased'' employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice that is unlawful under the Act.

D. Harbert v. Healthcare Services Group, Inc.

Section 825.111(a)(3) of the regulations provides that for an employee jointly employed by two or more employers, the ''worksite'' is the location of the primary employer's office from which the employee is assigned or reports. In *Harbert* v. *Healthcare Services Group, Inc.*, 391 F.3d 1140, the Court of Appeals held that section 825.111(a)(3), as applied to the situation of an employee with a long-term fixed worksite at a facility of the secondary employer, was arbitrary and capricious because it: (1) Contravened the plain meaning of the term ''worksite'' as the place where an employee actually works (as opposed to the location of the long-term care placement agency from which Harbert was assigned); (2) contradicted Congressional intent that if any employer, large or small, has no significant pool of employees nearby (within 75 miles) to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee; and (3) created an arbitrary distinction between sole and joint employers.

With respect to the term ''worksite,'' the court stated that Congress did not define the term in the FMLA, and it concluded that the common understanding of the term ''worksite'' is the site where the employee works. With respect to the employee eligibility requirement of 50 employees within 75 miles, the court noted that Congress recognized that even potentially large employers may have difficulty finding temporary replacements for employees who work at geographically scattered locations. Congress thus determined that if any employer (large or small) has no significant pool of employees in close geographic proximity to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee. Therefore, the court concluded that:

> An employer's ability to replace a particular employee during his or her period of leave will depend on where that employee must perform his or her work. In general, therefore, the congressional purpose underlying the 50/75 provision is not effected if the ''worksite'' of an employee

who has a regular place of work is defined as any site other than that place.

391 F.3d at 1150.

In comparing how the regulations apply the term ''worksite'' to joint employers and sole employers, the court stated:

The challenged regulation also creates an arbitrary distinction between sole employers and joint employers. For example, if the employer is a company that operates a chain of convenience stores, the ''worksite'' of an employee hired to work at one of those convenience stores is that particular convenience store. *See* 58 FR 31794, 31798 (1993). If, on the other hand, the employer is a placement company that hires certain specialized employees to work at convenience stores owned by another entity (and therefore is considered a joint employer), the ''worksite'' of that same employee hired to work at that same convenience store is the office of the placement company.

391 F.3d at 1150.

Importantly, the court did not invalidate the regulation with respect to employees who work out of their homes: ''We do not intend this statement to cast doubt on the portion of the agency's regulation defining the 'worksite' of employees whose regular workplace is his or her home. *See* 29 CFR 825.111(a)(2).'' 391 F.3d at 1150, n.1. Nor did the court invalidate the regulatory definition in section 825.111(a)(3) with respect to employees of temporary help companies: ''An employee of a temporary help agency does not have a permanent, fixed worksite. It is therefore appropriate that the joint employment provision defines the ''worksite'' of a temporary employee as the temporary help office, rather than the various changing locations at which the temporary employee performs his or her work.'' 391 F.3d at 1153.

E. RFI Comments and Recommendations

The RFI requested specific information, in light of the court's decision in *Harbert*, on the definition in section 825.111 for determining employer coverage under the statutory requirement that FMLA-covered employers must employ 50 employees within 75 miles. The Department also sought comment on any issues that may arise when an employee is jointly employed by two or more employers or when the employee works from home. Below are some of these comments.

1. ''Worksite'' for Employees Jointly Employed by Two or More Employers

The AFL–CIO in its comments urged the Department not to revise 29 CFR § 825.111 (a)(3) to reflect the court's decision in *Harbert* that held this section to be invalid when applied to a jointly-employed employee with a long-term fixed worksite at a facility of the secondary employer. *See* Doc. R329A, at 18, 21. The AFL–CIO pointed to the legislative history that the term ''worksite'' is to be construed in the same manner as the term ''single site of employment'' under the WARN Act and the regulations under that Act.

Specifically, the AFL–CIO agreed with the dissent in Harbert that the Secretary's interpretation of ''single site of employment'' under the WARN Act regulations as applying equally to employees with and without a fixed worksite is a ''permissible and reasonable interpretation'':

[Interpreting the WARN Act regulation so that it] only applies to employees without a regularly fixed site of employment would seem to contravene the express language of the provision which mentions other categories, including employees who ''travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites.''

Doc. R329A, at 20 (citations omitted).

Finally, the AFL–CIO agreed with the dissent that the application of the rule does not result in arbitrary differences between sole and joint employers under the FMLA. See id. at 20. Instead, it results in a rational distinction, rooted in the very purpose of the 50 employees within 75 miles rule, where the placement agency locates and hires the worker for the client agency:

Basing FMLA eligibility on primary employers prevents confusion and provides certainty, because a temporary placement employee's coverage could vary daily were he placed in different [locations of the client employer] on a rotating basis. Further, contrary to the court's assertion, the ability of a * * * [client employer] and a placement agency to find abundant nearby replacements probably is not identical, after all, the placement agency specializes in hiring and placing employees within the area.

Doc. R329A, at 20–21 (citation omitted).

The National Partnership for Women & Families similarly commented that it believes the current regulations are sound and do not require change. Specifically, the National Partnership stated that the preamble to the FMLA regulations makes clear that the Department gave much consideration to the question of how best to determine an employee's worksite. It noted that the Department's definition of the employee's ''worksite'' is in accord with the FMLA's legislative history, namely, that the term was to be construed the same as the term ''single site of employment'' under the WARN Act regulations. The National Partnership commented that the purpose of designating the primary office as the worksite is to ensure that the employer with the primary responsibility for the employee's assignment is the one held accountable for compliance with these regulations. *See* Doc. 10204A, at 6. The National Partnership stated that the same principles articulated in the regulations with regard to ''no fixed worksite'' situations also should apply to this factual scenario. ''In cases where employees have long-term assignments, we believe the purposes of the FMLA are best served by using the primary employer from which the employee is assigned as the worksite for determining FMLA coverage.'' *Id.*

Similarly, the Public Service Company of New Mexico commented that it has employees who perform work in a remote area or at home, and that it always interprets the most favorable option for the employee for FMLA eligibility. ''There is no known benefit to our company if we deny FMLA to certain workers simply due to their remote location.'' Doc. 10074A, at 3.

On the other hand, the National Council of Chain Restaurants commented that 29 CFR 825.104 and 825.106 are overly vague and expansive in their definitions of joint and integrated employment. Doc. 10157A, at 3. The National Council stated that these regulations were creating a potential liability for many restaurant franchisees and other small business owners who should not be considered employers under the Act. *Id.*

Oftentimes, individuals will have an ownership interest in one or more restaurants or stores. The FMLA regulations create a potential risk that a joint employment situation or a single integrated enterprise will be found even when the franchisee has few, if any, individuals who work at or for more than one of the restaurants or stores.

Id. at 4.

The law firm of Pilchak Cohen & Tice commented that, under the current regulations, employees at the same size establishment are treated differently because one works for a traditional sole employer and the other works for a staffing firm:

For example, where a small retail store chain may have many employees nationwide, each store could employ fewer than 50 employees. Those employees clearly would not be eligible for FMLA in the traditional employment context. Yet, under the current regulation, if that same retail chain utilized contract employees from an entity which employed more than 50 employees from its home office and that is where the contract employees received their assignments from or reported to, those contract employees could have FMLA rights at the retail chain. This creates an arbitrary distinction between

sole and joint employers * * * Under 29 CFR 825.106(e), an employer could contract for an engineer, Employee A, for a six-month project, and then find out after the employee has only been there for two weeks, that Employee A will need 12 weeks off due to the upcoming birth of his child. Upon Employee A's departure, the employer would then have to spend the time and expense training Employee B only to [be] forced to return Employee A to the position, even though it had already spent time training two individuals. The employer would then have to spend additional time and expense bringing Employee A ''up to speed'' on the project and complete the training initially started.

Doc. 10155A, at 7.

Pilchak Cohen & Tice stated that the regulation would be more palatable if, to qualify for FMLA job restoration with the client company, the contract employee had to have at least 12 months of service at that location. *Id.*

As discussed below, the law firm of Fisher & Phillips commented that an Outsourcing Vender (elsewhere called a Professional Employer Organization, or PEO) should not be treated as a joint employer. In contrast with an employer who uses a PEO, however, Fisher & Phillips stated that a small employer who uses employees from a temporary agency may still have to comply with the FMLA:

In this context, aggregation of the number of employees of both the temporary agency and the worksite employer may make sense in some cases because the temporary agency can help the smaller employer adapt to an employee's leave of absence by reassigning another temporary worker. Moreover, this regulation is consistent with Congress' intent that the application of the FMLA not unduly burden smaller employers who are unable to reassign employees to cover for absent workers.

Doc. FL57, at 6.

The law firm of Smith & Downey commented that placement agencies (as opposed to PEOs, as discussed below) face a different problem than other employers, in that they may not succeed in obtaining the client company's agreement to reinstate an employee who is returning from FMLA leave. Smith & Downey stated that in many cases although the placement agency dutifully fulfills its FMLA obligations, the entity with whom the employee was placed refuses to reinstate the employee returning from FMLA leave. Doc. FL106, at 1. ''This scenario typically places the placement agency in an impossible position, particularly in those cases where the only placements provided by the placement agency are with the single entity in question.'' *Id.* at 2.

Smith & Downey commented that the client company may not be able to keep a position available for the temporary employee who is on FMLA leave because the position is mission-critical to the company's success, and it proposed that the Department issue regulations that provide for an exception to the usual joint employment rules in those cases in which the employee is placed in a position that is mission-critical to the client employer. *Id.*

The National Coalition to Protect Family Leave commented that the court in Harbert was correct in distinguishing between a jointly employed employee who is assigned to a fixed worksite and a jointly employed employee who has no fixed worksite and changes worksites regularly. ''As for the former, the worksite for purposes of determining whether they are eligible employees * * * would be the fixed worksite of the secondary employer. As for the latter, the worksite would continue as stated in the regulation[.]'' Doc. 10172A, at 13.

Finally, Access Data Consulting Corporation stated that the best way to resolve identifying the employer is for the Department to clarify that ''the person's employer is the entity from which their paycheck is written.'' Doc. 10029A, at 2. This commenter stated that in the case of an employee who is employed by a long-term care placement agency and is assigned to work at the home of a client, the employer of record is the placement agency, not the client, because the paycheck is derived, or written from, the placement agency. ''This is not a situation where the employee has two employers; the employee has one—the placement agency, and that company's demographics should be used to determine FMLA eligibility.'' *Id.*

2. Professional Employer Organizations (PEOs)

A number of commenters, including the AFL–CIO, Jackson Lewis, Wilson Sonsini Goodrich & Rosati, Fulbright & Jaworski, Littler Mendelson, Fisher & Phillips, and TriNet, commented that the regulations incorrectly consider Professional Employer Organizations or PEOs (sometimes called HR Outsourcing Venders) to be joint employers with their client companies.

The comments submitted by the law firm of Jackson Lewis explained the typical differences between a temporary staffing agency and a PEO: A temporary staffing agency is a labor supplier that supplies employees to a client employer. A PEO is a service provider that provides services to existing employees of a company. Doc. R362A, at 3. Jackson Lewis commented that the determination of whether an employee is a ''key'' employee for purposes of considering entitlement to leave, for example, is made by the client employer and not by the PEO. It further stated that, unlike a temporary staffing agency, a PEO does not have the ability to place an employee returning from FMLA leave with a different client employer. *Id.* at 4.

Jackson Lewis commented that, like the employees of temporary staffing agencies, the client employer should include the employees serviced by a PEO for purposes of the 50 employee threshold, but should not include the corporate employees of the PEO or the employees of other clients of the PEO. *See* Doc. R362A, at 3, 5. ''In the PEO context, the ''worksite'' is the client's workplace. Just as in *Harbert*, aggregating unrelated companies that utilize the services of the same PEO is contrary to the purpose and intent of the statute and improperly creates coverage of employees that were not intended to be covered by the FMLA.'' *Id.* at 5.

The AFL–CIO commented that PEOs engage in a practice known as ''payrolling,'' in which the client employers transfer the payroll and related responsibilities for some or all of their employees to the PEO, and that typically, the PEO also makes payments on behalf of the client employer into state workers' compensation and unemployment insurance funds, but the PEO does not provide placement services. In contrast with a temporary staffing agency, this commenter stated, PEOs do not match people to jobs. *See* Doc. R329A, at 16.

Thus, PEOs do not fit the model of the primary employer who should bear the FMLA's job restoration responsibilities in a joint employment situation, because there is no evidence to suggest that hiring and related functions fall to them, as opposed to the client employer. * * * Client employers should not be able to shed FMLA responsibilities when they have contractual relationships with entities such as PEOs that are not able to fulfill the FMLA's job restoration responsibilities, despite how attractive it may be for the client to shift, and the PEO to ''accept,'' those responsibilities. For all of these reasons, we urge the Department to reconsider its joint employment rules as they apply to PEOs and similar organizations.

Id. at 17–18.

The law firm of Wilson Sonsini Goodrich & Rosati commented that 29 CFR 825.106(d) has led to a broader coverage of the Act than was intended by Congress. *See* Doc. R122A, at 4. Many small or start-up companies use PEOs to administer their payroll and benefits or provide other human resources assistance and this may

constitute a ''joint employer'' relationship. ''As a result, an employer that has only 15 employees (which is the cause of the need to outsource human resources functions) and would not otherwise be covered by the FMLA must count the employees of the PEO in addition to their own employees, which results in FMLA coverage for the employer.'' *Id.*

The law firm of Littler Mendelson stated that a ''PEO arrangement'' refers to a circumstance in which a customer contracts with another company to administer payroll and benefits, and perform other similar functions. Doc. 10271A, at 2. ''Employee leasing arrangements''—like those involving temporary services firms and other staffing companies—refer to arrangements in which the staffing firm places its own employees at a customer's place of business to perform services for the recipient's enterprise. The PEO assumes certain administrative functions such as payroll and benefits coverage and administration (including workers' compensation insurance and health insurance). The PEO typically has no direct responsibility for ''hiring, training, supervision, evaluation, discipline or discharge, among other critical employer functions.'' *Id.* Littler Mendelson argued that an employer—employee relationship between the PEO and these employees does not exist, based on the economic realities of the relationship and the fact that the employee is not dependent on the putative employer for his economic livelihood. ''Because a PEO does not control its client's employees, does not hire, fire or supervise them, determine their rates of pay or benefit from the work that the employees perform, the PEO cannot be considered an employer under the FLSA or the FMLA.'' *Id.* at 3.

Littler Mendelson commented that PEOs typically provide their services to small businesses and add value by administering their payroll process and providing access and administration of employee benefits that would be cost prohibitive if the small businesses tried to contract for these benefits on their own. ''It makes no sense to make an otherwise non-covered employer subject to the FMLA, in contravention of Congress' intent [in creating a small business threshold], simply because it contracts with a PEO for payroll services and other administrative benefits.'' *Id.* at 6.

The law firm of Fisher & Phillips commented on the same kinds of differences discussed above between a PEO and a temporary employment agency, staffing agency or traditional leasing company.

Specifically, if an employer contracts with an HR Outsourcing Vendor, should the number of individuals employed by the HR Outsourcing Vendor [PEO] be aggregated with the number of individuals employed by the employer in question? In addition, should the number of Individuals employed by the HR Outsourcing Vendor's other clients (within a 75-mile radius) be aggregated with the number of individuals employed by the employer in question. The answer to both of these questions is ''no.'' Unfortunately, under the current regulations, this answer is not clear. Consequently, the ambiguity from the two controlling regulations on the issue (Sections 825.111 and 835.106(d) has forced some employers to turn to the Judicial system for relief. Thus, in the interest of Judicial economy, ensuring compliance with the FMLA where warranted, and effectuating Congress' intent to protect small employers from the burdens of the FMLA, we respectfully request the DOL to revise and clarify not only Section 825.111, but also Section 826.106(b)–(e) concerning joint employment, as these sections relate to * * * [PEOs]. In addition, or alternatively, we urge the DOL to implement new regulations that expressly detail the requirements for an entity to be subject to the requirements of the FMLA. * * * Extending Section 835.106(d) to encompass relationships between * * * [PEOs] and their clients produces absurd results that were not intended by Congress and do not adhere to the intent of the FMLA.

Doc. FL57, at 2–3.

TriNet commented that in the case of a PEO, the employee is hired first by the client company and the PEO enters the picture when the client company signs up with the PEO and the existing workforce begins to receive PEO services. ''The timing is exactly opposite with a temporary staffing agency that first has an employee in its pool of talent and then second assigns that employee to a particular company to work.'' Doc. FL109, at 3.

The law firm of Fulbright & Jaworski commented that PEO responsibilities vary by organization and contract, but that most are not involved in the day-to-day operations of their client's business and do not exercise the right to hire, fire, supervise or manage daily activities of employees. In some cases, the PEO and the client are not in the same city. Doc. FL62, at 1. The firm commented on the need for the Department to clarify that opinion letter FMLA—111 (Sept. 11, 2000) is about an atypical PEO who actually exercised control over client's employees. ''This comment letter requests a Department regulation [as follows] clarifying that the most common type of PEOs—PEOs that do not exercise control of employees '' are not covered employers under the FMLA.'' *Id.* at 2.

Professional Employer Organizations that contract to perform administrative functions, including payroll, benefits, regulatory paperwork, and updating employment policies, are not joint or integrated employers with their clients under the provisions of 29 CFR 825.104 and 825.106, provided they do not exercise control over the day-to-day activities of the client's employees or engage in the hiring or firing of the client's employees.

Id. at 6.

3. Employees Who Work at Home

The RFI also sought comment on what constitutes the worksite for an employee who works from home. As discussed above, the Access Data Consulting Corporation commented that the employer should be determined ''by the entity from which their paycheck is written.'' Doc. 10029A, at 2. This commenter stated that the same principle should apply to workers who work from home. *Id.*

The National Coalition to Protect Family Leave commented that 29 CFR 825.111(a)(2) already addresses the issue of identifying the worksite for employees who work at home by expressly stating that an employee's home is not an appropriate worksite. In such cases, the location the employee reports to or that furnishes the employee with assignments is the worksite for FMLA purposes. ''The Coalition concurs with this analysis * * * [and] asks DOL to clarify the situation where an employee is jointly employed and works out of his home instead of changing locations regularly or at a secondary employer's premises. In such circumstances, the Coalition recommends that the employee's worksite be the primary employer's office from which the employee is assigned or reports.'' Doc. 10172A, at 13.

XI. Data: FMLA Coverage, Usage, and Economic Impact

To assist in analyzing the impacts of the FMLA, the Department presented estimates of the coverage and usage of FMLA leave in 2005 in the ''FMLA Coverage and Usage Estimates'' section of the Request for Information (''RFI'').[23] The Department requested comment on these estimates and any data that would allow the Department to better estimate the costs and benefits of the FMLA, as well as particular issues for which the Department was seeking additional information.

The Department's estimates were based, in large part, on a report it published in January 2001, Balancing the Needs of Families and Employers: Family and Medical Leave Surveys,

[23] 2005 data was used because the 2006 annual employment figures were not available in December of 2006 when the RFI was published.

2000 Update and its underlying employer and employee surveys. As the Department explained in the RFI, this report is commonly referred to as ''the 2000 Westat Report''—available online at *www.dol.gov/esa/whd/fmla2007report.htm.*[24]

The 2000 Westat Report was a compilation, analysis, and comparison of one set of survey research with another set that was conducted in 1995. Title III of the Family and Medical Leave Act established a bipartisan Commission on Family and Medical Leave to study family and medical leave policies. The Commission surveyed workers and employers in 1995 and issued a report published by the Department in 1996, ''A Workable Balance: Report to Congress on Family and Medical Leave Policies'' ''—available online at *www.dol.gov/esa/whd/fmla2007report.htm.*

The RFI was not meant to be a substitute for survey research about the leave needs of the work force and/or leave policies being offered by employers. Nonetheless, the Department identified a number of issues in the RFI on which it sought quantitative data that would supplement and update the data that was collected by the Westat surveys. The Department specifically asked for information and data on:

- The approach the Department used to estimate the number of eligible FMLA workers at covered establishments in 2005;
- The approach the Department used to estimate the number of FMLA leave-takers given the data limitations and methodological issues in the 2000 Westat Report, and other available data that could be used to refine its estimate;
- The approach the Department used to estimate the number of covered and eligible workers taking intermittent FMLA leave, and other available data that could be used to refine its estimate;
- The approach the Department used to estimate the number of covered and eligible workers taking unforeseen intermittent FMLA leave, other available data that could be used to refine this estimate, and information on the prevalence, durations, and causes of intermittent leave; and,
- The economic impact of intermittent FMLA leave and unforeseen intermittent leave, including any differences between large and small employers, the impact that unscheduled intermittent leave has on productivity and profits, information on the concentration of workers taking unscheduled intermittent FMLA leave in specific industries and employers, and information on the factors contributing to large portions of the work force in some facilities taking unscheduled, intermittent FMLA leave.

The Department also asked for information related to the different treatment of FLSA exempt and nonexempt employees taking unscheduled, intermittent FMLA leave, and the different impact the leave taken by FLSA exempt and nonexempt employees may have on the workers who are taking leave and their employers. More generally, the Department also asked for information that can be used to improve the estimates of the impact that FMLA leave has on employers and employees, and for any data that would allow the Department to better estimate the costs and benefits of the FMLA.

In response to this request, the Department received a significant amount of quantitative and qualitative data from a wide variety of sources that updates and builds upon the data collected in the Westat surveys. This includes a wide variety of national survey data from employers and employees; detailed information from specific employers, both large and small, in a wide variety of industries; and economic studies, or references to economic studies, on the costs and benefits of the FMLA.[25]

The Department also received comments on the estimates it presented in the RFI, many of which were consistent with the Department's estimates. Many comments stated that the Department's estimates of FMLA usage, especially of intermittent FMLA leave, appear to be low given their experience. In this chapter, the Department presents both the estimates developed for the RFI and the comments received about those estimates. Although the Department evaluates the RFI estimates based upon the comments received, no revisions to the RFI estimates have been developed at this time. Finally, this chapter offers some observations about the impacts of certain aspects of FMLA leave on certain sectors of the economy.

Care should be taken to avoid drawing improper comparisons of data submitted in response to the RFI with the data from the Westat surveys. The record presented here is different than the previous two Departmental reports because the RFI is a different information-gathering tool than the previous surveys. Given the differences in the data gathering approaches, the depth with which the RFI looked at specific regulatory issues, and, of course, the differences in the self-selection of those who took the time to submit comments to the RFI compared to voluntarily responding to previous survey questionnaires, variations in the data should be expected.

A. Comments on the 2000 Westat Report and Further Data Collection

The Department used the 2000 Westat Report as the basis for the coverage and usage estimates presented in the RFI. Although the Department did not specifically ask for comments on estimates in the 2000 Westat Report, it did note that it was ''interested in refining the coverage and eligibility estimates in the 2000 Westat Report,'' and highlighted a number of important results and caveats from the 2000 Westat Report.

[24] Westat is a statistical survey research organization serving agencies of the U.S. Government, as well as businesses, foundations, and state and local governments. These surveys were commissioned by the Department of Labor in 2000 as an update to similar 1995 surveys ordered by the Commission on Family and Medical Leave, which was established by Title III of the FMLA. Many of the comments to the RFI cited the Westat Report and surveys but referred to it by a number of names including the West Report, Westat's FMLA Report, the FMLA Report, the Department's FMLA Report, and the 2000 FMLA Report. In order to minimize any confusion in this chapter, the report will be referred to as the ''2000 Westat Report,'' the employer survey will be referred to as ''Westat's employer survey,'' the employee survey will be referred to as ''Westat's employee survey,'' and when discussing both the employer and employee surveys they will be referred as the ''Westat surveys.''

[25] Some of the data submitted were national surveys (*e.g.*, AARP, International Foundation of Employee Benefit Plans, Society for Human Resource Management, National Association of Manufacturers, U.S. Chamber of Commerce, WorldAtWork, and the College and University Professional Association for Human Resources). Others submitted surveys or collections of reports from their clients, customers, or members (*e.g.*, Willock Savage, Kalamazoo Human Resources Management Association, Manufacturers Alliance, Air Conference, Association of American Rail Roads, Retail Industry Leaders Association, National Federation of Independent Business, HR Policy Association, International Public Management Association for Human Resources, and American Bakers Association). Numerous other comments provided data from individual companies (*e.g.*, United Parcel Service, U.S. Postal Service, Honda, Southwest Airlines, YellowBook, Madison Gas and Electric Company, Edison Electric, Verizon, Delphi, MGM Mirage, Union Pacific, and Palmetto Health) or government and quasi-government agencies (*e.g.*, New York City, Dallas Area Rapid Transit, Fairfax County, VA, the Port Authority of Allegheny County, PA, and the City of Portland, OR). Other comments provided references to previously published studies (*e.g.*, Darby Associates, the Center for WorkLife Law, Women Employment Rights, and the Family Care Alliance). Many comments were also received from labor organizations and family advocates (*e.g.*, AFL–CIO, Communications Workers of America, National Partnership for Women and Families, Families USA, 9to5, National Association of Working Women). Finally, the Department received many comments from workers who took FMLA leave.

The Department received a few comments alleging the RFI was critical of the 2000 Westat Report. For example, the National Partnership for Women & Families stated that ''[t]he RFI takes great pains to criticize the 2000 study of FMLA[.]'' Doc. 10204A, at 2. However, as the Department explained in the RFI, there were several methodological issues that Westat itself noted (particularly in Appendix C) [26] that may have resulted in, among other issues, the overestimation of FMLA-covered and eligible workers and an underestimation of workers not covered.[27] Identifying some of Westat's own caveats and limitations was not a criticism of the 2000 Westat Report. Rather, the methodological issues of the 2000 Westat Report referred to in the RFI, some of which had to do with statistics regarding intermittent leave, were meant to fully inform the public about the limitations of the 2000 Westat Report particularly in light of how the data was being used and because the Department was interested in refining some of the estimates. It should further be noted that the Department based its best estimates on the 2000 Westat Report and believes that, despite the caveats noted, the 2000 Westat Report still provides a great deal of useful information and data on FMLA leave-takers. A number of commenters concurred, stating: ''the 2000 Westat Study, even with its limitations, has been invaluable and represents the best available source for information on FMLA usage and coverage.'' Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 2.

Other commenters, however, were more critical of the 2000 Westat Report. For example, the U.S. Chamber of Commerce noted that the questionnaire used to survey establishments ''provides little insight * * * on the nuanced complexity of the law, the vagueness that has resulted in abuse of FMLA leave, the cost associated with compliance and, more significantly, the cost associated with providing leave to employees who likely were not intended to be covered by the statute.'' Doc. 10142A, at 11. Another comment noted ''[t]he Department does not have an accurate measure of intermittent leave because this was not covered adequately by the Westat surveys'' and that ''there are a few questions in [the employer] survey that address intermittent leave, but not necessarily the FMLA definition of intermittent leave.'' Randy Albelda, Heather Boushey, and Vicky Lovell, Doc. 10223A, at 2. An economic analysis of the FMLA by Criterion Economics concluded that the results of the Westat surveys ''are subjective, qualitative, incomplete, and biased in the direction of understating the costs of FMLA[.]'' National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 23.

A number of groups favored additional data collection, beyond the RFI, but were split as to whether such additional data collection was needed to form the basis for rulemaking or would even contribute significantly beyond what is already known and available. The National Partnership for Women & Families noted that ''the lack of available data on many of the issues raised in the RFI is an unfortunate reminder of DOL's failure to conduct objective studies on the FMLA and its implementation in recent years. * * * DOL has neglected to undertake significant efforts to update this research, thus leaving an information void. While the RFI solicits data from commenters on a long list of questions, in many cases it is DOL that has been—and is—best positioned to gather the relevant data to provide answers.'' Doc. 10204A, at 2. ''DOL has a particularly important role in conducting and commissioning objective, scientifically sound research that can be used to inform and assess implementation of the FMLA,'' and that pursuing changes to the FMLA regulations without such data is unwarranted and inappropriate. *Id.* The AFL-CIO stated ''The Department should not yield to anecdotal evidence with respect to the purported burden of leave on employers as a basis for tightening the eligibility rules for FMLA leave. Anecdotes can never substitute for hard data[.]'' Doc. R329A at 9.

Randy Albelda, Heather Boushey, and Vicky Lovell mirrored the comments of others that recommended that ''[a]dditional data collection, using nationally representative surveys, could illuminate the issues raised in the RFI'' while noting that the Westat surveys ''provide us with valuable information about family and medical leave-taking[.]'' Doc. 10223A, at 1, 2. Criterion Economics concluded that ''[t]he Department has taken the first step towards a more complete and accurate assessment by soliciting additional information through the RFI[.]'' National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 23. The U.S. Chamber of Commerce also recommended that a ''follow-up study with employers should be conducted,'' but did not believe such further study should delay regulatory action ''strongly recommend[ing]'' that the Department initiate a rulemaking. Doc. 10142A, at 12. Another economic analysis by Darby Associates noted that although ''the data are scattered, spotty, frequently inconsistent, and largely anecdotal and episodic,'' ''[t]here is in the record a substantial amount of data, analysis and conjecture on which to base a description of various attributes of benefits and costs arising from over a decade of experience under the FMLA.'' National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 7.

The Department does not dispute that the RFI was not a nationally representative FMLA survey as were the Westat surveys and the Department makes no attempt to directly compare data from such different types of information collection. The Department, nevertheless, believes that the RFI was a useful information collection method that yielded a wide variety of objective survey data and research, as well as a considerable amount of company-specific data and information that supplements and updates our knowledge of the impacts of FMLA leave. In fact, several organizations conducted national surveys in response to the RFI.[28]

Finally, the Department asked a number of questions in the RFI on intermittent leave because one of the findings of the 2000 Westat Report was that ''most employers report no adverse effects [from FMLA], including from intermittent leave,'' [29] while more recent information on intermittent leave from private sector surveys and reports, recommendations to the Office of Management and Budget, and stakeholder meetings suggested that intermittent leave is a difficult issue for many employers, particularly in some industries. Moreover, there was not a lot of information on the issue in the 2000 Westat Report. As the remainder of this chapter demonstrates, the data and information obtained in response to the RFI provides considerable insight and a far more detailed picture of the workings of the FMLA, and the impact of intermittent leave, than the Westat surveys.

B. Number of Covered and Eligible Workers

The Department presented its best coverage estimates in the RFI. These estimates were based upon updating the estimates in the 2000 Westat Report to account for differences in employment between 2000 and 2005 and

[26] *See* 2000 Westat Report, at C–1.

[27] *See* 2000 Westat Report, at 3–4.

[28] *See also* footnote 25.

[29] *See* 2000 Westat Report, Foreword by DOL at ix.

''correcting'' some of the methodological issues in the 2000 Westat Report. A full description of the Department's approach was presented in the RFI and resulted in the following estimates:

NUMBER OF COVERED AND ELIGIBLE EMPLOYEES UNDER THE FAMILY AND MEDICAL LEAVE ACT IN 2005

	In millions
Total U.S. Employment	141.7
Employees at FMLA-Covered Worksites	94.4
Eligible Employees at FMLA-Covered Worksites	76.1

Note: Employment for 2006 was not available at the time the RFI was published in December 2006.

The Department did not receive any substantive comments on its coverage or eligibility estimates or the methodology it used to produce those estimates and concludes that these estimates are currently the best available.

C. Number of Workers With Medical Certifications for Chronic Conditions

Although the Department did not specifically ask in the RFI for comments on the number of covered and eligible workers who have medical certifications for FMLA leave, nor did it ask for this information in either the 1995 FMLA surveys or Westat surveys, it received a wide variety of information and data on this issue. Nationwide survey data and company-specific reports indicate that a significant number of workers have medical certifications on file with their employers for chronic health conditions, especially for some facilities or workgroups, and that the number is increasing. For example:

- Respondents to the National Association of Manufacturers' survey reported ''that 25 percent of those eligible for FMLA leave had medical certifications on file for a 'chronic' illness that permitted unannounced, unscheduled intermittent leave.'' Doc. 10229A, at 10.
- Another comment noted that ''[s]everal other [air] carriers report that 50% or more of all flight attendants and agents are certified for FMLA leave.'' Air Conference, Doc. 10160A, at 4.
- A survey by the U.S. Chamber of Commerce found ''[l]arge companies reported having generally 15 percent of the workforce with active medical certifications for FMLA at any time.'' Doc. 10142A, at 2.
- Verizon noted that 44 percent of the employees in its Florida Network Centers division had medical certifications and their Business Solutions Group saw a jump in medical certifications from 28 percent in 2005 to 42 percent in 2006. Doc. 10181A, at 4.
- The Commonwealth of Pennsylvania stated that it has two 24/7 healthcare facilities where 6 percent and 10 percent of the workers have medical certifications that excuse them from working mandatory overtime. Doc. 10042A, at 3.
- The City of New York noted that 32 percent of all police communication technicians (911 call-takers) have medical certifications. Doc. 10103A, at 3.

The data received in response to the RFI suggest that a significant number of workers in certain facilities and workplaces have medical certifications on file for chronic health conditions, which due to certain regulatory provisions and interpretations can allow these workers to take unscheduled intermittent leave with little or no notice, or to be excused from certain shifts or mandatory overtime.

D. Number of FMLA Leave-Takers

The Department presented three estimates of the number of covered and eligible workers who took FMLA leave in 2005 and asked for information and data on the approach it used to make these estimates, and for other available data that could be used to develop its estimates given the data limitations and methodological issues in the 2000 Westat Report. A full discussion of the Department's approach was presented in the RFI and resulted in the following estimates:

	Percent of covered & eligible workers taking leave	Number of FMLA leave-takers (in millions)
Upper-bound Estimate*	17.1	13.0
Employer Survey Based Estimate**	8.0	6.1
Lower-bound Estimate*	3.2	2.4

*From the Westat employee survey.
**The Department used a rate of 6.5 percent of covered workers in the RFI. The rate presented here is the percentage of covered and eligible workers calculated by dividing 6.1 million by 76.1 million.

In response to this request the Department received a significant amount of data on FMLA leave usage from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. The Department also received a few comments on the data limitations with its approach and methodology for estimating FMLA leave usage.

1. Comments on the Department's Approach and Data on the Number of Leave-Takers

The Department received very few comments on its approach. Most of the comments concerning the Department's leave estimates presented FMLA usage figures at or above the Department's estimates, although many of these were for individual employers or certain facilities of individual employers. For example:

- The U.S. Postal Service reported that 18.4 percent of its 620,688 employees took FMLA leave in 2006.[30] Doc. 10184A, at 3.
- Madison Gas and Electric Company stated, ''[o]ur data shows 30% of eligible workers requested FMLA leave. Of the 30%, only 69% of the requested leaves qualified as FMLA leave. This resulted in 20% of eligible workers taking a qualified FMLA leave.'' Doc. 10288A, at 4.
- Delphi reported that at one of its large manufacturing facilities in the Midwest ''nearly one of every five'' workers took FMLA leave in 2005. Doc. 10225A, at 1.
- UnumProvident reported that 17 percent of the employees in the FMLA program that it administers for 95 clients nationwide took FMLA in 2006. Doc. 10008A, at 1–2.
- First Premier Bank stated that ''[o]n average, over 25% of our staff has been on FMLA at one point or another during the course of a year. There is almost 10% of our staff on FMLA at any given time.'' Doc. 10101A, at 1.
- The University of Washington noted that ''[i]n our organization of 950 employees * * * we consistently have 20% of the workforce absent from work under FMLA[.]'' Doc. FL17, at 2.

The Department notes that although some employers experienced higher rates of FMLA usage than the rates published in the RFI, this does not indicate that these estimates were wrong. The Department presented three alternative estimates of average FMLA use across all employers in all industries of the economy in the RFI. Clearly some employers in some industries will experience higher rates of usage just as other employers in other industries may experience lower rates. For example, the International Foundation of Employee Benefit Plans conducted a nationwide survey of 241 corporate benefit managers, public

[30] The U.S. Postal Service only reported data for those employees who are in its eRMS system.

employers, and professional service providers and found:

Percent of workers using FMLA leave	Percent of companies
Less than 1%	9
1% to 3%	17
4% to 6%	22
7% to 10%	17
11% to 15%	11
16% to 20%	6
More than 20%	4
Don't Know	13

Doc. 10017A, at 17.

Although it is not possible to calculate the mean of this survey, the median of those reporting a percentage is between 7 percent and 10 percent. This would appear to be consistent with the national average findings presented in the 2000 Westat Report that 6.5 percent of workers employed at facilities covered by the FMLA took FMLA leave, and reflects the comments that suggest ''[w]ith the exception of Westat's employer survey, in which double counting may have occurred, the data tends to show that FMLA usage remains low.'' AFL–CIO, Doc. R329A, at 5 (footnote omitted).

Additional comments reported FMLA usage that is consistent with the range the Department estimated in the RFI. For example:

• A nationwide survey of 1,356 covered and eligible workers age 50+ by AARP found that 9 percent took leave under the FMLA. Doc. 10228B, at 5.

• The NJ Transit reported that 9 percent of its employees are covered and eligible leave-takers. Doc. FL85, at 8.

• FNG Human Resources stated that ''an average of 8% of employees [are] on some manner of Family Medical Leave at all times.'' Doc. FL13, at 2.

• Progressive Inc. also reported that approximately 10 percent of its workforce is on FMLA leave at any given time. Doc. FL2, at 1–2.

• The AFL–CIO stated that ''our survey shows that almost 16 percent (15.99%) of respondents have taken FMLA leave. These results are well within the general range of the Westat employee-based survey[.]'' Doc. R329A, at 7.

Further, comments clearly show that FMLA leave usage varies with workgroups of some employers and that using averages for FMLA usage may hide the impact it has on some employers and some facilities/workgroups within employers. For example:

• Union Pacific reported that ''17% of Train and Engine Service employees use FMLA leave versus 3.5% use among all other employees (5 x more). This disproportionate rate of use is magnified when coupled with the fact that Train and Engine Services employees make up roughly 46% of all employees company wide (25,000 of 54,000 total).'' Doc. 10148A, at page 2.

• The Manufacturers Alliance reported that one ''member company that is highly diversified, with eight business groups, states that the percentage of FMLA leave taken intermittently within those groups has ranged from a low of 10 percent to a high of 75 percent. Across all units, the company estimates that the percentage of intermittent leave as a percentage of all FMLA leave is in the range of 40 to 50 percent.'' Doc. 10063A, at 3.

2. Trend in the Number of Workers Taking FMLA Leave

A number of comments indirectly echoed Randy Albelda, Heather Boushey, and Vicky Lovell, who specifically noted that ''using the 2000 share of those taking leave with 2005 employment data may also underestimate the true take-up of the FMLA.'' Doc. 10223A, at 1. The Albelda letter speculated that more people may know their FMLA rights in 2005 compared to 2000, just as the 1995 FMLA surveys and Westat surveys showed an increase in the percentage of covered workers taking FMLA leave from 1995 to 2000. Madison Gas and Electric attributed its higher rate to employers' ''increased awareness and recordkeeping related to FMLA leave'' and ''[e]mployees have also become more aware of their rights under FMLA, which has changed the scope of leaves requested and taken.'' Doc. 10288A, at 4.

A number of other commenters explicitly reported that the use of FMLA leave has increased since 2000. For example:

• The Air Conference stated that ''[t]he percentage of employees using FMLA is steadily increasing'' in the airline industry. Doc. 10160A, at 4.

• The Port Authority of Pittsburgh stated that ''the number of employees on an approved leave at any one time has increased by five percent. In 2002 approximately 6% of the workforce was on leave at any one time. Over the years, this number has steadily increased to the current level of 11%.'' Doc. FL135, at 2.

• ''The Dallas Area Rapid Transit (DART) has experienced a significant increase in FMLA utilization over the past four years. Employee FMLA absences increased from 1,965 workdays in FY 2003, to over 6,100 workdays in 2006.'' Doc. FL41, at 2.

• The National Association of Manufacturers commented that ''for one major auto parts manufacturer, applications for FMLA leave increased 150-fold in ten years,'' Doc. 10229A, at 4.

• The City of New York reported that ''[t]he use of FMLA leave * * * has increased substantially in the last five years, from 10.8% of all medical leave in 2001 * * * to the 2006 level of 27.0% of all medical leave.'' Doc. 10103A, at 2.

• Aztec Manufacturing reported that ''FMLA absences have grown 200% from 2002 to 2006.'' Doc. 10081A, at 2.

Others suggested that FMLA usage remains low. The Department notes, however, that firms with higher than average FMLA usages rates probably have a greater incentive to report their higher rates than those with rates lower than the average.

Although the weight of the comments strongly suggests that the percentage of employees using FMLA leave has increased, particularly in some industries, the range of workers who took FMLA leave in 2005 (between 3.2 percent and 17.1 percent) is consistent with the data submitted in response to the RFI. Nevertheless, the Department recognizes it is possible that the number of workers who took FMLA leave in 2005 is more likely to be between 6.1 million and 13.0 million than between 2.4 million and 6.1 million. As the next section indicates, awareness of the FMLA appears to be higher in 2005 than in 1999 when Westat conducted its surveys. So just as FMLA usage increased between the times the two surveys sponsored by the Department were conducted in the 1990s, given the comments received it is likely that FMLA usage increased between 1999 and 2005.

3. Awareness of FMLA Leave Usage

In the RFI, the Department also raised the issue about the difference between its lower-bound estimate based upon Westat's employee survey and its best estimate based upon Westat's employer survey. The Department noted: ''2.4 million may be a lower-bound estimate in that it may under-estimate the number of covered and eligible workers who actually took FMLA leave, because evidence exists that many workers are unaware that their leave qualified and that their employers may have designated their leave as FMLA leave.'' 71 FR 69511.

The Department received many comments on this issue. For example, one commenter stated that ''[t]he obvious reason for this [discrepancy between employer and employee survey

figures] is that a significant number of employers are not properly informing employees that they are utilizing FMLA leave time when that is actually occurring.'' Kennedy Reeve & Knoll, Doc. 4763A, at 13.

Others believe that there may be some confusion over FMLA leave when other types of leave are taken concurrently. The National Council of Chain Restaurants, for example, stated that the Department asked ''why employee estimates regarding the use of FMLA are so much lower than employer estimates. We believe employees are much more likely to focus on whether leave is paid or unpaid, and only to count unpaid leave as FMLA leave when they answer such questions.'' Doc. 10157A, at 7. The Commonwealth of Pennsylvania reported that 6 percent of its employees ''use some type of FMLA qualifying leave without pay each year.'' Doc. 10042A, at 2. However, this did ''not include employees who use paid leave in lieu of unpaid FMLA leave.'' *Id.*

Data from the Westat surveys and other surveys suggest that when many employees think of FMLA leave, they only think of unpaid leave and do not realize that FMLA leave often runs concurrently with paid leave. They do not associate taking paid sick leave and other forms of paid leave (e.g., vacation, personal) as taking FMLA leave '' when at times it may be designated as such by their employer as permitted by the statute. For example, AARP's national sample of workers 50 or more years old reported that ''[d]espite high overall awareness of FMLA and the fact that the majority (58%) of survey respondents have taken at least some time off for family- or medical-related reasons within the past five years, only nine percent of respondents (or 15% of leave-takers) reported that any of the time taken was FMLA leave.'' Doc. 10228B, at 4.

4. Continuing Concern With Estimates of Leave Usage Over Time

After reviewing the comments the Department continues to believe that the available data do not enable an accurate estimation of the total number of workers who took FMLA leave since 1993, and remains concerned about the possible misinterpretation of its estimates and misapplication of its methodology for estimating the number of workers who took FMLA leave in a given year. In fact, the Department received a few comments with different estimates of the number of workers who have taken FMLA leave since 1993. For example, the National Women's Law Center noted, without citation, that ''[c]lose to 80 million workers have taken FMLA leave in the last 14 years[,]'' and 9to5 stated, again without citation, that ''FMLA has allowed more than 50 million Americans to take job-protected leave[.]'' Doc. 10272A, at 1; and Doc. 10210A, at 1, respectively.

As noted in the RFI, the Department has determined that the available data do not enable the accurate estimation of the total number of workers who have taken FMLA leave from 1993 to 2005 because ''establishments may double count persons that took more than one FMLA leave'' during the 18–20 month survey period that began in January 1999. Moreover, this double counting is even more likely to occur over the longer period that began in 1993 due to workers who have chronic conditions, more than one family member with a serious health condition, or multiple pregnancies or adoptions.

5. Differences Between FLSA Exempt and Nonexempt Workers

In the RFI the Department solicited the following information with respect to workers who are salaried and exempt from the Fair Labor Standards Act (''FLSA'') under 29 CFR Part 541:

- The Department requests that commenters submit information related to the different treatment of FLSA exempt and nonexempt employees taking unscheduled, intermittent FMLA leave.
- The Department also requests information on the different impact the leave taking by FLSA exempt and nonexempt employees may have on the workers who have taken leave and their employers.

The Department received a few comments in response to this request but they were generally vague and inconclusive. Some comments indicated that nonexempt employees tend to take more FMLA leave than exempt employees. For example, ''[t]he majority of our FMLA requests are from hourly Fair Labor Standards Act-nonexempt employees.'' University of Wisconsin-Milwaukee, Doc. FL120, at 1. Others indicated that FMLA usage by nonexempt workers presents more of an issue than FMLA usage by exempt workers because nonexempt workers tend to take more unscheduled intermittent leave. For example:

> As a general rule, non-exempt employees are more likely to use unscheduled intermittent leave than exempt employees. In the case of exempt employees, many tend to work more than 40 hours each week anyhow, or make up the time later, or work from home even when on a leave of absence. Exempt employees tend to use FMLA leave primarily for birth of a child, acute illnesses or surgery, or planned medical treatment (*e.g.*, chemotherapy), all of which normally result in scheduled time off and predictable time off. In most cases, these leaves are continuous leaves or intermittent leaves over a period of less than six (6) months.

Spencer Fane Britt & Browne LLP, Doc. 10133C, at 22.

However, several comments, particularly from the Society for Human Resource Management chapters, suggest that the difference between exempt and nonexempt employees is not their pattern of FMLA leave use but rather the way their employers track the use of FMLA leave. One commenter stated that ''many employers do not keep track of partial day absences of exempt employees because it is virtually impossible to know if and when the time has been made up. Many exempt employees make up the time of their own volition.'' Arkansas Society for Human Resource Management State Council, Doc. 5161, at 1. Another commenter noted that ''[t]racking FMLA leave in such small increments is extremely burdensome—particularly with respect to exempt employees, whose time is not normally tracked.'' Northern Arizona University, Doc. 10014A, at 5. One worker also agreed that employers treat exempt and nonexempt workers differently when it comes to tracking FMLA leave:

> I know there is inconsistency throughout the company on the application of how FMLA is measured. For example, exempt employees are allowed to take time off and it is generally considered that if you have [worked] a minimum of 5 hours, you have [worked] a full day. If I call in late due to being ill, the time I work is measured and if I do not make the 8 hours, I'm expected to log the difference. If another exempt calls in late because their child is sick, nothing is done. If they come in late or leave early, it is never a problem. My time is always scrutinized and questioned.

An Employee Comment, Doc. 10336A, at 9.

Although there was no consensus in the comments on whether one group is taking more FMLA leave than the other group, one commenter noted an apparent difference in the manner in which exempt and nonexempt employees are paid while on FMLA leave. For example, Madison Gas and Electric stated ''[a] variance also exists between time taken by FLSA exempt and non-exempt employees. Exempt employees are typically paid for time away while non-exempt employees do not receive pay, unless they are able to substitute from a paid leave balance. This pay for leave time differences generally increases the amount of time taken by FLSA exempt employees.'' Doc. 10288A, at 5.

E. Number of Workers Taking Intermittent FMLA Leave

The Department presented its estimate of the number of covered and eligible workers who took intermittent FMLA leave in 2005 and asked for information and data on the approach it used to make the estimate, and for other available data that could be used to refine its estimate. As noted in the RFI, the Department used data from Westat's employee survey to develop an estimate of the number of workers that used intermittent FMLA leave in 2005. Specifically, Westat's employee survey found that almost one-quarter (23.9 percent) of covered and eligible workers who took FMLA leave reported taking their leave intermittently. That is, they repeatedly took leave for a few hours or days at a time because of ongoing family or medical reasons. Therefore, based on the Westat survey data, about 1.5 million FMLA leave-takers (i.e., 23.9 percent of 6.1 million FMLA leave-takers) or about 2 percent of the workers employed in the establishments covered by the FMLA (i.e., 1.5 million of 94.4 million) used intermittent leave in 2005.

In response to this request, the Department received a significant amount of data on intermittent FMLA leave usage from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. In fact, the Department received more data on this issue (and the unscheduled component of intermittent leave discussed in the following section) than almost any other issue in the coverage and usage section of the RFI. The Department also received a few comments on the data limitations with its approach and methodology for estimating intermittent FMLA leave usage.

1. Comments on the Department's Approach To Estimating Intermittent FMLA Leave Use

As was noted in the RFI, the Westat surveys ''tended to focus on the longest leaves taken for family and medical reasons rather than the leaves taken intermittently.'' However, the Westat surveys also asked some questions related to intermittent leave.

Randy Albelda, Heather Boushey, and Vicky Lovell submitted one of the most critical comments on the Department's approach that touched on some data limitations of Westat's employee survey while noting that ''data that are available from the survey seem to suggest a wide range of possible leave-takers who might use the leave intermittently.'' Doc. 10223A, at 2. Specifically, the Albelda letter stated:

> [The Department's] approach may substantially understate the use of intermittent leave. The Department uses data from the employee survey, which does not ask about the number of intermittent leaves, asking instead whether those who took a leave for purposes covered under FMLA leave took their leave intermittently. Some, none, or all of that leave may have been under FMLA, but there is no way to know from the survey questions. Further, the Department applies this ''guesstimate'' to the total number of leave-takers, which may not be correct. As the Department points out, this assumes that all groups of workers are equally likely to take intermittent leave, which may not be true.
>
> The Department does not have an accurate measure of intermittent leave because this was not covered adequately by the Westat surveys''. The Westat employee survey asks how many leaves employees took over the previous 16–18 month period and probes further about two of their longest leaves, but does not specifically ask about FMLA-defined intermittent leave[.]

Doc. 10223A, at 2.

This criticism notwithstanding, the Albelda letter went on to identify a number of questions in the Westat employee survey that might be used to refine the Department's approach and reached nearly the same estimate as that presented by the Department in the RFI, that intermittent FMLA leave appears to be important for more than a quarter of leave-takers. Specifically, the Albelda letter noted:

> The data that are available from the survey seem to suggest a wide range of possible leave-takers who might use the leave intermittently. For example, 27.7 percent said they alternated between leave and work (question A5BB), with more than half (53.3 percent) of that group indicating they did that for less than half of their leave (question A5C). So, a relatively large number indicate not taking a leave all at once, but over half did so for less than half of their leave. In another part of the survey, 7.2 percent of leave-takers said that they were not off work the entire time during their longest leave over the past 16–18 months (question A3E). Of those who took multiple leaves, 20 percent indicated they alternated between leave and work (question A8); of those, 13 percent indicated they do so regularly (question A8A). Thus, the ability to use FMLA leave intermittently appears to be an important feature of the policy for more than a quarter of leave-takers.

Doc. 10223A, at 2–3 (footnote omitted).

Madison Gas and Electric Company stated that ''the approach used by the Department [to estimate the usage of intermittent leave] seems sound but will vary between employers. The estimated use of intermittent leave is lower than the experience of our company.'' Doc. 10288A, at 4.

A number of commenters who were critical of the Department's approach recommended that the Department collect additional information about intermittent FMLA leave, which was one of the objectives of the RFI. *See* Chapter XI, section A.

2. Data on the Number of Intermittent Leave-Takers

The Department received a significant amount of data on the number and percentage of workers who have taken intermittent FMLA leave that supplements and updates the results of the 2000 Westat Report. For example, a nation-wide survey of 241 corporate benefit managers, public employers, and professional service providers by the International Foundation of Employee Benefit Plans found:

Percent of FMLA leave that is taken intermittently	Percent of companies
Less than 5	48
5 to 15	16
16 to 25	10
26 to 55	6
More than 55	5
Don't Know	14

Doc. 10017A, at 20.

Although it is not possible to calculate the mean of this survey, the median of those reporting a percentage is between 5 percent and 15 percent, which is below Westat's estimate that 23.9 percent of FMLA leave-takers took some of their leave intermittently. Other comments also reported percentages of intermittent FMLA leave lower than either Westat's estimate or the Department's estimate that about 2 percent of all workers employed in the establishments covered by the FMLA took intermittent FMLA leave. For example:

- According to the WorldatWork survey, 18.1 percent of FMLA leaves in 2005 were due to chronic conditions. Doc. 10201A, at 11.
- The AFL–CIO stated ''in our survey just 12 percent of all respondents reported having taken intermittent leave. This finding supports that available evidence, which shows that 'intermittent leave is used infrequently[.]' '' Doc. R329A, at 7.
- One member company of the Manufacturers Alliance stated that intermittent leave ''is rare and generally involves ongoing medical treatment[.]'' This company ''does not see a lot of intermittent leave—probably less than 10 percent of all leave taken.'' Doc. 10063A, at 2.

Many comments, however, reported intermittent FMLA usage above either

the Westat or the Department's estimates. For example:

• The University of Washington reported ''5% of employees are currently approved for intermittent FMLA leave.'' Doc. FL17, at 2.

• Honda reported that 2,249 employees out of an employee population of 20,757 (about 11 percent) took a total of 22,250 days of intermittent FMLA leave in 2006. Doc. 10255A, at 6.

• NJ Transit reported that ''fully 95 percent of [FMLA] requests were for intermittent leave.'' Doc. FL85, at 5.

• Progressive Inc. reported that 75 percent of its employees' FMLA leaves are intermittent. Doc. FL2, at 2.

• The Madison Gas and Electric Company reported that ''[o]ver one-third of employees within our company request intermittent leave which is higher than the estimate determined by the Department.'' Doc. 10288A, at 4.

See also Delphi Inc, Doc. 10225A, at 2; Kalamazoo Human Resource Management Association, Doc. 10035A, at 2; HR Policy Association, Doc. R367A, at 3; Southwest Airlines Co., Doc. 10183A, at 3.

Other comments show that intermittent FMLA leave usage varies by workgroup within some employers, and that using averages for intermittent FMLA usage across industries and operations within industries may hide the impact that FMLA usage has on some employers and some facilities/workgroups within employers. For example:

• Based on client comments, Spencer Fane Britt & Browne stated ''[t]here are employers who report that they have as many as 40–50% or more of all their employees, and as much as 75–100% of employees within a particular work group or department, who have submitted medical certifications for and use intermittent leave for chronic conditions.'' Doc. 10133C, at 19.

• Southwest Airlines reported that ''[i]n the workgroup with the highest percentage of FMLA use in relation to [the] number of employees, Reservations, intermittent FMLA represents 75% of the FMLA leaves over the last two years[.]'' Doc. 10183A, at 3.

• The Manufacturers Alliance reported that one highly diversified member with eight business groups stated ''that the percentage of FMLA leave taken intermittently within those groups has ranged from a low of 10 percent to a high of 75 percent'' with a company wide average of ''40 percent to 50 percent.'' Doc. 10063A, at 3.

See also MGM Mirage, Doc. 10130A, at 4; Briggs and Stratton, Doc. FL37, at 1–2; and Association of American Railroads, Doc. 10193A, at 1.

A number of other comments reported that intermittent leave usage is increasing. In some cases the reported increases are very large. For example:

• DST Systems, Inc. stated that ''[t]he burden of intermittent leave is steadily growing. The number of intermittent leaves at our company has grown almost 300% in one year, from 71 in 2005 to 221 in 2006.'' Doc. 10222A, at 2.

• Verizon provided the example of its Customer Financial Services Mass Market group where ''the use of intermittent leave has increased from 22% of eligible employees in 2004 to 30% in 2005 and 37% in 2006.'' Doc. 10181A, at 4.

• National Association of Manufacturers reported that ''[f]or one major auto parts manufacturer * * * the use of intermittent leave increased five times more quickly than that for regular FMLA leave. Our data indicate that the experience of this company is typical of manufacturers.'' Doc. 10229A, at 4.

The fact that some employers have higher rates of intermittent FMLA leave use than the averages estimated by the Department is not surprising, especially in view of the self-selection of those who took the time to submit comments to the RFI. Moreover, it is noteworthy that the preponderance of companies responding to the survey conducted by the International Foundation of Employee Benefit Plans reported that less than 25 percent of FMLA leaves were taken intermittently.

On the whole, the data presented above appear to be consistent with the ratios used by the Department to develop the estimates presented in the RFI, i.e., that about one quarter of FMLA leaves are taken intermittently. However, the Department believes that its estimate that about 1.5 million workers took intermittent FMLA leave in 2005 may be too low because the estimate of 1.5 million workers taking intermittent FMLA leave was based upon the estimate of 6.1 million workers taking FMLA leave and for the reasons discussed above (e.g., increased employee awareness), the 6.1 million estimate may be low. Moreover, the comments also suggest that more workers appear to be taking intermittent FMLA for chronic serious health conditions.

F. Number of Workers Taking Unforeseen or Unscheduled Intermittent FMLA Leave

The Department presented its estimate of the number of covered and eligible workers who took unscheduled intermittent FMLA leave in 2005 and asked for information and data on the approach it used to make the estimate, and for other available data that could be used to refine its estimate.[31] The Department also requested comment on the prevalence, durations, and causes of intermittent leave.

As noted in the RFI, the Department used the responses to Question A8a in Westat's employee survey as a rough ''proxy'' for the percentage of the employees who took unscheduled intermittent FMLA by assuming that the portion of the intermittent FMLA leave-takers who took unscheduled leave were the 45.4 percent that answered ''As Needed'' to Question A8a. Thus the Department estimated that about 700,000 workers (i.e., 45.4 percent of 1.5 million) took unscheduled intermittent FMLA leave in 2005.

In response to this request, the Department received a significant amount of data on the use of unscheduled intermittent FMLA leave from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. The Department also received a few comments on the data limitations with its approach and methodology for estimating intermittent FMLA leave usage.

Although the Department did not receive significant comments on its method for estimating the number of workers who took unscheduled intermittent FMLA leave in 2005 (about 12 percent of workers taking FMLA leave), the Department acknowledges that the uncertainty regarding this estimate is larger than that of the estimate of intermittent FMLA leave because data on taking leave as needed was used as a proxy for unscheduled intermittent leave. Moreover, it is important to note that many of the estimated 700,000 workers may take a number of unscheduled intermittent leaves depending on their chronic health condition.[32]

The Department did receive a significant amount of data on the number and percentage of workers who

[31] Commenters used the terms ''unscheduled'' and ''unforeseen'' interchangeably.

[32] For example, Randy Albelda, Heather Boushey, and Vicky Lovell noted that data from the Westat employee survey found that for the 27.7 percent who said they alternated between leave and work (question A5BB), more than half (53.3 percent) of that group indicated they did that for less than half of their leave (question A5C). Doc. 10223A, at 2–3. This implies that nearly one-half (46.7 percent) used more than half of their leave intermittently. Given the comments that were received, certainly a significant amount of this intermittent leave was unscheduled. *Id.*

have taken unscheduled intermittent FMLA leave. Many commenters also used terms such as ''certified for intermittent leave'' or ''leave taken intermittently for chronic conditions'' to describe their data. For example:

- The National Association of Manufacturers said that ''respondents to the NAM's survey'' reported that 25 percent of those eligible for FMLA leave had medical certifications on file for a ''chronic'' illness that permitted unannounced, unscheduled intermittent leave. If only those workers used intermittent leave, manufacturers are experiencing a use of intermittent leave at nearly 8 times the national average!'' Doc. 10229A, at 10.
- Southwest Airlines noted that ''[m]ost of the intermittent leave at Southwest is also taken on an unscheduled basis, without advance notice by employees, particularly during the last five years.'' Doc. 10183A, at 1.
- New York City said that ''[t]he use of FMLA leave, particularly unscheduled intermittent leave, by PCTs [police communication technicians] has increased substantially in the last five years, from 10.8% of all medical leave in 2001, to a high of 39.6% of all medical leave in 2003, to the 2006 level of 27.0% of all medical leave.'' Doc. 10103A, at 2.

Other comments show that unscheduled intermittent FMLA leave usage varies with workgroups of some employers; these comments suggest that using averages for FMLA usage may hide the impact it has on some employers and some facilities/workgroups within employers. For example:

- The National Association of Manufacturers said that ''[f]or one major manufacturer, a staggering 60 percent of all FMLA leave taken in the last nine months was for a period of one day or less. Nearly all of this leave was unscheduled, nearly all of it unannounced.'' Doc. 10229A, at 10.
- The University of Wisconsin-Milwaukee stated ''[i]n one department alone, of 135 hourly blue-collar employees, 37 took FMLA during 2006, or roughly 27.4 percent. Of the 37 who used FMLA during 2006, 24 were on intermittent, unscheduled FMLA, or roughly 65 percent of those who used FMLA were on intermittent unscheduled FMLA.'' Doc. 10098B, at 3.
- The U.S. Chamber of Commerce provided several examples of workplaces where the large numbers of active FMLA certifications permit a significant portion of the workforce to take unscheduled FMLA leave. ''Large companies reported having generally 15 percent of the workforce with active medical certifications for FMLA at any time. Some employers reported extraordinary levels of active FMLA cases. * * * One employer reported certain facilities with 30 percent of the workforce classified as FMLA active. Another employer reported a call center where 50 percent of the workforce was classified as FMLA active.'' Doc. 10142A, at 2, n. 2.

After reviewing the comments, it appears that the Department's unscheduled intermittent FMLA leave estimates presented in the RFI—that about 700,000 workers took unscheduled intermittent FMLA leave—may be too low for at least a couple of reasons. First, as noted in the previous section, the Department's estimate of the number of workers who took intermittent leave in 2005 appears to be low. Second, the comments also suggest that a significant percentage of FMLA covered and eligible workers have medical certifications on file for chronic conditions that enable them to take unscheduled intermittent leave with little or no notice.[33] Thus, it is likely that a significant portion of the estimated 6.1 million workers who took FMLA leave in 2005 (perhaps several million) took some form of intermittent leave and that many of the workers who took intermittent leave took at least some of it without prior notification.

Finally, it is clear from the record and the comments received that if another nationwide survey of both employers and employees on the use and impact of FMLA is conducted in the future, it should do more than simply update the Westat surveys. The Westat surveys were not designed to inquire specifically about many of the issues currently being raised (*e.g.*, the use of unscheduled intermittent FMLA leave); the definition of ''intermittent leave'' used by Westat did not match the statutory definition; and the Westat surveys did not collect data on medical certifications for chronic health conditions.

G. The Economic Impact of FMLA Leave

Previous congressional testimony, the 2000 Westat Report, other surveys, and stakeholder meetings suggest that the FMLA has significant benefits and costs. Further, most surveys of workers and employers show that, while the FMLA has been generally effective in carrying out the congressional intent of the Act, some aspects of the statute and regulations have created challenges for both workers and employers. As was stated in the RFI:

> [T]he Department has not received complaints about the use of family leave—*i.e.*, leave for the birth or adoption of a child. Nor do employers for the most part report problems with the use of scheduled intermittent leave as contemplated by the statute, such as when an employee requests leave for medical appointments or medical treatment like chemotherapy. Rather, employers report job disruptions and adverse effects on the workforce when employees take frequent, unscheduled, intermittent leave from work with little or no advance notice to the employer.

The Department received additional support for this understanding in response to the RFI from both worker and employer groups. For example, the AFL–CIO noted that ''[c]oupled with smaller, more recent studies, the 2000 Westat Report shows that the FMLA, as implemented by the regulations, has worked as Congress intended.'' Doc. R329A, at 1. Further, the National Association of Manufacturers stated that ''the FMLA has achieved its principle goal: leave to care for oneself or one's family during health problems. * * * Yet there are a number of areas that continue to plague employers who are trying to provide the leave made available by law in a manner that is reasonable and cost-effective.'' Doc. 10229, at 3.

Given this assessment, the Department presented Westat's estimates of the impact that the FMLA had on productivity and profitability (*see* 71 FR 69513, Table 4), and asked a variety of questions intended to update and supplement data in the 2000 Westat Report on the economic impact of the FMLA. Specifically, the Department asked for:

- Data that would allow the Department to better estimate the costs and benefits of the FMLA.
- How does the availability of FMLA leave affect employee morale and productivity?
- Is there any evidence that FMLA leave increases employee retention, thereby, reducing employee turnover and the associated costs?
- Alternative information related to the different economic impacts that intermittent leave has on large employers compared to smaller employers.
- Alternative information regarding any economic impact that recurring unforeseen, unscheduled, intermittent FMLA leave may have on covered employers, and on productivity and profits.
- Information on the concentration of workers taking unscheduled, intermittent FMLA leave in specific industries and employers.

[33] *See* Chapter IV.

• Information on the factors contributing to large portions of the work force in some facilities taking unscheduled, intermittent FMLA leave.

• Does scheduled FMLA leave present different problems or benefits from unscheduled FMLA leave? Does intermittent leave present different problems or benefits from leave taken for one continuous block of time? Does the length of leave taken present different problems or benefits?

• How do employers cover the work of employees taking FMLA leave? Does the length of leave impact this coverage? Does the fact that the leave is scheduled or unscheduled impact this coverage? Does the amount of notice given by the leave-taking employee impact this coverage? Does the fact that the leave is intermittent impact this coverage?

• Is there any evidence of employers closing or relocating facilities as a result of employee leave patterns (either scheduled or unscheduled)?

The Department received many comments on some of these questions (*e.g.*, the impact of the FMLA on employees' morale, productivity and profits) and very few, if any, comments on others (*e.g.*, the closing of plants due to the FMLA). Since the responses to many of the questions overlap, the Department decided to organize the findings presented below by topic rather than according to each question asked.

1. Comments on the Department's Approach on the Economic Impacts of the FMLA

It was not the Department's intention in the RFI to focus on just the impact that the FMLA regulations have on productivity and profitability. Rather, the intention was to supplement existing data and information on the wide variety of economic impacts that the FMLA is likely to have on both workers and employers, including productivity and profitability. Despite this, the Department received some criticism that it did not discuss nor solicit sufficient information to assess the overall financial impact of the FMLA on the economy. For example, some Members of Congress noted that there may be ''unintended consequences that not only have an adverse effect on employers, they are equally harmful to employees[.]'' Letter from 2 Republican Members of Congress, Doc. FL112, at 1. A more specific critique was submitted by Criterion Economics, which stated:

[N]either the Westat survey nor the RFI itself provide an appropriate economic framework for assessing the costs of the FMLA. Both the Survey and the RFI focus on the effects of FMLA on the ''profitability'' and ''productivity'' of firms. * * * [T]he costs of FMLA are likely borne to a significant extent by workers, in the form of reduced wages, higher unemployment, or both; and by consumers, in the form of higher prices.

National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 2.

Darby Associates took another approach and used a standard economic welfare framework to assess the size, nature, and distribution of the Act's benefits and costs and among individuals, and concluded their analysis with a deadweight economic loss estimate. They also noted that many FMLA benefits and costs are difficult to measure. *See* National Coalition to Protect Family Leave, Doc. 10172A, Attachment.

Finally, the Office of Advocacy at the Small Business Administration (SBA) also noted that in 1995 the Department published a final rule that ''improperly compared the number of covered small entities to the total number of small businesses, rather than calculating the number of small businesses that are covered by a rule that will suffer a significant economic impact.'' [34] Doc. 10332A, at 4. The SBA Office of Advocacy recommended a Section 610 review that includes an evaluation of the ''degree to which the technology, economic conditions, or other factors have changed * * * the area affected by the rule.'' Doc. 10332A, at 3.

2. Overall Impacts of the FMLA

Although the intent of the RFI was not to provide a basis for estimating the entire impact of the FMLA on the economy, the Department did receive some comments about the overall impacts of the FMLA. These comments were generally divided into the costs and benefits resulting from the current implementation of the statute. The Department did not receive a single submission that attempted a comprehensive and detailed cost-benefit analysis.

3. Overall Benefits of the FMLA

The Department received many comments discussing the benefits to workers and employers of the FMLA in general as well as specific benefits that result from decreased costs to employers and the economy. These benefits include: The retention of valuable human capital, having more productive employees at work, lower long-run health care costs, lower turnover costs, lower presenteeism costs,[35] and lower public assistance costs.

Often these benefits are immeasurable and priceless. See also Chapter I. One worker perhaps said it best: ''Last year, my husband was diagnosed with Hodgkin's Lymphoma. * * * It was during this time that my husband needed me most. Had I not had the opportunity afforded to me by the FMLA, I don't know what we would have done. I needed to be there to help him eat, take care of him when he was sick, consult with doctors and nurses, but most of all for mental and emotional support. He still says how important it was that I was with him at all times during this terrible experience. * * * FMLA allowed me to help my husband and not have to worry about job security.'' An Employee Comment, Doc. 4755, at 1. Clearly, ''there is no denying the importance of fundamental benefits conferred by the Act on individuals.'' National Coalition to Protect Family Leave, Doc. 10172A, Darby Associates, Attachment at 2.

Although none of the commenters developed an overall estimate of the benefits of the FMLA, the comments generally characterized the major benefits to employers as reducing the cost of presenteeism and employee turnover. Additionally, there was a significant amount of anecdotal evidence presented on the benefits to the employees taking FMLA leave and their families.

For example, one commenter noted that ''[t]he Department should remember that there would be many hidden costs associated [with] weakening this law. Sick employees will report to work thereby infecting co-workers and further damaging productivity. People will not be able to provide adequate care for sick children and elderly parents. Nobody knows what such neglect might cost our economy.'' An Employee Comment, Doc. 5438, at 1.

4. Reduced Presenteeism Costs

According to the Center for Worklife Law, ''The cost of lost productivity due to presenteeism is significantly greater than the cost of lost productivity due to absenteeism. The total annual cost of lost productivity is $250 billion. Presenteeism accounts for $180 billion or 72% of that total. The availability of

[34] It should also be noted that the Regulatory Impact Analysis that accompanied the Department's 1995 final FMLA rule was based on 1987 and 1993 General Accountability Office (GAO) reports that did not include the net cost associated with replacing workers or maintaining output while workers are on unpaid leave. Nor did it include the costs associated with intermittent or unforeseen intermittent leave for the GAO reports focused on ''extended'' leave for birth or adoption of a child, a seriously ill child, a seriously ill parent, a seriously ill spouse, and temporary medical leave.

[35] Presenteeism is where employees report to work when they are ill and perform below the employer's expectations because they are not well.

intermittent FMLA leave incentivizes employees to stay home when they are seriously ill and reduces lost productivity expenses incurred by employers.'' [36] Doc. 10121A, at 5. ''Sick men and women do not add in a positive way to their working environment. What does happen is the population of the surrounding offices are exposed to increased risk of illnesses causing flu, colds and other seasonal illnesses to move more quickly and with a greater toll on our population in general.'' An Employee Comment, Doc. 4710, at 1.

The estimates submitted for the record, such as the one cited above, already include a reduction in presenteeism due to the use of the FMLA as the studies were conducted well after the FMLA was enacted in 1993. Although many commenters cited the overall costs of presenteeism and asserted that FMLA has some positive impact on limiting those costs, no one attempted to quantify the marginal effect or economic impact that enactment of the FMLA had on the issue. However, the lack of a quantitative estimate does not mean that the FMLA does not have an impact on presenteeism. Clearly, the FMLA has allowed workers to take leave and not work when they are suffering from a serious health condition that is contagious. On the other hand, it is also evident that workers with contagious illnesses still come to work for a variety of reasons.

5. Increased Employee Retention and Lower Turnover Costs

The Department received many comments emphasizing the positive impact the FMLA has on employee morale and how it increases worker retention and lowers turnover costs. By reducing employee turnover, some commenters argued that the FMLA reduces employer costs.

For example, the Human Rights Campaign noted that ''[t]he 2000 Westat Study found that 89% of employers reported that the FMLA has had either a positive or neutral effect on employee morale. The survey also reported that, of those who have taken on added duties when a co-worker has taken FMLA leave, over four in five (85%) say the impact on them was neutral or positive.'' Doc. 10179A, at 2. The Center for Law and Social Policy cited ''[t]he 1995 Commission on Leave report [that] found that 10.9 percent of leave-takers who are not covered by FMLA fail to return to the same employer after taking leave, compared to only 1.9 percent of workers who are covered.'' Doc. 10053A, at 2. Finally, Local 2026 of the American Federation of Teachers concluded, ''[t]he law promotes workforce stability by helping employees retain their jobs when an emergency strikes. We believe the FMLA is essential to greater employee retention and to reducing employee turnover, and it is crucial to preserve FMLA's protections in their entirety.'' Doc. 10242A, at 8.

A survey of AARP members suggests that the FMLA also increases the supply of labor. When FMLA leave-takers in its survey ''were asked to speculate about the steps that they would have taken if they had not received FMLA leave, approximately one in ten (11%) indicated that they would have had to quit their job or would have lost their job[.]'' Doc. 10228B, at 4.

Notably, the Center for WorkLife Law tried to quantify some parameters of the impact the FMLA has on worker retention. ''Employers also profit from the availability of intermittent leave. * * * [T]he total estimated annual replacement cost to employers associated with caregiver attrition is $6,585,310,888. Without FMLA leave, attrition among employed caregivers would increase even more sharply.'' [37] Doc. 10121A, at 5.

However, other commenters noted that while some uses of FMLA leave (*e.g.*, for a medical emergency, the birth of a child, to receive medial treatment or therapy) are good for employee morale, the repeated use of unscheduled FMLA leave by some employees can actually have the opposite effect. *See* Chapter IV, for a more complete discussion.

6. Other Benefits

A number of workers also submitted comments that either explicitly or implicitly identified other important benefits of the FMLA, such as having more productive employees at work, lower long-run health care costs, retaining valuable human capital, and lower public assistance costs. For example,

- ''Because of the Act our team is still complete and productive * * * the Family and Medical Leave Act not only keeps productive teams together in the long run, but it fosters loyalty to the corporation not only for those who take part in family leave, but for those who respect the support of their colleagues. It is a small investment by the corporation for a long term benefit.'' An Employee Comment, Doc. 4858, at 1–2.
- ''Having a parent available to care for a sick child has proven benefits in shortened recovery times and better health and school outcomes.'' 9 to 5, National Association of Working Women, Doc. 10210A, at 1.
- ''Because of being able to take time off for treatment and retain my job, my company was able to retain valuable expertise.'' An Employee Comment, Doc. 234, at 1.
- ''If it were not for FMLA, my family and I would be living in a box under a bridge somewhere * * * if it were not for my employer being understanding and supporting FMLA, [I would] be another statistic of the unemployed in the United States.'' An Employee Comment, Doc. 5006, at 1.

Clearly the FMLA has resulted in significant benefits for employers, their employees and the public. Employers benefit from reduced turnover and decreased presenteeism. Workers benefit from being able to take leave to care for themselves and family members with serious health conditions without fear of losing their jobs. Society benefits from the increased supply of trained workers and the reduced need for public assistance. The fact that these benefits have not been quantified or expressed in monetary terms by any of the commenters should not be taken as an indication that these benefits are not substantial.

7. Overall FMLA Compliance Costs

Some commenters cited a 1995 Department of Labor cost estimate [38] and a 2004 study by the Employment Policy Foundation that estimated the cost of the FMLA. For example, the SBA Office of Advocacy stated: ''In 1995, DOL estimated that the cost to all business from the FMLA [was] $675 million annually, but only computed the costs of maintaining group health insurance during periods of permitted absences. In contrast, a study by the Employment Policy Foundation (EPF) estimates that the direct costs [of] FMLA leave to employers was $21 billion in 2004 in terms of lost productivity from absenteeism, continued health benefits, and net labor replacement costs.'' [39] Doc. 10332A, at 3–4. The EPF estimates were based upon the direct compliance

[36] The Center for WorkLife Law's reference for these estimates was Jodi Levin-Epstein, Presenteeism and Paid Sick Days, Center for Law and Social Policy (February 28, 2005), citing W. Stewart, D. Matousek, & C. Verdon, The American Productivity Audit and the Campaign for Work and Health, The Center for Work and Health, Advance PCS (2003).

[37] The Center for WorkLife Law reference for this estimate was ''The MetLife Caregiving Cost Study: Productivity Losses to U.S. Business,'' MetLife Mature Market Institute and National Alliance for Caregiving, at 12 (July 2006).

[38] 60 FR 2180.

[39] *See also* footnote 34.

costs of the firms responding to a membership survey.

The Department received one economic study from Darby Associates that assessed the impact of the FMLA on the economy ''based on a review of data and analysis available after a decade of experience under the Act.'' National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 1. ''The paper concludes that much of the cost of implementation of the Act is effectively a ''dead weight'' economic loss that reflects economic waste and confers very limited benefit on all but a few stakeholders. These deadweight losses are estimated to be in excess of $30 billion annually[.]'' *Id.* Darby Associates developed their estimate by adding $11 billion in indirect costs from a 2001 National Association of Manufacturers survey to the $21 billion direct costs estimate by EPF.

Darby Associates also identified a number of FMLA-related costs that they did not attempt to separately estimate: these include the loss of productivity, increased administrative and personnel costs, overtime pay, decreases in quality and safety, and costs imposed on customers and other employees. National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 15. Darby Associates went on to note that ''[m]any of the costs of leave, especially intermittent leave, are experienced in ways that defy measurement '' lost opportunities by employers as well as impacts on other employees in the workplace, including stress, inconvenience, loss of morale and workplace effectiveness.'' *Id.*, Doc. 10172A, Attachment at 13–14.

A primary finding of Criterion Economics' analysis is that ''the costs of FMLA are likely borne to a significant extent by workers, in the form of reduced wages, higher unemployment, or both; and by consumers, in the form of higher prices.'' National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 2. *See also id.*, Doc. 10172A, Darby Associates, Attachment.

8. Summary of the Overall Benefits and Costs of the FMLA

The available evidence appears to support the conclusion that both the costs and benefits of the FMLA are large and difficult to quantify.

The overall weight of the comments is that the FMLA has had immeasurable benefits for millions of workers and has imposed significant costs on the economy. The records shows it has likely increased the supply of labor and reduced employer costs by enabling employees to remain in the work force in the face of serious health conditions, but its costs are borne by individuals as consumers, workers, and economic stakeholders.

As explained in earlier chapters, numerous comments that the Department received in response to the RFI confirm that the greatest challenge for employers associated with the FMLA, and its most significant economic impacts, stem primarily from the unscheduled intermittent leave portion of the FMLA.[40]

Finally, the Department believes that it would be difficult, with any precision, to differentiate the impact that the FMLA has had on the supply of labor, wages and prices from other changes that have occurred over the last 14 years. Similarly, it is not possible, with any precision, to estimate what the labor turnover rates or the cost of presenteeism would be without the FMLA.

H. Comments on the 2000 Westat Report's Findings on the Impact Intermittent FMLA Leave Has on Productivity and Profitability

The Department received many comments quoting sections of the 2000 Westat Report that suggest intermittent FMLA leave generally is not a problem for employers. For example, Local 2026 of the American Federation of Teachers stated, ''[t]he 2000 Westat Study found that 81% of covered establishments reported that intermittent leave had no impact on business productivity, and 94% reported that intermittent leave had no impact on business profitability.'' Doc. 10242A, at 6. Similarly, the Women's City Club of New York stated, ''[r]esearch shows that the FMLA has been beneficial to business. A United States Department of Labor employer [survey], released in 2000, found that 9 in 10 covered employers report that the FMLA has a positive or neutral effect on productivity and growth.'' Doc. 10003A, at 2.

Similarly, a 2007 Society for Human Resource Management survey found that 71 percent of respondents reported no noticeable effect on productivity. *See* Doc. 10154A, Attachment at 4. However, in the Department's view, the fact that many employers responding to a survey did not experience problems does not mean that the FMLA does not have a significant impact on the productivity and profits of a number of other employers in certain industries and sectors of the economy. As was noted by Criterion Economics, ''[c]ritical aggregate statistics in the Westat Survey are constructed by averaging across all industries. Reliance on simple averages disguises the fact that certain sectors incur disproportionately high costs as a result of FMLA compliance, and hence leads to estimates that are biased downward.'' National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 19.

In other words, just as certain employers reported higher FMLA leave use in response to the RFI than the average estimated by the Department, some employers are likely to incur higher costs than the ''average'' firm responding to Westat's employer survey. If these high costs are clustered in specific industries or types of work, then the FMLA could impose significant costs for those clusters of employers while the average number of employers may have reported relatively lower costs.[41]

Other comments cited the 2004 study by the Employment Policy Foundation (EPF)[42] referenced in the RFI as evidence that there are significant costs incurred by some firms in some industries. For example, The Equal Employment Advisory Council stated:

> While the 2000 Westat Report * * * suggests little, if any, burden associated with administering FMLA leave, we believe the Report does not accurately reflect the level of difficulty some employers have experienced in attempting to comply with the current FMLA regulations. Many EEAC members participated in a separate survey of 431 large corporations conducted by the Employment Policy Foundation in 2002. Of the 94 companies that responded, the vast majority reported that intermittent leave has been a problem to administer (87.2%). * * * Most of the respondents who were able to quantify the cost of complying with the regulatory FMLA recordkeeping and notification requirements reported a moderate to significant cost burden, with annual estimated costs per employer ranging from $213,188 to $1.3 million, excluding employer costs for complying with other existing federal recordkeeping and reporting requirements.

Doc. 10107A, at 2–3.

Moreover, as was noted in the RFI, Westat found that establishments with more than 250 employees experienced greater negative impacts on productivity

[40] *See also* Chapter IV.

[41] Similarly, epidemiologists might find a problem due to the cluster of an illness in a specific locality or demographic group, even if the average incidence in the general population is low. Therefore, it is not sufficient to only examine the average impact on employers. It is also necessary to examine the impact on employers experiencing problems to determine if there is some pattern involved.

[42] Janemarie Mulvey, The Cost and Characteristics of Family and Medical Leave, Employment Policy Foundation Issue Backgrounder (Apr. 19, 2005). But see Institute for Women's Policy Research, Assessing the Family and Medical Leave Act: An Analysis of an Employment Policy Foundation Paper on Costs (June 29, 2005).

and profits than smaller establishments covered by the Act. Criterion Economics presented an analysis stating that ''[i]n reporting its results, the Westat survey weights the results by the number of establishments, a weighting scheme that biases the overall results in favor of responses provided by small establishments, as there are far more small firms than large firms in the United States. *** weighting the Westat survey results by employment has a large effect on the reported impact.'' National Coalition to Protect Family Leave, Doc. 10172A, Attachment at 14–15.

I. Impact of Unscheduled Intermittent FMLA Leave

As discussed in Chapter IV, the Department received a variety of comments regarding the impact of unscheduled intermittent FMLA leave. At the same time, notice issues notwithstanding, comments from employees demonstrate that it is the unpredictable nature of certain serious health conditions that makes the use of intermittent leave invaluable.

Representative of many employer comments, the National Business Group on Health described the impact of unscheduled FMLA leave this way:

> Unscheduled leave presents different problems than scheduled FMLA leave because of the lack of advance notification and unpredictability of the employee's time away from work. Furthermore, it creates significant problems if the employer cannot obtain adequate staffing. Additionally, the need for overtime or temporary personnel increases operating costs. With unscheduled leave, employers cannot give advance notice of the need for overtime to those employees who must fill in for the employees on FMLA leave, negatively affecting employee morale. Scheduled FMLA leave, on the other hand, gives the employer a better opportunity to plan, though it still raises operating costs. It allows an employer time to obtain coverage during an employee's absence from the employer's own staff pool and to administer the FMLA leave in a timely manner. Also, the other employees who fill in for colleagues on FMLA can better plan their overtime.

Doc. 10268A, at 2. *See also* South Central Human Resource Management Association, Doc. 10136A, at 7.

However, the Women's Employment Rights Clinic at Golden Gate University School of Law provided this view of the benefits to workers of intermittent FMLA leave:

> Intermittent and reduced schedule leaves are central to employees' ability to balance work and family. * * * the opportunity to take leave in limited increments is extremely important to workers. In the case of one's own medical needs, intermittent and reduced schedule leave allow employees to continue working while undergoing medical treatments that require only partial absence from work. This not only gives the employee the opportunity to continue earning wages, but also to continue as an active participant in the workforce * * * For those who need only partial leave for care of a family member, such flexible leave arrangements give the worker the opportunity to maintain much needed earning capacity during periods of increased medical and caretaking expenses.

Doc. 10197A, at 6.

Keeping workers with chronic conditions employed not only benefits the workers themselves but also benefits society in the form of reduced public assistance payments. For example, one worker stated:

> Without [the FMLA], I would have surely missed mortgage payments, car payments and my paycheck would definitely not have been enough to provide groceries for the family. The end result would be a damaged credit history in which my family and I would suffer paying higher costs of insurance and other means of credit, suffering for years and years, causing unresolved debt hanging over our heads. Not to say the least, without this protection, I probably would have lost my job and all its benefits due to the missed time at work.

An Employee Comment, Doc. 2666, at 1. Another worker stated:

> My experience with the Act has been extensive as I used both intermittent and continuous leaves to care for my elderly mother * * * . Without this important benefit * * * [o]ur only alternative was to deplete Mother's assets and apply for Medicaid which would put the financial responsibility of her care on the Federal Government. With this Act we feel we were able to accomplish our goals and avoid shifting the burden of care to the government.

An Employee Comment, Doc. 4720, at 1.

On the other hand, as explained in Chapter IV, many comments indicate that unscheduled intermittent FMLA leave is difficult for employers because employee absences can be unpredictable and occur with little or no notice. However, it is precisely the unpredictable nature of many serious health conditions that makes the ability to take unscheduled intermittent FMLA leave so important for employees.[43]

J. Impact of Unscheduled Intermittent FMLA Leave on Productivity and Profitability

Although employer comments suggest that unscheduled intermittent leave is a problem, others pointed to data from the national surveys that suggest intermittent FMLA leave is not a significant problem. Two types of data were submitted as evidence that employers are overstating the impact of intermittent FMLA leave: data on productivity and profits, and data on the use of intermittent FMLA leave.

For example, the AFL–CIO stated:

> [A]lthough intermittent leave has now become a focal point of employer complaints about the FMLA, in our survey just 12 percent of all respondents reported having taken intermittent leave. This finding supports that available evidence, which shows that ''intermittent leave is used infrequently and has imposed minimal burdens on employers.'' Anne Wells, Note, Paid Family Leave: Striking a Balance Between the Need of Employees and Employers, 77 S. Cal. L. Rev. 1067, 1081 & nn.94–98 (2004). In fact, Westat found that ''[a]bout a fourth of leave-takers (27.8%) had at least one intermittent leave during the [2000] survey reference period.'' 2000 Westat Report at 2–18.

Doc. R329A, at 7–8.

As was noted previously, the use of averages tends to minimize the impact on some employers. The fact that relatively small averages of workers in the Westat employer survey and the AFL-CIO survey used intermittent FMLA leave may obscure the fact that some employers in some industries or workgroups are experiencing disruptive rates of unscheduled intermittent leave use.

Moreover, some commenters indicated that the use of unscheduled intermittent FMLA leave by a few workers can significantly disrupt the operations of their employers depending on their positions, duties, and the type of work being performed. As one HR manager stated, the regulatory ''definition of 'key employee' * * * has to do with income level. The reality is our transit drivers are key employees because without them, the bus does not run. So I think I would change the definition of what is 'key'. A policeman is key. A fireman is key. A transit driver is key.'' Doc. 2627A, at 3. ''[M]any positions only have one person or one person per shift in a job class. When this person is absent for any reason, specific duties do not get carried out for the company.'' Infinity Molding & Assembly, Doc. 5192A, at 1.

Some commenters asserted that the problems being cited by the employers result more from management practices than the FMLA. For example:

- Cummins Inc. noted, ''[i]t has been our experience that facilities that maintain stringent attendance management policies often experience the highest number of FMLA intermittent leave requests.'' Doc. 10340A, at 2.

[43] *See* Joan C. Williams, One Sick Child Away From Being Fired: When ''Opting Out'' Is Not an Option, University of California, Hastings College of the Law, 2006, at 31.

• Madison Gas and Electric Company stated ''[t]he belief that unscheduled, intermittent FMLA is increased due to poor management and labor-relations issues is valid. Employees may concentrate on chronic health issues more heavily if their work situation is not fulfilling or becomes difficult. It is very interesting when reviewing FMLA leave data to see an employee with a certain condition taking large amounts of intermittent, unscheduled FMLA leave and another with the same condition taking very little time.'' Doc. 10288A, at 5.

As mentioned in Chapter IV, other comments indicate that certain provisions in collective bargaining agreements (CBAs), in conjunction with the FMLA, may provide an opportunity for employees to work particular times or shifts, and avoid others. These include: (1) provisions that provide that bargaining unit workers can receive premium pay (*e.g.*, for working a holiday or a particular shift) without having to complete a 40 hour work week; and, (2) provisions that workers have to be paid a full day of pay regardless of the actual amount of time they are at work. For example:

• ''Common practice is to take FMLA through the week but work on the weekends at 1.5 to 2.0 [times] the salary.'' A Human Resource Manager Comment, Doc. 4917, at 1.

• ''We even had one individual during our busy period of time (where overtime was abundant) come in four hours before the start of their shift (2 hours at double time and 2 hours at time and one half) and then at the start of their regular shift go home [on] FMLA. In that way she would earn seven (7) hours of pay and leave while not working the shift (2nd shift) that she hated.'' An Employee Comment, Doc. 6A, at 4.

• ''Take, for example, a Yardmaster who frequently calls in at the start of his or her shift stating [that] he or she will be using * * * intermittent FMLA leave. * * * Under the Yardmaster collective bargaining agreement, Yardmasters cannot work part of a shift and if a replacement is called, the replacement must be paid for the entire shift regardless of how long he or she is needed. Thus, the absent employee may say he or she only needs two hours of FMLA leave and is charged accordingly but ends up with eight hours off from work because the replacement works the entire shift. * * * Another similar scenario is presented when an employee's health care provider indicates he or she cannot work more than four hours per day, for example, due to exhaustion * * * Again, a replacement must be called and paid for the entire shift under the labor contract.'' Union Pacific Railroad, Doc. 10148A, at 8.

• ''Due to the 'no penalty' clause in FMLA, absent employees acquire 'super seniority' in many cases. For example: Our labor agreement allows us to deny holiday pay under certain conditions. Although the entire workforce is covered under the labor agreement, FMLA privileges afford special treatment to employees absent for FMLA reasons.'' Interbake Foods, Doc. 10012A, at 2.

• ''In the railroad industry, workers from the railroad's pool or extra board are called in roughly two or three hours before they are needed (as prescribed in the pertinent labor agreement). Unfortunately, a railroad worker so inclined can use the existing regulatory scheme to repeatedly use very small increments of FMLA leave to avoid unwanted assignments—disrupting railroad operations and unfairly impacting his or her co-workers. For example, a worker could call in to the railroad at 1 a.m. and take FMLA leave (*e.g.*, for a chronic migraine), thereby preventing the railroad from assigning him or her to a 3 a.m. train run (or whatever assignment that worker may find unpleasant). That same worker can then call back a short period later (as soon as the worker feels that he or she has safely avoided that assignment), knowing that he or she would be assigned a later train run—thus obtaining a more favored assignment[.]'' Association of American Railroads, Doc. 10193A, at 6.

K. Specific Industries Report Difficulties With Unscheduled FMLA Leave

Some industries, and operations within industries, may have more problems with employees' use of unscheduled FMLA leave than others. ''[E]conomic theory and empirical research indicate that the costs of absenteeism vary depend[ing] on the characteristics of firm production functions.'' National Coalition to Protect Family Leave, Doc. 10172A, Criterion Economics, Attachment at 18. ''A regulation that reduces labor productivity, for example, will have a larger impact on economic welfare in industries where production requires 'fixed proportions' of capital and labor (*e.g.*, air transport, which requires at least one pilot and one co-pilot per airplane) than in industries where capital can easily be substituted for labor.'' *Id.*, at 6. Further, ''[i]n some industries, employee absenteeism will have a relatively small effect on firms' overall ability to operate, and therefore entail a relatively modest financial impact. In other sectors, absenteeism hinders production substantially by, for example, diminishing the productivity of other workers and equipment.'' *Id.*, at 8.

The RFI record suggests that intermittent FMLA leave can have significant impacts on time-sensitive business models. For example, the United States Postal Service reported ''[i]n a time-sensitive environment * * * unscheduled leave presents significant operational challenges.'' Doc. 10184A, at 9. The United Parcel Service stated ''employers typically can arrange coverage for an employee who might require intermittent leave to take his mother to regularly scheduled * * * treatments. However, it is a huge burden for management to cover for an employee who is certified for intermittent leave for chronic * * * [conditions] and who calls in with no advance notice * * * especially in time-sensitive / service-related industries.'' Doc. 10276A, at 5.

In many situations, the absence of just a few employees can have a significant impact. For example, ''[w]ith respect to unscheduled intermittent leaves, some employers find they have to over staff on a continuing basis just to make sure they have sufficient coverage on any particular day (such as hourly positions in manufacturing, public transportation, customer service, health care, call centers, and other establishments that operate on a 24/7 basis). Some employers are required to work employees overtime to cover the absent employee's work. Both of these options result in additional costs[.]'' Spencer Fane Britt & Browne LLP, Doc. 10133C, at 19.

The Department also received many comments discussing the benefits that FMLA leave has for workers in these industries, and some of the issues employees face trying to take FMLA leave in these industries. *See* Chapter XI.H.3; *see also* Chapter I. As noted earlier, often these benefits are immeasurable and priceless. Although they will not be repeated here, they should be taken into account.

Comments received in response to the RFI suggest at least four types of business operations appear to have particular difficulty with unscheduled intermittent FMLA leave: (1) Assembly line manufacturing; (2) operations with peak demand; (3) transportation operations; (4) and operations involving public health and safety.

1. Assembly Line Manufacturing

One commenter explained, if a single worker is missing or has to leave, the line may have to be shut down until a replacement arrives.

My company is a manufacturing facility * * * Unfortunately, the production process is often slowed down or brought to a halt when an employee is out on FMLA. Not all of our product lines have employees cross-trained to work there. Intermittent FMLA affects the employee's productivity if they are not able to work a full day to produce the product needed to meet the customer demands. Employees often do ''double duty'' to cover a team member who is out on FMLA, which in turn causes stress and feelings of resentment.

Cooper Bussmann, Doc. 247, at 1.

The National Association of Manufacturers summarized the problem for U.S. manufacturers in this way. 'In the '24/7' environment of modern manufacturing, a night shift only makes sense when the day shift is fully staffed to take up and continue their efforts. Manufacturing and shipping schedules can be met only when staffing requirements can be predictably and reliably filled. But making sense of personnel requirements and scheduling needs has been made significantly more difficult by the current interpretations of the FMLA by the DOL[.]'' Doc. 10229A, at 3.

Some comments said that problems such as those reported above are merely scheduling issues and are not really problems with the FMLA, and that employers should expect some workers to be absent each day and should hire, staff, and schedule accordingly. For example, the Center for WorkLife Law stated that ''[e]mployers should not rely on co-workers to cover for absent employees as a matter of course. Rather, co-workers should be used to pick up the slack when no other option is available. Most employees will need to take FMLA leave at some point during their career, and good management practices dictate that employers recognize this eventuality and plan for it.'' Doc. 10121A, at 7.

Employer commenters had a different view.

Given the need for U.S. manufacturers to control costs and compete in a global market, we do not have the luxury of having a 'pool' of surplus employees to cover for unplanned absences. Six to seven years ago we were able to have a few employees in a floater pool for flexibility, but [with] the utilization of lean manufacturing techniques [that enables] us to compete with foreign competition, we no longer have those 'extra' employees. I know most, if not all, of the manufacturing people that I interact with in our State no longer have this luxury.

Ed Carpenter, Human Resources Manager, Tecumseh Power Company, Doc. R123, at 1.

Companies with production lines have no useful work for an employee who reports to work a few hours late. For example, a manufacturing facility begins its production line at the start of the shift. Within the first hour or two of the shift, the company needs to fill all job positions so that the production line can begin operations. An employee with a chronic condition * * * has an episode that causes him to take 2–4 hours of unscheduled FMLA leave * * * By the time the employee reports to work * * * all jobs on the production line have already been filled and there is no work for the employee. If the employee is permitted to 'bump' the person assigned to do his tasks, then the employer is still left with another employee with nothing to do.

Clark Hill Inc, Doc. 10151A, at 2.

Honda's comments indicate that employers could incur substantial costs even when there are floaters available to keep the line moving.

[B]ecause all work stations must be covered in assembly-line manufacturing, employers must have extra workers to cover possible unscheduled, intermittent leave * * * Such absences increase the costs of manufacturing by increasing the number of extra employees who have no regular work but are ''floaters'' to cover for unscheduled absences * * * Furthermore, because those ''floaters'' or ''fill-in'' workers are not as experienced or knowledgeable, they may not be able to keep up with the normal pace * * * Because they move from department to department depending upon the need, they cannot be expected to have proficiency of an associate regularly assigned to that process. Therefore, production units may be lost, and, to make up for the lost units, the whole department or shift may have to work overtime. The employees in attendance are inconvenienced, and the employer has incurred increased costs for the same number of units.

Doc. 10255A, at 4–5.

2. Operations With Peak Demand

Commenters noted that in contrast to assembly line manufacturing, some operations primarily experience problems with unscheduled intermittent FMLA leave during their periods of peak demand. At other times, such leave can be more easily accommodated. Two examples are electric utilities during power outages, and call centers.

Although power interruptions are, in many cases, unavoidable, Exelon's customers expect the restoration of power as quickly and safely as possible. Indeed, in some cases, a customer's safety and wellbeing are dependent upon the prompt restoration of service. * * * The nature of Exelon's business requires employees to work overtime, particularly employees who are responsible for restoring electrical service to customers or who are responsible for responding to customer inquiries regarding electrical service. When employees with these duties are unable to work overtime [because of FMLA medical certifications], their co-workers have to pick up the burden * * * Simply put, when a customer is without power in the middle of the night, Exelon does not have the option of deciding to restore the customer's power the next morning, when the employee needing FMLA leave from overtime is able to come to work.

Exelon, Doc. 10146A, at 1 and 3.

Our company has several divisions, with the one being impacted the most by FMLA our call center. The call center is staffed by call volume and based on the expected minutes of an employee's time on the phone during a shift. Intermittent FMLA in this division causes problems with phone coverage. This frequently means that we * * * have to offer overtime to employees who will cover someone's shift (whenever enough notice is given), resulting in increased wage expenses. Another scenario is that our service level agreements with our customers suffer the consequences of our center being understaffed. This has a more long-term effect that may result in our customers not renewing contracts with our call center.

Leslile Masaitis, Doc. 224, at 1.

Moreover, it is impossible to calculate or repair the loss of goodwill that results from frustrated customers who are kept waiting for [call center] service and from disappointed customers whose needs remain unmet because of the absences. In one office, in one month alone in 2006, intermittent FMLA absence resulted in over 8,900 unanswered calls.

Verizon, Doc. 10181A, at 4.

3. Transportation Operations

The Department received a number of comments indicating there are unique FMLA issues for the transportation industry. Typically, the plane, bus, or train cannot leave until the crew is present. Many commenters pointed out that any delay in staff can result in a delay that inconveniences many passengers and customers. Moreover, if the individual taking FMLA leave arrives after the departure, there may be no work for that individual for several hours.

Our customers depend on us to get them to work, school or medical appointments on time. When drivers are late to work * * * their route must quickly be given to another driver, and the bus must get out on the road. This can mean that a busload of people is late. * * * Employers in time-sensitive industries such as public transportation whose existence depends on being able to make pull-out (getting the buses out on the road, particularly at peak ridership times); arriving at destinations on time; meeting up with other buses on schedule, etc., are really in a bind when an employee can circumvent rules by calling in to the dispatcher and

simply saying ''I'm running late because of FMLA.''

Metro Regional Transit Authority, Akron, Ohio, Doc. 10118A, at 1.

Unforeseen, intermittent FMLA leave is not only having a negative impact upon our operations, but also upon our customers, the general public. When bus operators report off work, in many instances, at the last possible moment, a bus may be late or not show at all. Additionally, extra operators must be scheduled to work in anticipation of coworkers calling off work. These costs are critical to nonprofit organizations that rely, to some degree, upon government funding. The current provisions for intermittent leave present a significant burden to schedule-driven operations.

The Port Authority of Allegheny County, PA, FL135, at 2.

Three workgroups represent 82% of all FMLA leave at Southwest and each of them has operational job responsibilities: Ramp, Operations and Provisioning Agents; Reservations Sales Agents; and Flight Attendants * * * When these employees take FMLA, it directly impacts Southwest's ability to operate our published flight schedule, much less on time and with efficiency. When these employees are absent, flights do not take off without another employee taking their place * * * the replacement staffing costs alone represent approximately $20 million annually * * * Southwest estimates that it must employ and pay as many as 200 additional Reserve Flight Attendants each month to cover intermittent FMLA.

Southwest Airlines Co., Doc. 10183A, at 3, 5.

An office worker who shows up one hour late for work may find some extra paperwork on his desk which he can handle during the day without affecting others. A flight attendant who reports at 10 a.m. for a 9 a.m. departure has almost certainly created significant operational problems. He has either (a) forced 100–400 passengers to wait and miss later connections, or (b) caused the airline to reposition another flight attendant onto the aircraft because, by federal regulation, an aircraft cannot board passengers or take off without a minimum number of flight attendants. The ripple effects of such delays also can affect an infinite number of passengers, as well as numerous coworkers * * * in cases where airline employees work on planes that have left the airport, it is physically impossible for an employee to report to work on a plane that has taken off.

Air Conference, Doc. 10160A, at 4, 11.

There are 55 employees in our workforce. * * * Three are [on] FMLA [leave]. * * * Buses don't leave the garage without drivers. Buses are not properly maintained without enough mechanics. Therefore we have to hire more people to get the job done while we wait to see if the four that are off will ever come back. If they do, we have to lay off the people that we hired and trained to do the job.

The Transit Authority, Huntington, WV, FL 3, at 1.

4. Operations Involving Public Health and Safety

The RFI record indicates that unscheduled intermittent leave can have an adverse impact on operations involving public safety. There are numerous examples in the record describing the impact of such leave on police, fire, correctional and health operations.

a. Hospitals, Clinics and Long-Term Care Facilities

Unscheduled leaves of absence, whether covered by the FMLA or not, naturally present staffing and operational difficulties, particularly for hospitals and other health care facilities that must provide treatment and services for patients' medical needs * * * for many years, the health care industry has been confronted with a serious nursing shortage. Therefore, hospitals and other health care facilities must supplement their regular nursing staffs through the use of nurse agencies in order to satisfy patient:nurse ratios in order to provide optimal patient care and treatment. It can be very difficult, however, to have an agency nurse assigned to a facility in a timely manner when a nurse experiences an unforeseeable absence, particularly in situations requiring nurses with specific expertise in a clinical area. In addition, when non-licensed (i.e., non-nursing) clinical staff experience unforeseeable absences, nurses and other staff members are often required to cover their duties, as it can be equally difficult to schedule a replacement employee in a timely manner to meet patient needs. Clearly, these situations impose significant stress on a workforce responsible for delivering optimal patient care.

Medstar Health, Doc. 10144A, at 11–12.

The Commonwealth of Pennsylvania expressed concern about the use of unscheduled intermittent FMLA leave making it difficult for hospitals to maintain necessary staffing levels. ''Some of our 24/7 direct care operations also experience difficulty in meeting federally mandated staffing standards of the Commission of Accreditation of Healthcare Organizations because of the intermittent use of FMLA.'' Doc. 10042A, at 3. Allina Hospitals and Clinics expressed concern about the impact of unscheduled FMLA leave on patient care. ''The great majority of Allina's employees work at hospitals and clinics and are involved in direct patient care * * * These provisions make it very difficult to ensure that hospitals and clinics will be adequately staffed. * * * Yet, Allina has had to allow emergency room staff, surgical support staff, nurses, physicians and ambulance drivers to take this extensive, unplanned leave * * * regardless of the impact on patient care.'' Doc. 641, at 1.

- The concern about patient care was also mentioned in the comments by Hinshaw and Culbertson. ''[W]e have conducted a formal survey of our clients with respect to the questions raised in the **Federal Register** * * * The general concern with unscheduled leave * * * and intermittent leave * * * [is] patient safety (at healthcare entities) can become a problem when staffing is low or when temporary employees are used[.]'' Doc. 10075A, at 1 and 3.
- Long term care (LTC) ''employers distribute work among its staff or hire agency staff to care for patients. Full time employees may be offered incentives beyond overtime pay, or staff may be brought in from affiliated employment sites, which means that travel costs must be covered. LTC employees provide direct care to frail, elderly and disabled individuals who are in need of clinically complex, special care. Therefore, when employees take FMLA leave, adequate numbers of trained replacement staff are especially important. Notably, some states have specific minimum requirements for nurse to patient staff ratios in LTC facilities in order for Medicare/Medicaid beneficiaries to reside in these facilities. On the federal level, facilities must have 'sufficient staff' to provide nursing care to residents. Therefore, having adequate staff on hand not only is necessary to promote good patient care, but it is a state and federal mandate.'' American Health Care Association, Doc. 10321.

b. Other 24/7 Operations

Franklin County Human Resources cited correctional institutions and nursing homes. ''Unscheduled leave is where the hardship lies in continuing normal operations. This is critical for a 24-hour operation. This is more difficult in our more service-based departments that include a Jail and Nursing Home. In these operations, we must have a proper number of nurses and corrections officers * * * [and] unscheduled absences * * * places demands on other employees they were not prepared for.'' Doc. FL59, at 5.

- The Indiana State Personnel Department cited correctional institutions and mental health facilities. ''Operations of 24/7 facilities housing correctional offenders or persons with mental illnesses are adversely impacted by unscheduled intermittent FMLA leave due to legal requirements for specific staff/resident ratios and related safety issues.'' Doc. 10244A, at 3.

c. Emergency 911 Operations and Public Safety

The situation is particularly ominous when the employee works in a safety-sensitive position, such as 911 operators, or other employees requiring face-to-face relief, because if the person's shift is not able to be covered by a colleague who in some instances is required to work overtime, then the public may receive a slow response to an emergency call. Moreover, on certain holidays, during public events or declared emergencies * * * the NYPD must be able to double the size of its staff. Yet, the inordinate number of employees who call in sick for allegedly FMLA qualifying reasons on holidays * * * and during public emergencies * * * places the NYPD in a precarious situation of trying to balance between an individual employee's rights and public safety concerns. Moreover, when more than 20% of the employees on a shift call in claiming the need for an FMLA-related reason on the same day—which happens frequently on holidays such as New Year's Eve—the employer, in this case, the NYPD, may be left short-staffed and unable to provide the necessary safety-sensitive services to the public.

New York City, Doc. 10103A, at 5.

• New York City provided many other examples of ''public safety sensitive positions'' including police officers, firefighters, sheriffs and sanitation workers. *Id.,* at 2, n.1.

• A manager of a 911 center also expressed similar concerns. ''The work in the 9–1–1 Center is very specialized and requires hundreds of hours of training. I cannot hire 'temps' from an office service to replace absent employees. The majority of absences require that I hire overtime, and often, that overtime is forced on employees. Currently, five of the seven employees assigned to day shift are on FMLA. Three other employees in the division (of 27 employees) are also on FMLA and another three have recently submitted FMLA paperwork for approval. With one exception, these medical conditions have not required hospitalization. Instead, these employees are given free license to call in sick on a day-to-day basis. And they do. Frequently. The remaining employees are working an enormous amount of short notice overtime and are denied their own personal and family time in order to cover these absences. The number of overtime hours being worked leads to overtired people making critical life and death decisions in an emergency driven environment.'' Doc. 5193, at 1.

• The Fairfax County Public Schools provided the example of school bus drivers. ''[T]he essence of a school bus driver's job is to deliver children to school on time and safely. A few bus drivers have used chronic conditions such as CFS, depression, or sleep problems as an excuse not to report on time and not to call in when they will be late. They claim that their ''condition'' precludes them from providing notice or from being on time. These behaviors mean that children are often left waiting on street corners in all weather for some other bus driver.'' Doc. 10134A, at 2.

L. The Impact of FMLA Leave Use in the Workplace

The 2000 Westat Report found that during a worker's FMLA leave, employers most frequently assign their work temporarily to other employees.

MOST FREQUENTLY USED METHOD TO COVER WORK WHEN AN EMPLOYEE TAKES LEAVE FOR A WEEK OR LONGER

	Percent
Temporarily Assign Work to Other Employees	74.5
Hire Outside Temporary Replacement Workers	18.0
Put Work on Hold Until Employee Returns	2.4
Some Other Method	4.3

Source: 2000 Westat Report, Table A2–6.5.

These results are consistent with the Society for Human Resource Management's more recent findings:

Employer approaches to covering work when an employee is on unscheduled intermittent leave vary based upon such factors as the nature and size of the employer's business, the employee's position, the number of individuals available to provide coverage in the employee's department, and business needs in that department. Employers may cover the leave-taker's work with: (i) Hiring a temporary worker; (ii) asking current employees to work overtime; (iii) spreading the work among current employees; or (iv) rearranging other employees' schedules to provide coverage. Sometimes, however, employers are unable to cover the work, particularly in situations involving unscheduled intermittent leaves. These situations can and do result in missed deadlines, lost production, and other business losses.

Doc. 10154A, at 7.

The 2003 Society for Human Resource Management survey found that assigning some work temporarily to other employees and hiring temporary outside replacements were the two most common methods used to cover the work of an employee absent on FMLA leave, with average ratings of 4.42 and 2.86 out of a possible 5, respectively. Id., at 13.

Westat's employee survey also found that 32.1 percent of employees worked more hours than usual, and 22.9 percent worked a shift not normally worked when co-workers took leave.[44] Moreover, 36.1 percent of workers felt that providing 12 weeks of unpaid leave for family and medical reasons was an unfair burden to employees' co-workers, and 15.1 percent of employees felt that their co-workers taking leave had a negative impact on them.[45]

The comments submitted for the RFI supplement this record by providing greater details and insights on this issue. For example, Darby Associates commented that ''[a]n important cost dimension is reflected in the burdens imposed upon fellow employees. These are not trivial * * * The record indicates that fellow employees who 'fill in' for unscheduled leave-takers are often obliged to miss professional appointments and family engagements. Employees also cite added workplace stress, resentment and uncertainty. There are considerable costs to employees that must work overtime or more intensely to cover for another employee 'out' on FMLA leave. This is especially true for unscheduled intermittent leave * * * employees are very unhappy when they believe that a fellow employee is gaming the system and forcing them to work extra when the person is abusing FMLA laws.'' Doc. 10172A, Attachment at 26.

The record indicates if the morale of workers covering for the absent workers on FMLA leave begins to suffer, these workers may in turn seek and need their own FMLA certifications, causing an even larger impact on productivity and attendance. For example:

• Workers ''also report that employees on unforeseen, intermittent leave indicate that they can and will misuse the system when they want to. As a result, more and more employees are applying for unforeseen, intermittent leave so they can take time off of work whenever they choose.'' YellowBook, Doc. 10021A, at 1.

• ''Productivity and services inevitably declined and morale suffered. Some of the over worked employees developed their own serious health conditions.'' City of Portland, Doc. 10161A, at 2.

• ''In larger companies, once employees understand that FMLA will allow the use of time off of work, without penalty and providing job protected leave, they have become savvy

[44] *See* 2000 Westat Report, Table 4.22 at 4–19.

[45] See *id.* at Table 4.20 at 4–18, and Table 4.23 at 4–20. It should be noted that 17.4 percent of workers felt co-workers taking leave had a positive impact and 67.4 percent felt it had no impact on them. Moreover, 63.9 percent did not feel that providing 12 weeks of unpaid leave was an unfair burden to co-workers.

with the use of FMLA to their benefit and they do not hesitate to let their co-workers know how it works.'' First Premier Bank, Doc. 10101A, at 4.

• ''We have had an employee request a week of vacation during the holidays and the request was denied because we had so many other employees off. Then the employee just called off for the entire week using FMLA, and then went on her vacation to Florida * * * Once one employee 'gets away with it', all employees are lined up at their doctors office to acquire intermittent FMLA leave.'' Akers Packaging Service, Doc. 5121, at 1.

The issue of leave ''contagion'' as a behavior pattern is discussed in research cited in the RFI by Harold Gardner, et al., titled Workers' Compensation and Family and Medical Leave Act Claim Contagion. It notes:

> Economists and psychologists have been interested in why groups tend to engage in repeated behavioral patterns * * * The social barrier theory suggests that future claims will increase as prior claims break social barriers to claim filing. An example of a social barrier effect is a driver who wants to speed but does not because he fears the consequences of being caught or the increased probability of an accident. These concerns create a psychological barrier that he may not be able to cross even though there may be no police presence. If several speeding motorists pass the driver, he now finds it more psychologically acceptable to speed. ''Contagion'' occurs when an individual observes others taking an action that has not been possible for him to take because of a psychological barrier, and seeing others break the barrier itself increases his own ability to break it as well * * * an alternative economic view is claimant learning by proxy * * * A workers' compensation claim by one member of a workgroup makes others more aware of its provisions for medical payments, disability pay, and rehabilitation services. A worker gains claimant capital through another workers' claims, by proxy. In other words, workers learn about the benefits of workers' compensation claims when their co-workers make workers' compensation claims, and this information lowers future barriers of filing claims.

71 FR 69514.

According to CCH's 2006 Unscheduled Absence Survey, ''the rate of unscheduled absenteeism climbed to its highest level since 1999, costing some large employers an estimated $850,000 per year in direct payroll costs, and even more when lost productivity, morale and temporary labor costs are considered.'' CCH estimates that 18 percent of unscheduled absences are due to personal needs, 12 percent due to stress, and 11 percent due to an entitlement mentality.[46]

As discussed in Chapter IV, several commenters noted the misuse of intermittent FMLA leave for the purpose of avoiding mandatory overtime, and argued that this can have an adverse impact on their co-workers who are forced to cover for absent workers. However, some academic research postulates the negative attendance effects on those who are working to cover the absence of a person on FMLA leave may be related to new serious health conditions that arise—not additional misuse:

> The loss of firm-specific human capital of the initial claimant places an increased burden on the workers in the group who remain because they must ''pick up the slack.'' The remaining workers may also be diverted from their assigned work if they have to train the replacement worker in those skills he needs to function as part of the group * * * The increased burden creates a higher stress environment. The stress felt by these workers may spread to other workers * * * Job-related stress has been found to be positively correlated with increased levels of coronary disease and mental illnesses * * * Stress can exacerbate preexisting conditions or cause new medical condition because of greater physiological pressure on the body created by psychological factors. Workers must exert more physical and mental effort to pick up the slack with the departure of the original claimant's firm-specific human capital. The higher stress environment will lead to more illnesses and therefore more claims being filed under * * * FMLA * * * Stressed workers are more likely to be absent, as they leave the work environment temporarily to cope with the stress.

Harold Gardner, et al., Workers' Compensation and Family and Medical Leave Act Claim Contagion, Journal of Risk and Uncertainty, Volume 20, Jan. 2000.[47]

Thus, based on the record, although some amount of contagion (i.e., the use of FMLA leave increases as more and more workers in a facility begin to take it) appears to be taking place, the causes of the increase are not certain. In addition to alleged misuse, the increase in the use of unscheduled intermittent FMLA leave seen in the data submitted by some employers could be due to other factors, such as workers suffering from the adverse health effects associated with the stress of staffing shorthanded operations.

M. Risk Management Analysis of Unscheduled Intermittent Leave

The techniques of risk management analysis and the concept of reasonableness can be used to explain how unscheduled intermittent FMLA leave can have different impacts on different employers, and account for such divergent comments about the economic impact and cost and benefits of the FMLA that the Department received in response to the RFI.[48]

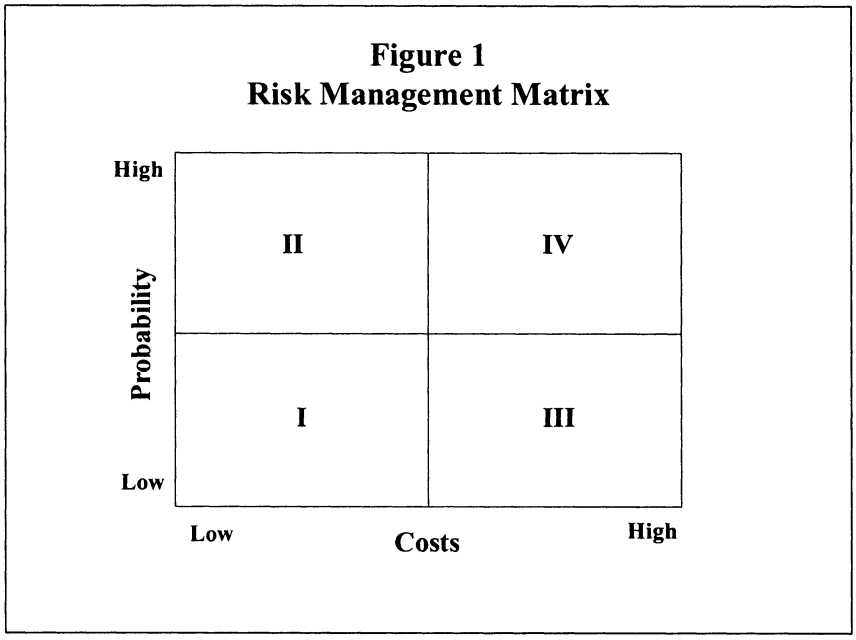
Figure 1, below, presents a standard risk management analysis matrix to illustrate how risk management principles apply to the issue of unscheduled intermittent FMLA leave.[49] It consists of four combinations of the probability (or rate) that unscheduled intermittent leave will occur, and consequences (is the cost high or low) associated with such leave for employers. In Block I, the probability that, or rate at which, unscheduled intermittent leave occurs is low, and the cost of such leave for employers is low. In Block II, the probability that, or rate at which, unscheduled intermittent leave occurs is higher, but the cost of such leave for employers remains low. In Block III, the probability that, or rate at which, unscheduled intermittent leave occurs is relatively low, but the cost of such leave for employers is high. Finally, in Block IV the probability that, or rate at which, unscheduled intermittent leave occurs is high, and the cost of such leave for employers is high.

[46] CCH, 2006 CCH Unscheduled Absence Survey, available online at: *www.cch.com/press/news/2006/20061026h.asp.*

[47] *See also* National Institute for Occupational Safety and Health, STRESS* * *At Work, NIOSH Publication No. 99–101, available online at: *www.cdc.gov/niosh/stresswk.html.*

[48] See the concept of reasonableness discussed in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[49] For more information on risk management matrices see, for example, Corinne Alexander and Maria I. Marshall, The Risk Matrix: Illustrating the Importance of Risk Management Strategies, Journal of Extension, April 2006, Volume 44 Number 2, Article Number 2TOT1, available online at: *www.joe.org/joe/2006april/tt1.shtml.*



Based upon the available evidence, the Department believes that most FMLA covered establishments are in Block I with respect to the use of unscheduled intermittent FMLA leave. The data indicate that only a small portion of the workforce covered by the FMLA takes any form of FMLA leave, and even a smaller portion takes unscheduled intermittent FMLA leave. If an absence occurs, the reasonable employer will resolve these infrequent low cost events on a case-by-case basis by using the existing workforce (or possibly bringing in temporary help) to cover for the absent worker, and likely will view unscheduled intermittent FMLA leave as an expected cost of business. These establishments probably constitute most of the 81 to 94 percent of covered establishments that report that intermittent FMLA leave did not adversely impact either their productivity or profits, or may have had some positive effect.[50]

For the establishments in Block II where the probability (or rate) of unscheduled intermittent leave is relatively high, but the overall cost to these establishments remains low because of the low cost associated with each absence, the reasonable employer may take steps to manage the leave (*e.g.*, talk to the workers, get the workers to call in before taking leave), but will most likely continue to resolve these low cost events on a case-by-case basis. It is likely that these establishments also report that intermittent FMLA leave does not adversely impact either productivity or profits.

On the other hand, most of the establishments in the time-sensitive industries discussed above (see Chapter XI, section K) are probably in Block III. Although only a small portion of their workforce may take unscheduled intermittent FMLA leave, or is certified for a chronic condition, the cost of an absence by a worker is relatively high (*e.g.*, the assembly line can not run as fast or it may take longer for the power to be restored). For the establishments in Block III, the overall cost is low if unscheduled intermittent leave does not occur, but high if it does. Here the reasonable employer is likely to take steps to reduce both the probability and the consequences associated with an absence. This may include more rigorous absence control systems and policies to discourage absences, overstaffing (*e.g.*, the use of floaters or on-call workers), and the use of mandatory overtime to ensure that the time-sensitive operations are adequately staffed when some workers are unexpectedly absent. These establishments clearly incur some additional costs to mitigate the impact that unscheduled intermittent FMLA leave has on their operations, and likely report a small negative impact (4.2 to 5.4 percent of establishments) on either productivity or profits if an absence occurs.[51]

To the extent the Department received comments about how family-friendly policies and flexible schedules are good for business (*e.g.*, improve morale, employee retention, productivity, etc.), these comments are most likely from employers in Blocks I and II (pertaining to the majority of employees covered by the FMLA). However, reasonable employers in Block IV, who face the high probability of high cost absences associated with FMLA leave (*e.g.*, a few workers taking leave that results in an assembly line being shut down for a shift), are not likely to be persuaded by comments that reflect a lower risk experience.

For those establishments and workgroups in Block IV with a high probability (rate) of unscheduled intermittent leave and where the cost of such leave is high, the comments suggest that none of the measures previously employed to reduce the risk and costs associated with unscheduled intermittent FMLA leave appears to work very well. Traditionally, employers have provided monetary incentives for workers to report (such as perfect attendance awards) and disincentives for workers not to report (such as an attendance point system).[52]

[50] *See* 2000 Westat Report, at 6–12.

[51] *See* 2000 Westat Report, Table A2–6.13, at A–2–59. Some of these establishments may also report that intermittent FMLA leave has no impact on either productivity or profits if such leave does not occur very frequently.

[52] The Department received many comments about the use of, or inability to use, perfect attendance awards due to certain regulatory provisions and interpretations. The Department interpreted the regulatory provisions on perfect attendance bonuses (section 825.220(c)) in Wage and Hour Opinion Letter FMLA–2 (Aug. 16, 1993):

With regard to attendance incentive plans rewarding perfect attendance, an employee may not be disqualified nor may any award be reduced for having taken unpaid FMLA leave. In a case where the bonus is expressed as an amount per hour worked, the employee on unpaid FMLA leave would receive a lesser amount than an employee who had not been on FMLA leave, as the employee

Continued

These establishments, whose risk management systems (*e.g.*, absence control policies, overstaffing, mandatory overtime) appear to be overwhelmed (*e.g.*, Southwest Research Institute, Doc. 10077A), are likely the employers reporting that intermittent FMLA leave has a moderate to large negative impact on their productivity and profits (1.8 to 12.7 percent of establishments).[53] In addition, many of their traditional methods to encourage or control absenteeism (*e.g.*, perfect attendance awards or no fault attendance polices) are not permitted for FMLA-protected leave. A reasonable employer in this situation may seek changes to the regulations or the statute,[54] may try to make it difficult for their workers to take unscheduled intermittent FMLA leave by repeatedly questioning the medical certifications or asking for recertifications (see Chapter VI.B.1.c, and comments from: the Association of Professional Flight Attendants, Doc. 10056A; the International Association of Machinists and Aerospace Workers, Doc. 10269A; and the Communication Workers of America, Doc. R346A), and whenever possible, may require employees to use paid leave to cover their absences (see the joint comment on behalf of the International Association of Machinists and Aerospace Workers, the Transportation Communications International Union, the Transport Workers Union, and the United Transportation Union, Doc. 10235A; and the joint comment from the American Train Dispatchers Association, the Brotherhood of Locomotive Engineers and Trainmen, the Brotherhood of Railroad Signalmen, the International Brotherhood of Electrical Workers, the National Conference of Fireman and Oilers, and the Sheet Metal Workers International Association, Doc. 10163A.).

As the risk analysis indicates, FMLA-related tension between employers and employees is at its highest for those entities in Block IV. More specifically, the comments confirm this tension arises, for the most part, due to unscheduled intermittent leave.

The tension can be traced to two competing needs that are true at the same time: (1) Employers' need for predictable attendance, particularly in certain industries; and (2) employees' need for unscheduled intermittent leave for their own or a family member's serious, chronic health conditions that flare up unpredictably and require absence from work. In some cases it appears these competing needs have resulted in employers and employees adopting a more adversarial approach in their FMLA interactions.

Signed at Washington, DC this 20th day of June, 2007.

Victoria A. Lipnic,

Assistant Secretary, Employment Standards Administration.

Paul DeCamp,

Administrator, Wage and Hour Division.

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on FMLA Leave is not entitled to accrue benefits during FMLA leave. See § 825.220(c).

The Department has restated its position in several opinion letters since then. *See, e.g.*, Wage and Hour Opinion Letter FMLA–31 (March 21, 1994), and Wage Hour Opinion Letter FMLA–110 (Sept. 11, 2000).

Several commenters suggested that no ''problem'' exists with respect to perfect attendance bonuses, and that employers ought simply to provide bonuses other than ''perfect attendance'' bonuses. *See* Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 2; International Association of Machinists and Aerospace Workers, Doc. 10269A, at 3; SEIU Local 668, Pennsylvania Social Services Union, Doc. FL105, at 3; Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 4; American Association of University Professors, Doc. R31A, at 3; and National Partnership for Women & Families, Doc. 10204A, at 10–11.

Several commenters, on the other hand, objected to prohibiting FMLA-protected leave from counting against an employee for the purposes of a perfect attendance bonus. *See* The Southern Company, Doc. 10293A, at 12; Taft, Stettinius & Hollister LLP, Doc. FL107, at 5; National Public Employer Labor Relations Association, Doc. R358A, at 3–4; Porter, Wright, Morris & Arthur LLP, Doc. 10124B, at 3–4; G.S.W. Manufacturing, Inc., Doc FL288, at 2; Fisher & Phillips LLP, Doc. 10262A, at 7–8; Edison Electric Institute, Doc. 10128A, at 4; and Carol Hauser, Senior Director of Human Resources, Miami University, Doc. 10032A, at 9.

[53] *See* 2000 Westat Report, Table A2–6.13, at A–2–59.

[54] A similar analysis can be used to show why workers wanted Congress to pass the FMLA. Before the FMLA, a serious health condition could have been a catastrophic high cost event due to the potential loss of employment and health insurance. When women entered the workforce in greater numbers in the 1970's and 1980's, fewer families had an adult available to care for family members with serious health conditions, and the probability of families experiencing such a catastrophic event rose. Workers reacted reasonably by trying to limit this risk through the passage of legislation such as the FMLA.

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

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S. 676/P.L. 110–38

To provide that the Executive Director of the Inter-American Development Bank or the Alternate Executive Director of the Inter-American Development Bank may serve on the Board of Directors of the Inter-American Foundation. (June 21, 2007; 121 Stat. 230)

S. 1537/P.L. 110–39

To authorize the transfer of certain funds from the Senate Gift Shop Revolving Fund to the Senate Employee Child Care Center. (June 21, 2007; 121 Stat. 231)

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