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WHEN: Tuesday, July 8, 2008
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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DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

7 CFR Part 650

RIN 0578-AA41

[Docket No. NRCS-IFR-08001]

Regulations for Complying With the National Environmental Policy Act

AGENCY: Natural Resources Conservation Service (NRCS), USDA.

ACTION: Interim final rule.

SUMMARY: The Natural Resources Conservation Service (NRCS or Agency) is amending its National Environmental Policy Act (NEPA) compliance regulations by clarifying the appropriate use of a program environmental assessment (EA) and by aligning its NEPA public involvement process with that of the Council on Environmental Quality's (CEQ) regulations that implement the NEPA. Both changes would better align the Agency regulations with the CEQ NEPA regulations and provide for the efficient and timely environmental review of NRCS actions, particularly those actions where Congress has directed NRCS action within short time periods of 60–90 days.

DATES: *Effective date:* This rule is effective June 25, 2008.

Comment date: Submit comments on or before July 25, 2008.

ADDRESSES: You may send comments (identified by Docket Number NRCS-IFR-08001) using any of the following methods:

- *Government-wide rulemaking Web site:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- *Mail:* Ecological Sciences Division, Natural Resources Conservation Service, Compliance with NEPA Comments, P.O.

Box 2890, Room 6158–S, Washington, DC 20013.

- *Fax:* 1–202–720–2646.

- *Hand Delivery:* Room 6158–S of the USDA South Office Building, 1400 Independence Avenue, SW., Washington, DC 20250, between 9 a.m. and 4 p.m., Monday through Friday, except Federal Holidays. For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Matt Harrington, National Environmental Coordinator, Ecological Sciences Division, NRCS, P.O. Box 2890, Room 6158–S, Washington, DC 20013; telephone (202) 720–4925; submit e-mail to: matt.harrington@wdc.usda.gov, *Attention:* Compliance with NEPA comments.

SUPPLEMENTARY INFORMATION:

Comments Invited

The NRCS invites interested persons to submit written comments, data(s), or views. The most helpful comments reference a specific portion of the revisions, explain the reason for any recommended further changes, and include supporting data. We ask that you send us two copies of written comments.

We will file all comments we receive in the docket, as well as a report summarizing each substantive public comment with NRCS personnel concerning this interim final rulemaking. The docket, including any personal information you provide, is made available for public inspection.

We will consider all comments we receive on or before the closing date for comments when we review the final rule's implementation and determine whether further action on these sections is necessary. We will consider comments filed late if it is possible to do so without incurring expense or delay.

Availability of Rulemaking Documents

You can get an electronic copy of the full Compliance with NEPA rule using the Internet through the NRCS homepage, at <http://www.nrcs.usda.gov>, and by selecting "Programs," then "National Environmental Policy Act (NEPA) Documents."

Background

Synopsis of the Rule

The rule will better align the NRCS' NEPA regulations with that of the CEQ's regulations that implement the NEPA. The rule amends 7 CFR 650.5(c) Figure 1 by inserting "Program EA" to the flow chart on NRCS decision-making and the rule adds a section to 7 CFR 650.8(a), which discusses the criteria for determining the need for a program EA. The rule also makes changes to 7 CFR 650.12 so that 650.12 better conforms to CEQ's similar regulations.

First, the rule amends 7 CFR 650.5(c) Figure 1 by inserting "Program EA" to the flow chart on NRCS decision-making and by adding a section to 7 CFR 650.8 discussing the criteria for determining the need for a program EA. Previously, Agency regulations did not address NRCS' ability to tier to Program EAs or clarify when it is appropriate to use a program environmental assessment. The change to Figure 1 explicitly confirms the State and field offices' ability to tier site specific environmental reviews and decision-making to either a Program EA or Program EIS. The change to section 650.8 clearly states when it is appropriate to use an environmental assessment. This change aligns NRCS' NEPA regulations with 40 CFR 1507.3(b)(2), which states that Agency NEPA regulations should identify specific criteria for and those classes of action which normally require EA but not EIS. For rulemaking actions under the Farm Bill, the Agency has prepared program EAs in the past because the limited significance of the actions did not warrant the preparation of an EIS. Therefore, this rule change provides for the efficient and timely environmental review of NRCS actions.

Second, NRCS is changing the current requirement of publication of the notice of availability for every EA/FNSI in the **Federal Register**. CEQ regulations require public involvement in preparing any EA/Finding of No Significant Impact (FNSI) and require a 30 day review period of the EA/FNSI only in the following limited circumstances: (a) The action is, or closely similar to, one which normally requires the preparation of an EIS, as defined by NRCS NEPA implementing regulations at 7 CFR 650.7, or (b) the nature of the action is one without precedent. The revised

interim final rule in 7 CFR 650.12 will change NRCS regulations to mirror CEQ's regulations. This will provide the Agency with the flexibility for all program actions to determine the most appropriate method of public involvement in preparing the EA/FNSI and the most appropriate method for publication of the notice of the availability of the EA/FNSI. As noted by CEQ regulations implementing NEPA (40 CFR 1506.6), actions primarily of local concern may be published in local newspapers and use other means to reach the interested and affected members of the public.

The rule will also allow the Agency to implement an action upon issuing the notice of availability of the EA/FNSI or at a specified time period after issuance of the notice based on the public involvement provided. For Agency actions with statutorily short rulemaking timeframes or for emergency actions, the ability to tailor public involvement and review allows the Agency to implement the action upon issuance of the notice of availability or a shorter time frame thereafter while still meeting the requirements of NEPA as well as its intent. This enables the Agency to prepare adequate NEPA analyses and to proceed with timely implementation for these important actions.

Regulatory Certifications

Executive Order 12866

The NRCS reviewed this interim final rule under U.S. Department of Agriculture (Department) procedures and Executive Order 12866 issued September 30, 1993 (E.O. 12866), as amended by E.O. 13422 on Regulatory Planning and Review. This interim final is issued in accordance with the E.O. 12866. It has been determined that this interim final is not significant and, therefore, it has not been reviewed by the OMB.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because NRCS is not required by 5 U.S.C. 553 or any

other provision of law to publish a notice of interim final rulemaking with respect to the subject matter of this rule.

Environmental Analysis

The interim final rule amends the procedures for implementing the National Environmental Policy Act (NEPA) at 7 CFR part 650 and would not directly impact the environment. Agency NEPA procedures are procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular action. The CEQ set forth the requirements for establishing agency NEPA procedures in its regulations at 40 CFR 1505.1 and 1507.3. The CEQ regulations do not require agencies to conduct NEPA analyses or prepare NEPA documentation when establishing their NEPA procedures. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc. v. U.S. Forest Service*, 230 F.3d 947, 954–55 (7th Cir. 2000).

Paperwork Reduction Act

There are no requirements for information collection associated with this interim final that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), NRCS has assessed the effects of this interim final on State, local, and Tribal governments and the private sector. This interim final does not compel the expenditure of \$100 million or more by any State, local, or Tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Civil Justice Reform

This interim final rule has been reviewed under Executive Order 12988, Civil Justice Reform. After adoption of this interim final, (1) all State and local

laws and regulations that conflict with this rule or that would impede full implementation of this rule will be preempted; (2) no retroactive effect would be given to this interim final; and (3) before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 614, 780, and 11 must be exhausted.

Federalism

NRCS has considered this interim final rule under the requirements of Executive Order 13132 issued August 4, 1999 (E.O. 13132), "Federalism." The Agency has made an assessment that the interim final rule conforms with the Federalism principles set out in this Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among the various levels of government. Therefore, NRCS concludes that this interim final rule does not have Federalism implications.

Energy Effects

This interim final rule has been reviewed under Executive Order 13211 issued May 18, 2001 (E.O. 13211), "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use." NRCS has determined that this interim final does not constitute a significant energy action as defined in E.O. 13211.

■ For the reasons stated in the preamble, the Natural Resources Conservation Service amends 7 CFR 650 as follows:

PART 650—COMPLIANCE WITH NEPA

■ 1. The authority citation for part 650 is amended to read as follows:

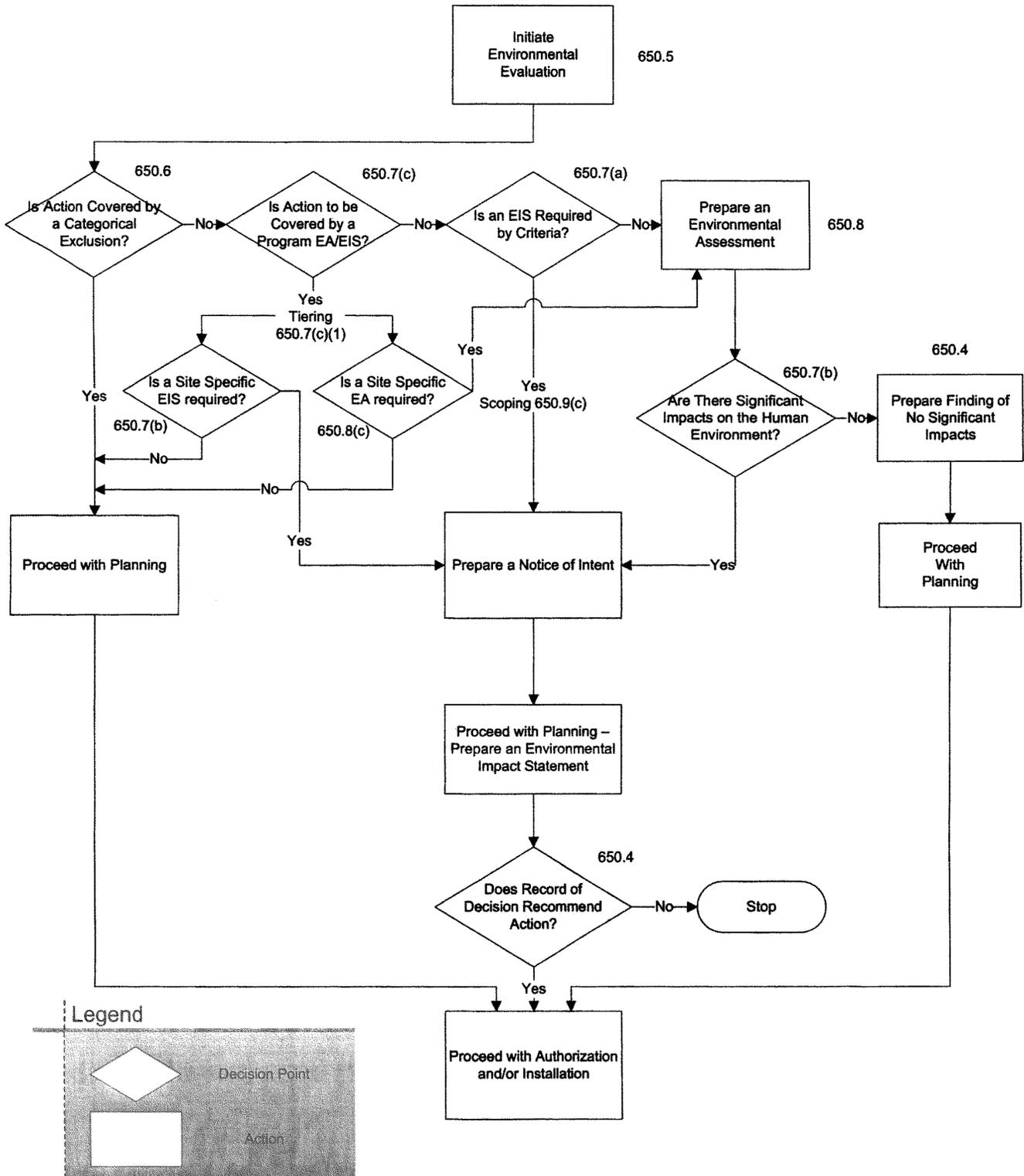
Authority: 42 U.S.C. 4321 *et seq.*; Executive Order 11514 (Rev.); 7 CFR 2.62, unless otherwise noted.

§ 650.5 [Amended]

■ 2. Section 650.5, following paragraph (c), Figure 1 is revised.

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NEPA in NRCS Planning



■ 3. Section 650.8 paragraph (b) is revised, and paragraphs (c) and (d) are added as follows:

§ 650.8 When to prepare an environmental assessment (EA).

* * * * *

(b) Other actions that the EE reveals may be a major Federal action significantly affecting the quality of the human environment.

(c) Criteria for determining the need for a program EA:

(1) A program EA is to be prepared when NRCS has determined, based on the environmental evaluation, that a program EIS is not required and the program and actions to implement the program are not categorically excluded; and

(2) A program EA may also be prepared to aid in NRCS decision-making and to aid in compliance with NEPA.

(d) The RFO, through the process of tiering, is to determine if a site-specific EA or EIS is required for an action that is included in a program EA or EIS.

■ 4. Section 650.12 paragraph (c) heading text is revised; the (c)(1) designation is removed; paragraphs (c)(2) and (c)(3) are removed; paragraph (d) is revised; and new paragraph (e) is added to read as follows:

§ 650.12 NRCS Decisionmaking.

* * * * *

(c) *Environmental Impact Statement (EIS) and Record of decision* * * *

(d) *Environmental Assessments and Finding of No Significant Impact (FNSI)*

(1) EA's. If the EA indicates that the proposed action is not a major Federal action significantly affecting the quality of the human environment, the RFO is to prepare a finding of no significant impact (FNSI).

(2) *Availability of the FNSI (40 CFR 1501.4(e)(2))*. In accordance with CEQ regulations at 40 CFR 1501.4(e)(2), NRCS shall make the EA/FNSI available for public review for thirty days in the following instances: The proposed action is, or closely similar to, one which normally requires the preparation of an EIS as defined by NRCS NEPA implementing regulations at § 650.7, or the nature of the action is one without precedent. When availability for public review for thirty days is not required, NRCS will involve the public in the preparation of the EA/FNSI and make the EA/FNSI available for public review in accordance with CEQ regulations at 40 CFR 1501.4(b) and 1506.6.

(e) *Changes in actions*. When it appears that a project or other action needs to be changed, the RFO will

perform an environmental evaluation of the authorized action to determine whether a supplemental NEPA analysis is necessary before making a change.

Dated: June 11, 2008.

Arlen Lancaster,

Chief, Natural Resources Conservation Service.

[FR Doc. E8-14122 Filed 6-24-08; 8:45 am]

BILLING CODE 3410-16-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 956

[Docket No. AMS-FV-07-0157; FV08-956-1 FR]

Sweet Onions Grown in the Walla Walla Valley of Southeast Washington and Northeast Oregon; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rate established for the Walla Walla Sweet Onion Marketing Committee (Committee) for the 2008 and subsequent fiscal periods from \$0.21 to \$0.22 per 50-pound bag or equivalent of Walla Walla sweet onions handled. The Committee locally administers the marketing order which regulates the handling of sweet onions grown in the Walla Walla Valley of Southeast Washington and Northeast Oregon. Assessments upon Walla Walla sweet onion handlers are used by the Committee to fund the reasonable and necessary expenses of the program. The fiscal period begins January 1 and ends December 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: *Effective Date:* June 26, 2008.

FOR FURTHER INFORMATION CONTACT:

Barry Broadbent or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, Suite 385, Portland, OR 97204; *Telephone:* (503) 326-2724, *Fax:* (503) 326-7440, or *E-mail:* Barry.Broadbent@usda.gov or GaryD.Olson@usda.gov.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington,

DC 20250-0237; *Telephone:* (202) 720-2491, *Fax:* (202) 720-8938, or *E-mail:* Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 956, both as amended (7 CFR part 956), regulating the handling of Walla Walla sweet onions grown in Southeast Washington and Northeast Oregon, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, Walla Walla sweet onion handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate, as proposed herein, will be applicable to all assessable Walla Walla sweet onions beginning on January 1, 2008, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

This rule increases the assessment rate established for the Committee for the 2008 and subsequent fiscal periods from \$0.21 to \$0.22 per 50-pound bag or equivalent of Walla Walla sweet onions handled.

The Walla Walla sweet onion marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from

handlers to administer the program. The members of the Committee are producers and handlers of Walla Walla sweet onions. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 1998–1999 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate of \$0.21 per 50-pound bag or equivalent that would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon the basis of the Committee's recommendation or other information available to USDA.

On December 11, 2007, the Committee met and unanimously recommended 2008 expenditures of \$116,255 and a \$0.01 increase in the assessment rate from \$0.21 to \$0.22 per 50-pound bag or equivalent. In comparison, the budgeted expenditures for the 2007 fiscal period were \$139,210.

The increase in the assessment rate is necessary to offset the recent decline in assessments paid by handlers. Assessment receipts have decreased as the production levels of Walla Walla sweet onions have dropped below historical averages—a result of lower total acreage planted and isolated weather-related crop failures. In response to the lower assessment income level, the Committee reduced the total budgeted expenditures from \$139,210 in 2007 to \$116,255 for 2008, but still found it necessary to increase the assessment rate to adequately fund Committee operations.

The major expenditures recommended by the Committee for the 2008 fiscal year include \$62,732 for administration, \$5,000 for travel, \$44,000 for promotion, and \$2,000 for compliance. Budgeted expenses for these items in 2007 were \$62,477, \$5,000, \$63,300, and \$1,000, respectively.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of Walla Walla sweet onions from the production area. Walla Walla sweet onion shipments are estimated to be 510,250 50-pound bags or equivalents for the 2008 fiscal period, which should provide \$112,255 in assessment income. The remaining difference between the anticipated Committee expenses and the anticipated revenue from assessments is expected to

come from interest income on reserve funds (\$4,000). Funds held in reserve by the Committee (currently \$144,953) are not expected to exceed the equivalent of two fiscal periods budgeted expenditures, the maximum permitted by the order.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2008 budget, and those for subsequent fiscal periods, will be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

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

There are approximately 42 producers of Walla Walla sweet onions in the production area and approximately 20 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201)(SBA) as those having annual receipts less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$6,500,000.

The Committee estimates that in 2007, 494,918 50-pound units of Walla Walla sweet onions were marketed at an average FOB price of approximately \$19.00 per 50-pound unit. Using that price as a basis, the total industry value at shipping point was approximately \$9,400,000. Average receipts per handler were \$470,000, which is much less than the threshold the SBA uses to define a small service firm. Average receipts for the 42 producers of Walla Walla sweet onions for last year were approximately \$225,000, well within the SBA definition of small agricultural producer. Thus, it can be concluded that most, if not all, handlers and producers of Walla Walla sweet onions may be classified as small entities based on the definition of the SBA.

This rule increases the assessment rate established for the Committee and collected from handlers for the 2008 and subsequent fiscal periods from \$0.21 to \$0.22 per 50-pound bag or equivalent. The Committee unanimously recommended 2008 expenditures of \$116,255 and an assessment rate of \$0.22 per 50-pound bag or equivalent. The assessment rate of \$0.22 is \$0.01 higher than the rate previously established in the order. The quantity of assessable Walla Walla sweet onions for the 2008 year is estimated at 510,250 50-pound bags or equivalents. Thus, the \$0.22 rate should provide \$112,255 in assessment income and, along with \$4,000 in interest income, will be adequate to meet this year's budgeted expenses of \$116,255.

The major expenditures recommended by the Committee for the 2008 year include \$62,732 for administration, \$5,000 for travel, \$44,000 for promotion, and \$2,000 for compliance. Budgeted expenses for these items in 2007 were \$62,477, \$5,000, \$63,300, and \$1,000, respectively.

The recent decline in assessments collected from handlers has necessitated this assessment rate increase. Assessment income has decreased as the production levels of Walla Walla sweet onions have dropped below historical average levels as a result of lower total acreage planted and isolated weather related crop failures. In response to the lower assessment income level, the Committee reduced its total budgeted expenditures from \$139,210 in 2007 to \$116,255 for 2008, but still found it necessary to increase the assessment rate to adequately fund Committee operations without depleting the Committee's reserve funds.

The Committee reviewed and unanimously recommended 2008 expenditures of \$116,255. Prior to

arriving at this budget, the Committee considered information from various sources, including the Finance and the Promotion sub-committees. Alternative expenditure levels were discussed at length by all parties. The assessment rate of \$0.22 per 50-pound bag or equivalent of assessable Walla Walla sweet onions was then determined by dividing the total recommended budget by the quantity of assessable Walla Walla sweet onions, estimated at 510,250 50-pound units for the 2008 fiscal period. Anticipated assessment revenue is expected to be approximately \$4,000 below the budgeted expenses, which the Committee determined to be acceptable. The Committee expects that interest income for the year will compensate for the \$4,000 deficit, but is prepared to use reserve funds if necessary.

A review of historical information and preliminary information pertaining to the upcoming crop year indicates that the producer price for Walla Walla sweet onions for the 2008 season could range between \$10.00 and \$12.00 per 50-pound bag or equivalent. Therefore, the estimated assessment revenue for the 2008 crop year as a percentage of total producer revenue could range between 1.83 and 2.20 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs are offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meeting was widely publicized throughout the Walla Walla sweet onion industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the December 11, 2007, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

This rule imposes no additional reporting or recordkeeping requirements on either small or large Walla Walla sweet onion handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

A proposed rule concerning this action was published in the **Federal Register** on March 14, 2008 (73 FR 13798). Copies of the proposed rule were also mailed or sent via facsimile to all Walla Walla sweet onion handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 60-day comment period ending May 13, 2008, was provided for interested persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because handlers are already receiving 2008 crop Walla Walla sweet onions from producers. The crop year began on January 1, 2008, and the assessment rate applies to all Walla Walla sweet onions received during the 2008 and subsequent seasons. Also, the Committee needs funds to pay its expenses, which are incurred on a continuing basis. Further, handlers are aware of this rule which was recommended at a public meeting. Finally, a 60-day comment period was provided for in the proposed rule.

List of Subjects in 7 CFR Part 956

Marketing agreements, Onions, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 956 is amended as follows:

PART 956—SWEET ONIONS GROWN IN THE WALLA WALLA VALLEY OF SOUTHEAST WASHINGTON AND NORTHEAST OREGON

■ 1. The authority citation for 7 CFR part 956 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 956.202 is revised to read as follows:

§ 956.202 Assessment rate.

On and after January 1, 2008, an assessment rate of \$0.22 per 50-pound bag or equivalent is established for Walla Walla sweet onions.

Dated: June 19, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–14339 Filed 6–24–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 982

[Docket No. AMS–FV–07–0150; FV08–982–1 FIR]

Hazelnuts Grown in Oregon and Washington; Establishment of Interim Final and Final Free and Restricted Percentages for the 2007–2008 Marketing Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule establishing interim final and final free and restricted percentages for domestic inshell hazelnuts for the 2007–2008 marketing year under the Federal marketing order for hazelnuts grown in Oregon and Washington. This rule continues in effect the interim final free and restricted percentages of 8.1863 and 91.8137 percent, respectively, and the final free and restricted percentages of 9.2671 and 90.7329 percent, respectively. The percentages allocate the quantity of domestically produced hazelnuts which may be marketed in the domestic inshell market (free) and the quantity of domestically produced hazelnuts that must be disposed of in outlets approved by the Board (restricted). Volume regulation is intended to stabilize the supply of domestic inshell hazelnuts to meet the limited domestic demand for such hazelnuts with the goal of providing

producers with reasonable returns. This rule was recommended unanimously by the Hazelnut Marketing Board (Board), the agency responsible for local administration of the marketing order.

DATES: *Effective Date:* July 25, 2008.

This rule applies to all 2007–2008 marketing year restricted hazelnuts until they are properly disposed of in accordance with marketing order requirements.

FOR FURTHER INFORMATION CONTACT:

Barry Broadbent or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, Suite 385, Portland, OR 97204; Telephone: (503) 326–2724, Fax: (503) 326–7440, or E-mail: Barry.Broadbent@usda.gov or GaryD.Olson@usda.gov.

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 115 and Marketing Order No. 982, both as amended (7 CFR Part 982), regulating the handling of hazelnuts grown in Oregon and Washington, hereinafter referred to as the “order.” The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.”

USDA is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is intended that this action apply to all merchantable hazelnuts handled during the 2007–2008 marketing year beginning July 1, 2007. This action applies to all 2007–2008 marketing year restricted hazelnuts until they are properly disposed of in accordance with marketing order requirements. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any

obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA’s ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule continues in effect free and restricted percentages which allocate the quantity of domestically produced hazelnuts that may be marketed in domestic inshell markets (free) and hazelnuts that must be exported, shelled, or otherwise disposed of by handlers (restricted). The Board met and, after determining that volume regulation would tend to effectuate the declared policy of the Act, developed a marketing policy to be employed for the duration of the 2007–2008 marketing year.

Volume regulation is intended to stabilize the supply of domestic inshell hazelnuts to meet the limited domestic demand for such hazelnuts, with the goal of providing producers with reasonable returns. Based on an estimate of the domestic inshell trade demand and the total supply of domestically produced hazelnuts available for the 2007–2008 marketing year, the Board voted unanimously at their November 15, 2007, meeting to recommend to USDA that the interim final free and restricted percentages for the 2007–2008 marketing year be established at 8.1863 percent and 91.8137 percent, respectively. Additionally, the Board unanimously voted to set the final free and restricted percentages, effective May 1, 2008, at 9.2671 and 90.7329 percent, respectively.

The Board’s authority to recommend volume regulation and use computations to determine the allocation of hazelnuts to individual markets is specified in § 982.40 of the order. Under the order’s provisions, free and restricted market allocations of hazelnuts are expressed as percentages of the total hazelnut supply subject to regulation. The percentages are derived by dividing the estimated domestic inshell trade demand (computed by formula) by the Board’s estimate of the total domestically produced supply of hazelnuts that are expected to be available over the course of the marketing year.

Inshell trade demand, the key component of the marketing policy, is

the estimated quantity of inshell hazelnuts necessary to adequately supply the domestic inshell hazelnut market for the duration of the marketing year. The Board determines the domestic inshell trade demand for each year and uses that estimate as the basis for setting the percentage of the available supply of domestically produced hazelnuts that handlers may ship to the domestic inshell market throughout the marketing season. The order specifies that inshell trade demand be computed by averaging the preceding three years’ trade acquisitions of inshell hazelnuts, allowing adjustments for abnormal crop or marketing conditions. In addition, the Board may increase the computed inshell trade demand by up to 25 percent, if market conditions warrant an increase.

As required by the order, prior to September 20 of each marketing year, the Board meets to establish its marketing policy for that year. If the Board determines that volume control would tend to effectuate the declared policy of the Act, the Board then follows a procedure, specified by the order, to compute and announce preliminary free and restricted percentages. The preliminary free percentage releases 80 percent of the adjusted inshell trade demand that handlers may ship to the domestic market. The purpose of releasing only 80 percent of the inshell trade demand under the preliminary stage of regulation is to guard against any potential underestimate of crop size. The preliminary free percentage is expressed as a percentage of the total hazelnut supply subject to regulation, where total supply is the sum of the estimated crop production less the three-year average disappearance plus the undeclared carry-in from the previous marketing year.

On August 21, 2007, the National Agricultural Statistics Service (NASS) released an estimate of 2007 hazelnut production for the Oregon and Washington area at 33,000 dry orchard-run tons. NASS uses an objective yield survey method to estimate hazelnut production which has historically been very accurate.

On August 23, 2007, the Board met for the purpose of (1) determining if volume control regulation would tend to effectuate the declared policy of the Act; (2) estimating the total available supply and the domestic inshell trade demand for hazelnuts; (3) establishing preliminary free and restricted marketing percentages for the 2007–2008 marketing year; and (4) authorizing market outlets for restricted hazelnuts.

After discussion, the Board unanimously determined that volume regulation would be necessary to effectively market the industry's 2007 crop and would tend to effectuate the declared policy of the Act. The determination was based on (1) the size of the 2007 hazelnut crop; (2) the inability of the domestic inshell market to absorb such a large crop; (3) the projected large size of the world hazelnut crop and the probability of an oversupplied world market; and (4) the average price paid to Oregon-Washington producers has not exceeded the parity price in any one of the past 18 years.

The Board then estimated the total available supply for the 2007 crop year to be 33,603 tons. The Board arrived at that quantity by using the crop estimate compiled by NASS (33,000 tons) and then adjusting that estimate to account for disappearance and carry-in. The order requires the Board to reduce the crop estimate by the average disappearance over the preceding three years (1,426 tons) and to increase it by the amount of undeclared carry-in from previous years' production (2,029 tons).

In the calculation, disappearance is defined as the difference between the estimated orchard-run production and the actual supply of merchantable product available for sale by handlers. Disappearance can consist of (1) unharvested hazelnuts; (2) culled product (nuts that are delivered to handlers but later discarded); (3) product used on the farm, sold locally, or otherwise disposed of by producers; and (4) statistical error in the orchard-run production estimate.

Undeclared carry-in is defined as hazelnuts that were produced in a previous marketing year but were not subject to regulation because they were not shipped during that marketing year. Undeclared carry-in is subject to regulation during the current marketing year and is accounted for as such by the Board.

Additionally, the Board estimated domestic inshell trade demand for the 2007-2008 marketing year to be 2,478 tons. The Board arrived at this estimate by taking the average of the domestic inshell trade acquisitions for the 2003/2004, 2004/2005, and the 2006/2007 marketing years (2,649 tons), increasing that amount by 5 percent (133 tons) to encourage sales (as allowed by the order), and then reducing that quantity by the declared carry-in from last year's crop (304 tons). The trade acquisition data for the 2005-2006 marketing year was omitted from the Board's calculations, as allowed by the order, after it was determined to be abnormal

due to crop and marketing conditions. The Board is also allowed to increase the average domestic inshell trade acquisitions in their calculation by up to 25 percent, if market conditions justify such an increase. At this stage in the establishment of the marketing policy, the Board voted unanimously that a 5 percent increase would be sufficient to encourage new sales without risking oversupply of the market.

The declared carry-in represents product regulated under the order during a preceding marketing year but not shipped during that year. This inventory must be accounted for when estimating the quantity of product to make available to adequately supply the market.

After establishing estimates for total available hazelnut supply and domestic inshell trade demand, the Board used those estimates to compute and announce preliminary free and restricted percentages of 5.8983 percent and 94.1017 percent, respectively. The Board computed the preliminary free percentage by multiplying the adjusted inshell trade demand by 80 percent and dividing the result by the estimate of the total available supply subject to regulation (2,478 tons \times 80 percent / 33,603 tons = 5.8983 percent). The preliminary free percentage initially released 1,982 tons of hazelnuts from the 2007-2008 supply for domestic inshell use. The Board authorized the preliminary restricted percentage (31,621 tons) to be exported or shelled for the domestic kernel markets.

Under the order, the Board must meet again on or before November 15 to review and revise the preliminary estimate of the total available supply of hazelnuts and to recommend interim final and final free and restricted percentages. As indicated earlier, when establishing preliminary free and restricted percentages, the Board utilizes a pre-harvest objective yield survey, compiled by NASS on behalf of the Board, to estimate the upcoming crop size. After the hazelnut harvest has concluded—usually sometime in October—information is available directly from handlers to more accurately estimate crop size. The Board may use this information to amend their preliminary estimate of total available supply before calculating the interim final and final percentages. At this meeting, the Board may also amend the percentage increase included in the computation of inshell trade demand to encourage increased sales.

Interim final percentages are calculated in the same way as the preliminary percentages but release 100 percent of the inshell trade demand,

effectively releasing the additional 20 percent held back at the preliminary stage. Final free and restricted percentages may release up to an additional 15 percent of the average trade acquisitions of inshell hazelnuts for desirable carryout, to provide an adequate carryover of product into the following season. The order requires that final free and restricted percentages be effective 30 days prior to the end of the marketing year, or earlier, if recommended by the Board and approved by USDA. The Board is allowed to combine the interim final and the final stages of the marketing policy, if marketing conditions so warrant, by recommending final percentages which immediately release 100 percent of the inshell trade demand (the preliminary percentage plus the additional 20 held back) plus any percentage increase the Board determines for desirable carryout. Revisions in the marketing policy can be made until February 15 of each marketing year, but the inshell trade demand can only be revised upward, consistent with § 982.40(e).

The Board met, as required by the order, on November 15, 2007, to review and approve an amended marketing policy and to recommend the establishment of interim final and final free and restricted percentages. At that time, the Board revised the crop estimate in the marketing policy to 36,270 tons (from 33,000 tons) after considering the results of post-harvest handler survey information compiled by the Board. The Board also revised the percentage increase meant to encourage sales that is included in the inshell trade demand computation from 5 percent to 25 percent, effectively allocating another 529 tons of inshell hazelnuts that may be marketed in the domestic market.

Using the revised crop estimate and the increased inshell trade demand, the Board then computed interim final free and restricted percentages. The percentages release the remaining 20 percent of the estimated inshell trade demand that was withheld during the preliminary stage of the marketing policy, as well as take into account the amendments made by the Board to the marketing policy computations (revising the total supply estimate and increasing the inshell trade demand). The interim final free and restricted percentages were therefore set at 8.1863 and 91.8137 percent, respectively. The interim final free percentage immediately releases a total of 3007 tons of inshell hazelnuts from the 2007-2008 supply that may be marketed in domestic markets.

During the meeting, the Board decided that market conditions were such that the industry would benefit from the release of an additional 15 percent of the three year average trade acquisitions to allow for desirable carryout and that the increase would not adversely affect the 2007–2008 domestic

inshell market. The final free and restricted percentages were set at 9.2671 and 90.7329 percent, respectively. The final percentages are to become effective May 1, 2008. The final free percentage releases 3,404 tons of inshell hazelnuts from the 2007–2008 supply for domestic use, which includes 397 tons released

late in the marketing year for desirable carryout.

The final marketing percentages are based on the Board's final production estimate and the following supply and demand information for the 2007–2008 marketing year:

Total available supply		Tons	
(1) Production forecast (11/15/07 crop estimate)		36,270	
(2) Minus: Disappearance (three year average—4.32 percent of Item 1)		– 1,567	
(3) Merchantable production (Item 1 minus Item 2)		34,703	
(4) Plus: Undeclared carry-in as of July 1, 2007 (subject to 2007–2008 regulation)		+ 2,029	
(5) Available supply subject to regulation (Item 3 plus Item 4)		36,732	
Inshell trade demand			
(6) Average trade acquisition (ATA) of inshell hazelnuts (three prior years domestic sales)		2,649	
(7) Plus: Increase to encourage increased sales (25% of average trade acquisitions)		+ 662	
(8) Minus: Declared carry-in as of July 1, 2007 (not subject to 2007–2008 regulation)		– 304	
(9) Adjusted inshell trade demand (Item 6 plus Item 7 minus Item 8)		3,007	
Percentages		Free	Restricted
(10) Interim final percentages (Item 9 divided by Item 5) × 100		8.1863	91.8137
(11) Interim final free tonnage (Item 9)		3,007	.....
(12) Interim final restricted in tons (Item 5 minus Item 9)			33,725
(13) Final percentages (Item 14 divided by Item 5) × 100		9.2671	90.7329
(14) Final free tonnage (Interim final free tonnage (Item 11) plus 15% of ATA(397))		3,404	.....
(15) Final restricted tonnage (Item 5 minus Item 11)			33,328

In addition to complying with the provisions of the order, the Board also considered USDA's 1982 "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" (Guidelines) when making its computations in the marketing policy. This volume control regulation provides a method to collectively limit the supply of inshell hazelnuts available for sale in domestic markets. The Guidelines provide that the domestic inshell market has available a quantity equal to 110 percent of prior years' shipments before allocating supplies for the export inshell, export kernel, and domestic kernel markets. This provides for a plentiful supply of inshell hazelnuts for consumers and for market expansion, while retaining the mechanism for dealing with oversupply situations. The established final percentages make available approximately 755 additional tons to encourage increased sales. The total free supply for the 2007–2008 marketing year is estimated to be 3,404 tons of hazelnuts, which is 137 percent of the average of the last three prior years' sales (2,478 tons) and exceeds the goal of the Guidelines.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the

Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

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

Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those having annual receipts of less than \$6,500,000. There are approximately 650 producers of hazelnuts in the production area and approximately 19 handlers subject to regulation under the order. Using statistics compiled by NASS, the average value of production received by producers in 2004–2006 was \$54,088,000. Using those estimates, the average annual hazelnut revenue per producer would be approximately

\$83,200. The level of sales of other crops by hazelnut producers is not known. In addition, based on records maintained by the Board, approximately 83 percent of the handlers ship under \$6,500,000 worth of hazelnuts on an annual basis. In view of the foregoing, it can be concluded that the majority of hazelnut producers and handlers may be classified as small entities.

Board meetings are widely publicized in advance of the meetings and are held in a location central to the production area. The meetings are open to all industry members and other interested persons who are encouraged to participate in the deliberations and voice their opinions on topics under discussion. Thus, Board recommendations can be considered to represent the interests of small business entities in the industry.

Currently, U.S. hazelnut production is allocated among three main market outlets: Domestic inshell, export inshell, and kernel markets. Handlers and producers receive the highest return for sales in the domestic inshell market. They receive less for product going to export inshell, and the least for kernels. Based on Board records of average shipments for 1997–2006, the percentage going to each of these markets was 10 percent (domestic

inshell), 53 percent (export inshell), and 36 percent (kernels). Other minor market outlets make up the remaining 1 percent.

The inshell hazelnut market can be characterized as having limited and inelastic demand with a very short primary marketing period. On average, 80 percent of domestic inshell hazelnut shipments occur between October 1 and November 30, primarily to supply holiday nut demand. The inshell market is, therefore, prone to oversupply and correspondingly low producer prices in the absence of supply restrictions. This volume control regulation provides a method for the U.S. hazelnut industry to limit the supply of domestic inshell hazelnuts available for sale in the continental U.S. and thereby mitigate market oversupply conditions.

Many years of marketing experience led to the development of the current volume control procedures. These procedures have helped the industry solve its marketing problems by keeping inshell supplies in balance with domestic needs. Volume controls ensure that the domestic inshell market is fully supplied while protecting the market from the negative effects of oversupply.

Although the domestic inshell market is a relatively small portion of total hazelnut sales (averaging 10 percent of total shipments for 1997–2006), it remains a profitable market segment. The volume control provisions of the order are designed to avoid oversupplying this particular market segment, because that would likely lead to substantially lower producer prices. The other market segments, export inshell and kernels, are expected to continue to provide good outlets for U.S. hazelnut production into the future.

Adverse climatic conditions that negatively impacted hazelnut production in the other hazelnut producing regions of the world in 2004 and 2005 have corrected and the total world supply in 2007–2008 is predicted to be near the historically high levels seen in 2006. Product prices in the world market have trended downward in the expectation of the large available supply. While the U.S. hazelnut industry continues to experience high demand for their large sized and high quality product, the prices that producers receive are tied to the global market. In light of the anticipated world supply situation, regulation of the domestic inshell market is important to the U.S. hazelnut industry to insulate that specialty market from the supply related challenges of the global hazelnut market.

In Oregon and Washington, lower hazelnut production years typically follow higher production years (a historically consistent cyclical pattern), and such was the case in 2007. The 2006 crop of 43,000 tons was 20 percent above the 10-year average (34,000 tons for 1997–2006) for hazelnut production. The 2007 crop of (36,720 tons, according to the survey of handlers conducted by the Board) is estimated to be 16 percent below the previous year. Using the NASS estimate of 33,000 tons, the crop is 23 percent lower. It is predicted that the 2008 crop will follow the recent production pattern and will be larger than the current crop year. This cyclical trait also leads to an inversely corresponding cyclical price pattern for hazelnuts. The intrinsic cyclical nature of the hazelnut industry lends credibility to the volume control measures enacted by the Board under the marketing order.

Recent production and price data reflect the stabilizing effect of volume control regulations. Industry statistics show that total hazelnut production has varied widely over the 10-year period between 1997 and 2006, from a low of 15,500 tons in 1998 to a high of 49,500 tons in 2001. Production in the smallest crop year and the largest crop year were 48 percent and 145 percent, respectively, of the 10-year average of 34,000 tons. Producer price, however, has not fluctuated to the extent of production. Prices in the lowest price year and the highest price year were 63 percent and 200 percent, respectively, of the 10-year average price of \$1,114 per ton. If the extraordinarily high price for the 2005 crop year is excluded as an aberration that stems from a global production crisis, the percentage variation in price drops to 70 percent and 145 percent of a \$988 per ton average price, respectively.

The lower level of variability of price versus the variability of production provides an illustration of the order's price-stabilizing impact. The coefficient of variation (a standard statistical measure of variability; "CV") for hazelnut production over the 10-year period is 0.33. In contrast, the coefficient of variation for hazelnut producer prices, excluding the 2005 price, is only 0.20, dramatically lower than the CV for production. The lower level of variability of price versus the variability of production provides an illustration of the order's price-stabilizing impact.

Comparing producer revenue to cost is useful in highlighting the impact on producers of recent product and price levels. A recent hazelnut production cost study from Oregon State University

estimated cost-of-production per acre to be approximately \$1,340 for a typical 100-acre hazelnut enterprise. Average producer revenue per bearing acre (based on NASS acreage and value of production data) equaled or exceeded that typical cost level only four times from 1997 to 2006. Average producer revenue was below typical costs in the other years. Without the stabilizing influence of the order, producers may have lost more money. While crop size has fluctuated, volume regulations contribute to orderly marketing and market stability by moderating the variation in returns for all producers and handlers, both large and small.

While the level of benefits of this rulemaking is difficult to quantify, the stabilizing effects of volume regulation impact both small and large handlers positively by helping them maintain and expand markets even though hazelnut supplies fluctuate widely from season to season. This regulation provides equitable allotment of the most profitable market, the domestic inshell market. That market is available to all handlers, regardless of size.

As an alternative to this regulation, the Board discussed not regulating the marketing of the 2007 hazelnut crop. However, without any regulation in effect, the Board believes that the industry would tend to oversupply the inshell domestic market. The 2007 hazelnut crop is smaller than last year's crop but is still 7 percent above the ten-year average. The unregulated release of 36,732 tons on the domestic inshell market could easily oversupply the small, but lucrative domestic inshell market. The Board believes that any oversupply would completely disrupt the market, causing producer returns to decrease dramatically.

Section 982.40 of the order establishes a procedure and computations for the Board to follow in recommending to USDA establishment of preliminary, interim final, and final percentages of hazelnuts to be released to the free and restricted markets each marketing year. The program results in a plentiful supply of hazelnuts for consumers and for market expansion while retaining the mechanism for dealing with oversupply situations.

Hazelnuts produced under the order comprise virtually all of the hazelnuts produced in the U.S. This production represents, on average, less than 3 percent of total U.S. production of all tree nuts, and less than 5 percent of the world's hazelnut production.

Last season, 73 percent of the domestically produced hazelnut kernels were marketed in the domestic market and 27 percent were exported.

Domestically produced kernels generally command a higher price in the domestic market than imported kernels. The industry is continuing its efforts to develop and expand other markets with emphasis on the domestic kernel market. Small business entities, both producers and handlers, benefit from the expansion efforts resulting from this program.

Inshell hazelnuts produced under the order compete well in export markets because of their high quality. Based on Board statistics, Europe has historically been the primary export market for U.S. produced inshell hazelnuts. Shipments have also been relatively consistent, not varying much from the 10 year average of 4,906 tons. Recent years, though, have seen a significant increase in export destinations. Last season, inshell shipments to Europe totaled 4,401 tons, representing just 16 percent of exports, with the largest share going to Germany. Inshell shipments to Southwest Pacific countries—Hong Kong in particular—have increased dramatically in the past few years, rising to 79 percent of total inshell exports of 27,259 tons for the 2006–2007 marketing year. The industry continues to pursue export opportunities.

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

There are some reporting, recordkeeping, and other compliance requirements under the order. The reporting and recordkeeping burdens are necessary for compliance purposes and for developing statistical data for maintenance of the program. The information collection requirements have been previously approved by the Office of Management and Budget under OMB No. 0581–0178, Vegetable and Specialty Crops. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. This rule does not change those requirements. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Further, the Board's meetings were widely publicized throughout the hazelnut industry and all interested persons were invited to attend the

meetings and participate in Board deliberations. Like all Board meetings, those held on August 23, 2007, and November 15, 2007, were public meetings and all entities, both large and small, were able to express their views on this issue.

An interim final rule concerning this action was published in the **Federal Register** on February 19, 2008. Copies of the rule were mailed by the Board's staff to all Board members and hazelnut handlers. In addition, the rule was made available through the Internet by USDA and the Office of the Federal Register. That rule provided for a 60-day comment period which ended April 21, 2008. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Board and other available information, it is hereby found that finalizing the interim final rule, without change, as published in the **Federal Register** (73 FR 9000, February 19, 2008) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 982

Filberts, Hazelnuts, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

PART 982—HAZELNUTS GROWN IN OREGON AND WASHINGTON

■ Accordingly, the interim final rule amending 7 CFR part 982 which was published at 73 FR 9000 on February 19, 2008, is adopted as a final rule without change.

Dated: June 19, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–14338 Filed 6–24–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1750

RIN 2550-AA38

Risk-Based Capital Regulation—Loss Severity Amendments

AGENCY: Office of Federal Housing Enterprise Oversight, HUD.

ACTION: Final rule.

SUMMARY: The Office of Federal Housing Enterprise Oversight (OFHEO) is amending its regulations related to Risk-Based Capital (Risk-Based Capital Regulation) to enhance the transparency, sensitivity to risk, and accuracy of the calculation of the risk-based capital requirement for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). OFHEO is amending the Risk-Based Capital Regulation by changing the current loss severity equations that understate losses on defaulted single-family conventional and government guaranteed loans and by changing the treatment of Federal Housing Administration insurance in the Risk-Based Capital Regulation to conform the treatment to current law.

DATES: *Effective Date:* June 25, 2008.

FOR FURTHER INFORMATION CONTACT: David A. Felt, Deputy General Counsel, telephone (202) 414–3750, or Jamie Schwing, Associate General Counsel, telephone (202) 414–3787 (not toll free numbers), Office of Federal Housing Enterprise Oversight, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Background

Title XIII of the Housing and Community Development Act of 1992, Public Law 102–550, titled the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Act) (12 U.S.C. 4501 *et seq.*), established OFHEO as an independent office within the Department of Housing and Urban Development to ensure that Fannie Mae and Freddie Mac (collectively the Enterprises) are adequately capitalized, operate safely and soundly, and comply with applicable laws, rules and regulations. The Act provides that the Director of OFHEO (Director) is authorized to make such determinations

and take such actions as the Director determines necessary with respect to the issuance of regulations regarding, among other things, the required capital levels for the Enterprises. The Act further provides that the Director shall issue regulations establishing the risk-based capital test (Risk-Based Capital Regulation) and that the Risk-Based Capital Regulation, subject to certain confidentiality provisions, shall be sufficiently specific to permit an individual other than the Director to apply the risk-based capital test in the same manner as the Director.

Pursuant to the Act, OFHEO published a final regulation setting forth a risk-based capital test which forms the basis for determining the risk-based capital requirement for each Enterprise. The Risk-Based Capital Regulation has been amended to incorporate corrective

and technical amendments that enhance the transparency sensitivity to risk and accuracy of the calculation of the risk-based capital requirement.

Consistent with the Act and OFHEO's commitment to review, update and enhance the Risk-Based Capital Regulation in order to ensure an accurate risk sensitive and transparent calculation of the risk-based capital requirement, OFHEO published a notice of proposed rulemaking (NPRM) to incorporate amendments to the Risk-Based Capital Regulation. Specifically, OFHEO proposed two changes to the Risk-Based Capital Regulation. The first change was proposed because certain loss severity equations resulted in the Enterprises recording profits instead of losses on foreclosed mortgages during the calculation of the risk-based capital requirement. The current loss severity

equations overestimate Enterprise recoveries for defaulted government guaranteed and low loan-to-value loans. The results generated by the current loss severity equations are not consistent with the Risk-Based Capital Regulation and result in significant reductions in the risk-based capital requirements for the Enterprises. The second change relates to the treatment of Federal Housing Administration insurance associated with single-family loans with a loan-to-value ratio below 78%. OFHEO proposed changes related to these loans that would make the Risk-Based Capital Regulation consistent with current law.

The following table shows the estimated capital impact of all of the amendments at September 30 and December 31, 2006.

TABLE 1.—ESTIMATED CAPITAL IMPACT OF AMENDMENTS
[Billions of dollars]

	Quarter	Interest rate scenario	RBC requirement		
			Current regulation	Current regulation with proposed amendments	Change *
Fannie Mae	2006 3Q	Up-Rate	\$22.5	\$32.0	\$9.5
		Down-Rate	16.4	25.1	8.6
	2006 4Q	Up-Rate	26.9	36.6	9.8
		Down-Rate	9.1	16.6	7.5
Freddie Mac	2006 3Q	Up-Rate	14.9	19.4	4.5
		Down-Rate	13.8	18.2	4.4
	2006 4Q	Up-Rate	15.3	20.7	5.4
		Down-Rate	12.9	17.5	4.5

* Figures may not sum precisely due to rounding.

The amendments substantially increase the RBC Requirement in both the up and down interest rate scenarios for both Enterprises for the two quarters analyzed. However, if the amendments had been in effect during the analyzed periods, total capital would have exceeded the RBC Requirement and the capital classifications of the Enterprises would not have changed.

The 90-day comment period ended March 4, 2008. All comments received have been made available to the public in the OFHEO Public Reading Room and have also been posted on the OFHEO Web site at <http://www.OFHEO.gov>.

Comments Received

Comments were received from the American Bankers Association (ABA), Fannie Mae, Freddie Mac, the National Association of Homebuilders (NAHB), and the Mortgage Insurance Companies of America (MICA). All comments were taken into consideration. Significant

comments related to the proposed regulation are discussed below.

Purpose and Scope

Fannie Mae commented that the proposed amendments fail to recognize properly its experience during times of credit stress. In support of this statement, Fannie Mae presented data on mortgage defaults that occurred between 1992 and 2006 when home prices declined more than 15% between origination and foreclosure. Within this population of loans, Fannie Mae realized a gain on 20% of the loans with an LTV of 60 percent or less and also realized a gain on six percent of the loans with high levels of third party mortgage insurance.

OFHEO does not find that the comment and data presented by Fannie Mae support a change in OFHEO's proposed amendment to the Risk-Based Capital Regulation. While gains on defaults of individual loans are possible and have occurred in the historical data,

the risk-based capital stress test simulates the average behavior of groups of similar loans, rather than that of individual loans. From that perspective the data presented by Fannie Mae bolsters the OFHEO proposal to restrict negative losses. The data from Fannie Mae show that 80% of defaulted loans with an LTV below 60 percent result in a loss and 94% of defaulted loans with high levels of mortgage insurance result in a loss. Although Fannie Mae did not provide the average gain or loss for these populations, it is unlikely that there was an average gain, given the small percentages of loans with gains.

Fannie Mae also commented that the proposed amendments, by not fully recognizing the Enterprises' loss mitigation practices, do not provide the proper incentive to the Enterprises to engage in those practices. The ABA and the NAHB also raised concerns that the risk-based capital stress test might not fully recognize the benefits of the Enterprises' loss mitigation practices.

OFHEO expects that only rarely, if at all, would the risk-based capital stress test limit the representation of benefits of the Enterprises' loss mitigation practices. This expectation is consistent with the data on loans with high levels of mortgage insurance that Fannie Mae presented in its comment, which showed a gain on only six percent of those loans. OFHEO also acknowledges that the risk-based capital stress test does not capture every detail of the risks and the risk mitigation strategies of the Enterprises, since, of necessity, it is a stylized representation of the financial operations and statements of the Enterprises. As such, the risk-based capital stress test reflects numerous accommodations across the dimensions of accuracy, complexity, transparency, operational workability, and regulatory caution. OFHEO will continue to review the RBC Stress Test Model and will propose enhancements where appropriate. This final amendment is a marked improvement over the prior approach.

Freddie Mac and MICA commented in favor of all of the proposed amendments. In addition to its comments on the proposed amendments, MICA raised additional concerns that were beyond the scope of the current rulemaking. MICA expressed concern that the current Risk-Based Capital Regulation allowed the cross-subsidization of interest-rate and credit risk, thereby allowing the Enterprises to hold an insufficient amount of capital against either risk. MICA also commented that OFHEO should revise the Risk-Based Capital Regulation to apply the regulation on a combined loan-to-value ratio of an Enterprise's position and to develop measures of credit risk that distinguish subprime and non-traditional mortgage structures from less-risky ones. Although these comments are beyond the scope of the current rulemaking, OFHEO nevertheless welcomes MICA's suggestions for possible future rulemaking topics.

OFHEO has taken into consideration all of the comments submitted in connection with this rulemaking, and for the reasons discussed above, OFHEO has determined to issue the amendments as proposed.

Regulatory Impacts

Executive Order 12866, Regulatory Planning and Review

The amendments incorporate changes to the loss severity equations used to calculate the risk-based capital

requirement as well as changes to the treatment of Federal Housing Administration insurance in the Risk-Based Capital Regulation in order to conform to current law. The amendments to the Risk-Based Capital Regulation are not classified as an economically significant rule under Executive Order 12866 because they do not result in an annual effect on the economy of \$100 million or more or a major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies, or geographic regions; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in foreign or domestic markets. Accordingly, no regulatory impact assessment is required. Nevertheless, the amendments were submitted to the Office of Management and Budget (OMB) for review under the provisions of Executive Order 12866 as a significant regulatory action.

Executive Order 13132, Federalism

Executive Order 13132 requires that Executive departments and agencies identify regulatory actions that have significant federalism implications. A regulation has federalism implications if it has substantial direct effects on the states, on the relationship or distribution of power between the Federal Government and the states, or the distribution of power and responsibilities among various levels of government. The Enterprises are federally chartered entities supervised by OFHEO. The amendments to the Risk-Based Capital Regulation address matters which the Enterprises must comply with for Federal regulatory purposes. The amendments to the Risk-Based Capital Regulation address matters regarding the risk-based capital calculation for the Enterprises and therefore do not affect in any manner the powers and authorities of any state with respect to the Enterprises or alter the distribution of power and responsibilities between Federal and state levels of government. Therefore OFHEO has determined that the amendments to the Risk-Based Capital Regulation have no federalism implications that warrant preparation of a Federalism Assessment in accordance with Executive Order 13132.

Paperwork Reduction Act

The amendments do not contain any information collection requirements that

require the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation does not have a significant economic impact on a substantial number of small entities 5 U.S.C. 605(b). OFHEO has considered the impact of the amendments to the Risk-Based Capital Regulation under the Regulatory Flexibility Act. The General Counsel of OFHEO certifies that the amendments to the Risk-Based Capital Regulation are not likely to have a significant impact on a substantial number of small business entities because the regulation is applicable only to the Enterprises, which are not small entities for the purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1750

Capital classification, Mortgages, Risk-based capital.

■ Accordingly, for the reasons stated in the preamble, OFHEO is amending 12 CFR part 1750 as follows:

PART 1750—CAPITAL

■ 1. The authority citation for part 1750 continues to read as follows:

Authority: 12 U.S.C. 4513, 4514, 4611, 4612, 4614, 4618.

■ 2. Amend Appendix A to subpart B of part 1750 as follows:

■ a. In paragraph 3.6.3.6.4.3[a]1, under the explanation "Where: $m' = m$, except for counterparties rated below BBB, where $m' = 120$ ", revise the equation;

■ b. In paragraph 3.6.3.6.5.1[a] revise equation;

■ c. In paragraph 3.6.3.6.5.1[b]2 revise equation.

Appendix A to Subpart B of Part 1750—Risk-Based Capital Text Methodology and Specifications

* * * * *

3.6.3.6.4.3 * * *

[a] * * *

1. * * *

$m' = m$, except for counterparties rated below BBB, where $m' = 120$

$MIExp_m^{LG} = 1$ if $\left(LTV_{ORIG} \times \frac{UPB_m^{LG}}{UPB_{ORIG}^{LG}} \right) < 0.78$ and the loan group comprises conventional loans

$MIExp_m^{LG} = 0$ otherwise

0.78 (78%) = the LTV at which MI is cancelled if payments are current

* * * * *
 3.6.3.6.5.1 * * *
 [a] * * *

$$LS_m^{SF} = MAX \left[\left(\frac{1}{\left(1 + \frac{DR_m}{2}\right)^{\frac{MQ}{6}}} + \frac{\left(\frac{MQ}{12} \times PTR_m\right) + F - MI_m}{\left(1 + \frac{DR_m}{2}\right)^{\frac{MF}{6}}} + \frac{R - RP_m - ALCE_m}{\left(1 + \frac{DR_m}{2}\right)^{\frac{MF + MR}{6}}} \right), 0 \right]$$

[b] * * *
 2. * * *

$$LS_m^{VA} = max \left[\frac{1 + F + \left(\frac{MQ}{12} \times PTR_m\right) + (R - RP_m) - 0.30}{\left(1 + \frac{DR_m}{2}\right)^{\frac{MF}{6}}}, 0 \right]$$

* * * * *

Dated: June 10, 2008.
James B. Lockhart III,
 Director, Office of Federal Housing Enterprise Oversight.
 [FR Doc. E8-13378 Filed 6-24-08; 8:45 am]
 BILLING CODE 4220-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE288; Special Conditions No. 23-228-SC]

Special Conditions: Embraer S.A. Model EMB-500; Full Authority Digital Engine Control (FADEC) System.

AGENCY: Federal Aviation Administration (FAA), DOT.
ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Embraer S.A. Model EMB-500 airplane. This airplane will have a novel or unusual design feature(s) associated with the use of an electronic engine control system instead

of a traditional mechanical control system. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is June 16, 2008. Comments must be received on or before July 25, 2008.

ADDRESSES: Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE-7, Attention: Rules Docket CE288, 901 Locust, Room 506, Kansas City, Missouri 64106, or delivered in duplicate to the Regional Counsel at the above address. Comments must be marked: CE288. Comments may be inspected in the Rules Docket weekdays, except Federal holidays between 7:30 and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Peter L. Rouse, Federal Aviation Administration, Aircraft Certification Service, Small Airplane Directorate, ACE-111, 901 Locust, Room 301,

Kansas City, Missouri 64106; 816-329-4135, fax 816-329-4090.

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

Comments Invited

Interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or special condition number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments received will be available in

the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. CE288." The postcard will be date stamped and returned to the commenter.

Background

On October 5, 2005, Embraer S.A. applied for a type certificate for their new Model EMB-500. The Model EMB-500 is a normal category, low-winged monoplane with "T" tailed vertical and horizontal stabilizers, retractable tricycle type landing gear and twin turbofan engines mounted on the aircraft fuselage. Its design characteristics include a predominance of metallic construction. The maximum takeoff weight is 9,965 pounds, the V_{MO}/M_{MO} is 275 KIAS/M 0.70 and maximum altitude is 41,000 feet.

The Embraer S.A. Model EMB-500 airplane is equipped with Pratt & Whitney Canada PW617F turbofan engines using an electronic engine control system instead of a traditional mechanical control system. Even though the engine control system will be certificated as part of the engine, the installation of an engine with an electronic control system requires evaluation due to critical environmental effects and possible effects on or by other airplane systems. For example, indirect effects of lightning, radio interference with other airplane electronic systems, shared engine and airplane data and power sources.

The regulatory requirements in 14 CFR part 23 for evaluating the installation of complex systems, including electronic systems and critical environmental effects, are contained in § 23.1309. However, when § 23.1309 was developed, the use of electronic control systems for engines was not envisioned. Therefore, the § 23.1309 requirements were not applicable to systems certificated as part of the engine (reference § 23.1309(f)(1)). Although the parts of the system that are not certificated with the engine could be evaluated using the criteria of § 23.1309, the integral nature of systems such as these makes it unfeasible to evaluate the airplane portion of the system without including the engine portion of the system.

In some cases, the airplane that the engine is used in will determine a higher classification (Advisory Circular (AC) 23.1309) than the engine controls are certificated for, which will require that the FADEC/DEEC (Digital Electronic Engine Control) systems be analyzed at a higher classification. As of November 2005 FADEC special conditions will mandate the classification for § 23.1309 analysis for loss of FADEC control as catastrophic for any airplane. This is not to imply that an engine failure is classified as catastrophic, but that the digital engine control must provide an equivalent reliability to mechanical engine controls.

Type Certification Basis

Under the provisions of 14 CFR 21.17, Embraer S.A. must show that the Model EMB-500 meets the applicable provisions of 14 CFR part 23, as amended by Amendments 23-1 through 23-55, thereto.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 23) do not contain adequate or appropriate safety standards for the Model EMB-500 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Model EMB-500 must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36, and the FAA must issue a finding of regulatory adequacy pursuant to section 611 of Public Law 92-574, the "Noise Control Act of 1972."

Special conditions, as appropriate, as defined in 11.19, are issued in accordance with § 11.38, and become part of the type certification basis in accordance with § 21.17(a)(2).

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

Novel or Unusual Design Features

The Embraer S.A. Model EMB-500 will incorporate the following novel or unusual design features: Electronic engine control system.

Applicability

As discussed above, these special conditions are applicable to the Model

EMB-500. Should Embraer S.A. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on one model (Model EMB-500) of airplane. It is not a rule of general applicability, and it affects only the applicant who applied to the FAA for approval of these features on the airplane.

Under standard practice, the effective date of final special conditions would be 30 days after the date of publication in the **Federal Register**; however, as the certification date for the Embraer S.A. Model EMB-500 is imminent, the FAA finds that good cause exists to make these special conditions effective upon issuance.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

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

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.17; and 14 CFR 11.38 and 11.19.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Embraer S.A. Model EMB-500 airplanes.

1. *Electronic Engine Control.*

The installation of the electronic engine control system must comply with the requirements of § 23.1309(a) through (e) at Amendment 23-55. The intent of this requirement is not to reevaluate the inherent hardware reliability of the control itself, but rather determine the effects, including environmental effects addressed in § 23.1309(e), on the airplane systems and engine control system when installing the control on the airplane. When appropriate, engine certification data may be used when showing compliance with this requirement; however, the effects of the installation on this data must be addressed.

For these evaluations, the loss of FADEC control will be analyzed utilizing the threat levels associated with a catastrophic failure.

Issued in Kansas City, Missouri, on June 16, 2008.
James E. Jackson,
Acting Manager, Small Airplane Directorate, Aircraft Certification Service.
 [FR Doc. E8-14383 Filed 6-24-08; 8:45 am]
BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2008-0331; Directorate Identifier 2008-CE-009-AD; Amendment 39-15569; AD 2008-13-06]

RIN 2120-AA64

Airworthiness Directives; Cessna Aircraft Company Models 208 and 208B Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.
ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for certain Cessna Aircraft Company (Cessna) Models 208 and 208B airplanes. This AD requires you to inspect the left and right wing wire bundle(s) and repair or replace damaged wire. This AD also requires inspecting the wire bundles for correct attachment to the anchor points and correcting any deficient attachments. This AD results from chafed wiring found on wire bundles in the left and right wings containing the auto-control wing de-ice system, fuel quantity indication, and low fuel annunciation on the Cessna 208B airplanes. Improper installation of wire bundle supporting hardware can cause chafed wiring in the affected bundles. We are issuing this AD to detect and correct damaged wiring of the auto-control wing de-ice system, fuel quantity indication, and low fuel annunciation systems. This condition could result in incorrect fuel quantity indications, loss of low fuel quantity

annunciations, or loss of the autocontrol wing de-ice system.

DATES: This AD becomes effective on July 30, 2008.

On July 30, 2008, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: To get the service information identified in this AD, contact Cessna Aircraft Company, One Cessna Boulevard, P.O. Box 7706, Wichita, KS 67277-7704; telephone: (316) 517-5800; fax: (316) 942-9006.

To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at <http://www.regulations.gov>. The docket number is FAA-2008-0331; Directorate Identifier 2008-CE-009-AD.

FOR FURTHER INFORMATION CONTACT: Daniel Hilton, Aerospace Engineer, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946-4173; fax: (316) 946-4107.

SUPPLEMENTARY INFORMATION:

Discussion

On March 11, 2008, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Cessna Model 208 and 208B airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on March 17, 2008 (73 FR 14191). The NPRM proposed to detect and correct damaged wiring of the auto-control wing de-ice system, fuel quantity indication, and low fuel annunciation systems.

Comments

We provided the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal and FAA's response to each comment:

Comment Issue: Allow More Time for Service Bulletin

The Aircraft Owners and Pilots Association (AOPA) comments that they believe the issuance of an AD on the wiring bundles of the Cessna 208 is premature. The AOPA comments that it believes a service bulletin is an effective way to correct the wiring bundle issues, and FAA should have allowed more time for the service bulletin, dated February 4, 2008, to be distributed to Cessna 208 owners and mechanics. The commenter adds that if after a reasonable amount of time the service bulletin is not appropriately addressing the safety concern, then the FAA could issue a special airworthiness information bulletin (SAIB) or an AD.

We do not concur with the AOPA comment. Mandatory service bulletins and their process thereof do not constitute rulemaking for owners/operators to complete the requested action. The only enforceable process to assure that the unsafe condition is properly addressed on all aircraft is through the rulemaking process, in this case an AD.

We are making no changes to the final rule based on this comment.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD affects 512 airplanes in the U.S. registry.

We estimate the following costs to do the inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work-hour × \$80 per hour = \$80	Not Applicable	\$80	\$40,960

We estimate the following costs to do any necessary repairs that would be

required based on the results of the inspection. We have no way of

determining the number of airplanes that may need this repair/replacement:

Labor cost	Parts cost	Total cost per airplane
1 work-hour × \$80 per hour = \$80	\$10	\$90

Warranty credit will be given to the extent specified in Cessna Aircraft Company Service Bulletin CAB08-2, dated February 4, 2008.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include "Docket No. FAA-2008-0331; Directorate Identifier 2008-CE-009-AD" in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

- 1. The authority citation for part 39 continues to read as follows:
Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

- 2. FAA amends § 39.13 by adding a new AD to read as follows:

2008-13-06 Cessna Aircraft Company:
Amendment 39-15569; Docket No. FAA-2008-0331; Directorate Identifier 2008-CE-009-AD.

Effective Date

- (a) This AD becomes effective on July 30, 2008.

Affected ADs

- (b) None.

Applicability

- (c) This AD applies to the following airplane models and serial numbers that are certificated in any category:

Models	Serial Nos.
208	20800001 through 20800415.
208B	208B0001 through 208B1299.

Unsafe Condition

- (d) This AD results from reports of chafed wiring found on wire bundles in the left and right wings containing the auto-control wing de-ice system, fuel quantity indication, and low fuel annunciation on several Cessna Model 208B airplanes. We are issuing this AD to detect and correct damaged wiring of the auto-control wing de-ice system, fuel quantity indication, and low fuel annunciation systems. This condition, if not corrected, could result in incorrect fuel quantity indications, loss of low fuel quantity annunciations, or loss of the auto-control wing de-ice system.

Compliance

- (e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Inspect the left and right wing electrical wire bundles at the anchor attach points for loose and damaged wiring.	Within the next 200 hours time-in-service after July 30, 2008 (the effective date of this AD) or within 12 months after July 30, 2008 (the effective date of this AD), whichever comes first.	Follow Cessna Aircraft Company Service Bulletin CAB08-2, dated February 4, 2008.
(2) If, as a result of the inspection required by paragraph (e)(1) of this AD, damaged wires are found, repair or replace damaged wires and properly attach wire bundle.	Before further flight after the inspection required by paragraph (e)(1) of this AD.	Follow Cessna Aircraft Company Service Bulletin CAB08-2, dated February 4, 2008.
(3) If, as a result of the inspection required by paragraph (e)(1) of this AD, loosely attached wires were found, secure any wires that are loosely attached and properly attach wire bundle supporting hardware.	Before further flight after the inspection required by paragraph (e)(1) of this AD.	Follow Cessna Aircraft Company Service Bulletin CAB08-2, dated February 4, 2008.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Daniel Hilton, Aerospace Engineer, FAA, Wichita ACO, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: 316-946-

4173; e-mail address: daniel.hilton@faa.gov. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Material Incorporated by Reference

(g) You must use Cessna Aircraft Company Service Bulletin CAB08-2, dated February 4,

2008, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Cessna Aircraft Company, One Cessna Boulevard, P.O. Box 7706, Wichita, KS 67277-7704; telephone: (316) 517-5800; fax: (316) 942-9006.

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

Issued in Kansas City, Missouri, on June 10, 2008.

Kim Smith,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-13564 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2008-0664; Directorate Identifier 2008-NE-04-AD; Amendment 39-15579; AD 2008-13-16]

RIN 2120-AA64

Airworthiness Directives; Pratt & Whitney Canada Corp. (P&WC) Models PW305A and PW305B Turbofan Engines

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

ACTION: Final rule; request for comments.

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

There have been two incidents of fan blade dislodgements due to blade fracture on relatively hi-time PW305 engines (over 5000 Hrs). The blade dislodgement in both cases was contained. However, engine installations sustained considerable collateral damage. The root cause of fan blade fracture was determined to be the under-minimum material condition at the fracture location.

This AD requires actions that are intended to address the unsafe condition described in the MCAI, which could result in an engine shutdown and damage to the airplane.

DATES: This AD becomes effective July 10, 2008.

The Director of the Federal Register approved the incorporation by reference of P&WC Alert Service Bulletin (ASB)

PW300-72-A24588, Revision 2, dated November 27, 2007, listed in the AD as of July 10, 2008.

We must receive comments on this AD by July 25, 2008.

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

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- **Mail:** U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- **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.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this 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.

FOR FURTHER INFORMATION CONTACT: Ian Dargin, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: ian.dargin@faa.gov; telephone (781) 238-7178; fax (781) 238-7199.

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada (TC), which is the aviation authority for Canada, has issued Airworthiness Directive CF-2008-08R1, dated March 18, 2008, (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

There have been two incidents of fan blade dislodgements due to blade fracture on relatively hi-time PW305 engines (over 5000 Hrs). The blade dislodgement in both cases was contained. However, engine installations sustained considerable collateral damage. The root cause of fan blade fracture was determined to be the under-minimum material condition at the fracture location.

P&WC has established that the subject under-minimum material condition is limited only to fan blades P/N 30B2855-01, manufactured under heat code: MCBWF. Accordingly, P&WC on 24 August 2007 issued Alert Service Bulletin (ASB) No.

A24588, requiring, on priority bases, identification and removal of all such discrepant fan blades from service, in accordance with Special Instructions (SI) No. 37-2007. ASB No. A24588 was subsequently revised (Rev. 2) on 27 November 2007 to include clarification on the incorporation of another Service Bulletin (SB) No. 24595, on the same subject.

Considering the potentially hazardous consequence of possible uncontained dislodgement of discrepant blade and its impact on aircraft safety, this AD is issued to mandate the inspection of the affected engine low-pressure (LP) compressor fan blades in accordance with ASB A24588 requirements.

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

Relevant Service Information

P&WC has issued ASB PW300-72-A24588, Revision 2, dated November 27, 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 AD

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

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because fan blades identified by this AD have been found to have an under-minimum material thickness condition which has caused failure and release of fan blades. In one event, the fan blade failure (contained) resulted in high engine vibrations causing the loss of the upper and lower engine cowls. Fan blade failure could result in an engine shutdown and damage to the airplane. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2008-0664; Directorate Identifier 2008-NE-04-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008-13-16 Pratt & Whitney Canada Corp. (P&WC) (Formerly Pratt & Whitney Canada, Inc.): Amendment 39-15579; Docket No. FAA-2008-0664; Directorate Identifier 2008-NE-04-AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective July 10, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to P&WC models PW305A and PW305B turbofan engines that have a serial number (SN) listed in Table 1 of this AD. These engines are installed on, but not limited to, Bombardier Learjet M60 and Hawker Beechcraft 1000 series airplanes.

TABLE 1.—AFFECTED ENGINES BY SN

CA0192
CA0195
CA0197
CA0199
CA0200
CA0202
CA0203
CA0204
CA0206
CA0207
CA0208
CA0209
CA0210
CA0211
CA0212
CA0213
CA0214
CA0215
CA0216

TABLE 1.—AFFECTED ENGINES BY SN—Continued

CA0217
CA0218
CA0220
CA0221
CA0223
CA0228
CA0231
CA0232
CA0234
CA0235
CA0240
CA0241
CA0243
CA0244
CA0246
CA0247
CA0257
CA0259
CA0260
CA0280
CA0300

Reason

(d) There have been two incidents of fan blade dislodgements due to blade fracture on relatively hi-time PW305 engines (over 5000 Hrs). The blade dislodgement in both cases was contained. However, engine installations sustained considerable collateral damage. The root cause of fan blade fracture was determined to be the under-minimum material condition at the fracture location.

This AD requires actions that are intended to address the unsafe condition described in the MCAI, which could result in an engine shutdown and damage to the airplane.

Actions and Compliance

(e) Unless already done, do the following actions on all affected engines as specified in the applicability section of this AD, accomplish in accordance with P&WC Alert Service Bulletin (ASB) PW300-72-A24588, Revision 2, dated November 27, 2007:

(1) For engines with more than 5,000 hours of operating time, before next flight, inspect low-pressure (LP) compressor fan blades and replace any blade that is found to be under-minimum material condition.

(2) For engines with 5,000 or less, but more than 4,000 hours of operating time, within 30 hours of operating time from the effective date of this AD, but not later than September 30, 2008, inspect LP compressor fan blades and replace any blade that is found to be under-minimum material condition.

(3) For engines with 4,000 or less, but more than 2,500 hours of operating time, no later than September 30, 2008, inspect LP compressor fan blades and replace any blade that is found to be under-minimum material condition, in accordance with one of the following schedules, whichever occurs first:

(i) At the next first stage high-pressure compressor rotor inspection (Ref 05-20-00 scheduled maintenance checks), or

(ii) At the next scheduled opportunity where the LP compressor fan is removed (Ref. Hot Section Inspection or Overhaul Shop Visit), or

(iii) Within 300 hours of operating time from August 24, 2007.

(4) For engines with 2,500 or less hours of operating time, before it accumulates 4,000 hours of operating time, but not later than September 30, 2008, inspect LP compressor fan blades and replace any blade that is found to be under-minimum material condition.

Previous Credit

(f) Inspection of the fan blades for an under-minimum material condition done before the effective date of this AD that used P&WC ASB PW300-72-A24588, dated August 24, 2007; or Revision 1, dated October 26, 2007; or P&WC SB PW300-72-24595, dated October 26, 2007; or Revision 1, dated November 28, 2007, comply with the requirements specified in this AD.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(2) *Special Flight Permits*: We are limiting Special Flight Permits to one repositioning maintenance flight to facilitate the subject inspection.

Related Information

(h) Refer to Transport Canada Airworthiness Directive CF-2008-08R1, dated March 18, 2008; P&WC ASB PW300-72-A24588, Revision 2, dated November 27, 2007; and P&WC SB PW300-72-24595, Revision 1, dated November 28, 2007, for related information.

(i) Contact Ian Dargin, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: ian.dargin@faa.gov; telephone (781) 238-7178; fax (781) 238-7199, for more information about this AD.

Material Incorporated by Reference

(j) You must use Pratt & Whitney Canada Corp. Alert Service Bulletin PW300-72-A24588, Revision 2, dated November 27, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Pratt & Whitney Canada Corp., 1000 Marie-Victorin, Longueuil, Quebec, Canada J4G 1A1, telephone: (800) 268-8000.

(3) You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Burlington, Massachusetts, on June 13, 2008.

Peter A. White,

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

[FR Doc. E8-13854 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2008-0360; Directorate Identifier 2007-NM-368-AD; Amendment 39-15570; AD 2008-13-07]

RIN 2120-AA64

Airworthiness Directives; Bombardier Model DHC-8-400 Series Airplanes

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

ACTION: Final rule.

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

Several production aircraft have been found with the elevator overload bungees installed in reverse orientation: i.e., larger end outboard rather than inboard. This bungee reversal does not impact normal operation of the elevator, and would not increase the probability of an elevator disconnect. However, if a bungee became disconnected at the inboard side, the corresponding side of the elevator may not center, and this could adversely affect the pitch control of the aircraft.

Loss of elevator pitch control could result in reduced controllability of the airplane. We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective July 30, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of July 30, 2008.

ADDRESSES: You may examine the AD docket on the Internet at <http://www.regulations.gov> or in person at the U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Fabio Buttitta, Aerospace Engineer, Systems and Flight Test Branch, ANE-172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228-7303; fax (516) 794-5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on March 28, 2008 (73 FR 16577). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Several production aircraft have been found with the elevator overload bungees installed in reverse orientation: i.e., larger end outboard rather than inboard. This bungee reversal does not impact normal operation of the elevator, and would not increase the probability of an elevator disconnect. However, if a bungee became disconnected at the inboard side, the corresponding side of the elevator may not center, and this could adversely affect the pitch control of the aircraft.

Loss of elevator pitch control could result in reduced controllability of the airplane. Corrective action includes a visual inspection for correct installation of the elevator overload bungees, reinstallation if necessary, and installation of labels to the elevator overload bungees. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This AD and the MCAI or Service Information

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

provided in the MCAI and related service information.

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

Costs of Compliance

We estimate that this AD will affect 38 products of U.S. registry. We also estimate that it will take 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is \$80 per work-hour. Required parts will cost about \$36 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be \$4,408, or \$116 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008-13-07 Bombardier, Inc. (Formerly de Havilland, Inc.): Amendment 39-15570. Docket No. FAA-2008-0360; Directorate Identifier 2007-NM-368-AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective July 30, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model DHC-8-400, DHC-8-401, and DHC-8-402 airplanes; certificated in any category; having serial numbers 4003 and subsequent.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight controls.

Reason

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

Several production aircraft have been found with the elevator overload bungees installed in reverse orientation: i.e., larger end outboard rather than inboard. This bungee reversal does not impact normal operation of the elevator, and would not increase the probability of an elevator disconnect. However, if a bungee became disconnected at the inboard side, the corresponding side of the elevator may not center, and this could adversely affect the pitch control of the aircraft.

Loss of elevator pitch control could result in reduced controllability of the airplane. Corrective action includes a visual inspection for correct installation of the elevator overload bungees, reinstallation if necessary, and installation of labels to the elevator overload bungees.

Actions and Compliance

(f) For airplanes having serial numbers 4003, 4004, 4006, and 4008 through 4159: unless already done, do the following actions.

(1) Within 5,000 flight hours after the effective date of this AD: Visually inspect both left and right elevator overload bungees, part number (P/N) FE289000000, to determine if they are correctly installed, in accordance with Bombardier Service Bulletin 84-27-30, Revision 'C,' dated October 31, 2007. If any bungee is found installed incorrectly, remove the bungee and re-install it correctly before the next flight in accordance with the service bulletin.

(2) Within 5,000 flight hours after the effective date of this AD: Attach label, P/N FE289006200, to both left and right elevator overload bungees to show the correct orientation of the outboard end in accordance with Bombardier Service Bulletin 84-27-30, Revision 'C,' dated October 31, 2007.

(3) Within 5,000 flight hours after the effective date of this AD: Re-identify the P/N to read "FE289000001" on the identification plate of both the left and right elevator overload bungees in accordance with Bombardier Service Bulletin 84-27-30, Revision 'C,' dated October 31, 2007.

(4) Actions accomplished before the effective date of this AD in accordance with Bombardier Service Bulletin 84-27-27, dated May 24, 2005, are acceptable for compliance with the corresponding actions specified in paragraphs (f)(1), (f)(2), and (f)(3) of this AD.

(5) Actions accomplished before the effective date of this AD in accordance with Bombardier Service Bulletin 84-27-30, dated February 8, 2007; Revision 'A,' dated March 2, 2007; or Revision 'B,' dated May 3, 2007; are acceptable for compliance with the corresponding actions specified in this AD.

Note 1: Paragraphs (f)(2) and (f)(3) of this AD constitute Modsum 4-113537.

(g) *For all airplanes:* As of the effective date of this AD, no replacement/spare elevator overload bungees, P/N FE289000000, are permitted to be installed on any airplane. Only elevator overload bungees identified with new P/N

“FE28900001” on the identification plate are permitted to be installed.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), 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: Fabio Buttitta, Aerospace Engineer, Systems and Flight Test Branch, ANE-172, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228-7303; fax (516) 794-5531. 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

(i) Refer to MCAI Canadian Airworthiness Directive CF-2007-30, dated November 28, 2007; and Bombardier Service Bulletin 84-27-30, Revision ‘C,’ dated October 31, 2007; for related information.

Material Incorporated by Reference

(j) You must use Bombardier Service Bulletin 84-27-30, Revision ‘C,’ dated October 31, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Bombardier, Inc., Bombardier Regional Aircraft Division, 123 Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Renton, Washington, on June 7, 2008.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-13921 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2008-0182; Directorate Identifier 2007-NM-262-AD; Amendment 39-15577; AD 2008-13-14]

RIN 2120-AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB-135ER, -135KE, -135KL, and -135LR Airplanes, and Model EMB-145, -145ER, -145MR, -145LR, -145XR, -145MP, and -145EP Airplanes

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

ACTION: Final rule.

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

Fuel system reassessment, performed according to RBHA-E88/SFAR-88 (Regulamento Brasileiro de Homologacao Aeronautica 88/Special Federal Aviation Regulation No. 88), requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

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

DATES: This AD becomes effective July 30, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of July 30, 2008.

ADDRESSES: You may examine the AD docket on the Internet at <http://www.regulations.gov> or in person at the U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Sanjay Ralhan, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1405; fax (425) 227-1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That supplemental NPRM was published in the **Federal Register** on May 7, 2008 (73 FR 25609). That supplemental NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Fuel system reassessment, performed according to RBHA-E88/SFAR-88, requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

The corrective action is revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness (ICA) to incorporate new limitations for fuel tank systems. You may obtain further information by examining the MCAI in the AD docket.

Comments

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

Request To Revise Inspections

ExpressJet requests that we revise two tasks, “28-41-01-720-001-A00 and 28-41-01-720-A00,” specified in Table 1 of the supplemental NPRM. The commenter states that these tasks are related to a functional check of the component rather than the aircraft system. The commenter suggests that we identify these two components by part number and require the inspections be done before the part accumulates 10,000 flight hours since new or 10,000 flight hours since the last functional check.

We agree with the commenter that tasks 28-41-01-720-001-A00 and 28-41-04-720-001-A00 are related to a functional check of the component rather than the aircraft system (the commenter referred to task 28-41-01-720-A00, which is not listed in Table 1; we infer that the commenter intended to refer to task 28-41-04-720-001-A00). Prior to the commenter submitting its comment, the commenter raised the issue during a visit by the FAA. Since then we have discussed the issue with the manufacturer and with the Agência Nacional de Aviação Civil (ANAC),

which is the aviation authority for Brazil. ANAC states that it intends to issue an airworthiness directive to address an inspection threshold for these tasks. Therefore, we have removed these tasks from Table 1 of this AD. We might consider further rulemaking once new actions and compliance times for these tasks are identified by ANAC or in absence of any new action from ANAC, we might consider unilateral rulemaking.

Requests To Extend Compliance Times/ Include Costs of Unscheduled Inspections

ExpressJet and EMBRAER request that we extend the compliance times specified in Table 1 of the supplemental NPRM. ExpressJet states that the compliance times for the inspections specified in Table 1 of the supplemental NPRM are confusing. ExpressJet notes that the "Grace Period" is "Within 90 days after the effective date of this AD," but the effective date of the AD is not stated and the compliance time for revising the ALS of the ICA is before December 16, 2008. ExpressJet recommends that we revise the "Grace Period" to within 90 days after December 16, 2008.

EMBRAER states that the compliance time "within 90 days of the effective date of the AD" for airplanes with cycle totals above the thresholds would require airplanes to be removed from service for special inspections and that these inspections would require the fuel tanks to be drained and ventilated prior to inspection. EMBRAER states that requiring unscheduled tank inspections will increase the probability of maintenance error, which will result in an increase in the risk of ignition sources. EMBRAER believes that there is no special risk that justifies the compliance time of within 90 days from the effective date of the AD and suggests that the compliance time be revised to within 5,000 flight hours after the effective date of the AD.

EMBRAER also requests that if the compliance time of within 90 days after the effective date of the AD is retained, we include the costs of unscheduled inspections. EMBRAER notes that the costs of unscheduled inspections would be higher than the estimate given in the promulgation of Special Federal Aviation Regulation No. 88 of between 60 and 330 work-hours for the inspection and between 36 and 96 hours for time out of service.

We agree to extend the "Grace Period" specified in Table 1 of this AD. We agree with ExpressJet that the compliance time of within 90 days after December 16, 2008 is appropriate. We

have determined that the new compliance time will ensure an acceptable level of safety. We have revised Table 1 of this AD accordingly.

However, we do not agree with EMBRAER to defer the first mandatory inspections to within 5,000 flight hours after the effective date of the AD. In revising the appropriate compliance time for the inspections (*i.e.*, extending the "Grace Period" to within 90 days after December 16, 2008), we considered the urgency associated with the subject unsafe condition, the availability of required parts, and the practical aspect of accomplishing the required inspections within a period of time that corresponds to the normal scheduled maintenance for most affected operators. If an operator decides that more time is needed to comply with the AD, the operator can request an alternative method of compliance (AMOC) in accordance with the provisions of paragraph (g)(1) of the supplemental NPRM.

As stated earlier, we have extended the compliance time and therefore the number of unscheduled inspections should be reduced. However, because operators' schedules vary substantially, it would be nearly impossible for us to accurately calculate all costs associated with unscheduled inspections. Therefore, we have not revised the Costs of Compliance section of this AD to reflect unscheduled inspections. However, we have revised the Costs of Compliance section of this AD to reflect a change in the number of airplanes affected by this AD from 704 (as specified in the supplemental NPRM) to 668 airplanes.

Request To Clarify Actions

ExpressJet notes that paragraph (f)(2) of the supplemental NPRM states "Before December 16, 2008, revise the ALS of the ICA * * *." ExpressJet states that it assumes that this is referring to the operator's ICA.

We infer that ExpressJet is requesting clarification of the actions in this AD. The wording that was used represents a standard approach and has been used for many years. The intent is to have all airworthiness limitations, regardless of whether imposed by original type certification or by a later AD, located in one immediately recognizable document. In 1980, the FAA identified the Airworthiness Limitations section of the Instructions for Continued Airworthiness as the appropriate document.

We consider that not having all airworthiness limitations in one document could lead to confusion as to what is or what is not a mandatory

maintenance action as identified in Federal Aviation Regulation, part 25, Appendix H, section H25.4. This is the basis of our requirement to have each operator maintain a current copy of the Airworthiness Limitations section. Concerning ExpressJet's statement that the AD is referring to the operator's ICA, we infer that the commenter is wondering if, after revising its copy of the Airworthiness Limitation section, there are other required actions such as ensuring that the operator's maintenance program is updated to incorporate the actions specified in the revised Airworthiness Limitations.

Ensuring that operators' maintenance programs and the actions of its maintenance personnel are in accordance with the Airworthiness Limitations is required, but not by this AD. 14 CFR 91.403(c) specifies that no person may operate an aircraft for which airworthiness limitations have been issued unless those limitations have been complied with. Therefore, there is no need to further expand the requirements of the AD beyond that which was proposed because section 91.403(c) already imposes the appropriate required action after the airworthiness limitations are revised. We have not changed this AD in this regard.

Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect 668 products of U.S. registry. We also estimate that it will take about 1 work-

hour per product to comply with the basic requirements of this AD. The average labor rate is \$80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be \$53,440, 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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008-13-14 Empresa Brasileira de Aeronautica S.A. (EMBRAER):
Amendment 39-15577. Docket No. FAA-2008-0182; Directorate Identifier 2007-NM-262-AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective July 30, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to EMBRAER Model EMB-135ER, -135KE, -135KL, and -135LR airplanes, and Model EMB-145, -145ER, -145MR, -145LR, -145XR, -145MP, and -145EP airplanes; certificated in any category; except for Model EMB-145LR airplanes modified according to Brazilian

Supplemental Type Certificate 2002S06-09, 2002S06-10, or 2003S08-01.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (g) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Subject

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

Reason

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

Fuel system reassessment, performed according to RBHA-E88/SFAR-88, requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

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

Actions and Compliance

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

(1) The term “MRBR,” as used in this AD, means the EMBRAER EMB135/ERJ140/EMB145 Maintenance Review Board Report (MRBR) MRB-145/1150, Revision 11, dated September 19, 2007.

(2) Before December 16, 2008, revise the ALS of the ICA to incorporate Section A2.5.2, Fuel System Limitation Items, of Appendix 2 of the MRBR. For all tasks identified in Section A2.5.2 of Appendix 2 of the MRBR, the initial compliance times start from the applicable times specified in Table 1 of this AD; and the repetitive inspections must be accomplished thereafter at the interval specified in Section A2.5.2 of Appendix 2 of the MRBR, except as provided by paragraphs (f) (4) and (g) of this AD.

TABLE 1.—INITIAL INSPECTIONS

Reference No.	Description	Compliance time (whichever occurs later)	
		Threshold	Grace period
28-11-00-720-001-A00	Functionally Check critical bonding integrity of selected conduits inside the wing tank, Fuel Pump and FQIS connectors at tank wall by conductivity measurements.	Before the accumulation of 30,000 total flight hours.	Within 90 days after December 16, 2008.

TABLE 1.—INITIAL INSPECTIONS—Continued

Reference No.	Description	Compliance time (whichever occurs later)	
		Threshold	Grace period
28-17-01-720-001-A00	Functionally Check critical bonding integrity of Fuel Pump, VFQIS and Low Level SW connectors at tank wall by conductivity measurements.	Before the accumulation of 30,000 total flight hours.	Within 90 days after December 16, 2008.
28-21-01-220-001-A00	Inspect Electric Fuel Pump Connector	Before the accumulation of 10,000 total flight hours.	Within 90 days after December 16, 2008.
28-23-03-220-001-A00	Inspect Pilot Valve harness inside the conduit	Before the accumulation of 20,000 total flight hours.	Within 90 days after December 16, 2008.
28-23-04-220-001-A00	Inspect Vent Valve harness inside the conduit	Before the accumulation of 20,000 total flight hours.	Within 90 days after December 16, 2008.
28-27-01-220-001-A00	Inspect Electric Fuel Transfer Pump Connector	Before the accumulation of 10,000 total flight hours.	Within 90 days after December 16, 2008.
28-41-03-220-001-A00	Inspect FQIS harness for clamp and wire jacket integrity.	Before the accumulation of 20,000 total flight hours.	Within 90 days after December 16, 2008.
28-41-07-220-001-A00	Inspect VFQIS and Low Level SW Harness for clamp and wire jacket integrity.	Before the accumulation of 20,000 total flight hours.	Within 90 days after December 16, 2008.

(3) Before December 16, 2008, or within 90 days after the effective date of this AD, whichever occurs first, revise the ALS of the ICA to incorporate items 1, 2, and 3 of Section A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MRBR.

(4) After accomplishing the actions specified in paragraphs (f)(2) and (f)(3) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are part of a later revision of Appendix 2 of the MRBR that is approved by the Manager, ANM-116, FAA, or ANAC (or its delegated agent); or unless the inspections, intervals, or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (g) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: The MCAI specifies a compliance date of “Before December 31, 2008” for doing the ALI revisions. We have already issued regulations that require operators to revise their maintenance/inspection programs to address fuel tank safety issues. The compliance date for these regulations is December 16, 2008.

To provide for coordinated implementation of these regulations and this AD, we are using this same compliance date in this AD.

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, 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1405; 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 Brazilian Airworthiness Directive 2007-08-02, effective September 27, 2007; and Sections A2.5.2, Fuel System Limitation Items, and A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MRBR; for related information.

Material Incorporated by Reference

(i) You must use Sections A2.5.2, Fuel System Limitation Items, and A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of EMBRAER EMB135/ERJ140/EMB145 Maintenance Review Board Report MRB-145/1150, Revision 11, dated September 19, 2007, to do the actions required by this AD, unless the AD specifies otherwise. This document contains the following effective pages:

Pages	Revision level	Date
List of Effective Pages: Pages A through L	11	September 19, 2007.

(The revision level of this document is identified only on the title page of the document.)

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Renton, Washington, on June 13, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-13924 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2008-0194; Directorate Identifier 2007-NM-263-AD; Amendment 39-15578; AD 2008-13-15]

RIN 2120-AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB-135BJ Airplanes

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

ACTION: Final rule.

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

Fuel system reassessment, performed according to RBHA-E88/SFAR-88 (Regulamento Brasileiro de Homologacao Aeronautica 88/Special Federal Aviation Regulation No. 88), requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

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

DATES: This AD becomes effective July 30, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of July 30, 2008.

ADDRESSES: You may examine the AD docket on the Internet at <http://www.regulations.gov> or in person at the U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1405; fax (425) 227-1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (NPRM) to amend

14 CFR part 39 to include an AD that would apply to the specified products. That supplemental NPRM was published in the **Federal Register** on May 7, 2008 (73 FR 25606). That supplemental NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Fuel system reassessment, performed according to RBHA-E88/SFAR-88, requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

The corrective action is revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness (ICA) to incorporate new limitations for fuel tank systems. You may obtain further information by examining the MCAI in the AD docket.

Comments

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

Request To Extend Compliance Times/ Include Costs of Unscheduled Inspections

EMBRAER request that we extend the compliance times specified in Table 1 of the supplemental NPRM. EMBRAER states that the compliance time "within 90 days of the effective date of the AD" for airplanes with cycle totals above the thresholds would require airplanes to be removed from service for special inspections and that these inspections would require the fuel tanks to be drained and ventilated prior to inspection. EMBRAER states that requiring unscheduled tank inspections will increase the probability of maintenance error, which will result in an increase in the risk of ignition sources. EMBRAER believes that there is no special risk that justifies the compliance time of within 90 days from the effective date of the AD and suggests that the compliance time be revised to within 5,000 flight hours after the effective date of the AD.

EMBRAER also requests that if the compliance time of within 90 days after the effective date of the AD is retained, we include the costs of unscheduled inspections. EMBRAER notes that the costs of unscheduled inspections would be higher than the estimate given in the promulgation of Special Federal Aviation Regulation No. 88 of between 60 and 330 work-hours for the inspection and between 36 and 96 hours for time out of service.

We agree to extend the "Grace Period" specified in Table 1 of this AD. We have determined that a compliance

time of within 90 days after December 16, 2008 is appropriate and will ensure an acceptable level of safety. We have revised Table 1 of this AD accordingly. We do not agree with EMBRAER to defer the first mandatory inspections to within 5,000 flight hours after the effective date of the AD. In revising the appropriate compliance time for the inspections (i.e., extending the "Grace Period" to within 90 days after December 16, 2008), we considered the urgency associated with the subject unsafe condition, the availability of required parts, and the practical aspect of accomplishing the required inspections within a period of time that corresponds to the normal scheduled maintenance for most affected operators. If an operator decides that more time is needed to comply with this AD, the operator can request an alternative method of compliance (AMOC) in accordance with the provisions of paragraph (g)(1) of the supplemental NPRM.

As stated earlier, we have extended the compliance time and therefore the number of unscheduled inspections should be reduced. However, because operators' schedules vary substantially, it would be nearly impossible for us to accurately calculate all costs associated with unscheduled inspections. Therefore, we have not revised the Costs of Compliance section of this AD to reflect unscheduled inspections.

Explanation of Removal of Certain Tasks

We have determined that tasks 28-41-01-720-001-A00 and 28-46-05-720-001-A00 in Table 1 of the supplemental NPRM are related to a functional check of the component rather than the aircraft system. We have discussed the issue with the manufacturer and with the Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil. ANAC states that it intends to issue an airworthiness directive to address an inspection threshold for these tasks. Therefore, we have removed these tasks from Table 1 of this AD. We might consider further rulemaking once new actions and compliance times for these tasks are identified by ANAC or in the absence of any new action from ANAC, we might consider unilateral rulemaking.

Revision to Costs of Compliance

The number of airplanes on the U.S. Registry has changed since we issued the supplemental NPRM from 49 airplanes to 41 airplanes. We have revised the Costs of Compliance section of this AD accordingly.

Conclusion

We reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect 41 products of U.S. registry. We also estimate that it will take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is \$80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be \$3,280, 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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008-13-15 Empresa Brasileira de Aeronautica S.A. (EMBRAER):
Amendment 39-15578. Docket No.

FAA-2008-0194; Directorate Identifier 2007-NM-263-AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective July 30, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all EMBRAER Model EMB-135BJ airplanes, certificated in any category.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (g) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Subject

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

Reason

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

Fuel system reassessment, performed according to RBHA-E88/SFAR-88, requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

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

Actions and Compliance

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

(1) The term "MPG," as used in this AD, means the EMBRAER Legacy BJ—Maintenance Planning Guide (MPG) MPG-1483, Revision 5, dated March 22, 2007.

(2) Before December 16, 2008, revise the ALS of the ICA to incorporate Section A2.5.2, Fuel System Limitation Items, of Appendix 2 of the MPG. For all tasks identified in Section A2.5.2 of Appendix 2 of the MPG, the initial compliance times start from the applicable times specified in Table 1 of this AD; and the repetitive inspections must be accomplished thereafter at the interval specified in section A2.5.2 of Appendix 2 of the MPG, except as provided by paragraphs (f)(4) and (g) of this AD.

TABLE 1—INITIAL INSPECTIONS

Reference number	Description	Compliance time (whichever occurs later)	
		Threshold	Grace period
28-11-00-720-001-A00	Functionally Check critical bonding integrity of selected conduits inside the wing tank, Fuel Pump and FQIS connectors at tank wall by conductivity measurements.	Before the accumulation of 30,000 total flight hours	Within 90 days after December 16, 2008
28-13-01-720-002-A00	Functionally Check Aft Fuel tank critical bonding integrity of Fuel Pump, FQGS and Low Level SW connectors at tank wall by conductivity measurements.	Before the accumulation of 30,000 total flight hours	Within 90 days after December 16, 2008
28-15-04-720-001-A00	Functionally Check Fwd Fuel tank critical bonding integrity of Fuel Pump, FQGS and Low Level SW connectors at tank wall by conductivity measurements.	Before the accumulation of 30,000 total flight hours	Within 90 days after December 16, 2008
28-21-01-220-001-A00	Inspect Wing Electric Fuel Pump Connector.	Before the accumulation of 10,000 total flight hours	Within 90 days after December 16, 2008D
28-23-03-220-001-A00	Inspect Pilot Valve harness inside the conduit.	Before the accumulation of 20,000 total flight hours	Within 90 days after December 16, 2008
28-23-04-220-001-A00	Inspect Vent Valve harness inside the conduit.	Before the accumulation of 20,000 total flight hours	Within 90 days after December 16, 2008
28-41-03-220-001-A00	Inspect FQIS harness for clamp and wire jacket integrity.	Before the accumulation of 20,000 total flight hours	Within 90 days after December 16, 2008
28-46-02-220-001-A00	Aft Fuel Tank Internal Inspection: FQGS harness and Low Level SW harness for clamp and wire jacket integrity.	Before the accumulation of 20,000 total flight hours	Within 90 days after December 16, 2008
28-46-04-220-001-A00	Fwd Fuel Tank Internal Inspection: FQGS harness and Low Level SW harness for clamp and wire jacket integrity.	Before the accumulation of 20,000 total flight hours	Within 90 days after December 16, 2008

(3) Before December 16, 2008, or within 90 days after the effective date of this AD, whichever occurs first, revise the ALS of the ICA to incorporate items 1, 2, and 3 of Section A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MPG.

(4) After accomplishing the actions specified in paragraphs (f)(2) and (f)(3) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are part of a later revision of Appendix 2 of the MPG that is approved by the Manager, ANM-116, FAA, or ANAC (or its delegated agent); or unless the inspections, intervals, or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (g) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows:

(1) The MCAI specifies a compliance date of “Before December 31, 2008” for doing the ALI revisions. We have already issued regulations that require operators to revise their maintenance/inspection programs to address fuel tank safety issues. The compliance date for these regulations is December 16, 2008. To provide for coordinated implementation of these

regulations and this AD, we are using this same compliance date in this AD.

(2) The MCAI specifies a compliance time of 180 days to revise the ALS of the ICA to incorporate items 1, 2, and 3 of Section A2.4 of Appendix 2 of the MPG. This AD requires a compliance time of 90 days to do this revision. This difference has been coordinated with ANAC.

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, 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1405; 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 Brazilian Airworthiness Directive 2007-08-01, effective September 27, 2007; and Sections A2.5.2, Fuel System Limitation Items, and A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MPG; for related information.

Material Incorporated by Reference

(i) You must use Sections A2.5.2, Fuel System Limitation Items, and A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of EMBRAER Legacy BJ—Maintenance Planning Guide MPG-1483, Revision 5, dated March 22, 2007, to do the actions required by this AD, unless the AD specifies otherwise. This document contains the following effective pages:

Pages	Revision level	Date
List of Effective Pages: Pages A through J	5	March 22, 2007.

(The revision level of this document is identified only on the title page of the document.)

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Renton, Washington, on June 13, 2008.

Ali Bahrami,

*Manager, Transport Airplane Directorate,
Aircraft Certification Service.*

[FR Doc. E8-13926 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2008-0493 Directorate Identifier 2008-CE-028-AD; Amendment 39-15581; AD 2008-13-18]

RIN 2120-AA64

Airworthiness Directives; Pilatus Aircraft Ltd. PC-6 Series Airplanes

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

ACTION: Final rule.

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

This Airworthiness Directive (AD) is prompted due to a potential problem with the tail landing gear locking mechanism of PC-6 series aircraft.

Investigation, carried out after an incident report, determined that both screws of the tail-wheel locking mechanism had ruptured, rendering the mechanism inoperative.

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

DATES: This AD becomes effective July 30, 2008.

On July 30, 2008, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: You may examine the AD docket on the Internet at <http://www.regulations.gov> or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4059; fax: (816) 329-4090.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on May 1, 2008 (73 FR 23993). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

This Airworthiness Directive (AD) is prompted due to a potential problem with the tail landing gear locking mechanism of PC-6 series aircraft.

Investigation, carried out after an incident report, determined that both screws of the tail-wheel locking mechanism had ruptured, rendering the mechanism inoperative.

In order to address this situation, the present AD requires you replace the two bolts of the tail-wheel locking mechanism with new ones, having higher shear strength, and install a warning placard on the tail-wheel mudguard.

The actions specified by this AD are intended to prevent, on take-off or landing runs, possible hazards associated with loss of directional control.

Comments

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

received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this AD will affect 50 products of U.S. registry. We also estimate that it will take about 3 work-hours per product to comply with basic requirements of this AD. The average labor rate is \$80 per work-hour. Required parts will cost about \$120 per product.

Based on these figures, we estimate the cost of this AD to the U.S. operators to be \$18,000 or \$360 per product.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for

safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008-13-18 Pilatus Aircraft Ltd.:
Amendment 39-15581; Docket No. FAA-2008-0493; Directorate Identifier 2008-CE-028-AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective July 30, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Models PC-6, PC-6-H1, PC-6-H2, PC-6/350, PC-6/350-H1, PC-6/350-H2, PC-6/A, PC-6/A-H1, PC-6/A-H2, PC-6/B-H2, PC-6/B1-H2, PC-6/B2-H2, PC-6/B2-H4, PC-6/C-H2, and PC-6/C1-H2 airplanes, all serial numbers, certificated in any category.

Note 1: These airplanes may also be identified as Fairchild Republic Company PC-6 airplanes, Fairchild Heli Porter PC-6 airplanes, or Fairchild-Hiller Corporation PC-6 airplanes.

Subject

(d) Air Transport Association of America (ATA) Code 32: Landing Gear.

Reason

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

"This Airworthiness Directive (AD) is prompted due to a potential problem with the tail landing gear locking mechanism of PC-6 series aircraft.

Investigation, carried out after an incident report, determined that both screws of the tail-wheel locking mechanism had ruptured, rendering the mechanism inoperative.

In order to address this situation, the present AD requires you replace the two bolts of the tail-wheel locking mechanism with new ones, having higher shear strength, and install a warning placard on the tail-wheel mudguard.

The actions specified by this AD are intended to prevent, on take-off or landing runs, possible hazards associated with loss of directional control."

Actions and Compliance

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

(1) Within the next 100 hours time-in-service after July 30, 2008 (the effective date of this AD) or within the next 12 months after July 30, 2008 (the effective date of this AD), whichever occurs first:

(i) Replace the screws and nuts that attach the locking plate to the locking lever of the tail-wheel locking mechanism with steels screws and nuts following Pilatus Aircraft Ltd. Pilatus PC-6 Service Bulletin, 32-001, dated August 8, 2006.

(ii) Install the placard on the tail-wheel mudguard following Pilatus Aircraft Ltd. Pilatus PC-6 Service Bulletin, 32-001, dated August 8, 2006.

(2) As of July 30, 2008 (the effective date of this AD) do not install on any of the affected airplanes locking lever assemblies part number (P/N) 6403.0094.00 or P/N 114.45.06.077 or tail landing gear assemblies P/N 6403.0067.xx or P/N 114.45.06.050

unless they have been modified following the Accomplishment Instructions of Pilatus Aircraft Ltd. Pilatus PC-6 Service Bulletin, 32-001, dated August 8, 2006.

Note 2: The letter "x" in P/N 6403.0067.xx stands for a numeral varying from 0 to 9.

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 Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4059; fax: (816) 329-4090. 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. 2008-0070, dated April 15, 2008; and Pilatus Aircraft Ltd. Pilatus PC-6 Service Bulletin 32-001, dated August 8, 2006, for related information.

Material Incorporated by Reference

(i) You must use Pilatus Aircraft Ltd. Pilatus PC-6 Service Bulletin, 32-001, dated August 8, 2006, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Pilatus Aircraft Ltd., Customer Liaison Manager, CH-6371 STANS, Switzerland; telephone: +41 (0)41 619 65 80; fax: +41 (0)41 619 65 76; email: fodermatt@pilatus-aircraft.com.

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this

material at NARA, call 202-741-6030, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Kansas City, Missouri, on June 13, 2008.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-14106 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

15 CFR Part 296

[Docket No.: 071106659-8716-02]

RIN 0693-AB59

Technology Innovation Program

AGENCY: National Institute of Standards and Technology, United States Department of Commerce.

ACTION: Final rule.

SUMMARY: The Deputy Director of the National Institute of Standards and Technology (NIST), United States Department of Commerce, issues a final rule to implement the Technology Innovation Program (TIP). This rule prescribes the policies and procedures for the award of financial assistance (grants and/or cooperative agreements) under TIP.

DATES: This rule is effective on June 25, 2008.

FOR FURTHER INFORMATION CONTACT: Barbara Lambis, National Institute of Standards and Technology, Mail Stop 4700, Gaithersburg, MD 20899-8600, telephone number (301) 975-4447, e-mail barbara.lambis@nist.gov.

Background

The America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science (COMPETES) Act, Public Law 110-69, was enacted on August 9, 2007, to invest in innovation through research and development and to improve the competitiveness of the United States. Section 3012 of the COMPETES Act established TIP for the purpose of assisting United States businesses and institutions of higher education or other organizations, such as national laboratories and nonprofit research institutions, to support, promote, and accelerate innovation in the United States through high-risk, high-reward research in areas of critical national need. High-risk, high-reward research is research that has the potential for

yielding transformational results with far-ranging or wide-ranging implications; addresses areas of critical national need that support, promote, and accelerate innovation in the United States and is within NIST's areas of technical competence; and is too novel or spans too diverse a range of disciplines to fare well in the traditional peer review process. Section 3012(f) of the America COMPETES Act requires the NIST Director to promulgate regulations implementing the TIP.

NIST published a notice of proposed rulemaking with a request for public comments in the **Federal Register** on March 7, 2008 (46 FR 12305) to seek public comment on proposed regulations implementing TIP, which included policies and procedures for the award of financial assistance (grants and/or cooperative agreements) under TIP. The notice specifically sought comment on how NIST should determine if "reasonable and thorough efforts have been made to secure funding from alternative funding sources and no other alternative funding sources are reasonably available." In addition, the **Federal Register** notice informed the public that NIST was revising the heading of Subchapter K of its regulations to accurately reflect the current contents of that subchapter.

The comment period closed on April 21, 2008.

In response to the comment received regarding the ownership of invention rights in the course of a bankruptcy or dissolution, and also to correct the following typographical errors and inconsistencies and clarify terminology found in the proposed rule, NIST makes the following changes from the proposed rule:

In the Table of Contents, the titles of section 296.11 and the title of Subpart C were revised to be consistent with the titles of that section and subpart within the body of the rule. The title of section 296.20 in both the Table of Contents and the body of the rule was changed to be consistent with the capitalization format used in the remainder of the rule.

In paragraphs 296.2(f) and (z), the definitions of *critical national need* and *societal challenge*, respectively, the word "demands" was changed to "justifies" to better characterize the government's role in responding to societal challenges.

In paragraph 296.4(c), the second sentence was corrected to reflect the fact that the referenced Procurement Standards are in part 14 of subtitle A of title 15.

Paragraph 296.11(b)(4) was revised to clarify under what situations that paragraph applies.

In section 296.22, the order of the award criteria found in paragraphs (d) and (e) was revised to be consistent with the order of the evaluation criteria found in section 296.21.

In paragraph 296.21(b)(1), the first sentence was corrected by adding the word "knowledge" after "United States science and technology" to be consistent with newly redesignated paragraph 296.22(e).

Summary of Public Comments Received by NIST in Response to the May 7, 2008, Proposed Regulations, and NIST's Response to Those Comments

NIST received five responses to the request for comments. Two responses were from for-profit companies. One response was from a United States Senator. One response was from an individual. One response was from an industry association. A detailed analysis of the comments follows.

General Comments

Comment: One commenter expressed personal views about NIST.

Response: This comment is outside the scope of this rulemaking.

Comment: One commenter stated that they found it difficult to understand how NIST staff will identify areas that demand government attention. Another commenter highlighted their industry's commitment to high-risk, high-reward research, including a few examples of their work to transform some of the Nation's major societal challenges. The commenter further stated that the examples provided amplify that their specific industry should be considered as an area of critical national need.

Response: As indicated in the March 7, 2008 **Federal Register** notice, in determining which areas of critical national need will be addressed in a competition, TIP may solicit input from within NIST, from the TIP Advisory Board, and from the public. TIP may engage experts in scientific and technology policy to ensure that the areas of critical national need that will be considered are those that entail significant societal challenges that are not already being addressed by others and could be addressed through high-risk, high-reward research. Specific societal challenges within selected areas of critical national need will be the focus of TIP funding.

Comment: One commenter raised a question about a business review indicating that the new legislation appears to remove the impetus and need to commercialize to capture the economic value potentially created.

Response: The TIP legislation does not include a commercialization

element; therefore, business review is not required.

Comment: One commenter stated that a representative of their industry should be on the TIP Advisory Board.

Response: This comment is outside the scope of this rulemaking.

Comment: One commenter recommended that NIST clarify the ownership of invention rights in the course of a bankruptcy or dissolution. Specifically, the commenter suggested that in the course of a bankruptcy or dissolution of a joint venture, the last participant in a joint venture would determine whether to retain ownership or transfer a patent for an invention developed with TIP funds. The commenter provided an example where a company in bankruptcy could continue to exist and run its day-to-day operations and therefore, should be able to opt to retain or transfer such a patent for a TIP funded invention.

Response: The TIP statute requires that intellectual property developed by a joint venture from assistance provided by TIP "shall not be transferred or passed, except to a participant in the joint venture, until the expiration of the first patent obtained in connection with such intellectual property." (15 U.S.C. 278n(e)(1)). Section 296.11(b)(4) of the TIP rule contemplates the situation where all members of a joint venture cease to exist prior to the expiration of the first such patent. NIST has revised section 296.11(b)(4) of the rule to clarify that whenever the last existing participant in a joint venture ceases to exist prior to the expiration of the first patent obtained in connection with intellectual property developed by a joint venture from assistance under the TIP, title to any such patent must be transferred or passed to a United States entity that can commercialize the technology in a timely fashion.

Comment: One commenter recommended that NIST clarify that contractors and subcontractors who have contributed to an invention should have ownership rights to the invention if contractually agreed upon by the participants in the joint venture.

Response: The TIP statute specifies: "Title to any intellectual property developed by a joint venture from assistance provided under this section may vest in any participant in the joint venture, as agreed by the members of the joint venture, notwithstanding section 202(a) and (b) of title 35, United States Code." (15 U.S.C. 278n(e)(1)). This section of the TIP statute clearly means that the members of the joint venture must decide and set forth in their joint venture agreement how title to all intellectual property that arises

from the project, including intellectual property developed by the members themselves and intellectual property created by contractors, will be owned. The decisions of the joint venture will be implemented through the contracts.

Comments on the Selection Process

Comment: Two commenters recommended that the reviewers demonstrate proven technical and industry sector expertise in the research proposed in order to effectively award scarce funds to appropriate and deserving applicants.

Response: NIST intends to use qualified reviewers with requisite in-depth knowledge to evaluate proposals.

Comment: One commenter recommended that their specific industry be represented on the TIP Evaluation Panel and that the Evaluation Panel members have in-depth knowledge of their specific private industry sector.

Response: The composition and requisite expertise of the TIP Evaluation Panel will depend on the area(s) of critical national need selected for each competition. NIST intends to use qualified individuals to serve on the Evaluation Panel with requisite in-depth knowledge to evaluate proposals.

Comment: One commenter asked what makes one eligible to participate in the Evaluation Panel and what is the overall make-up.

Response: Since the Evaluation Panel(s) will be providing funding recommendations to the Selecting Official, to ensure compliance with the Federal Advisory Committee Act (5 U.S.C. App.), all members of the Evaluation Panel(s) will be federal employees. The Evaluation Panel may request individual technical reviews of proposals. The technical reviews will generally be conducted by federal employees. As stated in the response to the previous comment, the composition and requisite expertise of the TIP Evaluation Panel will depend on the area(s) of critical national need selected for each competition. NIST intends to use qualified individuals to serve on the Evaluation Panel with requisite in-depth knowledge to evaluate proposals. The make-up of the Evaluation Panel will be discussed in the notice announcing a competition and request for proposals.

Comments on the Evaluation Criteria

Comment: One commenter questioned, how is a proposing entity to provide a 50% matching, when a major premise of the process is that no alternative funding is available to support these developments? The commenter further stated that while a

number of states might respond to this by creating specific matching funds for their companies, it could create an unnecessary burden on numerous underserved regions and benefit those that already have significant technology-based business infrastructures.

Response: The 50% cost sharing requirement is statutorily mandated and cannot be changed in the rule.

Comment: One commenter indicated that meeting "the second 50% of the evaluation criteria relating to demonstrating the potential magnitude of transformational results upon the Nation's capabilities in an area, the mechanism and timing for the translational effects to be useful to the Nation, and demonstrating the capacity and commitment of each award participant to enable or advance the transformation seems somewhat improbable and potentially impossible."

Response: TIP was established to fund research and development projects that will address areas of critical national need that demand government attention because the magnitude of the problem is large and the societal challenges that need to be overcome are not being addressed, but could be addressed through high-risk, high-reward research. NIST developed the evaluation criteria contained in the rule to ensure that projects funded by TIP meet the requirements sets forth in the authorizing legislation. The TIP Proposal Preparation Kit will provide guidance to potential proposers on how to address the TIP evaluation criteria.

Comments on How NIST Should Determine if "Reasonable and Thorough Efforts Have Been Made To Secure Funding From Alternative Funding Sources and No Other Alternative Funding Sources Are Reasonably Available"

Comment: One commenter suggested that any criteria set forth regarding the demonstration that reasonable and thorough efforts have been made to secure external funding "does not require exchange of detailed information that would be deemed to be confidential by the alternative funding sources." The commenter indicated that in some cases, funding sources may deem that even the acknowledgement of consideration of funding is confidential and offerors may not be able to disclose details about the funding source and would therefore not meet award criteria. The commenter requested that the government consider the level of information that can be reasonably provided by the offeror depending upon the funding source as acceptable.

Response: To the extent permitted by law, including the Freedom of Information Act (5 U.S.C. 552), NIST will protect confidential/proprietary information about business operations possessed by any organization and provided to NIST. Proposals are likely to be less competitive if significant details are omitted due to an organization's reluctance to reveal confidential/proprietary information.

Comment: One commenter suggested that the regulations require applicants to provide evidence that their application has been rejected by at least two funding sources, including one private source, before they can be considered for federal funding, and that the application submitted to NIST must be identical to the application rejected twice previously. The commenter further suggests that applicants must demonstrate that they do not have the necessary financial resources to conduct the research themselves.

Response: Due to the variety of types of organizations that may apply to TIP and the various types of funds available to different types of organizations and in different sectors, setting a minimum number of unsuccessful attempts to obtain funding seems to be inappropriate. Rather, NIST will require that each proposer, including each member of a joint venture, submit evidence documenting all of their unsuccessful attempts to obtain funding for the work described in the proposal, including internal funding, funding from external private sources, and other funding from government sources (federal, state and local). Based on all relevant factors, NIST will determine whether the unsuccessful attempts to obtain funding documented in each proposal are reasonable and thorough.

Comment: One commenter recommended that NIST consider an applicant's previous efforts to raise funds, such as through public and private financing, to demonstrate "reasonable and thorough" efforts to secure alternative funds and to show that no other alternative sources are available. The commenter further recommended that NIST should examine the rationale behind a non-lead product failing to receive funding, which would allow companies to satisfy the requirement that no other alternative sources are reasonably available. The commenter provided the example that a company could submit as part of their proposal an attestation by the company's board, which would usually include key investors. Such attestation would state that the funds raised are for the more advanced lead products and

that there was no alternative in the budget for the proposed project.

Response: NIST will consider information provided in each proposal received to address the award criteria on a case by case basis. It would be premature to speculate on what documentation an applicant will submit to address the applicant's efforts to secure alternative funding and whether such documentation will be acceptable. The example provided by the commenter could be considered along with the documentary evidence of any efforts to secure alternative funding.

Additional Information

Executive Order 12866

This rulemaking is a significant regulatory action under sections 3(f)(3) and 3(f)(4) of Executive Order 12866, as it materially alters the budgetary impact of a grant program and raises novel policy issues. This rulemaking, however, is not an "economically significant" regulatory action under section 3(f)(1) of the Executive Order, as it does not have an effect on the economy of \$100 million or more in any one year, and it does not have a material adverse effect on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

Executive Order 13132

This rule does not contain policies with Federalism implications as defined in Executive Order 13132.

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(a)(2), all matters related to agency management or personnel or to public property, loans, grants, benefits, or contracts are exempt from the rulemaking requirements of 5 U.S.C. 553, including the 30-day delay in effectiveness. This rule prescribes the policies and procedures for the award of financial assistance (grants and/or cooperative agreements) under the Technology Innovation Program. Because this rule concerns a grant program, this rule is not subject to the 30-day delay in effectiveness. Therefore, this final rule is made effective immediately upon publication.

Regulatory Flexibility Act

Because notice and comment are not required under 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. As such, a regulatory flexibility analysis is not required, and none has been prepared.

Paperwork Reduction Act

Notwithstanding any other provision of the law, no person is required to, nor shall any person be subject to 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 Office of Management and Budget (OMB) Control Number.

This rule does not contain collection of information requirements subject to review and approval by OMB under the Paperwork Reduction Act (PRA). The TIP Proposal Preparation Kit, which contains all necessary forms and information requirements, was submitted to OMB and approved. The OMB Control Number for the information collection requirements is 0693-0050 and will be published in all **Federal Register** notices soliciting proposals under the Program.

National Environmental Policy Act

This rule will not significantly affect the quality of the human environment. Therefore, an environmental assessment or Environmental Impact Statement is not required to be prepared under the National Environmental Policy Act of 1969.

List of Subjects in 15 CFR Part 296

Business and industry; Grant programs—science and technology; Inventions and patents; Reporting and recordkeeping requirements; Research; Science and technology.

Dated: June 16, 2008.

James M. Turner,
Deputy Director.

■ For the reasons set forth in the preamble, Title 15 of the Code of Federal Regulations is amended as follows:

Subchapter K—NIST Extramural Programs

- 1. The heading of chapter II, subchapter K is revised to read as set forth above.
- 2. In 15 CFR chapter II, subchapter K, add a new part 296 as follows:

PART 296—TECHNOLOGY INNOVATION PROGRAM

Subpart A—General

- Sec.
- 296.1 Purpose.
 - 296.2 Definitions.
 - 296.3 Types of assistance available.
 - 296.4 Limitations on assistance.
 - 296.5 Eligibility requirements for companies and joint ventures.
 - 296.6 Valuation of transfers.
 - 296.7 Joint venture registration.
 - 296.8 Joint venture agreement.

- 296.9 Activities not permitted for joint ventures.
- 296.10 Third party in-kind contribution of research services.
- 296.11 Intellectual property rights and procedures.
- 296.12 Reporting and auditing requirements.

Subpart B—The Competition Process

- 296.20 The selection process.
- 296.21 Evaluation criteria.
- 296.22 Award criteria.

Subpart C—Dissemination of Program Results

- 296.30 Monitoring and evaluation.
- 296.31 Dissemination of results.
- 296.32 Technical and educational services.
- 296.33 Annual report.

Authority: 15 U.S.C. 278n (Pub. L. 110–69 section 3012)

Subpart A—General

§ 296.1 Purpose.

(a) The purpose of the Technology Innovation Program (TIP) is to assist United States businesses and institutions of higher education or other organizations, such as national laboratories and nonprofit research institutes, to support, promote, and accelerate innovation in the United States through high-risk, high-reward research in areas of critical national need within NIST's areas of technical competence.

(b) The rules in this part prescribe policies and procedures for the award and administration of financial assistance (grants and/or cooperative agreements) under the TIP. While the TIP is authorized to enter into grants, cooperative agreements, and contracts to carry out the TIP mission, the rules in this part address only the award of grants and/or cooperative agreements.

§ 296.2 Definitions.

Award means Federal financial assistance made under a grant or cooperative agreement.

Business or company means a for-profit organization, including sole proprietors, partnerships, limited liability companies (LLCs), and corporations.

Contract means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

Contractor means the legal entity to which a contract is made and which is accountable to the recipient, subrecipient, or contractor making the contract for the use of the funds provided.

Cooperative agreement refers to a Federal assistance instrument used whenever the principal purpose of the

relationship between the Federal government and the recipient is to transfer something of value, such as money, property, or services to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the Federal government; and substantial involvement is anticipated between the Federal government and the recipient during performance of the contemplated activity.

Critical national need means an area that justifies government attention because the magnitude of the problem is large and the societal challenges that need to be overcome are not being addressed, but could be addressed through high-risk, high-reward research.

Direct costs means costs that can be identified readily with activities carried out in support of a particular final objective. A cost may not be allocated to an award as a direct cost if any other cost incurred for the same purpose in like circumstances has been assigned to an award as an indirect cost. Because of the diverse characteristics and accounting practices of different organizations, it is not possible to specify the types of costs which may be classified as direct costs in all situations. However, typical direct costs could include salaries of personnel working on the TIP project, travel, equipment, materials and supplies, subcontracts, and other costs not categorized in the preceding examples. NIST shall determine the allowability of direct costs in accordance with applicable Federal cost principles.

Director means the Director of the National Institute of Standards and Technology (NIST).

Eligible company means a small-sized or medium-sized business or company that satisfies the ownership and other requirements stated in this part.

Grant means a Federal assistance instrument used whenever the principal purpose of the relationship between the Federal government and the recipient is to transfer something of value, such as money, property, or services to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the Federal government; and no substantial involvement is anticipated between the Federal government and the recipient during performance of the contemplated activity.

High-risk, high-reward research means research that:

(1) Has the potential for yielding transformational results with far-ranging or wide-ranging implications;

(2) Addresses areas of critical national need that support, promote, and accelerate innovation in the United States and is within NIST's areas of technical competence; and

(3) Is too novel or spans too diverse a range of disciplines to fare well in the traditional peer-review process.

Indirect costs means those costs incurred for common or joint objectives that cannot be readily identified with activities carried out in support of a particular final objective. A cost may not be allocated to an award as an indirect cost if any other cost incurred for the same purpose in like circumstances has been assigned to an award as a direct cost. Because of diverse characteristics and accounting practices it is not possible to specify the types of costs which may be classified as indirect costs in all situations. However, typical examples of indirect costs include general administration expenses, such as the salaries and expenses of executive officers, personnel administration, maintenance, library expenses, and accounting. NIST shall determine the allowability of indirect costs in accordance with applicable Federal cost principles.

Institution of higher education means an educational institution in any State that—(1) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(2) Is legally authorized within such State to provide a program of education beyond secondary education;

(3) Provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;

(4) Is a public or other nonprofit institution; and

(5) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary of Education for the granting of preaccreditation status, and the Secretary of Education has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time (20 U.S.C. 1001). For the purpose of this paragraph (1) only,

the term *State* includes, in addition to the several States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Freely Associated States. The term *Freely Associated States* means the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

Intellectual property means an invention patentable under title 35, United States Code, or any patent on such an invention, or any work for which copyright protection is available under title 17, United States Code.

Joint venture means a business arrangement that:

(1) Includes either:

(i) At least two separately owned companies that are both substantially involved in the project and both of which are contributing to the cost-sharing required under the TIP statute, with the lead company of the joint venture being an eligible company; or

(ii) At least one eligible company and one institution of higher education or other organization, such as a national laboratory, governmental laboratory (not including NIST), or nonprofit research institute, that are both substantially involved in the project and both of which are contributing to the cost-sharing required under the TIP statute, with the lead entity of the joint venture being either the eligible company or the institution of higher education; and

(2) May include additional for-profit companies, institutions of higher education, and other organizations, such as national laboratories and nonprofit research institutes, that may or may not contribute non-Federal funds to the project.

Large-sized business means any business, including any parent company plus related subsidiaries, having annual revenues in excess of the amount published by the Program in the relevant **Federal Register** notice of availability of funds in accordance with § 296.20. In establishing this amount, the Program may consider the dollar value of the total revenues of the 1000th company in Fortune magazine's Fortune 1000 listing.

Matching funds or *cost sharing* means that portion of project costs not borne by the Federal government. Sources of revenue to satisfy the required cost share include cash and third party in-kind contributions. Cash may be contributed by any non-Federal source, including but not limited to recipients, state and local governments, companies, and nonprofits (except contractors

working on a TIP project). Third party in-kind contributions include but are not limited to equipment, research tools, software, supplies, and/or services. The value of in-kind contributions shall be determined in accordance with § 14.23 of this title and will be prorated according to the share of total use dedicated to the TIP project. NIST shall determine the allowability of matching share costs in accordance with applicable Federal cost principles.

Medium-sized business means any business that does not qualify as a *small-sized business* or a *large-sized business* under the definitions in this section.

Member means any entity that is identified as a joint venture member in the award and is a signatory on the joint venture agreement required by § 296.8.

Nonprofit research institute means a nonprofit research and development entity or association organized under the laws of any state for the purpose of carrying out research and development.

Participant means any entity that is identified as a recipient, subrecipient, or contractor on an award to a joint venture under the Program.

Person will be deemed to include corporations and associations existing under or authorized by the laws of the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Program or *TIP* means the Technology Innovation Program.

Recipient means an organization receiving an award directly from NIST under the Program.

Small-sized business means a business that is independently owned and operated, is organized for profit, has fewer than 500 employees, and meets the other requirements found in 13 CFR part 121.

Societal challenge means a problem or issue confronted by society that when not addressed could negatively affect the overall function and quality of life of the Nation, and as such justifies government attention.

State, except for the limited purpose described in paragraph (l) of this section, means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under the United States Housing Act of 1937.

Subaward means an award of financial assistance made under an award by a recipient to an eligible subrecipient or by a subrecipient to a

lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the legal agreement is called a contract, but does not include procurement of goods and services.

Subrecipient means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided.

Transformational results means potential project outcomes that enable disruptive changes over and above current methods and strategies. Transformational results have the potential to radically improve our understanding of systems and technologies, challenging the status quo of research approaches and applications.

United States owned company means a for-profit organization, including sole proprietors, partnerships, limited liability companies (LLCs), and corporations, that has a majority ownership by individuals who are citizens of the United States.

§ 296.3 Types of assistance available.

Subject to the limitations of this section and § 296.4, assistance under this part is available to eligible companies or joint ventures that request either of the following:

(a) Single Company Awards: No award given to a single company shall exceed a total of \$3,000,000 over a total of 3 years.

(b) Joint Venture Awards: No award given to a joint venture shall exceed a total of \$9,000,000 over a total of 5 years.

§ 296.4 Limitations on assistance.

(a) The Federal share of a project funded under the Program shall not be more than 50 percent of total project costs.

(b) Federal funds awarded under this Program may be used only for direct costs and not for indirect costs, profits, or management fees.

(c) No large-sized business may receive funding as a recipient or subrecipient of an award under the Program. When procured in accordance with procedures established under the Procurement Standards required by part 14 of Subtitle A of this title, recipients may procure supplies and other expendable property, equipment, real property and other services from any party, including large-sized businesses.

(d) If a project ends before the completion of the period for which an award has been made, after all allowable costs have been paid and appropriate audits conducted, the unspent balance

of the Federal funds shall be returned by the recipient to the Program.

§ 296.5 Eligibility requirements for companies and joint ventures.

Companies and joint ventures must be eligible in order to receive funding under the Program and must remain eligible throughout the life of their awards.

(a) A company shall be eligible to receive an award from the Program only if:

(1) The company is a small-sized or medium-sized business that is incorporated in the United States and does a majority of its business in the United States; and

(2) Either

(i) The company is a United States owned company; or

(ii) The company is owned by a parent company incorporated in another country and the Program finds that:

(A) The company's participation in TIP would be in the economic interest of the United States, as evidenced by investments in the United States in research, development, and manufacturing (including, for example, the manufacture of major components or subassemblies in the United States); significant contributions to employment in the United States; and agreement with respect to any technology arising from assistance provided by the Program to promote the manufacture within the United States of products resulting from that technology, and to procure parts and materials from competitive United States suppliers; and

(B) That the parent company is incorporated in a country which affords to United States-owned companies opportunities, comparable to those afforded to any other company, to participate in any joint venture similar to those authorized to receive funding under the Program; affords to United States-owned companies local investment opportunities comparable to those afforded to any other company; and affords adequate and effective protection for the intellectual property rights of United States-owned companies.

(b) NIST may suspend a company or joint venture from continued assistance if it determines that the company, the country of incorporation of the company or a parent company, or any member of the joint venture has failed to satisfy any of the criteria contained in paragraph (a) of this section, and that it is in the national interest of the United States to do so.

(c) Members of joint ventures that are companies must be incorporated in the

United States and do a majority of their business in the United States and must comply with the requirements of paragraph (a)(2) of this section. For a joint venture to be eligible for assistance, it must be comprised as defined in § 296.2.

§ 296.6 Valuation of transfers.

(a) This section applies to transfers of goods, including computer software, and services provided by the transferor related to the maintenance of those goods, when those goods or services are transferred from one joint venture member to another separately-owned joint venture member.

(b) The greater amount of the actual cost of the transferred goods and services as determined in accordance with applicable Federal cost principles, or 75 percent of the best customer price of the transferred goods and services, shall be deemed to be allowable costs. Best customer price means the GSA schedule price, or if such price is unavailable, the lowest price at which a sale was made during the last twelve months prior to the transfer of the particular good or service.

§ 296.7 Joint venture registration.

Joint ventures selected for assistance under the Program must notify the Department of Justice and the Federal Trade Commission under section 6 of the National Cooperative Research Act of 1984, as amended (15 U.S.C. 4305). No funds will be released prior to receipt by the Program of copies of such notification.

§ 296.8 Joint venture agreement.

NIST shall not issue a TIP award to a joint venture and no costs shall be incurred under a TIP project by the joint venture members until such time as a joint venture agreement has been executed by all of the joint venture members and approved by NIST.

§ 296.9 Activities not permitted for joint ventures.

The following activities are not permissible for TIP-funded joint ventures:

(a) Exchanging information among competitors relating to costs, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required to conduct the research and development that is the purpose of such venture;

(b) Entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the marketing, distribution, or provision by any person who is a party to such joint venture of any product, process, or service, other than the

distribution among the parties to such venture, in accordance with such venture, of a product, process, or service produced by such venture, the marketing of proprietary information, such as patents and trade secrets, developed through such venture, or the licensing, conveying, or transferring of intellectual property, such as patents and trade secrets, developed through such venture; and

(c) Entering into any agreement or engaging in any other conduct:

(1) To restrict or require the sale, licensing, or sharing of inventions or developments not developed through such venture; or

(2) To restrict or require participation by such party in other research and development activities, that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture.

§ 296.10 Third party in-kind contribution of research services.

NIST shall not issue a TIP award to a single recipient or joint venture whose proposed budget includes the use of third party in-kind contribution of research as cost share, and no costs shall be incurred under such a TIP project, until such time as an agreement between the recipient and the third party contributor of in-kind research has been executed by both parties and approved by NIST.

§ 296.11 Intellectual property rights and procedures.

(a) *Rights in Data.* Except as otherwise specifically provided for in an award, authors may copyright any work that is subject to copyright and was developed under an award. When claim is made to copyright, the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Federal government sponsorship shall be affixed to the work when and if the work is delivered to the Federal government, is published, or is deposited for registration as a published work in the U.S. Copyright Office. The copyright owner shall grant to the Federal government, and others acting on its behalf, a paid up, nonexclusive, irrevocable, worldwide license for all such works to reproduce, publish, or otherwise use the work for Federal purposes.

(b) *Invention Rights.*

(1) Ownership of inventions developed from assistance provided by the Program under § 296.3(a) shall be governed by the requirements of chapter 18 of title 35 of the United States Code.

(2) Ownership of inventions developed from assistance provided by

the Program under § 296.3(b) may vest in any participant in the joint venture, as agreed by the members of the joint venture, notwithstanding section 202(a) and (b) of title 35, United States Code. Title to any such invention shall not be transferred or passed, except to a participant in the joint venture, until the expiration of the first patent obtained in connection with such invention. In accordance with § 296.8, joint ventures will provide to NIST a copy of their written agreement that defines the disposition of ownership rights among the participants of the joint venture, including the principles governing the disposition of intellectual property developed by contractors and subcontractors, as appropriate, and that complies with these regulations.

(3) The United States reserves a nonexclusive, nontransferable, irrevocable paid-up license, to practice or have practiced for or on behalf of the United States any inventions developed using assistance under this section, but shall not in the exercise of such license publicly disclose proprietary information related to the license. Nothing in this subsection shall be construed to prohibit the licensing to any company of intellectual property rights arising from assistance provided under this section.

(4) Should the last existing participant in a joint venture cease to exist prior to the expiration of the first patent obtained in connection with any invention developed from assistance provided under the Program, title to such patent must be transferred or passed to a United States entity that can commercialize the technology in a timely fashion.

(c) *Patent Procedures.* Each award by the Program will include provisions assuring the retention of a governmental use license in each disclosed invention, and the government's retention of march-in rights. In addition, each award by the Program will contain procedures regarding reporting of subject inventions by the recipient through the Interagency Edison extramural invention reporting system (iEdison), including the subject inventions of recipients, including members of the joint venture (if applicable), subrecipients, and contractors of the recipient or joint venture members.

§ 296.12 Reporting and auditing requirements.

Each award by the Program shall contain procedures regarding technical, business, and financial reporting and auditing requirements to ensure that awards are being used in accordance with the Program's objectives and

applicable Federal cost principles. The purpose of the technical reporting is to monitor "best effort" progress toward overall project goals. The purpose of the business reporting is to monitor project performance against the Program's mission as required by the Government Performance and Results Act (GPRA) mandate for program evaluation. The purpose of the financial reporting is to monitor the status of project funds. The audit standards to be applied to TIP awards are the "Government Auditing Standards" (GAS) issued by the Comptroller General of the United States and any Program-specific audit guidelines or requirements prescribed in the award terms and conditions. To implement paragraph (f) of § 14.25 of this title, audit standards and award terms may stipulate that "total Federal and non-Federal funds authorized by the Grants Officer" means the total Federal and non-Federal funds authorized by the Grants Officer annually.

Subpart B—The Competition Process

§ 296.20 The selection process.

(a) To begin a competition, the Program will solicit proposals through an announcement in the **Federal Register**, which will contain information regarding that competition, including the areas of critical national need that proposals must address. An Evaluation Panel(s) will be established to evaluate proposals and ensure that all proposals receive careful consideration.

(b) (1) A preliminary review will be conducted to determine whether the proposal:

- (i) Is in accordance with § 296.3;
- (ii) Complies with either paragraph (a) or paragraph (c) of § 296.5;
- (iii) Addresses the award criteria of paragraphs (a) through (c) of § 296.22;
- (iv) Was submitted to a previous TIP competition and if so, has been substantially revised; and
- (v) Is complete.

(2) Complete proposals that meet the preliminary review requirements described in paragraphs (b)(1)(i) through (v) of this section will be considered further. Proposals that are incomplete or do not meet any one of these preliminary review requirements will normally be eliminated.

(c) The Evaluation Panel(s) will then conduct a multi-disciplinary peer review of the remaining proposals based on the evaluation criteria listed in § 296.21 and the award criteria listed in § 296.22. In some cases NIST may conduct oral reviews and/or site visits. The Evaluation Panel(s) will present funding recommendations to the

Selecting Official in rank order for further consideration. The Evaluation Panel(s) will not recommend for further consideration any proposal determined not to meet all of the eligibility and award requirements of this part and the **Federal Register** notice announcing the availability of funds.

(d) In making final selections, the Selecting Official will select funding recipients based upon the Evaluation Panel's rank order of the proposals and the following selection factors: assuring an appropriate distribution of funds among technologies and their applications, availability of funds, and/or Program priorities. The selection of proposals by the Selecting Official is final.

(e) NIST reserves the right to negotiate the cost and scope of the proposed work with the proposers that have been selected to receive awards. This may include requesting that the proposer delete from the scope of work a particular task that is deemed by NIST to be inappropriate for support against the evaluation criteria. NIST also reserves the right to reject a proposal where information is uncovered that raises a reasonable doubt as to the responsibility of the proposer. The final approval of selected proposals and award of assistance will be made by the NIST Grants Officer as described in the **Federal Register** notice announcing the competition. The award decision of the NIST Grants Officer is final.

§ 296.21 Evaluation criteria.

A proposal must be determined to be competitive against the Evaluation Criteria set forth in this section to receive funding under the Program. Additionally, no proposal will be funded unless the Program determines that it has scientific and technical merit and that the proposed research has strong potential for meeting identified areas of critical national need.

(a)(1) The proposer(s) adequately addresses the scientific and technical merit and how the research may result in intellectual property vesting in a United States entity including evidence that:

- (i) The proposed research is novel;
- (ii) The proposed research is high-risk, high-reward;

(iii) The proposer(s) demonstrates a high level of relevant scientific/technical expertise for key personnel, including contractors and/or informal collaborators, and have access to the necessary resources, for example research facilities, equipment, materials, and data, to conduct the research as proposed;

(iv) The research result(s) has the potential to address the technical needs associated with a major societal challenge not currently being addressed; and

(v) The proposed research plan is scientifically sound with tasks, milestones, timeline, decision points and alternate strategies.

(2) Total weight of (a)(1)(i) through (v) is 50%.

(b)(1) The proposer(s) adequately establishes that the proposed research has strong potential for advancing the state-of-the-art and contributing significantly to the United States science and technology knowledge base and to address areas of critical national need through transforming the Nation's capacity to deal with a major societal challenge(s) that is not currently being addressed, and generate substantial benefits to the Nation that extend significantly beyond the direct return to the proposer including an explanation in the proposal:

(i) Of the potential magnitude of transformational results upon the Nation's capabilities in an area;

(ii) Of how and when the ensuing transformational results will be useful to the Nation; and

(iii) Of the capacity and commitment of each award participant to enable or advance the transformation to the proposed research results (technology).

(2) Total weight of (b)(1)(i) through (iii) is 50%.

§ 296.22 Award criteria.

NIST must determine that a proposal successfully meets all of the Award Criteria set forth in this section for the proposal to receive funding under the Program. The Award Criteria are:

(a) The proposal explains why TIP support is necessary, including evidence that the research will not be conducted within a reasonable time period in the absence of financial assistance from TIP;

(b) The proposal demonstrates that reasonable and thorough efforts have been made to secure funding from alternative funding sources and no other alternative funding sources are reasonably available to support the proposal;

(c) The proposal explains the novelty of the research (technology) and demonstrates that other entities have not already developed, commercialized, marketed, distributed, or sold similar research results (technologies);

(d) The proposal has scientific and technical merit and may result in intellectual property vesting in a United States entity that can commercialize the technology in a timely manner;

(e) The proposal establishes that the research has strong potential for advancing the state-of-the-art and contributing significantly to the United States science and technology knowledge base; and

(f) The proposal establishes that the proposed transformational research (technology) has strong potential to address areas of critical national need through transforming the Nation's capacity to deal with major societal challenges that are not currently being addressed, and generate substantial benefits to the Nation that extend significantly beyond the direct return to the proposer.

Subpart C—Dissemination of Program Results

§ 296.30 Monitoring and evaluation.

The Program will provide monitoring and evaluation of areas of critical national need and its investments through periodic analyses. It will develop methods and metrics for assessing impact at all stages. These analyses will contribute to the establishment and adoption of best practices.

§ 296.31 Dissemination of results.

Results stemming from the analyses required by § 296.30 will be disseminated in periodic working papers, fact sheets, and meetings, which will address the progress that the Program has made from both a project and a portfolio perspective. Such disseminated results will serve to educate both external constituencies as well as internal audiences on research results, best practices, and recommended changes to existing operations based on solid analysis.

§ 296.32 Technical and educational services.

(a) Under the Federal Technology Transfer Act of 1986, NIST has the authority to enter into cooperative research and development agreements with non-Federal parties to provide personnel, services, facilities, equipment, or other resources except funds toward the conduct of specified research or development efforts which are consistent with the missions of the laboratory. In turn, NIST has the authority to accept funds, personnel, services, facilities, equipment and other resources from the non-Federal party or parties for the joint research effort. Cooperative research and development agreements do not include procurement contracts or cooperative agreements as those terms are used in sections 6303, 6304, and 6305 of title 31, United States Code.

(b) In no event will NIST enter into a cooperative research and development agreement with a recipient of an award under the Program which provides for the payment of Program funds from the award recipient to NIST.

(c) From time to time, TIP may conduct public workshops and undertake other educational activities to foster the collaboration of funding Recipients with other funding resources for purposes of further development and diffusion of TIP-related technologies. In no event will TIP provide recommendations, endorsements, or approvals of any TIP funding Recipients to any outside party.

§ 296.33 Annual report.

The Director shall submit annually to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Science and Technology of the House of Representatives a report describing the Technology Innovation Program's activities, including a description of the metrics upon which award funding decisions were made in the previous fiscal year, any proposed changes to those metrics, metrics for evaluating the success of ongoing and completed awards, and an evaluation of ongoing and completed awards. The first annual report shall include best practices for management of programs to stimulate high-risk, high-reward research.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 242

[Docket No. FR-4927-F-03]

RIN 2502-A122

Revisions to the Hospital Mortgage Insurance Program: Technical and Clarifying Amendments

AGENCY: Office of Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: On November 28, 2007, HUD published a final rule revising HUD's regulations on mortgage insurance for hospitals. This publication corrects certain non-substantive errors and omissions that occurred in the final rule, as well as makes certain additional amendments designed to enhance clarity of certain of the rule's provisions.

DATES: *Effective Date:* July 25, 2008.

FOR FURTHER INFORMATION CONTACT:

Roger E. Miller, Director, Office of Insured Health Care Facilities, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 9224, Washington, DC 20410-8000; telephone (202) 708-0599 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the Federal Information Relay Service at (800) 877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:**I. Background**

On November 28, 2007 (72 FR 67524), HUD published a final rule revising its regulations governing mortgage insurance for hospitals. This final rule followed a January 10, 2005 (70 FR 1750), proposed rule and took into consideration public comment submitted on the proposed rule. The November 2007 final rule made certain changes in response to public comment and became effective on January 28, 2008. HUD's regulations promulgated by the November 2007 final rule implement section 242 of the National Housing Act (12 U.S.C. 1715z-7), and are codified at 24 CFR part 242.

II. Technical and Clarifying Amendments

Following publication of the November 2007 final rule, it was brought to HUD's attention that certain provisions of the regulatory text contained technical errors. In addition, upon reviewing the final rule in response to notification of technical errors, HUD identified other provisions in the regulatory text that HUD determined should be revised to improve clarity. The correction of these errors and the clarifying amendments made to the November 2007 final rule by this rule are as follows:

- Authority. The main authority for hospital mortgage insurance, section 242 of the National Housing Act (12 U.S.C. 1715z-7) was inadvertently omitted. This technical correction makes the appropriate revision to the authority citation.

- 24 CFR 242.1 (Definitions). The definition in the rule of "chronic convalescent and rest" refers to "rehabilitation services." This element is not required by statute. This technical correction removes this term from the definition. A comment submitted on the proposed rule requested that HUD remove from the definition of "chronic convalescent and rest" the following terms: "respite care services," "hospice services," and "rehabilitation services." HUD responded to the comment citing

the statutory definition of "chronic convalescent and rest" as the reason for not removing these terms. However, while the terms "respite care services" and "hospice services" are part of the definition of "chronic convalescent and rest," the term "rehabilitation services" is not part of the definition. (See 72 FR 67526-67527.) Accordingly, reference to "rehabilitation services" is removed from the definition of "chronic convalescent and rest."

This rule also amends the definition of "mortgagee or lender" because the rule used the term "mortgagee" to refer to the applicant as well as the original lender. Therefore, a definition of "mortgagee" will clarify any possible ambiguity regarding to whom "mortgagee" refers.

The definition of "construction" inadvertently omitted reference to "substantial rehabilitation". As is made clear in other parts of the rule, including in the definition of "project," substantial rehabilitation such as additions and renovations are supported by the program. However, to remove any possible ambiguity, the phrase "or the substantial rehabilitation of an existing facility" is being added to the definition of "construction".

With respect to the definition of "surplus cash," it was the intent of the final rule that "surplus cash" includes cash from prior periods. This statement was made in the preamble of the final rule in response to public comments. (See 72 FR 67529.) This technical correction adds language to make this explicit in the definition of "surplus cash".

- 24 CFR 242.10 (Eligible Mortgagees). This final rule amends the second sentence of this section because HUD discovered a possible unintended contradiction between § 242.10 and § 242.72. Section 242.10 provides that the mortgagor "shall possess the powers necessary and incidental to operating a hospital". Under normal circumstances, that is indeed a requirement. However, § 242.72 creates a contradiction by permitting leasing arrangements to comply with certain state laws that prohibit public hospitals from mortgaging their property. Under such arrangements, the mortgagor of record is an entity (which may be created solely for the purpose of enabling the financing to take place) that does not "possess the powers necessary and incidental to operating a hospital". The mortgagor simply serves as the owner, and it is the lessee-operator who possesses those powers. This amendment therefore removes any possible contradiction.

- 24 CFR 242.23 (Maximum Mortgage Amounts and Cash Equity Requirements). Where excess cash equity is needed, section 242(d)(6) of the National Housing Act (12 U.S.C. 1715z-7(d)(6)), entitles the mortgagor to fund the excess with a letter of credit at the option of the mortgagee. This is the mortgagee's option, not an option of HUD, but the November 28, 2007, final rule inadvertently presents this option as HUD's option. This rule corrects that error.

- 24 CFR 242.23, 242.35, 242.52, and 242.90 (Reference to "Rehabilitation"). The rule contains several references to the term "rehabilitation." The program insures "substantial rehabilitation" in addition to new construction and, therefore, references to the term "rehabilitation" are generally in the context of "substantial rehabilitation." Therefore, to avoid any possible ambiguity where the term "rehabilitation" is used alone, the term "substantial" has been added to precede this term wherever it appears.

- 24 CFR 242.33 (Covenant for Malpractice, Fire, and Other Hazard Insurance). Section 242.33 requires that the hospital have insurance coverage "acceptable to the mortgagee and HUD." The amendment removes the word "and" from this phrase and substitutes the word "or." The final rule did not intend to place the evaluation of acceptable insurance solely on the mortgagee. This amendment therefore provides the mortgagee with the option of assuming responsibility to determine the adequacy of insurance coverage, or leaving such determination to HUD.

- 24 CFR 50 (Funds and Finances: Off-Site Utilities and Streets). The November 2007 final rule inadvertently omitted "letter of credit" and use of a letter of credit has been a longstanding practice in this program. This rule corrects that omission.

- 24 CFR 242.56 (Form of Regulation). HUD amends this section to add a new sentence at the section's end which would restore a provision consistent with longstanding practice. This amendment relates to the issue of leasing, which is addressed in §§ 242.10 and 242.72. When leasing is permitted under § 242.72, it is the lessee that operates the hospital and whose financial results determine whether or not there is an insurance claim. HUD's established practice, prior to the final rule, has been to have the lessee, as well as the mortgagor of record, sign the Regulatory Agreement and be governed by its provisions. HUD did not intend for the revisions to §§ 242.10 and 242.72 to cause a departure from established practice.

• 24 CFR 242.58 (Books, Accounts, and Financial Statements). Paragraph (c) of this regulatory section describes the organizations that are subject to audit. While paragraph (c)(1) references not-for-profit organizations, this paragraph inadvertently omits reference to state and local governments, which have long been among those organizations that are audited in accordance with the Consolidated Audit Guide for Audits of HUD Programs and OMB Circular A-133, which authorities are referenced in paragraph (c)(1). This rule corrects that omission.

Additionally, a new paragraph (h) is added for the same reasons provided in the amendment to § 242.56.

• 24 CFR 242.61 (Management). Section 242.61(a) requires HUD's written approval before a mortgagor can execute a contract for management of the hospital. This technical correction makes explicit that this approval requirement refers to the management of the hospital, not to management of specific components of the hospital such as the pharmacy, cafeteria, etc.

Findings and Certifications

Justification for Final Rulemaking

In general, the Department publishes a rule for public comment before issuing a rule for effect, in accordance with its own regulations on rulemaking, 24 CFR part 10. However, part 10 does provide for exceptions from that general rule where the agency finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when prior public procedure is "impracticable, unnecessary, or contrary to the public interest" (24 CFR 10.1). In this case, public comment is unnecessary because HUD is making only technical corrections and clarifying amendments to a previously published final rule.

Regulatory Flexibility Act

The undersigned, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this rule, and in so doing certified that this rule will not have a significant economic impact on a substantial number of small entities. This rule only makes technical corrections and clarifying amendments to a previously published final rule.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made in connection with this rulemaking in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the

National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact remains applicable, and is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-5000.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This final rule does not impose any federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

List of Subjects in 24 CFR Part 242

Hospitals, Mortgage insurance, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons described in the preamble, HUD amends 24 CFR part 242 to read as follows:

PART 242—MORTGAGE INSURANCE FOR HOSPITALS

■ 1. The authority citation is revised to read:

Authority: 12 U.S.C. 1709, 1710, 1715b, 1715u, and 1715z-7; 42 U.S.C. 3535d.

Subpart A—General Eligibility Requirements

■ 2. Amend § 242.1 by revising the definitions of "chronic convalescent and rest," "construction," "mortgagee or lender" and first sentence of the definition of "surplus cash," to read as follows:

§ 242.1 Definitions.

* * * * *

Chronic convalescent and rest means skilled nursing services, intermediate care services, respite care services, hospice services, and other services of a similar nature.

Construction means the creation of a new or replacement hospital facility, or the substantial rehabilitation of an existing facility. The cost of acquiring new or replacement equipment may be included in the cost of construction.

* * *

Mortgagee or lender means the applicant for insurance or the original lender under a mortgage. * * *

Surplus Cash means any cash remaining after all of the following conditions have been met:

* * * * *

■ 3. Revise the second sentence of § 242.10 as follows:

§ 242.10 Eligible mortgagors.

* * * The mortgagor shall be approved by HUD and, except in those cases where the hospital is leased as permitted in § 242.72, shall possess the powers necessary and incidental to operating a hospital. * * *

Subpart B—Application Procedures and Commitments

■ 4. Revise § 242.23(a) and the last sentence of paragraph (c) to read as follows:

§ 242.23 Maximum mortgage amounts and cash equity requirements.

(a) *Adjusted mortgage amount-rehabilitation projects.* A mortgage financing the substantial rehabilitation of an existing hospital shall be subject to the following limitations, in addition to those set forth in § 242.7:

(1) *Property held unencumbered.* If the mortgagor is the fee simple owner of the property and the property is not encumbered by an outstanding indebtedness, the mortgage shall not exceed 100 percent of HUD's estimate of the cost of the proposed substantial rehabilitation.

(2) *Property subject to existing mortgage.* If the mortgagor owns the property subject to an outstanding indebtedness, which is to be refinanced with part of the insured mortgage, the mortgage shall not exceed the total of the following:

(i) The Commissioner's estimate of the cost of substantial rehabilitation, plus

(ii) Such portion of the outstanding indebtedness as does not exceed 90 percent of HUD's estimate of the fair market value of such land and improvements prior to substantial rehabilitation.

(3) *Property to be acquired.* If the property is to be acquired by the mortgagor and the purchase price is to be financed with a part of the insured mortgage, the mortgage shall not exceed 90 percent of the total of the following:

(i) The Commissioner's estimate of the cost of substantial rehabilitation, plus

(ii) The actual purchase price of the land and improvements or HUD's estimate (prior to substantial rehabilitation) of the fair market value of such land and improvements, whichever is the lesser. * * *

(c) *Cash equity.* * * *. A private nonprofit or public mortgagor, but not a proprietary mortgagor, at the mortgagee's option and subject to 24 CFR 242.49, may provide any such required equity in the form of a letter of credit.

Subpart C—Mortgage Requirements

■ 5. Revise § 242.33 to read as follows:

§ 242.33 Covenant for malpractice, fire, and other hazard insurance.

The mortgage shall contain a covenant binding the mortgagor to maintain adequate liability, fire, and extended coverage insurance on the property. The mortgage shall also contain a covenant binding the mortgagor to maintain adequate malpractice coverage. All coverage shall be acceptable to the mortgagee or HUD.

■ 6. Revise § 242.35(d) to read as follows:

§ 242.35 Mortgage lien certifications.

(d) The mortgagor has notified HUD in writing of all unpaid obligations in connection with the mortgage transaction, the purchase of the mortgaged property, the construction or substantial rehabilitation of the project, or the purchase of the equipment financed with mortgage proceeds.

Subpart E—Construction

■ 7. Revise the second sentence of § 242.50 to read as follows:

§ 242.50 Funds and finances: off-site utilities and streets.

* * * Where such assurance is required, it shall be in the form of a cash escrow deposit, a letter of credit, the retention of a specified amount of mortgage proceeds by the mortgagee, or a combination thereof.

■ 8. Revise § 242.52(a) to read as follows:

§ 242.52 Construction contracts.

(a) *Awarding of contract.* A contract for the construction or substantial

rehabilitation of a hospital shall be entered into by a mortgagor, with a builder selected by a competitive bidding procedure acceptable to HUD.

* * * * *

Subpart G—Regulatory Agreement, Accounting and Reporting, and Financial Requirements

■ 9. Amend § 242.56 by adding a new sentence at the end of the section to read as follows:

§ 242.56 Form of regulation.

* * * In those cases in which the hospital facility is leased as permitted by § 242.72, the provisions of this section also shall apply to the lessee.

■ 10. Revise § 242.58(c)(1) and add a new paragraph (h) to read as follows:

§ 242.58 Books, accounts, and financial statements.

* * * * *

(c) * * * (1) Not-for-profit and state and local governments shall conduct audits in accordance with the Consolidated Audit Guide for Audits of HUD Programs (Handbook 2000.04) and OMB Circular A-133 (Audits of states, local governments, and nonprofit organizations). * * *

(h) In those cases in which the hospital facility is leased as permitted by § 242.72, the requirements pertaining to the mortgagor in § 242.58 (a) through (g) also shall pertain to the lessee.

■ 11. Revise § 242.61(a) to read as follows:

§ 242.61 Management.

* * * (a) *Contract Management of Hospital.* The mortgagor shall not execute a management agreement or any other contract for management of the hospital without HUD's prior written approval. (Management of the hospital, which requires HUD's prior written approval, refers to management of the hospital not management of components within the hospital such as the hospital cafeteria or hospital pharmacy.) Any management agreement or contract for management of the hospital shall contain a provision that it shall be subject to termination without penalty and with or without cause, upon written request by HUD addressed to the mortgagor and management agent.

* * * * *

Subpart H—Miscellaneous Requirements

■ 12. Revise § 242.90(a) to read as follows:

§ 242.90 Eligibility of mortgages covering hospitals in certain neighborhoods.

(a) A mortgage financing the repair, substantial rehabilitation, or construction of a hospital located in an older declining urban area shall be eligible for insurance under this subpart, subject to compliance with the additional requirements of this section.

* * * * *

Dated: June 16, 2008.

Brian D. Montgomery,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. E8-14131 Filed 6-24-08; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG-2008-0163]

RIN 1625-AA08

Special Local Regulations for Marine Events; Marine Events in San Diego Harbor

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulations in 33 CFR 100.1101 during the Coronado 4th of July Fireworks Display, to be held 8:30 p.m. to 10 p.m. on July 4, 2008, on the waters of San Diego Bay, San Diego, California. These special local regulations are necessary to provide for the safety of the participants, crew, spectators, sponsor vessels of the race, and general users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: 33 CFR 100.1101 will be enforced on July 4, 2008 from 8:30 p.m. until 10 p.m.

FOR FURTHER INFORMATION CONTACT: Petty Officer Kristen Beer, USCG, c/o U.S. Coast Guard Captain of the Port, at (619) 278-7277.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce special local regulations (SLR) on the navigable waters of Glorietta Bay in support of the Coronado July 4th Fireworks Show on July 4, 2008, from 8:30 p.m. until 10 p.m. These SLR will encompass a 100-foot radius around and under each fireworks barge while the fireworks

barge is towed to its firing position. Once the barge is in position for the fireworks show, the SLR will be increased to a 500-yard radius around the barge. In order to ensure the safety of participants, spectators and transiting vessels, 33 CFR 100.1101 will be enforced for the duration of the event. Under provisions of 33 CFR 100.1101, vessels would be prohibited from entering into, transiting through or anchoring within the SLR without permission of the Coast Guard Patrol Commander.

In addition to this notice, the maritime community will be provided extensive advance notification via the Local Notice to Mariners allowing mariners to adjust their plans accordingly.

Dated: June 10, 2008.

C.V. Strangfeld,

Captain, U.S. Coast Guard, Captain of the Port, Sector San Diego.

[FR Doc. E8-14351 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-15-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2008-0463]

RIN 1625-AA00

Safety Zone: Founder's Day Fireworks Event, Chesapeake Bay, Hampton, VA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a 350-foot radius safety zone on the Chesapeake Bay in Hampton, VA, to support the Founder's Day Fireworks Event. This action is intended to restrict vessel traffic movement to protect mariners from the hazards associated with fireworks displays.

DATES: This rule is effective from 9 p.m. to 10 p.m. on July 9, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG-2008-0463 and are available online at www.regulations.gov. They are also available for inspection or copying in two locations: The Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays;

and the Sector Hampton Roads, Norfolk Federal Building, 200 Granby St., 7th Floor, Norfolk, VA 23510 between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call LT Bill Clark, Chief Waterways Management Division, Sector Hampton Roads at (757) 668-5580. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest since immediate action is needed to provide for the safety of life and property on navigable waters.

Additionally, this temporary safety zone will only be enforced for 1 hour on July 09, 2008, and should have minimal impact on vessel transits due to the fact that vessels can safely transit through the zone when authorized by the Captain of the Port or his Representative and that they are not precluded from using any portion of the waterway except the safety zone area itself. For the same reasons above, 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**.

Background and Purpose

On July 09, 2008, the City of Hampton, VA, will sponsor a fireworks display on the Chesapeake Bay shoreline centered on position 37°02'23.27" N/076°17'22.54" W (NAD 1983). Due to the need to protect mariners and spectators from the hazards associated with the fireworks display, access will be temporarily restricted within 350 feet of the fireworks launch site.

Discussion of Rule

The Coast Guard is establishing a safety zone on the navigable waters of the Chesapeake Bay within 350 feet of position 37°02'23.27" N/076°17'22.54" W (NAD 1983). This safety zone will be established in the vicinity of the Buckroe Beach Park, Pier One in Hampton, VA, from 9 p.m. to 10 p.m. on July 9, 2008. In the interest of public safety, access within the safety zone will be restricted during the specified date and times. Except for participants and vessels authorized by the Coast Guard Captain of the Port or his representative, no person or vessel may enter or remain in the regulated area.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. Although this regulation restricts access to the safety zone, the effect of this rule will not be significant because: (i) The safety zone will be in effect for a limited duration; (ii) the safety zone is of limited size; and (iii) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

Small Entities

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

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

This rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in this portion of the Chesapeake Bay between 9 p.m. and 10 p.m. on July 9, 2008.

The safety zone will not have a significant economic impact on a substantial number of small entities because the zone will only be enforced for limited times and is of limited size. Additionally, vessel traffic can pass safely around the zone. Before the effective period, maritime advisories will be issued and made widely available to waterway users.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 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 does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these

standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Commandant Instruction M16475.ID 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, under the instruction that there are no factors in this case that would limit the use of a 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.

A final environmental analysis checklist and a final categorical exclusion determination will be available in the docket where indicated under ADDRESSES.

List of Subjects 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 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.T05–0463, to read as follows:

§ 165.T05–0463 Safety Zone: Founder's Day Fireworks Event, Chesapeake Bay, Hampton, VA.

(a) Location. The following area is a safety zone: All navigable waters of the Captain of the Port Sector Hampton Roads zone, as defined in 33 CFR 3.25–10, in the vicinity of Buckroe Beach Pier One located in Hampton, VA, within

350 feet of position 37°02'23.27" N/
076°17'22.54" W (NAD 1983).

(b) Definition:

(1) As used in this section; Captain of the Port Representative means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port Hampton Roads, Virginia to act on his behalf.

(c) Regulation:

(1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port Hampton Roads or his designated representatives.

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

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

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

(3) The Captain of the Port Hampton Roads and the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia can be contacted at telephone number (757) 668-5555 or (757) 484-8192.

(4) The Captain of the Port Representative enforcing the safety zone can be contacted on VHF-FM marine band radio, channel 13 (156.65 Mhz) and channel 16 (156.8 Mhz).

(d) Enforcement Period: This regulation will be enforced from 9 p.m. to 10 p.m. on July 9, 2008.

Dated: June 13, 2008.

Patrick B. Trapp,

Captain, U.S. Coast Guard, Captain of the Port Hampton Roads.

[FR Doc. E8-14350 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-15-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2008-0065]

RIN 1625-AA00

Safety Zone: Stars and Stripes Fourth of July Fireworks Event, Nansemond River, Suffolk, VA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the

Nansemond River in Suffolk, VA in support of the Stars and Stripes Fourth of July Fireworks event. This action is intended to restrict vessel traffic movement on the Nansemond River to protect mariners from the hazards associated with fireworks displays.

DATES: This rule is effective from 9 p.m. until 10 p.m. on July 4, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG-2008-0065 and are available online at www.regulations.gov. They are also available for inspection or copying in two locations: the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; and the Sector Hampton Roads, Norfolk Federal Building, 200 Granby St., 7th Floor, Norfolk, VA 23510 between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call LT Bill Clark, Chief Waterways Management Division, Sector Hampton Roads at (757) 668-5580. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On March 31, 2008, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone: Stars and Stripes Fourth of July Fireworks Event, Nansemond River, Suffolk, VA in the **Federal Register** (73 FR 16809). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Delaying the effective date of this rule would be contrary to public interest since immediate action is needed to provide for the safety of life and property on navigable waters. Additionally, this temporary safety zone will only be enforced for a limited time and is of a limited size, the zone should have minimal impact on the public due to the fact that vessels can safely transit through the zone when authorized by the Captain of the Port or his Representative, the public is not precluded from using any portion of the

waterway except the safety zone area itself.

Background and Purpose

On July 04, 2008, Suffolk Parks and Recreation will sponsor a fireworks display along the shoreline in position 36°44'27.3"N/76°34'42" W (NAD 1983). Due to the need to protect the maritime public from the hazards associated with the fireworks display, access will be temporarily restricted within 600 feet of the fireworks launch site.

Discussion of Rule

The Coast Guard is establishing a safety zone on specified waters of the Nansemond River in the vicinity of Constant's Wharf in Suffolk, VA. This safety zone will encompass all navigable waters within 600 feet of the fireworks barge located in position 36°-44'-27.3"N/076°-34'-42" W (NAD 1983). This regulated area will be established in the interest of public safety during the Stars and Stripes spectacular event and will be enforced from 9 p.m. to 10 p.m. on July 04, 2008. Access within the safety zone will be restricted during the specified date and times. Except for those authorized by the Coast Guard Captain of the Port or his representative, no person or vessel may enter or remain in the regulated area.

Discussion of Comments and Changes

No comments were received for this proposed rule. Two changes were made from the original proposal. These changes reduce the time that this regulated area will be enforced by three hours and expands the size of the zone by 100 feet.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. Although this regulation restricts access to the safety zone, the effect of this rule will not be significant because: (i) The safety zone will be in effect for a limited duration; (ii) the zone is of limited size; and (iii) the Coast Guard will make notifications via maritime

advisories so mariners can adjust their plans accordingly.

Small Entities

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

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

This rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in the specified zone area during the enforcement period.

The safety zone will not have a significant economic impact on a substantial number of small entities because the zone will only be enforced for limited times and is of limited size. Additionally, vessel traffic can pass safely around the zone. Before the effective period, maritime advisories will be issued and made widely available to waterway users.

Assistance for Small Entities

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

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

Collection of Information

This rule calls for no new collection of information under the Paperwork

Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 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 does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under 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 a 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.

A final environmental analysis checklist and a final categorical exclusion determination are available in the docket where indicated under

ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping

requirements, Security measures, and Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 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.T05–0065, to read as follows:

§ 165.T05–0065 Safety Zone: Stars and Stripes Fourth of July Fireworks Event, Nansemond River, Suffolk, VA.

(a) Location. The following area is a safety zone: All navigable waters of the Nansemond River, located within 600 feet of position 36°-44'-27.3" N/076°-34'-42" W (NAD 1983) in the vicinity of Constant's Wharf, Suffolk, VA in the Captain of the Port Sector Hampton Roads zone as defined in 33 CFR 3.25–10.

(b) Definition:

(1) As used in this section; Captain of the Port Representative means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port Hampton Roads, Virginia to act on his behalf.

(c) Regulation:

(1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port Hampton Roads or his designated representatives.

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

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

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

(3) The Captain of the Port Hampton Roads and the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia can be contacted at telephone number (757) 668–5555 or (757) 484–8192.

(4) The Captain of the Port Representative enforcing the safety zone can be contacted on VHF–FM marine band radio, channel 13 (156.65 MHz) and channel 16 (156.8 MHz).

(d) Effective Period: This regulation will be effective from 9 p.m. to 10 p.m. on July 4, 2008.

Dated: June 13, 2008.

Patrick B. Trapp,

Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.

[FR Doc. E8–14348 Filed 6–24–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0449]

RIN 1625–AA00

Safety Zone; Paradise Point Resort 4th of July Display; Mission Bay, San Diego, CA.

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of Mission Bay in support of the Paradise Point Resort 4th of July Display. The safety zone is necessary to provide for the safety of the crew, spectators, participants of the event, participating vessels and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective from 8:30 p.m. until 10 p.m. on July 3, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0449 and are available online at www.regulations.gov. They are also available for inspection or copying two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and at Coast Guard Sector San Diego, 2710 N. Harbor Drive, San Diego, CA 92101–1064 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Petty Officer Kristen Beer, Waterways Management, U.S. Coast Guard Sector San Diego, CA at telephone (619) 278–7233.

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. Final approval and permitting of this event were not issued in time to engage in full notice and comment rulemaking. Publishing an NPRM and delaying the effective date would be contrary to the public interest since the event would occur before the rulemaking process was complete.

Under 5 U.S.C. 553(d)(3), the Coast Guard also finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. In addition, it would be contrary to the public interest not to publish this rule because the event has been permitted and participants and the public require protection.

Background and Purpose

The Coast Guard is establishing, pursuant to 33 U.S.C. 1225, a temporary safety zone in support of the Paradise Point Resort 4th of July Display, near the navigation channel of Mission Bay off of Paradise Point. The safety zone is comprised of a 450 foot radius located around an anchored firing barge. This temporary safety zone is necessary to provide for the safety of the show's crew, spectators, participants of the event, participating vessels and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

Discussion of Rule

The Coast Guard establishes this temporary rule, pursuant to 33 U.S.C. 1225, to provide for the safety of the participants, spectators and other users of the waterways. This safety zone will be effective from 8:30 p.m. until 10 p.m. on July 3, 2008. This temporary safety zone is necessary to ensure the safety of participants and spectators of the Paradise Point Resort 4th of July Display. The duration of the display is expected to be approximately 15–20 minutes. The event involves one anchored barge, which will be used as a platform for launching of fireworks. The limits of this temporary safety zone include all areas within a 450 foot radius of the firing barge's location. The barge will be located approximately 450 feet southwest of Paradise Point in Mission Bay. This temporary safety zone is necessary to provide for the safety of the crews, spectators, participants of the

event, participating vessels and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

U.S. Coast Guard personnel will enforce this safety zone. Other Federal, State, or local agencies may assist the Coast Guard, including the Coast Guard Auxiliary. Section 165.23 of Title 33, Code of Federal Regulations, prohibits any unauthorized person or vessel from entering or remaining in a safety zone. Vessels or persons violating this section will be subject to the penalties set forth in 33 U.S.C. 1232.

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.

Due to the temporary safety zone's short duration of one and a half hours, its limited scope of implementation, and because vessels will have an opportunity to request authorization to transit through the zone or the vessels may safely travel around the zone, the Coast Guard expects the economic impact of this rule to be so minimal that full regulatory evaluation under paragraph 10(e) of the regulatory policies and procedures of the DHS is unnecessary.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in a portion of Mission Bay from 8:30 p.m. to 10 p.m. on July 3, 2008. This safety zone will not have a significant economic impact on a substantial number of small entities for the

following reasons: The safety zone only encompasses a small portion of the waterway, it is short in duration at a late hour when commercial traffic is low, vessels may safely travel around the safety zone, and the Captain of the Port may authorize entry into the zone, if necessary.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. If your small business or organization is affected by this rule and you have questions concerning its provisions or options for compliance, please contact Petty Officer Kristen Beer, U.S. Coast Guard Sector San Diego at (619) 278-7233.

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 does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their

regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards. 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.ID 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, under the Instruction, that there are no factors in this case that would limit the use of a 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 because it establishes a safety zone.

A final “Environmental Analysis Check List” and a final “Categorical Exclusion Determination” are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and 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. 1225, 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 § 165.T11–044 to read as follows:

§ 165.T11–044 Safety Zone; the Paradise Point Resort 4th of July Display; Mission Bay, CA.

(a) *Location.* The limits of the temporary safety zones include all areas within an 450 feet radius located around an anchored barge. The barge will be anchored approximately 450 feet southwest of Paradise Point in Mission Bay.

(b) *Effective Period.* This safety zone will be in effect from 8:30 p.m. until 10 p.m. on July 3, 2008. If the display concludes prior to the scheduled termination time, the Captain of the Port or his designated representative will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, entry into, transit through, or anchoring within this zone by all vessels is prohibited, unless authorized by the Captain of the Port, or his designated representative. Mariners requesting permission to transit through the safety zone may request authorization to do so from the U.S. Coast Guard Patrol Commander. The U.S. Coast Guard Patrol Commander may be contacted via VHF–FM Channel 16.

(d) *Enforcement.* All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene patrol personnel. Patrol personnel can be comprised of commissioned, warrant, and petty officers of the Coast Guard onboard Coast Guard, Coast Guard Auxiliary, local, state, and federal law enforcement vessels. Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed. The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: June 10, 2008.

C.V. Strangfeld,

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

[FR Doc. E8–14364 Filed 6–24–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0472]

RIN 1625–AA00

Safety Zone: Fourth of July Fireworks Event, Pagan River, Smithfield, VA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a 420 foot radius safety zone on the Pagan River in Smithfield, VA in support of the Fourth of July Fireworks event. This action is intended to restrict vessel traffic movement to protect mariners from the hazards associated with fireworks displays.

DATES: This rule is effective from 9 p.m. to 10 p.m. on July 3, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0472 and are available online at www.regulations.gov. They are also available for inspection or copying in two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; and the Sector Hampton Roads, Norfolk Federal Building, 200 Granby St., 7th Floor, Norfolk, VA 23510 between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call LT Bill Clark, Chief Waterways Management Division, Sector Hampton Roads at (757) 668–5580. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that

good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest since immediate action is needed to provide for the safety of life and property on navigable waters. Additionally, this temporary safety zone will only be enforced for 1 hour on July 03, 2008 and should have minimal impact on vessel transits due to the fact that vessels can safely transit through the zone when authorized by the Captain of the Port or his Representative and that they are not precluded from using any portion of the waterway except the safety zone area itself. For the same reasons above, 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**.

Background and Purpose

On July 3, 2008, the Isle of Wight County, VA will sponsor a fireworks display on the Pagan River shoreline centered on position 36°59'18.26" N/ 076°37'44.74" W (NAD 1983). Due to the need to protect mariners and spectators from the hazards associated with the fireworks display, vessel traffic will be temporarily restricted within 420 feet of the fireworks launch site.

Discussion of Rule

The Coast Guard is establishing a safety zone on the navigable waters of the Pagan River within the area bounded by a 420 foot radius circle centered on position 36°59'18.26" N/ 076°37'44.74" W (NAD 1983). This safety zone will be established in the vicinity of Smithfield, VA from 9 p.m. to 10 p.m. on July 3, 2008. In the interest of public safety, general navigation within the safety zone will be restricted during the specified date and times. Except for participants and vessels authorized by the Coast Guard Captain of the Port or his representative, no person or vessel may enter or remain in the regulated area.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not

require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. Although this regulation restricts access to the safety zone, the effect of this rule will not be significant because: (i) The safety zone will be in effect for a limited duration; (ii) the zone is of limited size; and (iii) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

Small Entities

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

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

This rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in a portion of the Pagan River between 9 p.m. and 10 p.m. on July 3, 2008.

The safety zone will not have a significant economic impact on a substantial number of small entities because the zone will only be enforced for limited times and is of limited size. Additionally, vessel traffic can pass safely around the zone. Before the effective period, maritime advisories will be issued and made widely available to waterway users.

Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–

888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 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 does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments,

because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.ID 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 a 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.

A final environmental analysis checklist 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, and Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 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.T05–0472, to read as follows:

§ 165.T05–0472 Safety Zone: Fourth of July Fireworks Event, Pagan River, Smithfield, VA.

(a) Location. The following area is a safety zone: All navigable waters of the Captain of the Port Hampton Roads zone, as defined in 33 CFR 3.25–10, in the vicinity of Clontz Park in Smithfield, VA, and within 420 feet of position 36°59'18.26" N/076°37'44.74" W (NAD 1983).

(b) Definition:

(1) As used in this section; Captain of the Port Representative means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port Hampton Roads, Virginia to act on his behalf.

(c) Regulation:

(1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port Hampton Roads or his designated representatives.

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

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

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

(3) The Captain of the Port Hampton Roads and the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia can be contacted at telephone number (757) 668–5555 or (757) 484–8192.

(4) The Captain of the Port Representative enforcing the safety zone can be contacted on VHF–FM marine band radio, channel 13 (156.65 MHz) and channel 16 (156.8 MHz).

(d) Effective Period: This regulation will be effective from 9 p.m. to 10 p.m. on July 3, 2008.

Dated: June 13, 2008.

Patrick B. Trapp,

Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.

[FR Doc. E8–14365 Filed 6–24–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0471]

RIN 1625–AA00

Safety Zone: 31st Annual Virginia Lakes Festival Fireworks Event, John H. Kerr Lake, Clarksville, VA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a 700-foot radius safety zone on John H. Kerr Lake in the vicinity of the Highway 58 Business Bridge in Clarksville, VA in support of the 31st Annual Virginia Lakes Festival Fireworks Display. This action is intended to restrict vessel traffic movement to protect mariners from the hazards associated with the fireworks display.

DATES: This rule is effective from 9 p.m. to 10 p.m. on July 19, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0471 and are available online at www.regulations.gov. They are also available for inspection or copying in two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; and the Sector Hampton Roads, Norfolk Federal Building, 200 Granby St., 7th Floor, Norfolk, VA 23510 between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call LT Bill Clark, Chief Waterways Management Division, Sector Hampton

Roads at (757) 668-5580. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest since immediate action is needed to provide for the safety of life and property on navigable waters. Additionally, this temporary safety zone will only be enforced for 1 hour on July 19, 2008 and should have minimal impact on vessel transits due to the fact that vessels can safely transit through the zone when authorized by the Captain of the Port or his representative and that they are not precluded from using any portion of the waterway except the safety zone area itself. For the same reasons above, 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**.

Background and Purpose

On July 19, 2008, Clarksville Lake County Chamber of Commerce of Clarksville, VA will sponsor a fireworks display centered on the Highway 58 Bridge in Clarksville, VA in position 36°37'51" N/078°32'50" W (NAD 1983). Due to the need to protect mariners and spectators from the hazards associated with the fireworks display, vessel traffic will be temporarily restricted within 700-feet of the fireworks launch site.

Discussion of Rule

The Coast Guard is establishing a safety zone on specified waters of John H. Kerr Lake within the area bounded by a 700-foot radius circle centered on position 36°37'51" N/078°32'50" W (NAD 1983) in the vicinity of Highway 58 Business Bridge in Clarksville, VA. This safety zone will be established in the interest of public safety during the

31st Annual Virginia Lakes Festival Fireworks event and will be enforced from 9 p.m. to 10 p.m. on July 19, 2008. General navigation within the safety zone will be restricted during the specified date and times. Except for participants and vessels authorized by the Coast Guard Captain of the Port or his representative, no person or vessel may enter or remain in the regulated area.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. Although this regulation restricts access to the safety zone, the effect of this rule will not be significant because: (i) The safety zone will be in effect for a limited duration; and (ii) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in this portion of John H. Kerr Lake between 9 p.m. and 10 p.m. on July 19, 2008.

The safety zone will not have a significant economic impact on a substantial number of small entities because the zone will only be enforced for limited times and is of limited size. Additionally, vessel traffic can pass safely around the zone. Before the

effective period, maritime advisories will be issued and made widely available to waterway users.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 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 does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Commandant Instruction M16475.ID 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, under the instruction, that there are no factors in this case that would limit the use of a 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.

A final environmental analysis checklist 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, and Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 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.T05–0471, to read as follows:

§ 165.T05–0471 Safety Zone: John H. Kerr Lake, Clarksville, VA.

(a) *Location.* The following area is a safety zone: All navigable waters of the Captain of the Port Sector Hampton Roads zone, as defined in 33 CFR 3.25–10, within 700 feet of position 36°37'51" N/078°32'50" W (NAD 1983) on John H. Kerr Lake near Clarksville, VA.

(b) *Definition:*

(1) As used in this section; Captain of the Port Representative means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port Hampton Roads, Virginia to act on his behalf.

(c) *Regulation:*

(1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port Hampton Roads or his designated representatives.

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

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

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

(3) The Captain of the Port Hampton Roads and the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia can be contacted at telephone number (757) 668–5555 or (757) 484–8192.

(4) The Captain of the Port Representative enforcing the safety zone can be contacted on VHF–FM marine band radio, channel 13 (156.65 MHz) and channel 16 (156.8 MHz).

(d) Enforcement Period: This regulation will be enforced from 9 p.m. to 10 p.m. on July 19, 2008.

Dated: June 13, 2008.

Patrick B. Trapp,

Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.

[FR Doc. E8–14366 Filed 6–24–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0269]

RIN 1625–AA00

Safety Zone; Mission Bay Yacht Club 4th of July Display; Mission Bay, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of Mission Bay in support of the Mission Bay Yacht Club 4th of July Display near the navigation channel in the vicinity of Santa Clara Point. The safety zone is necessary to provide for the safety of the crew, spectators, and participants of the event, participating vessels and other vessels and users of the waterway. Persons and vessels are prohibited from entering

into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective from 8:30 p.m. until 10 p.m. on July 4, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG-2008-0269 and are available online at www.regulations.gov. They are also available for inspection or copying two locations: The Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and at Coast Guard Sector San Diego, 2710 N. Harbor Drive, San Diego, CA 92101-1064 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Petty Officer Kristen Beer, Waterways Management, U.S. Coast Guard Sector San Diego, CA at telephone (619) 278-7233.

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. Final approval and permitting of this event were not issued in time to engage in full notice and comment rulemaking. Publishing an NPRM and delaying the effective date would be contrary to the public interest since the event would occur before the rulemaking process was complete.

Under 5 U.S.C. 553(d)(3), the Coast Guard also finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. In addition, it would be contrary to the public interest not to publish this rule because the event has been permitted and participants and the public require protection.

Background and Purpose

The Coast Guard is establishing a temporary safety zone on the navigable waters of Mission Bay in support of the Mission Bay Yacht Club 4th of July Display. The safety zone is comprised of an 800-foot radius located around an anchored firing barge. This temporary safety zone is necessary to provide for the safety of the show's crew, spectators, and participants of the event, participating vessels and other vessels and users of the waterway. Persons and

vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port or his designated representative.

Discussion of Rule

The Coast Guard establishes this temporary rule, pursuant to 33 U.S.C. 1225, to provide for the safety of the participants, spectators and other users of the waterways. This safety zone will be effective from 8 p.m. to 10 p.m. on July 4, 2008. This temporary safety zone is necessary to ensure the safety of participants and spectators of the Mission Bay Yacht Club 4th of July Display. The duration of the show is expected to be approximately 20-25 minutes. The event involves one anchored barge, which will be used as a platform for launching of fireworks. The limits of the temporary safety zones include all areas within an 800-foot radius around an anchored barge. The barge will be anchored at a location approximately 600 feet east of the Santa Clara Point. This temporary safety zone is necessary to provide for the safety of the crews, spectators, participants of the event, participating vessels and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

U.S. Coast Guard personnel will enforce this safety zone. Other Federal, State, or local agencies may assist the Coast Guard, including the Coast Guard Auxiliary. § 165.23 of Title 33, Code of Federal Regulations, prohibits any unauthorized person or vessel from entering or remaining in a safety zone. Vessels or persons violating this section will be subject to the penalties set forth in 33 U.S.C. 1232.

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.

Due to the temporary safety zone's short duration of one and a half hours, its limited scope of implementation, and because vessels will have an opportunity to request authorization to transit through the zone or the vessels may safely travel around the zone, the Coast Guard expects the economic impact of this rule to be so minimal that full regulatory evaluation under

paragraph 10(e) of the regulatory policies and procedures of the DHS is unnecessary.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in a portion of Mission Bay from 8:30 p.m. to 10 p.m. on July 4, 2008. This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: The safety zone only encompasses a small portion of the waterway, it is short in duration at a late hour when commercial traffic is low, vessels may safely travel around the safety zone, and the Captain of the Port may authorize entry into the zone, if necessary.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. If your small business or organization is affected by this rule and you have questions concerning its provisions or options for compliance, please contact Petty Officer Kristen Beer, U.S. Coast Guard Sector San Diego at (619) 278-7233.

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 does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian

tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

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

Technical Standards

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

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards. 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.ID 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, under the Instruction, that there are no factors in this case that would limit the use of a 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 because it establishes a

safety zone. A final “Environmental Analysis Check List” and a final “Categorical Exclusion Determination” are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and 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. 1225, 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 § 165.T11–045 to read as follows:

§ 165.T11–045 Safety Zone: Mission Bay Yacht Club 4th of July Display; Mission Bay, San Diego, CA.

(a) *Location.* The limits of the temporary safety zones include all areas within an 800-foot radius around an anchored barge. The barge will be anchored at a location approximately 600 feet east of the Santa Clara Point.

(b) *Effective Period.* This safety zone will be in effect from 8:30 p.m. until 10 p.m. on July 4, 2008. If the display concludes prior to the scheduled termination time, the Captain of the Port or his designated representative will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, entry into, transit through, or anchoring within this zone by all vessels is prohibited, unless authorized by the Captain of the Port or his designated representative. Mariners requesting permission to transit through the safety zone may request authorization to do so from the U.S. Coast Guard Patrol Commander. The U.S. Coast Guard Patrol Commander may be contacted via VHF–FM Channel 16.

(d) *Enforcement.* All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene patrol personnel. Patrol personnel can be comprised of commissioned, warrant, and petty officers of the Coast Guard onboard Coast Guard, Coast Guard Auxiliary, local, state, and federal law

enforcement vessels. Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed. The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: June 10, 2008.

C.V. Strangfeld,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. E8-14370 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-15-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2008-0164]

RIN 1625-AA00

Safety Zones; Big Bay July 4th Fireworks Show; San Diego Bay, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing four (4) temporary safety zones on the navigable waters of San Diego Bay in support of the North San Diego Bay July 4th Fireworks Show. These safety zones are necessary to provide for the safety of the crews, spectators, participants of the event, participating vessels and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within these safety zones unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective from 8 p.m. until 10 p.m. on July 4, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG-2008-0164 and are available online at www.regulations.gov. They are also available for inspection or copying two locations: the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and at Coast Guard Sector San Diego, 2710 N. Harbor Drive, San Diego, CA 92101-1064 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Petty Officer Kristen Beer, Waterways

Management, U.S. Coast Guard Sector San Diego, CA at telephone (619) 278-7233.

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. Final approval and permitting of this event were not issued in time to engage in full notice and comment rulemaking. Publishing an NPRM and delaying the effective date would be contrary to the public interest since the event would occur before the rulemaking process was complete.

Under 5 U.S.C. 553(d)(3), the Coast Guard also finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. In addition, it would be contrary to the public interest not to publish this rule because the event has been permitted and participants and the public require protection.

Background and Purpose

The Coast Guard is establishing four (4) temporary safety zones on the navigable waters of San Diego Bay in support of the North San Diego Bay July 4th Fireworks Show. These temporary safety zones are necessary to provide for the safety of the crews, spectators, participants of the event, participating vessels and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within these safety zones unless authorized by the Captain of the Port, or his designated representative.

Discussion of Rule

The Coast Guard establishes this temporary rule, pursuant to 33 U.S.C. 1225, to provide for the safety of the participants, spectators and other users of the waterways. These safety zones will be effective from 8 p.m. to 10 p.m. on July 4, 2008. These four temporary safety zones are necessary to ensure the safety of participants and spectators of the North San Diego Bay July 4th Fireworks Show. The duration of the show is expected to be approximately 20-25 minutes. The event involves four (4) anchored barges, which will be used as platforms for the launching of fireworks.

The limits of the temporary safety zones include all areas within a 1200 foot radius around the firing locations at the following points: 32-42.83' N, 117-13.20' W (in vicinity of Shelter Island), 32-43.33' N, 117-12.00' W (in vicinity

of Harbor Island), 32-43.00' N, 117-10.80' W (in vicinity of North Embarcadero), and 32-43.23' N, 117-10.05' W (in vicinity of Seaport Village/Coronado Landing).

These temporary safety zones are necessary to provide for the safety of the crews, spectators, participants of the event, participating vessels and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within these safety zones unless authorized by the Captain of the Port, or his designated representative.

U.S. Coast Guard personnel will enforce this safety zone. Other Federal, State, or local agencies may assist the Coast Guard, including the Coast Guard Auxiliary. § 165.23 of Title 33, Code of Federal Regulations, prohibits any unauthorized person or vessel from entering or remaining in a safety zone. Vessels or persons violating this section will be subject to the penalties set forth in 33 U.S.C. 1232.

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.

Due to the temporary rule's short duration of two hours, its limited scope of implementation, and because vessels will have an opportunity to request authorization to transit through the zone or the vessels may safely travel around the zone, the Coast Guard expects the economic impact of this rule to be so minimal that full regulatory evaluation under paragraph 10(e) of the regulatory policies and procedures of the DHS is unnecessary.

Small Entities

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

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

This rule will affect the following entities, some of which may be small

entities: The owners or operators of vessels intending to transit or anchor in a portion of North San Diego Bay from 8 p.m. to 10 p.m. on July 4, 2008.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: The safety zone only encompasses a small portion of the waterway, it is short in duration at a late hour when commercial traffic is low, vessels may safely travel around the safety zone, and the Captain of the Port may authorize entry into the zone, if necessary.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. If your small business or organization is affected by this rule and you have questions concerning its provisions or options for compliance, please contact Petty Officer Kristen Beer, U.S. Coast Guard Sector San Diego at (619) 278–7233.

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 does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.ID 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, under the Instruction, that there are no factors in this case that would limit the use of a 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 because it establishes a safety zone.

A final “Environmental Analysis Check List” and a final “Categorical Exclusion Determination” are available in the docket where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and 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. 1225, 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 § 165.T11-042 to read as follows:

§ 165.T11-042 Safety Zone: Big Bay July 4th Fireworks Show; San Diego Bay, San Diego, CA.

(a) *Location.* The limits of the temporary safety zones include all areas within a 1200 foot radius around the firing locations at the following points: 32-42.83' N, 117-13.20' W (in vicinity of Shelter Island), 32-43.33' N, 117-12.00' W (in vicinity of Harbor Island), 32-43.00' N, 117-10.80' W (in vicinity of North Embarcadero), and 32-43.23' N, 117-10.05' W (in vicinity of Seaport Village/Coronado Landing).

(b) *Effective Period.* This safety zone will be in effect from 8 p.m. until 10 p.m. on July 4, 2008. If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, entry into, transit through, or anchoring within this zone by all vessels is prohibited, unless authorized by the Captain of the Port, or his designated representative. Mariners requesting permission to transit through the safety zone may request authorization to do so from the designated representative. The designated representative may be contacted via VHF-FM channel 16.

(d) *Enforcement.* All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene patrol personnel. Patrol personnel can be comprised of commissioned, warrant, and petty officers of the Coast Guard onboard Coast Guard, Coast Guard Auxiliary, Local, State, and Federal law enforcement vessels.

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

The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: June 10, 2008.

C.V. Strangfeld,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. E8-14353 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-15-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-HQ-OAR-2006-0406, FRL-8684-8]

RIN 2060-AM74

National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Dispensing Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action on certain amendments to the National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Dispensing Facilities, which EPA promulgated on January 10, 2008, and amended on March 7, 2008. The January 10, 2008 rule established national emission standards for hazardous air pollutants for the facilities in the gasoline distribution (Stage I) area source category. This action only affects area source gasoline dispensing facilities with a monthly throughput of 100,000 gallons of gasoline or more. In this action, EPA is amending the pressure and vacuum vent valve cracking pressure and leak rate requirements for vapor balance systems used to control emissions from gasoline storage tanks at gasoline dispensing facilities. Newly constructed or reconstructed gasoline dispensing facilities must comply with the requirements of these amendments by the effective date of the amendments, or upon start-up, whichever is later. We are not modifying the compliance date for existing sources with a monthly throughput of 100,000 gallons of gasoline or more.

DATES: This direct final rule is effective on September 23, 2008 without further notice, unless EPA receives adverse comment by August 11, 2008. If we receive adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule, or the relevant section of this rule, will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2006-0406, by one of the following methods:

- <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *E-mail:* a-and-r-Docket@epa.gov.
- *Fax:* (202) 566-9744.
- *Mail:* Air and Radiation Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania

Ave., NW., Washington, DC 20460. Please include a total of two copies.

• *Hand Delivery:* In person or by courier, deliver your comments to: Air and Radiation Docket, Public Reading Room, 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. We request that a separate copy also be sent to the contact persons listed below (see **FOR FURTHER INFORMATION CONTACT**).

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2006-0406. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

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

available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket, EPA West Building, 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 and Radiation Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: General and Technical Information: Mr. Stephen Shedd, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Coatings and Chemicals Group (E143-01), EPA, Research Triangle Park, NC 27711, telephone: (919) 541-5397, facsimile number: (919) 685-3195, e-mail address: shedd.steve@epa.gov.

Compliance Information: Ms. Maria Malave, Office of Compliance, Air Compliance Branch (2223A), EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, telephone: (202) 564-7027, facsimile

number: (202) 564-0050, e-mail address: malave.maria@epa.gov.

SUPPLEMENTARY INFORMATION: EPA is publishing this rule without prior proposal because we view this as a noncontroversial action and anticipate no adverse comment. The amendments being implemented revise certain technical requirements in 40 CFR part 63, Subpart CCCCCC. However, in the "Proposed Rules" section of this **Federal Register**, we are publishing a separate document that will serve as the proposed rule for these amendments if adverse comments are received on this direct final rule. If EPA receives adverse comment on all or a distinct portion of this rule, we will publish a timely withdrawal in the **Federal Register** informing the public that some of or this entire direct final rule will not take effect. The rule provisions that are not withdrawn will become effective on the date set out above, notwithstanding adverse comment on any other provision, unless we determine that it would not be appropriate to promulgate those provisions due to their being affected by the provision for which we receive adverse comments. We would address all public comments in any

subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

Submitting CBI. Do not submit this information to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on 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.

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

Category	NAICS*	Examples of regulated entities
Industry	447110 447190	Operations at area source gasoline dispensing facilities.
Federal/State/local/tribal governments		

* North American Industry 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 final rule. To determine whether your facility is regulated by this action, you should examine the applicability criteria in 40 CFR part 63, subpart CCCCCC. If you have any questions regarding the applicability of this final rule to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as listed in 40 CFR 63.13.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of this final rule is also available on the WWW through the Technology Transfer Network (TTN). Following signature, a copy of this final rule will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: <http://www.epa.gov/ttn/oarpg>. The TTN provides information and technology exchange in various areas of air pollution control.

Outline: The information presented in this preamble is organized as follows:

- I. Background
- II. Summary of These Final Rule Amendments
- III. Rationale For These Final Rule Amendments
- IV. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review
 - B. Paperwork Reduction Act
 - C. Regulatory Flexibility Act
 - D. Unfunded Mandates Reform Act
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
 - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer and Advancement Act
 - J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
 - K. Congressional Review Act

I. Background

On January 10, 2008 (73 FR 1916), EPA issued a final rule that established national emission standards for hazardous air pollutants (NESHAP) for the facilities in the gasoline distribution (Stage I¹) area source category. These facilities include bulk distribution facilities, i.e., gasoline distribution bulk terminals, bulk plants, and pipeline facilities, and gasoline dispensing facilities (GDF), as defined in 40 CFR 63.11100 and 63.11132. EPA subsequently identified certain cross-referencing errors in the final rule. On March 7, 2008 (73 FR 12275), EPA promulgated a technical corrections notice and corrected those errors. As explained below, this action amends certain requirements of the January 10, 2008 final rule that apply to GDF with a monthly throughput of 100,000 gallons or more.

¹ Stage 1 refers to here, the entire gasoline distribution system that includes all facilities from and including the refinery to the end user, except for vehicle refueling (so called Stage II).

II. Summary of These Final Rule Amendments

The January 10, 2008, final rule requires installation of vapor balance systems between the delivery tank truck and the storage tank at GDF with a monthly throughput of 100,000 gallons of gasoline or more. Facilities can satisfy the vapor balance system requirements by complying with the listed applicability criteria and management practices in Table 1 to subpart CCCCCC of 40 CFR part 63.² Entry 1.(g) in Table 1 to subpart CCCCCC requires the installation of pressure/vacuum (PV) vent valves with specific cracking pressure and leak rate settings on the storage tank vent pipes at affected GDF. As explained below, PV vent valves are integral to the functionality of the vapor balance system; however, after promulgation, we discovered that PV vent valves with the specific pressure, deviations, and leak rate settings required in the January 10, 2008, final rule are no longer manufactured. These final rule amendments change those specific pressure and leak rate settings for PV vent valves so that GDFs may obtain and install PV vent valves and thus operate a functioning vapor balance system. The amended PV vent valve settings are:

“A positive pressure setting of 2.5 to 6.0 inches of water and a negative pressure setting of 6.0 to 10.0 inches of water. The total leak rate of all PV vent valves at an affected facility, including connections, shall not exceed 0.17 cubic foot per hour at a pressure of 2.0 inches of water and 0.63 cubic foot per hour at a vacuum of 4 inches of water.”

New or reconstructed affected GDF, as defined in § 63.11112 of Subpart CCCCCC, that have a monthly throughput of 100,000 gallons of gasoline or more must comply with the revised vapor balance system requirements, set forth in Table 1 of these amendments, by September 23, 2008, or upon startup, whichever is later. The compliance date for existing GDF to install vapor balance systems with a monthly throughput of 100,000 gallons of gasoline or more is January 10, 2011, which is the same date specified in the January 10, 2008, final rule. We are not modifying this date because existing sources will have sufficient time to comply with the revised vapor balance system requirements in revised Table 1 by that date. The compliance dates for all other requirements in the rule remain as

² Subpart CCCCCC also provides two additional methods for complying with the vapor balancing requirements. See §§ 63.11118(b)(2) and 63.11120(b).

promulgated in the January 10, 2008, final rule, as those requirements are not the subject of this direct final rule.

III. Rationale for These Final Rule Amendments

Following issuance of the January 10, 2008, final rule, EPA received several inquiries from stakeholders and regulatory agencies concerning the PV vent valve requirements for vapor balance systems. A vapor balance system is a combination of equipment (connectors, piping, storage tank, hoses, PV vent valves, gaskets, and the tank truck). These equipment, taken together, work as a system to route the vapors displaced from the storage tank back into the delivery tank truck. If the PV vent valves, which are an integral part of the vapor balance system, are not installed, the vapors would escape into the atmosphere through the storage tank vent instead of being routed back into the delivery tank truck and the source would not be in compliance with the requirement to have a functioning vapor balance system.

Those who contacted EPA concerning the PV vent valve requirements reported that the PV vent valve specifications in the final rule are not commercially available because manufacturers are no longer making PV vent valves with these specifications; therefore, facilities cannot currently comply with the requirements in the January 10, 2008, final rule. In entry 1.(g) of Table 1 to Subpart CCCCCC of Part 63, “Applicability Criteria and Management Practices for Gasoline Dispensing Facilities With Monthly Throughput of 100,000 Gallons of Gasoline or More,” we specified:

(g) Pressure/vacuum vent valves shall be installed on the storage tank vent pipes. For systems where vapors from vehicle refueling operations are not recovered, the positive cracking pressure shall be 13.8 inches of water and the negative cracking pressure shall be 6.9 inches of water. For systems where vapors from vehicle refueling operations are recovered (Stage II controls), the positive cracking pressure shall be 3 inches of water and the negative cracking pressure shall be 8 inches of water. Deviations of within ± 0.5 inches of the specified positive cracking pressures and ± 2.0 inches of the negative pressure are acceptable. The leak rates for pressure/vacuum valves, including connections, shall be less than or equal to 0.17 cubic foot per hour at a pressure of 2.0 inches of water and 0.21 cubic foot per hour at a vacuum of 4 inches of water.

The first set of cracking pressure settings (positive and negative cracking pressure of 13.8 and 6.9 inches of water, respectively) are from guidance provided for vapor balancing systems

installed in the 1970s. The second set of cracking pressure settings (positive and negative cracking pressure of 3 and 8 inches of water, respectively), and deviation and leak rate settings are based on the PV vent valve cracking pressure setting requirements in the 2005 California Air Resources Board (CARB) Vapor Recovery Certification Procedure (CP-201). All of these PV vent valve settings were in the draft rule in the docket when we proposed the rules for this source category on November 9, 2006; however, we did not receive any public comments on this portion of the draft rule.

After the final rule was promulgated, interested stakeholders contacted EPA and stated that the PV vent valve settings specified in the final rule are not being used on GDF storage tanks because manufacturers are not making PV vent valves with these settings. In response to these inquiries, EPA contacted the two major PV vent valve manufacturers and received confirmation that neither manufacturer offers a PV vent valve with the settings specified in the January 10, 2008, final rule nor do they recommend those settings for any vapor balance systems, with or without vehicle refueling vapor recovery systems.

EPA also contacted CARB representatives to discuss the issue of the PV vent valve settings. The CARB representatives stated that the PV vent valve settings in CP-201 apply to vapor balance systems, Stage I only and Stage I with Stage II.³ With regard to the PV vent valve cracking pressure settings, the CARB representatives explained that CP-201 was amended on May 25, 2006. The 2006 CP-201 specifies acceptable ranges for the positive (2.5 to 6.0 inches of water) and negative (6.0 to 10.0 inches of water) cracking pressures, rather than the single values with allowable deviations, which was the format used in the January 10, 2008, EPA final rule. The CARB representatives also informed EPA that the allowable PV vent valve leak rates in CP-201 were also amended on May 25, 2006. The 2006 CP-201 new allowable leak rates are less than or equal to 0.17 cubic foot per hour at a pressure of 2.0 inches of water and 0.63

³ A vapor balance system at GDF is divided into two types. Vapor balancing between the delivery tank truck and the storage tank is referred to as Stage I or Phase I vapor balance systems. Vapor balancing between the storage tank and the vehicle being refueled is referred to as Stage II or Phase II vapor balance systems. Among other things, the January 10, 2008 final rule requires installation of Stage I vapor balance systems at GDF with monthly throughput of 100,000 gallons of gasoline or more. Stage II controls are not required by subpart CCCCCC.

cubic foot per hour at a vacuum of 4.0 inches of water. According to CARB representatives, CARB's certification testing (using test procedure TP-201.1) demonstrates that Stage I and Stage II systems, alone or together, achieve CARB's 98-percent efficiency requirement using the 2006 CP-201 PV vent valve settings.

In evaluating how to revise the PV vent valve settings in Table 1, we considered if other types of vapor balance systems using the 2006 CP-201 PV vent valve settings provide emission controls at least equivalent to the performance levels of vapor balance systems that follow the requirements in Table 1 of the January 10, 2008, final rule. Specifically, under the January 10, 2008, final rule, facilities using vapor balance systems other than those meeting the management practices specified in Table 1 to subpart CCCCCC must demonstrate equivalency using the procedures in 40 CFR 63.11120(b)(1) through (3). The procedure in § 63.11120(b)(1) requires that vapor balance systems be tested using CARB test procedure TP-201.1 to demonstrate that the system achieves at least a level of 95 percent control. As noted above, CARB's amended 2006 CP-201 PV vent valve settings provide a level of emissions control that is at least equivalent to the level required by § 63.11120(b)(1).

Based on the above information and our own analysis, we agree with the stakeholders who contacted EPA following issuance of the final rule in January 2008. Specifically, we agree that PV vent valves with the settings specified in the January 10, 2008, final rule are not currently available for purchase from manufacturers so that GDFs choosing to comply with the vapor balance system requirement in Table 1 of Subpart CCCCCC cannot currently comply with this requirement. Therefore, given the equal or better control from the amended 2006 CARB CP-201 settings, and the fact that PV vent valves meeting these specifications are currently available, which is not the case for the settings specified in the January 10, 2008, final rule, EPA is taking this final action and adopting the following new requirements for PV vent valve specifications in entry 1.(g) of Table 1 to subpart CCCCCC of 40 CFR part 63:

(g) Pressure/vacuum (PV) vent valves shall be installed on the storage tank vent pipes. The pressure specifications for PV vent valves shall be: a positive pressure setting of 2.5 to 6.0 inches of water and a negative pressure setting of 6.0 to 10.0 inches of water. The total leak rate of all PV vent valves at an affected facility, including connections,

shall not exceed 0.17 cubic foot per hour at a pressure of 2.0 inches of water and 0.63 cubic foot per hour at a vacuum of 4 inches of water.

Because we are modifying the PV vent valve setting requirements of Table 1, it is appropriate to address the date by which new and existing sources must comply with these new requirements. As explained above, the PV vent valve settings are an integral part of enabling the vapor balance system to function properly. Without the PV vent valves, the vapors escape into the atmosphere rather than being rerouted into the tank truck. As also explained above, the PV vent valve settings in the January 10, 2008, final rule are not available so owners and operators of new and reconstructed GDF cannot currently comply with the vapor balance system requirements in subpart CCCCCC.

Owners or operators of new or reconstructed GDF, as defined in § 63.11112 of Subpart CCCCCC, must comply with the new vapor balance system requirements specified in Table 1 of these amendments by September 23, 2008, or upon startup, whichever is later. Because these new PV vent valve settings are off-the-shelf items that are easy to install, and because of the 3-year compliance period for existing sources specified in the January 10, 2008, final rule, we have not extended the compliance date of January 10, 2011, for existing GDF. We believe that existing GDF can meet the new requirements in Table 1 of this direct final rule by January 10, 2011, which is the compliance date specified in the January 10, 2008, rule.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The final amendments clarify, but do not add requirements increasing the collection burden. The information collection requirements contained in the existing regulations at 40 CFR part 63, subpart CCCCCC have been sent to the Office of Budget and Management (OMB) for approval under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* OMB will assign an OMB control number when the information

collection requirements are approved. The OMB control numbers for EPA 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 Procedure Act or any other statute unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, a small entity is defined as: (1) A small business whose parent company has less than \$25 million in revenue (NAICS 447110, Gasoline Stations with Convenience Stores), and less than \$8.0 million in revenue (NAICS 447190, Other Gasoline Stations), and any other small business as defined by 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; or (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 final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any new requirement on small entities since we are replacing one specification for PV vent valves with another readily available specification for PV vent valves.

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 one year. Before promulgating an EPA rule for which a written statement is needed, section 205

of the UMRA generally requires us 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 us 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 we establish any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, we 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 contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. These final rule amendments correct a technical error in the rule text for a rule EPA determined not to include a Federal mandate that may result in an estimated cost of \$100 million or more (73 FR 1916, January 10, 2008). These amendments do not change the level or cost of the standard. Thus, these final rule amendments are not subject to the requirements of section 202 and 205 of the UMRA. EPA has determined that this rule contains no regulatory requirement that might significantly or uniquely affect small governments. These final rule amendments update PV vent valve settings in the vapor balance system requirements in the rule text; thus, the amendments should not affect small governments.

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 Executive Order 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. These final rule amendments update the PV vent valve settings in the vapor balance system requirements in the rule text. These amendments do not modify existing or create new responsibilities among EPA Regional Offices, States, or local enforcement agencies. Thus, Executive Order 13132 does not apply to this 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 Executive Order 13175. It will not have substantial direct effects on tribal governments, 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. Thus, Executive Order 13175 does not apply to this rule.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance.

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

This rule is not subject to Executive Order 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 Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, 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. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standard.

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

Executive Order 12898 (59 FR 7629, February 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.

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. These final rule amendments do not relax the control measures on sources regulated by the rule and, therefore, will not cause emissions increases from these sources.

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. EPA will submit a

report containing the final rule amendments and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the final rule amendments 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). These final rule amendments will be effective on September 23, 2008.

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: June 19, 2008.

Stephen L. Johnson,
Administrator.

■ For the reasons set out in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart CCCCC—[Amended]

■ 2. Section 63.11113 is amended by revising paragraph (a) introductory text and by adding paragraph (d) to read as follows:

§ 63.11113 When do I have to comply with this subpart?

(a) If you have a new or reconstructed affected source, you must comply with

this subpart according to paragraphs (a)(1) and (2) of this section, except as specified in paragraph (d) of this section.

* * * * *

(d) If you have a new or reconstructed affected source and you are complying with Table 1 to this subpart, you must comply according to paragraphs (d)(1) and (2) of this section.

(1) If you start up your affected source from November 9, 2006 to September 23, 2008, you must comply no later than September 23, 2008.

(2) If you start up your affected source after September 23, 2008, you must comply upon startup of your affected source.

* * * * *

■ 3. Table 1 to Subpart CCCCC of Part 63 is amended by revising entry 1.(g) to read as follows:

TABLE 1 TO SUBPART CCCCC OF PART 63.—APPLICABILITY CRITERIA AND MANAGEMENT PRACTICES FOR GASOLINE DISPENSING FACILITIES WITH MONTHLY THROUGHPUT OF 100,000 GALLONS OF GASOLINE OR MORE

If you own or operate . . .	Then you must . . .
* * * * *	* * * * *
1. A new, reconstructed, or existing GDF subject to § 63.11118.	(g) Pressure/vacuum (PV) vent valves shall be installed on the storage tank vent pipes. The pressure specifications for PV vent valves shall be: a positive pressure setting of 2.5 to 6.0 inches of water and a negative pressure setting of 6.0 to 10.0 inches of water. The total leak rate of all PV vent valves at an affected facility, including connections, shall not exceed 0.17 cubic foot per hour at a pressure of 2.0 inches of water and 0.63 cubic foot per hour at a vacuum of 4 inches of water.
* * * * *	* * * * *

[FR Doc. E8-14377 Filed 6-24-08; 8:45 am]
BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[FRL-8684-9]

IBM Semiconductor Manufacturing Facility in Essex Junction, VT, Under Project XL

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is withdrawing a final rule published on September 12, 2000 which modified the regulations under the Resource, Conservation and Recovery Act (RCRA) to enable the implementation of the International Business Machines Corporation (IBM) Copper Metallization project that was

developed under EPA's Project eXcellence in Leadership (Project XL) program. Project XL was a national pilot program that allowed state and local governments, businesses and federal facilities to work with EPA to develop more cost-effective ways of achieving environmental and public health protection. In exchange, EPA provided regulatory, policy or procedural flexibilities to conduct the pilot experiments.

DATES: The final rule is effective July 25, 2008.

FOR FURTHER INFORMATION CONTACT: Sandra Panetta, Mail Code 1870T, U.S. Environmental Protection Agency, Office of Policy, Economics and Innovation, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Ms. Panetta's telephone number is (202) 566-2184 and her e-mail address is panetta.sandra@epa.gov. Further information on today's action may also be obtained on the internet at <http://www.epa.gov/projectxl/ibm2/index.htm>.

SUPPLEMENTARY INFORMATION: EPA is withdrawing the final rule which was published on September 12, 2000 (65 FR 54955) in response to IBM's request to discontinue the XL project. The final rule granted IBM an exemption under Project XL from the F006 hazardous listing for sludge generated from the treatment of copper electroplating rinsewaters. IBM has implemented a new process step that has caused the wastewater treatment sludge to once again become F006 listed hazardous waste and is complying with the Vermont Department of Environmental Conservation requirements for this listed waste. Discontinuing the XL project will have no environmental impact. All reporting requirements in 40 CFR 261.4(b)(16) are discontinued.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule

without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because EPA is withdrawing a rule that no longer applies to the company and the company has notified us that the project has terminated. The removal of the rule has no legal effect. Notice and public procedure would serve no useful purpose and is thus unnecessary. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

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.*, because it is withdrawing a rule that was not implemented and does not impose any new requirements.

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 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

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant

economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because it withdraws a rule that applied to only one facility and does not impose any new requirements. Because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute [see **SUPPLEMENTARY INFORMATION** section], it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

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 one 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.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The rule imposes no enforceable duty on any State, local or tribal governments or the private sector. (*Note:* The term "enforceable duty" does not include duties and conditions in voluntary federal contracts for goods and services.) Because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute [see **SUPPLEMENTARY INFORMATION** section], it is not subject to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4).

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 Executive Order 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. This rule withdraws a rule that was specific to one facility. Thus, Executive Order 13132 does not apply to this 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 Executive Order 13175. This final rule withdraws a rule that was not

implemented. Thus, Executive Order 13175 does not apply to this rule.

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

(62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a 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. EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211 (Energy Effects)

This rule is not subject to Executive Order 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 Executive Order 12866.

I. National Technology Transfer Advancement Act

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards 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 voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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. 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. This rule applies to one facility and withdraws a rule that was not implemented.

K. The 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. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because it is a rule of particular applicability and does not impose any new requirements.

List of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Waste treatment and disposal, Recycling.

Dated: June 19, 2008.

Stephen L. Johnson,
Administrator.

■ For the reasons set forth in the preamble, parts 261 of chapter I of title 40 of the Code of Federal Regulations are amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y) and 6938.

■ 2. Section 261.4 paragraph (b)(16) is removed and reserved.

[FR Doc. E8-14403 Filed 6-24-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 1051

[EPA-HQ-OAR-2008-0124; FRL-8684-6]

RIN 2060-A088

Exhaust Emission Standards for 2012 and Later Model Year Snowmobiles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: In a November 2002 final rule, we established the first U.S. emission standards for new snowmobiles. Subsequent litigation regarding that final rule resulted in a court decision which requires us to: remove the oxides of nitrogen (NO_x) component from the Phase 3 snowmobile standards set to take effect in 2012, and; clarify the evidence and analysis upon which the Phase 3 carbon monoxide (CO) and hydrocarbon (HC) standards were based. In this action, we are removing the NO_x component from the Phase 3 emission standard calculation. We are deferring action on the 2012 CO and HC emission standards portion of the court's remand to a separate rulemaking action.

DATES: This rule is effective on August 25, 2008 without further notice, unless EPA receives adverse comment by July 25, 2008 or a request for a public hearing by July 15, 2008. If a hearing is requested by this date, it will be held at a time and place to be published in the **Federal Register**. After the hearing, the docket for this rulemaking will remain open for an additional 30 days to receive comments. If a hearing is held, EPA will publish a document in the **Federal Register** extending the comment period for 30 days after the hearing. If EPA receives adverse comments or a request for public hearing, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-

OAR-2008-0124, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.
- *E-mail*: a-and-r-docket@epa.gov.
- *Fax*: (202) 566-1741.
- *Mail*: Environmental Protection Agency, Mail Code: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460. Please include two copies.
- *Hand Delivery*: EPA Docket Center (Air Docket), U.S. Environmental Protection Agency, EPA West Building, 1301 Constitution Avenue, NW., Room: 3334 Mail Code: 6102T, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2008-0124. 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 www.regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA

recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

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

Public Hearing: To request a public hearing, contact John Mueller at (734) 214-4275 or mueller.john@epa.gov. If a public hearing is held, persons wishing to testify must submit copies of their testimony to the docket and to John Mueller at the address below, no later than 10 days prior to the hearing.

FOR FURTHER INFORMATION CONTACT: John Mueller, Assessment and Standards Division, Office of Transportation and

Air Quality, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214-4275; fax number: (734) 214-4050; e-mail address: mueller.john@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Why Is EPA Using a Direct Final Rule?

We are publishing this as a direct final rule because we view this as a noncontroversial action. We are simply removing the NO_x component from the Phase 3 snowmobile emission standard equation as required by the court decision. However, in the "Proposed Rules" section of today's **Federal Register**, we are publishing a separate document that will serve as the proposed rule to consider adoption of the provisions in this direct final rule if adverse comments or a request for a public hearing are received on this action. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment or a request for a public hearing, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

II. Does This Action Apply to Me?

This action will affect companies that manufacture, sell, or import into the United States new snowmobiles and new spark-ignition engines for use in snowmobiles. This action may also affect companies and persons that rebuild or maintain these engines. Affected categories and entities include the following:

Category	NAICS code ^a	Examples of potentially affected entities
Industry	333618	Manufacturers of new nonroad spark-ignition engines.
Industry	336999	Snowmobile manufacturers.
Industry	811310	Engine repair and maintenance.
Industry	421110	Independent commercial importers of vehicles and parts.

^aNorth American Industry Classification System (NAICS).

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 particular activities may be affected by this action, you should carefully examine the regulations. You may direct questions regarding the

applicability of this action as noted in **FOR FURTHER INFORMATION CONTACT**.

III. What Should I Consider as I Prepare My Comments for EPA?

A. Submitting CBI. Do not submit Confidential Business Information (CBI) to EPA through <http://www.regulations.gov> or e-mail. Clearly

mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that

includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

B. Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

- Describe any assumptions and provide any technical information and/or data that you used.

- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

- Provide specific examples to illustrate your concerns, and suggest alternatives.

- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

- Make sure to submit your comments by the comment period deadline identified.

IV. Summary of Rule

In November 2002, we adopted emission standards for new

snowmobiles.¹ The program contained three phases of standards. The Phase 1 standards, effective with the 2006 model year, and the Phase 2 standards, effective with the 2010 model year, contained limits for CO and HC emissions. The Phase 3 standards, effective with the 2012 model year, also contained a NO_x component in addition to CO and HC components, effectively creating separate HC+NO_x and CO emission standards for 2012 and later model years. Each set of these standards permits emissions averaging among a manufacturer's engine families.

The form of the Phase 3 standards also differed from the Phase 1 and 2 standards. While the Phase 1 and 2 standards simply contained numerical limits for CO and HC, the Phase 3 standards were in the form of an equation, as follows:

$$\left(1 - \frac{(HC + NO_x)_{STD} - 15}{150}\right) \times 100 + \left(1 - \frac{CO_{STD}}{400}\right) \times 100 \geq 100$$

The two main advanced technologies we anticipated being used to meet the Phase 3 standards (direct or semi-direct injection 2-stroke engines, and 4-stroke engines) tend to have rather different emissions profiles, and the equation was designed to allow manufacturers to use varying mixes of these technologies as the market would allow, while still achieving substantial emission reductions. The Phase 3 standard equation in essence requires nominal 50 percent reductions in CO and HC compared to uncontrolled levels, which are 150 g/kW-hr for HC and 400 g/kW-hr for CO. However, the equation is structured such that mixes of CO and HC reductions can be used. In conjunction with a straight HC limit of 75 g/kW-hr (ensuring at least 50 reduction in HC) and a corporate average CO standard that could not exceed 275 g/kW-hr (ensuring at least approximately 30 reduction in CO), the equation allows up to 70 percent reductions of HC and 30 percent reductions of CO, as long as the percentage reduction of both pollutants combined is at least 100 percent. As

previously mentioned, the Phase 3 equation also contained a NO_x component. We did not want the anticipated increased use of 4-stroke engines (which tend to have higher NO_x emissions as compared to 2-stroke engines) to result in fleet average increases in snowmobile NO_x emissions. Thus, we included in the Phase 3 equation a NO_x term that was intended to cap NO_x emissions, and a “- 15” term that was intended to account for NO_x emissions from existing 4-stroke engines. See 67 FR 68272–68275.

Following the promulgation of the November 2002 final rule, Bluewater Network, Environmental Defense and the International Snowmobile Manufacturers Association petitioned for review of the rule in the Court of Appeals for the District of Columbia. The court upheld much of the rule and rationale, but made two determinations requiring further action by EPA. See *Bluewater Network v. EPA*, 370 F. 3d 1 (D.C. Cir 2004) First, the court vacated the NO_x portion of the Phase 3 standards, stating that EPA did not have

authority to adopt NO_x standards for snowmobiles under the section 214(a)(4) of the Clean Air Act. Second, the court remanded the CO and HC portions of the Phase 3 standards for us to clarify the evidence and analysis upon which the standards are based. Today's action pertains to the first portion of the court's ruling. In contrast to today's action, addressing the remand of the 2012 CO and HC emission standards will require more deliberate study. Thus, we will be addressing those standards in a separate rulemaking action; we are not addressing them here. Our intention is to release a Notice of Proposed Rulemaking in the 2009 timeframe, with a Final Rule in the 2010 timeframe.

Today's action consists of modifications to the Phase 3 emission standard equation shown above. In that equation (40 CFR 1051.103), we are removing both the component requiring addition of NO_x emissions to HC emissions (the HC component remains) and the component reducing that sum by 15, to read as follows:

$$\left(1 - \frac{HC_{STD}}{150}\right) \times 100 + \left(1 - \frac{CO_{STD}}{400}\right) \times 100 \geq 100$$

¹ “Control of Emissions from Nonroad Large Spark-Ignition Engines; and Recreational Engines

(Marine and Land-Based); Final Rule,” 67 FR 68242, November 8, 2002.

We note that by removing both the “NO_x” and the “–15” terms we are effectively maintaining the stringency of the HC and CO limits relative to baseline levels (nominal 50 percent reductions of HC and CO, or up to 70 percent reductions of HC and 30 percent reductions of CO) as they were originally promulgated.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order. This direct final rule merely removes the NO_x component from the snowmobile Phase 3 emission standards equation, as directed by the court’s ruling. There are no new costs associated with this rule.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This direct final rule merely revises the snowmobile Phase 3 emissions equation by removing the NO_x component. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations [40 CFR part 1051] under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0338, EPA ICR number 1695. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

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 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 Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final rule on small entities, a small entity is defined as: (1) A small business that meets the definition for business based on SBA size standards 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 today’s final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives “which minimize any significant economic impact of the rule on small entities.” 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This direct final rule merely removes the NO_x component from the snowmobile Phase 3 regulations. We have therefore concluded that today’s final rule will not affect regulatory burden for all affected small entities.

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 one 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 to 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 of why such an alternative was 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 rule contains no federal mandates for state, local, or tribal governments, or the private sector as defined by the provisions of Title II of the UMRA. The rule imposes no enforceable duties on any of these governmental entities. This rule contains no regulatory requirements that would significantly or uniquely affect small governments. EPA has determined that this rule contains no federal mandates that may result in expenditures of more than \$100 million to the private sector in any single year. This direct final rule merely removes the NO_x component from the snowmobile Phase 3 regulations. This rule is not subject to the requirements of sections 202 and 205 of UMRA.

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” are defined in the Executive Order 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.”

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the agency consults with State and local officials early in the process of developing the regulation.

Section 4 of the Executive Order contains additional requirements for rules that preempt State or local law, even if those rules do not have federalism implications (i.e., the rules 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). Those requirements include providing all affected State and local officials notice and an opportunity for appropriate participation in the development of the regulation. If the preemption is not based on express or implied statutory authority, EPA also must consult, to the extent practicable, with appropriate State and local officials regarding the conflict between State law and Federally protected interests within the agency’s area of regulatory responsibility.

This 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. This direct final rule merely removes the NO_x component from the snowmobile Phase 3 regulations. Thus, Executive Order 13132 does not apply to this rule.

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

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (59 FR 22951, November 6, 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.” “Policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, 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, as specified in Executive Order 13175. This rule does not uniquely affect the communities of Indian Tribal Governments. Further, no circumstances specific to such communities exist that would cause an impact on these communities beyond those discussed in the other sections of this rule. This direct final rule merely removes the NO_x component from the snowmobile Phase 3 regulations. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, section 5–501 of the Order directs the Agency to 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 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. This direct final rule merely removes the NO_x component from the snowmobile Phase 3 regulations.

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

This rule is not a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This direct final rule merely removes the NO_x component from the snowmobile Phase 3 regulations.

I. National Technology Transfer and Advancement Act

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

This direct final rule does not involve technical standards. This direct final rule merely removes the NO_x component from the snowmobile Phase 3 regulations. Therefore, EPA did not consider the use of any voluntary consensus standards.

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.

EPA has determined that this 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. This direct final rule merely removes the NO_x component from the snowmobile Phase 3 regulations.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as amended 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 Congress and the Comptroller General of the United States. We 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 before 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 direct final rule is effective on August 25, 2008.

L. Statutory Authority

The statutory authority for this action comes from section 213 of the Clean Air Act as amended (42 U.S.C. 7547). This action is a rulemaking subject to the provisions of Clean Air Act section 307(d). See 42 U.S.C. 7607(d).

List of Subjects in 40 CFR Part 1051

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential business information, Imports, Penalties, Reporting and recordkeeping requirements, Warranties.

Dated: June 19, 2008.

Stephen L. Johnson,
Administrator.

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

PART 1051—CONTROL OF EMISSIONS FROM RECREATIONAL ENGINES AND VEHICLES

■ 1. The authority citation for part 1051 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

■ 2. Section 1051.103 is amended by revising paragraphs (a)(1) including Table 1 and (a)(2) to read as follows:

§ 1051.103 What are the exhaust emission standards for snowmobiles?

(a) * * *

(1) Follow Table 1 of this section for exhaust emission standards. You may generate or use emission credits under the averaging, banking, and trading (ABT) program for HC and CO emissions, as described in subpart H of this part. This requires that you specify a family emission limit for each pollutant you include in the ABT program for each engine family. These family emission limits serve as the emission standards for the engine family with respect to all required testing instead of the standards specified in this section. An engine family meets emission standards even if its family emission limit is higher than the standard, as long as you show that the whole averaging set of applicable engine families meets the applicable emission standards using emission credits, and the vehicles within the family meet the family emission limit. The phase-in values specify the percentage of your U.S.-directed production that must comply with the emission standards for those model years. Calculate this compliance percentage based on a simple count of your U.S.-directed production units within each certified engine family compared with a simple count of your total U.S.-directed production units. Table 1 also shows the maximum value you may specify for a family emission limit, as follows:

TABLE 1 OF § 1051.103.—EXHAUST EMISSION STANDARDS FOR SNOWMOBILES (g/kW-HR)

Phase	Model year	Phase-in (percent)	Emission standards		Maximum allowable family emission limits	
			HC	CO	HC	CO
Phase 1	2006	50	100	275	.....	.....
Phase 1	2007–2009	100	100	275	.....	.....
Phase 2	2010 and 2011	100	75	275	.....	.....
Phase 3	2012 and later	100	(¹)	(¹)	150	400

¹ See § 1051.103(a)(2).

(2) For Phase 3, the HC and CO standards are defined by a functional relationship. Choose your corporate average HC and CO standards for each year according to the following criteria:

(i) Prior to production, select the HC standard and CO standard (specified as g/kW-hr) so that the combined percent reduction from baseline emission levels is greater than or equal to 100 percent;

that is, that the standards comply with the following equation:

$$\left(1 - \frac{HC_{STD}}{150}\right) \times 100 + \left(1 - \frac{CO_{STD}}{400}\right) \times 100 \geq 100$$

(ii) Your corporate average HC standard may not be higher than 75 g/kW-hr.

(iii) Your corporate average CO standard may not be higher than 275 g/kW-hr.

part to show compliance with these HC and CO standards at the end of the model year under paragraph (a)(2)(i) of this section. You must comply with

(iv) You may use the averaging and banking provisions of subpart H of this

these final corporate average emission standards.

* * * * *

■ 3. Section 1051.740 is amended by revising paragraph (b)(4) to read as follows:

§ 1051.740 Are there special averaging provisions for snowmobiles?

* * * * *

(b) * * *

(4) For generating early Phase 3 credits, you may generate credits for HC or CO separately as described:

(i) To determine if you qualify to generate credits in accordance with paragraphs (b)(1) through (3) of this section, you must meet the credit trigger level. For HC this value is 75 g/kW-hr. For CO this value is 200 g/kW-hr.

(ii) HC and CO credits for Phase 3 are calculated relative to 75 g.kW-hr and 200 g/kW-hr values, respectively.

* * * * *

[FR Doc. E8-14411 Filed 6-24-08; 8:45 am]

BILLING CODE 6560-50-P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 301-11 and 302-17

[FTR Amendment 2008-04; FTR Case 2008-303; Docket 2008-0002, Sequence 2]

RIN 3090-A150

Federal Travel Regulation; Relocation Allowances; Relocation Income Tax (RIT) Allowance Tax Tables

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) has determined that it will no longer publish the Federal, State, and Puerto Rico tax tables needed for calculating the relocation income tax (RIT) allowance in the **Federal Register**. These tax tables, for use in calculating the annual RIT allowance to be paid to relocating Federal employees, will be treated like changes to other tables of rates that implement long-standing policies, such as the domestic per diems, relocation mileage, and travel mileage rates, and be posted in a Federal Travel Regulation (FTR) bulletin. GSA will continue to publish policy changes in the **Federal Register** as amendments to the Federal Travel Regulation.

DATES: *Effective Date:* June 25, 2008.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Ed

Davis, Office of Governmentwide Policy (M), Office of Travel, Transportation and Asset Management (MT), General Services Administration at (202) 208-7638 or e-mail at *ed.davis@gsa.gov*. For information pertaining to status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FTR Amendment 2008-04; FTR Case 2008-303.

SUPPLEMENTARY INFORMATION:

A. Background

In previous years, the General Services Administration (GSA), Office of Governmentwide Policy published the annual tax tables for Federal, State, and Puerto Rico used for calculating the RIT allowance to be paid to relocating Federal employees, in the **Federal Register**. These tax tables have been located in 41 CFR part 302-17 as Appendices A through D.

This final rule informs Government agencies that the Federal, State, and Puerto Rico tax tables (41 CFR part 302-17, Appendices A through D) will no longer appear in the **Federal Register** or in 41 CFR part 302-17. From now on, these tax tables will be published similar to other tables of rates that implement long-standing policies, such as the domestic per diems, relocation mileage, and travel mileage rates, and appear as Federal Travel Regulation (FTR) bulletins. You may find the FTR bulletins with the annual RIT allowances at *www.gsa.gov/ftrbulletin*. The tax table will also be published at *www.gsa.gov/relo*. This final rule removes Appendices A through D of 41 CFR part 302-17, adds a new section to that part that will provide a cross reference to the tax tables, and amends references to part 302-17 Appendices A through D in applicable sections of the FTR.

These tax tables are developed from several sources of information (e.g., the IRS, individual state taxing authorities, and the Commonwealth of Puerto Rico Department of the Treasury). GSA has determined that publishing these tax tables annually in the **Federal Register** is a time consuming and costly process that will no longer be needed when this same information is posted as FTR bulletins. As a result of the newly implemented process, the information will be available to the agency and relocating employees in a more timely manner. As part of GSA mission to serve its Federal customers as quickly as permitted, this change in delivering the RIT Allowance Tables is now implemented by this final rule.

B. Summary of the Issues Involved

This final rule is a response to agency personnel who process relocation vouchers and must delay the reimbursements because they are waiting for the most current RIT Allowance Tables to be published. By moving to the FTR bulletin process, this information will be available for the calculation of reimbursements much earlier in the calendar year and will therefore benefit both agencies and their relocating employees.

C. Changes to Current FTR

This final rule removes Appendices A through D of 41 CFR part 302-17 and adds a new section 302-17.14 to that part which will serve as a cross-reference to the location of the calendar 2008 RIT Tables and all subsequent changes to the RIT Allowance Tables in FTR bulletins. This information will be able to be accessed at both *www.gsa.gov/ftrbulletin* and *www.gsa.gov/relo*. This final rule also amends numerous sections in FTR part 301-11, 302-17.5, 302-17.8, and 302-17.10.

D. Executive Order 12866

This final rule is excepted from the definition of “regulation” or “rule” under Section 3(d)(3) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993 and, therefore, was not subject to review under Section 6(b) of that executive order.

E. Regulatory Flexibility Act

This final rule is not required to be published in the **Federal Register** for notice and comment; therefore, the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, does not apply.

F. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FTR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

G. Small Business Regulatory Enforcement Fairness Act

This final rule is also exempt from congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Parts 301-11 and 302-17

Government Employees, Relocation, Travel and Transportation Expenses.

Dated: May 5, 2008.

David L. Bibb,

Acting Administrator of General Services.

■ For the reasons set out in the preamble, 41 CFR parts 301–11 and 302–17 are amended as set forth below:

PART 301–11—PER DIEM EXPENSES

■ 1. The authority citation for 41 CFR part 301–11 continues to read as follows:

Authority: 5 U.S.C. 5707.

§ 301–11.524 [Amended]

■ 2. Amend § 301–11.524 by removing from paragraph (a) the words “Appendices A, B, C, and D to part 302–11 of this title” and adding the words “the appropriate RIT tax table(s) located at www.gsa.gov/ftrbulletin” in its place.

§ 301–11.532 [Amended]

■ 3. Amend § 301–11.532 by removing the words “Appendices A, B, C, and D to part 302–11 of this title” and adding the words “the appropriate RIT tax table(s) located at www.gsa.gov/ftrbulletin” in its place.

§ 301–11.535 [Amended]

■ 4. Amend § 301–11.535 by—
 ■ a. Removing from paragraph (a)(1) the words “Appendices A, B, C, and D to part 302–11 of this title” and adding the words “the appropriate RIT tax table(s) located at www.gsa.gov/ftrbulletin” in its place; and
 ■ b. Removing from paragraph (b) the words “Appendix B to part 302–11 of this title” and adding the words “the state RIT tax table(s) located at www.gsa.gov/ftrbulletin” in its place.

§ 301–11.624 [Amended]

■ 5. Amend § 301–11.624 by removing from paragraph (a) the words “Appendices A, B, C, and D to part 302–11 of this title” and adding the words “the appropriate RIT tax table(s) located at www.gsa.gov/ftrbulletin” in its place.

§ 301–11.632 [Amended]

■ 6. Amend § 301–11.632 by removing the words “Appendices A, B, C, and D to part 302–11 of this title” and adding the words “the appropriate RIT tax table(s) located at www.gsa.gov/ftrbulletin” in its place.

§ 301–11.635 [Amended]

■ 7. Amend § 301–11.635 by—
 ■ a. Removing from paragraph (a) the words “Appendices A, B, C, and D to part 302–11 of this title” and adding the words “the appropriate RIT tax table(s) located at www.gsa.gov/ftrbulletin” in its place; and
 ■ b. Removing from paragraph (b) the words “Appendix B to part 302–11 of

this title” and adding the words “the state RIT tax table(s) located at www.gsa.gov/ftrbulletin” in its place.

PART 302–17—RELOCATION INCOME TAX (RIT) ALLOWANCE

■ 8. The authority citation for 41 CFR part 302–17 is amended to read as follows:

Authority: 5 U.S.C. 5738; 20 U.S.C. 905(a); E.O. 11609, as amended, 36 FR 13747, 3 CFR, 1971–1975 Comp., p. 586.

§ 302–17.5 [Amended]

■ 9. Amend § 302–17.5 by removing from the second sentence of paragraph (i) the words “provided in appendices A through D of this part” and adding the words “located at www.gsa.gov/ftrbulletin (see § 302–17.14)” in its place.

■ 10. Amend § 302–17.8 by—

- a. Removing from the last sentence of paragraph (a), the words “in Appendices A, B, and C of this part” and adding the words “in an annual Federal Travel Regulation (FTR) Bulletin (located at www.gsa.gov/ftrbulletin)” in its place;
- b. Removing from the first sentence of paragraph (e)(1) the words “contained in appendices A and C of this part” and adding the words “located at www.gsa.gov/ftrbulletin” in its place; removing from the second sentence the words “(see appendix A of this part)” and adding the words “(see the appropriate RIT tax table(s) located at www.gsa.gov/ftrbulletin)” in its place; also, removing from the second sentence the words “(see appendix C of this part)” and adding the words “(see the appropriate RIT tax table(s) located at www.gsa.gov/ftrbulletin)” in its place; and removing from the fifth sentence the words “appendices A and C of this part” and adding the words “the appropriate RIT tax table(s) located at www.gsa.gov/ftrbulletin” in its place;
- c. Removing from the first sentence of paragraph (e)(2)(i) the words “in appendix B of this part” and adding the words “located at www.gsa.gov/ftrbulletin” in its place;
- d. Removing from the first sentence of paragraph (e)(2)(ii) the words “in appendix B of this part” and adding the words “located at www.gsa.gov/ftrbulletin” in its place and removing from the third sentence of paragraph (e)(2)(ii) the words “appendix B of this part” and adding the words “located at www.gsa.gov/ftrbulletin” in its place;
- e. Removing from the last sentence of paragraph (e)(4)(i)(A) the words “contained in Appendix D of this part” and adding the words “located at www.gsa.gov/ftrbulletin” in its place; and

■ f. Removing from the third sentence of paragraph (e)(5) the words “prescribed in appendix B of this part” and adding the words “located at www.gsa.gov/ftrbulletin” in its place.

§ 302–17.10 [Amended]

■ 11. Amend § 302–17.10 by removing from paragraph (a) the words “appendices A, B, and C of 41 CFR Part 302–17” and adding the words “the appropriate RIT tax table(s) located at www.gsa.gov/ftrbulletin” in its place.

■ 12. Add § 302–17.14 to read as follows.

§ 302–17.14 Where can I find the tax tables used for calculating the relocation income tax (RIT) allowances?

The annual tax tables for Federal, State, and Puerto Rico needed for calculating RIT allowance are published annually as an FTR Bulletin. These Bulletins are located at www.gsa.gov/ftrbulletin. A notice announcing each new Bulletin will be published in the **Federal Register**.

Appendices A through D to part 302–17 [Removed]

■ 13. Remove Appendices A through D to Part 302–17.

[FR Doc. E8–14276 Filed 6–24–08; 8:45 am]

BILLING CODE 6820–14–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3151.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Assistant Administrator of the Mitigation Directorate has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has

developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community. The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601-612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Sonoma County, California and Incorporated Areas Docket No.: FEMA-B-7751 and FEMA-D-7644			
Mount Hood Creek	Approximately 0.38 mile downstream of Sonoma Highway (State Route 12).	+468	City of Santa Rosa.
Petaluma River	At Sonoma Highway (State Route 12)	+495	City of Petaluma.
	Approximately 400 feet south of the intersection of South McDowell Boulevard and Cader Lane.	+9	
Laguna de Santa Rosa Creek ..	At downstream side of Redwood Highway South (US Route 101).	+97	City of Rohnert Park.
	Approximately 0.80 mile upstream of Redwood Highway South.	+100	
Russian River (Area behind Railroad Avenue/Kelly Road levees).	Approximately 1.5 miles downstream of Crocker Road	+285	Unincorporated Areas of Sonoma County.
	Approximately 1,550 feet downstream of Crocker Road	+300	

Depth in feet above ground.
+ North American Vertical Datum.
* National Geodetic Vertical Datum.

ADDRESSES

City of Petaluma

Maps are available for inspection at Petaluma City Hall, 11 English Street, Petaluma, California.

City of Rohnert Park

Maps available for inspection at the Rohnert Park City Public Works Department, 6750 Commerce Boulevard, Rohnert Park, California.

City of Santa Rosa

Maps are available for inspection at Santa Rosa City Hall, 100 Santa Rosa Avenue, Santa Rosa, California.

Unincorporated Areas of Sonoma County

Maps are available for inspection at Sonoma County Engineering Division, 2550 Ventura Avenue, Santa Rosa, California.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Avery County, North Carolina and Incorporated Areas			
Docket No.: FEMA-D-7676, FEMA-D-7808, FEMA-B-7746, FEMA-B-7763			
Anthony Creek	Approximately 140 feet upstream of Anthony Creek Road (SR 1362).	+1,720	Avery County (Unincorporated Areas).
	Approximately 1,100 feet upstream of Anthony Creek Road (SR 1362).	+1,753	
Beech Creek	At the confluence with Watauga River	+2,444	Unincorporated Areas of Avery County.
	Approximately 1,100 feet upstream of the confluence of Buckeye Creek.	+2,776	
Bill White Creek	At the confluence with Linville River	+3,274	Avery County (Unincorporated Areas).
	Approximately 1.2 miles upstream of the confluence with Linville River.	+3,331	
Brushy Creek	At the confluence with North Toe River	+2,622	Unincorporated Areas of Avery County.
	Approximately 2.0 miles upstream of the confluence with North Toe River.	+2,792	
Buckeye Creek	At the confluence with Beech Creek	+2,731	Unincorporated Areas of Avery County.
	Approximately 950 feet upstream of the confluence of Clingman Mine Branch.	+2,940	
Cary Flat Branch	At the confluence with Wilson Creek	+2,047	Avery County (Unincorporated Areas).
	Approximately 720 feet upstream of the confluence with Wilson Creek.	+2,057	
Clark Branch	At the confluence with Mill Timber Creek	+3,325	Avery County (Unincorporated Areas).
	Approximately 0.7 mile upstream of East Crossnore Drive	+3,362	
Clear Creek	At the confluence with North Toe River	+2,776	Unincorporated Areas of Avery County.
	Approximately 1,300 feet upstream of the confluence with North Toe River.	+2,816	
Cranberry Creek	At the confluence with Elk River	+2,898	Unincorporated Areas of Avery County.
	Approximately 0.5 mile upstream of Substation Road	+3,113	
Crossnore Creek	At the confluence with Mill Timber Creek	+3,323	Avery County (Unincorporated Areas), Town of Crossnore.
	Approximately 60 feet downstream of Henson Street	+3,408	
Curtis Creek	At the confluence with Elk River	+3,036	Unincorporated Areas of Avery County.
	Approximately 170 feet downstream of Alton Palmer Road (State Road 1324).	+3,249	
Elk River	At the North Carolina/Tennessee state boundary	+2,693	Unincorporated Areas of Avery County, Town of Banner Elk.
	Approximately 0.5 mile downstream of Glove Factory Lane.	+3,673	
Elk River Tributary 1	At the North Carolina/Tennessee state boundary	+2,772	Unincorporated Areas of Avery County.
	Approximately 0.7 mile upstream of North Carolina/Tennessee State boundary.	+3,198	
Fall Creek	At the confluence with Elk River	+2,713	Unincorporated Areas of Avery County.
	Approximately 0.8 mile upstream of the confluence with Elk River.	+3,174	
Gragg Prong Creek	At the confluence with Lost Cove Creek	+1,707	Unincorporated Areas of Avery County.
	Approximately 1,350 feet upstream of the confluence with Webb Creek.	+2,199	
Hanging Rock Creek	At the confluence with Elk River	+3,658	Unincorporated Areas of Avery County, Town of Banner Elk.
	Approximately 160 feet downstream of Dobbins Road (State Road 1337).	+3,848	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Harper Creek	At the Avery/Caldwell County boundary	+1,800	Avery County (Unincorporated Areas).
Henson Creek	At the confluence of South Harper and North Harper Creeks.	+1,816	
Horney Creek	At the confluence with North Toe River	+2,838	Unincorporated Areas of Avery County.
Horse Bottom Creek	Approximately 700 feet upstream of Henson Creek Road (State Road 1126).	+3,351	
Hull Branch	At the confluence with Elk River	+3,391	Unincorporated Areas of Avery County, Town of Banner Elk.
Kentucky Creek	Approximately 1,620 feet upstream of Banner Elk Highway/US-194.	+3,586	
Linville River (downstream)	At the confluence with Hanging Rock Creek	+3,686	Unincorporated Areas of Avery County, Town of Banner Elk.
Linville River (upstream)	Approximately 650 feet upstream of Guignard Lane	+3,774	
Little Elk Creek	At the confluence of South Harper Creek	+2,279	Avery County (Unincorporated Areas).
Little Elk Creek Tributary 1	Approximately 450 feet upstream of the confluence with South Harper Creek.	+2,285	
Little Elk Creek Tributary 1A	At the confluence with North Toe River	+3,590	Unincorporated Areas of Avery County, Town of Newland.
Little Elk Creek Tributary 2	Approximately 0.5 mile upstream of Damon Vance Lane ..	+3,762	
Little Elk Creek Tributary 2	Approximately 0.3 mile downstream of the Avery/Burke County boundary.	+3,206	Avery County (Unincorporated Areas).
Little Elk Creek Tributary 2	Approximately 1.1 miles upstream of River Road	+3,573	
Little Elk Creek Tributary 2	Approximately 50 feet downstream of Highland Mist Road	+3,695	Avery County (Unincorporated Areas), Village of Grandfather Village.
Little Elk Creek Tributary 2	At the confluence of Big Grassy Creek	+3,834	
Little Elk Creek Tributary 2	At the confluence with Elk River	+2,865	Unincorporated Areas of Avery County, Town of Elk Park.
Little Elk Creek Tributary 2	Approximately 0.8 mile upstream of Little Elk Road (State Road 1173).	+3,716	
Little Elk Creek Tributary 2	At the confluence with Little Elk Creek	+2,897	Unincorporated Areas of Avery County, Town of Elk Park.
Little Elk Creek Tributary 2	Approximately 140 feet upstream of Brooks Shell Road (State Road 1171).	+3,564	
Little Elk Creek Tributary 2	At the confluence with Little Elk Creek Tributary 1	+3,098	Unincorporated Areas of Avery County, Town of Elk Park.
Little Elk Creek Tributary 2	Approximately 1,420 feet upstream of Brooks Shell Road (State Road 1171).	+3,445	
Little Elk Creek Tributary 2	At the confluence with Little Elk Creek	+3,037	Unincorporated Areas of Avery County, Town of Elk Park.
Lost Cove Creek	Approximately 260 feet upstream of Cliff Taylor Lane	+3,146	
Mill Timber Creek	At the Avery/Caldwell County boundary	+1,580	Avery County (Unincorporated Areas).
North Toe River	Approximately 2.1 miles upstream of the confluence with Gragg Prong Creek.	+1,947	
North Toe River	At the confluence with Linville River	+3,315	Avery County (Unincorporated Areas).
Plumtree Creek	Approximately 150 feet downstream of U.S. 221	+3,362	
Roaring Creek	Approximately 1.3 miles downstream of the confluence of Brushy Creek.	+2,604	Unincorporated Areas of Avery County, Town of Newland.
Roaring Creek	At the confluence of Hickorynut Branch	+3,770	
Roaring Creek	At the confluence with North Toe River	+2,865	Unincorporated Areas of Avery County.
Roaring Creek	Approximately 1.0 mile upstream of US-19	+2,957	
Roaring Creek	At the confluence with North Toe River	+2,966	Unincorporated Areas of Avery County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Rockhouse Creek	Approximately 2.7 miles upstream of Roaring Creek Road (State Road 1132). At the confluence with Lost Cove Creek	+4,240 +1,580	Avery County (Unincorporated Areas).
Shawneehaw Creek	Approximately 0.5 mile upstream of the Avery/Caldwell County boundary. Approximately 300 feet upstream of the confluence with Elk River.	+1,639 +3,644	Unincorporated Areas of Avery County, Town of Banner Elk.
Shawneehaw Creek Tributary 1	Approximately 270 feet upstream of Gualtney Road (State Road 1335). At the confluence with Shawneehaw Creek	+3,962 +3,813	Unincorporated Areas of Avery County, Town of Banner Elk.
Shoemaker Creek	Approximately 880 feet upstream of Balm Highway/US-194. At the confluence with Shawneehaw Creek	+3,871 +3,796	Unincorporated Areas of Avery County, Town of Banner Elk.
South Harper Creek	Approximately 400 feet upstream of Shoemaker Road At the confluence with Harper Creek	+3,882 +1,816	Avery County (Unincorporated Areas).
Stamey Branch	Approximately 320 feet upstream of the confluence of Hull Branch. At the confluence with Linville River	+2,284 +3,263	Avery County (Unincorporated Areas).
Sugar Creek	Approximately 0.6 mile upstream of the confluence with Linville River. Approximately 150 feet upstream of the confluence with Elk River.	+3,281 +3,681	Unincorporated Areas of Avery County, Town of Banner Elk.
Threemile Creek	Approximately 1,250 feet upstream of Mac Lane At the confluence with North Toe River	+3,727 +2,756	Unincorporated Areas of Avery County.
Trivett Branch	Approximately 0.8 mile upstream of Greenway Lane At the North Carolina/Tennessee state boundary	+2,853 +2,644	Unincorporated Areas of Avery County.
Trivett Branch Tributary 1	Approximately 700 feet upstream of the confluence with Trivett Branch Tributary 3. At the North Carolina/Tennessee state boundary	+2,995 +2,633	Unincorporated Areas of Avery County.
Trivett Branch Tributary 1A	Approximately 700 feet upstream of the confluence of Trivett Branch Tributary 1A. At the confluence with Trivett Branch Tributary 1	+2,841 +2,760	Unincorporated Areas of Avery County.
Trivett Branch Tributary 2	Approximately 720 feet upstream of the confluence with Trivett Branch Tributary 1. At the confluence with Trivett Branch	+2,890 +2,650	Unincorporated Areas of Avery County.
Trivett Branch Tributary 3	Approximately 1,150 feet upstream of the confluence with Trivett Branch. At the confluence with Trivett Branch	+2,754 +2,968	Unincorporated Areas of Avery County.
Watauga River	Approximately 370 feet upstream of Dark Ridge Road (State Road 1310). At the North Carolina/Tennessee state boundary	+2,998 +2,142	Unincorporated Areas of Avery County.
Webb Creek	At the confluence of Beech Creek At the confluence with Gragg Prong Creek	+2,446 +2,172	Avery County (Unincorporated Areas).
Whitehead Creek	Approximately 475 feet upstream of Webb Creek Road At the confluence with Elk River	+2,396 +3,404	Unincorporated Areas of Avery County, Town of Banner Elk,
West Fork Linville River	Approximately 100 feet upstream of Tumbling Brook Drive Approximately 670 feet upstream of Joe Hartley Road Approximately 0.4 mile upstream of Joe Hartley Road	+3,764 +3,684 +3,712	Avery County (Unincorporated Areas).

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Wilson Creek	At the Avery/Caldwell County boundary Approximately 500 feet upstream of the confluence with Cary Flat Branch.	+1,670 +2,056	Avery County (Unincorporated Areas).

+ North American Vertical Datum.
* National Geodetic Vertical Datum.
Depth in feet above ground.

ADDRESSES

Avery County (Unincorporated Areas)

Maps are available for inspection at the Avery County Courthouse, 100 Montezuma Street, Newland, North Carolina.

Town of Banner Elk

Maps are available for inspection at the Banner Elk Town Hall, 200 Park Avenue, Banner Elk, North Carolina.

Town of Crossnore

Maps are available for inspection at the Crossnore Town Hall, 1 Circle Drive, Crossnore, North Carolina.

Town of Elk Park

Maps are available for inspection at the Elk Park Town Hall, 169 Winters Street, Elk Park North Carolina.

Town of Newland

Maps are available for inspection at the Newland Town Hall, 301 Cranberry Street, Newland, North Carolina.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: June 17, 2008.

David I. Maurstad,

Federal Insurance Administrator of the National Flood Insurance Program, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8-14326 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each

community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3151.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Assistant Administrator of the Mitigation Directorate has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community. The BFEs and

modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601-612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*;
Reorganization Plan No. 3 of 1978, 3 CFR,
1978 Comp., p. 329; E.O. 12127, 44 FR 19367,
3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the
authority of § 67.11 are amended as
follows:

State	City/town/county	Source of flooding	Location	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified
City of Sacramento, California Docket No.: FEMA-B-7753				
California	City of Sacramento	Natomas Basin	Area West of Natomas East Main Drainage Canal.	* 33
			Area North of American River	* 33
			Area East of Sacramento River	* 33

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
Depth in feet above ground.

ADDRESSES

City of Sacramento

Maps are available for inspection at Stormwater Management Program, 1395 35th Avenue, Sacramento, CA 95822.

Unincorporated Areas of Sacramento County, California
Docket No.: FEMA-B-7753

California	Unincorporated Areas of Sacramento County.	Natomas Basin	Area West of Natomas East Main Drainage Canal.	* 33
			Area North of American River	* 33
			Area East of Sacramento River	* 33

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
Depth in feet above ground.

ADDRESSES

Unincorporated Areas of Sacramento County

Maps are available for inspection at Municipal Services Agency, Department of Water Resources, 827 7th Street, Room 301, Sacramento, CA 95814.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: June 17, 2008.

David I. Maurstad,

Federal Insurance Administrator of the National Flood Insurance Program, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8-14327 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 31

[USCG-2008-0394]

RIN 1625-ZA18

Shipping; Technical, Organizational, and Conforming Amendments

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: This rule makes non-substantive changes to Title 46, part 31 of the Code of Federal Regulations. The purpose of this rule is to make conforming amendments and technical corrections to Coast Guard shipping regulations. Specifically, this final rule updates 46 CFR 31.10-16 concerning inspection and certification of shipboard cargo gear. This rule will have no substantive effect on the regulated public.

DATES: This final rule is effective June 25, 2008.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG-2008-0394 and are available for inspection or copying at the Docket Management Facility, 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. You may also

find this docket on the Internet at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call LCDR Reed Kohberger, CG-5232, Coast Guard, telephone 202-372-1471. If you have questions on viewing the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

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- I. Regulatory History
- II. Background and Purpose
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- IV. Regulatory Analyses
 - A. Regulatory Planning and Review
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 - D. Federalism
 - E. Unfunded Mandates Reform Act
 - F. Taking of Private Property
 - G. Civil Justice Reform
 - H. Protection of Children
 - I. Indian Tribal Governments
 - J. Energy Effects
 - K. Technical Standards

L. Environment

I. Regulatory History

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under both 5 U.S.C. 553(b)(A) and (b)(B), the Coast Guard finds this rule is exempt from notice and comment rulemaking requirements because these changes involve agency organization and practices, and good cause exists for not publishing an NPRM for all revisions in the rule because they are all non-substantive changes. This rule consists only of corrections and editorial, organizational, and conforming amendments. These changes will have no substantive effect on the public; therefore, it is unnecessary to publish an NPRM. Under 5 U.S.C. 553(d)(3), the Coast Guard finds that, for the same reasons, good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

II. Background and Purpose

The Coast Guard periodically makes technical amendments to Title 46 of the Code of Federal Regulations. This rule, which becomes effective June 25, 2008, updates 46 CFR 31.10–16 concerning inspection and certification of shipboard cargo gear. This rule does not create any substantive requirements.

III. Discussion of Rule

This rule adds the National Cargo Bureau, Inc. (NCB) to 46 CFR 31.10–16(e) as an organization authorized by the Coast Guard to perform inspections of shipboard cargo gear. In a letter dated March 28, 2007, the Chief of the Office of Vessel Activities, U.S. Coast Guard, confirmed that the NCB is authorized to perform such inspections, and has been since 1960. In a **Federal Register** notice dated December 24, 1960, the Coast Guard announced that valid current certificates and/or registers issued by the NCB may be accepted as *prima facie* evidence of the condition of such gear. 25 FR 13730. The letter and notice are available under docket number USCG–2008–0394 where indicated under the **ADDRESSES** section of this preamble. This technical amendment will afford the public appropriate notice of the NCB's existing authorization to conduct shipboard cargo gear inspections.

IV. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analysis based on 12 of these statutes or executive orders.

A. Regulatory Planning and Review

This rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. As this rule involves internal agency practices and procedures and non-substantive changes, it will not impose any costs on the public.

B. Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This rule does not require a general NPRM and, therefore, is exempt from the requirements of the Regulatory Flexibility Act. The Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

C. 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).

D. 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.

E. 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.

F. 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.

G. 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.

H. Protection of Children

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

I. Indian Tribal Governments

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

J. 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.

K. 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.

L. Environment

We have analyzed this rule under Commandant Instruction M16475.ID and Department of Homeland Security Management Directive 5100.1, which guides 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 a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraphs (34)(a) and (b) of the Instruction, from further environmental documentation because this rule involves editorial, procedural, and internal agency functions. A final “Environmental Analysis Check List” and a final “Categorical Exclusion Determination” are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 46 CFR Part 31

Cargo vessels, Marine safety, Reporting and recordkeeping requirements.

■ For the reasons discussed in the preamble, the Coast Guard amends 46 CFR part 31 as follows:

PART 31—INSPECTION AND CERTIFICATION

■ 1. The authority citation for part 31 continues to read as follows:

Authority: 33 U.S.C. 1321(j); 46 U.S.C. 2103, 3205, 3306, 3307, 3703; 46 U.S.C. Chapter 701; 49 U.S.C. 5103, 5106; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; Department of Homeland Security Delegation No. 0170.1. Section 31.10–21 also issued under the authority of Sect. 4109, Pub. L. 101–380, 104 Stat. 515.

■ 2. In § 31.10–16, revise paragraph (e) to read as follows:

§ 31.10–16 Inspection and certification of cargo gear-TB/ALL.

* * * * *

(e) The authorization for organizations to perform the required inspection is granted by the Chief, Office of Vessel Activities, Commandant (CG–543), and will continue until superseded, canceled, or modified. The following organizations are currently recognized

by the Commandant (CG–543) as having the technical competence to handle the required inspection:

(1) National Cargo Bureau, Inc., with home offices at 17 Battery Place, Suite 1232, New York, NY 10004.

(2) The International Cargo Gear Bureau, Inc., with home office at 321 West 44th Street, New York, NY 10036.

Dated: June 19, 2008.

Stefan G. Venckus,

Chief, Office of Regulations and Administrative Law, United States Coast Guard.

[FR Doc. E8–14293 Filed 6–24–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket No. OST–2003–15245]

RIN 2105–AD55

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Department of Transportation is amending certain provisions of its drug and alcohol testing procedures to change instructions to collectors, laboratories, medical review officers, and employers regarding adulterated, substituted, diluted, and invalid urine specimen results. These changes are intended to create consistency with specimen validity requirements established by the U.S. Department of Health and Human Services and to clarify and integrate some measures taken in two of our own Interim Final Rules. This Final Rule makes specimen validity testing mandatory within the regulated transportation industries.

DATES: This rule is effective August 25, 2008.

FOR FURTHER INFORMATION CONTACT: Jim L. Swart, Acting Director (S–1), U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone number (202) 366–3784 (voice), (202) 366–3897 (fax), or jim.swart@dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

Background

The Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C.

31300, *et seq.*, 49 U.S.C. 20100, *et seq.*, 49 U.S.C. 5330, *et seq.*, and 49 U.S.C. 45100, *et seq.* (the Omnibus Act), requires the U.S. Department of Transportation (DOT) to use the laboratories certified by, and testing procedures of, the U.S. Department of Health and Human Services (HHS) to ensure “the complete reliability and accuracy of controlled substances tests.” Since Congress specifically limited the scientific testing methodology upon which the DOT can rely in making its drug and alcohol testing regulations, we follow the HHS scientific and technical guidelines, including the amendments to their Mandatory Guidelines.

In its final rule of December 2000 [65 FR 79526], the U.S. Department of Transportation (DOT) made specimen validity testing (SVT) mandatory for the transportation industry contingent upon the HHS publishing its Mandatory Guidelines on SVT. DOT anticipated that HHS would, sometime in 2001, amend its Mandatory Guidelines to establish SVT requirements for HHS-certified laboratories. When it appeared that HHS would not establish final SVT requirements in 2001, we amended 49 CFR part 40 (part 40) to remove the mandatory requirement. We believed it advisable to wait until HHS completed its amendment before making SVT mandatory throughout the transportation industries for all DOT specimens.

On August 9, 2001, the DOT amended part 40 [66 FR 41952] to remove the mandatory requirement because HHS had not finalized its Mandatory Guidelines regarding SVT. SVT would remain authorized but not required.

The DOT issued a May 28, 2003 interim final rule (2003 IFR) [68 FR 31626] in response to scientific and medical information suggesting we modify testing criteria for some specimens that had been considered to be substituted and ultimately were treated as refusals to test. The 2003 IFR modified how the medical review officer (MRO) would deal with any substituted result with creatinine concentrations equal to or greater than 2, but less than or equal to 5 mg/dL [hereafter, “2–5 mg/dL range”]. It did not change the HHS substitution criteria that we had used.

On April 13, 2004, the HHS published a **Federal Register** notice revising its Mandatory Guidelines [69 FR 19644] with an effective date of November 1, 2004. Among the revisions contained in the HHS Mandatory Guidelines were requirements that laboratories modify substituted and diluted specimen testing procedures and reporting criteria. The HHS also revised

laboratory requirements for adulterated specimen testing and made SVT mandatory for Federal employee testing under the HHS Federal Workplace Drug Testing Program.

In an IFR (2004 IFR) [69 FR 64865] published on November 9, 2004, the DOT changed a number of items in part 40 to make them consistent with the HHS Mandatory Guidelines. We did this to avoid conflicting requirements that implementation of both rules would have had on laboratories and MROs.

While the HHS Mandatory Guidelines' approach to substituted test results allowed DOT to simplify its guidance to MROs on how to deal with those results, there were several important differences between the 2004 IFR and the HHS Guidelines. The most important among them was the fact that SVT, though authorized by part 40 and the 2004 IFR, was not yet required.

In the 2004 IFR, we indicated that we intended to fully address all aspects of the HHS changes to their Mandatory Guidelines in a notice of proposed rulemaking (NPRM). We also said that we would take into consideration any subsequent HHS materials (e.g., HHS MRO Manual) and would update our cost figures for SVT in the context of making SVT mandatory.

Subsequently, the DOT published—on October 31, 2005—an NPRM [70 FR 62276] responding to comments made to the 2003 IFR and to the 2004 IFR. The NPRM also proposed making SVT mandatory and included a number of other proposed technical changes, mostly clarifying the procedures related to testing and reporting of adulterated, substituted, and invalid specimens.

Summary of NPRM Comments

A total of 27 commenters responded to the 2005 NPRM, making 234 separate comments. Eight commenters were individuals with no known affiliations; seven were MROs representing themselves or their organizations; two were employers; one was a Third-Party Administrator (TPA); four represented associations; four represented labor unions; and one represented a drug testing laboratory.

Eleven commenters expressed general support for the DOT effort to establish clear requirements for SVT that were consistent with the HHS procedures. Of these eleven, one individual thought the SVT rules should be more rigorous; four others commended the DOT in its efforts; one TPA thought the effort admirable; two labor unions commended and supported the DOT's efforts; one association applauded the effort; and one laboratory supported

DOT efforts to bring more consistency on SVT with the HHS.

Six commenters specifically supported making SVT mandatory and five specifically opposed this proposal. Several stated that authorizing SVT is sufficient to address adulteration and substitution issues. A number of commenters provided numerous technical suggestions, supported most of the proposed changes or additions, and were interested in establishing relevant procedures to address the various issues of adulterated, substituted, and invalid test results.

A number of commenters were concerned about the current state of science related to SVT testing as compared to that of drug testing. At least two commenters believed the DOT needed to require laboratories to utilize two separate methodologies for certain SVT. However, this would require laboratories to change testing protocols that the HHS does not mandate.

A number of commenters supported the DOT's proposal to rectify past problems related to substituted specimens and suggested a number of options and recommendations. We appreciate the input from the commenters and considered their comments in the Informational Notice Regarding Certain Substituted Specimens published in the **Federal Register** on September 11, 2007 [72 51887]. Because we addressed those issues in that notice, we will not deal with them in this final rule.

A number of commenters raised part 40 issues unrelated to the proposed SVT issues. We have not addressed these unrelated items in this preamble because they are outside the scope of the NPRM.

Finally, the NPRM proposed or asked a number of major policy questions relevant to SVT. We specifically address major policy issues in a separate section and address the others in section-by-section discussions.

Principal Policy Issues

Mandatory Specimen Validity Testing

The DOT proposed making SVT mandatory, as in the current HHS Federal employee testing program.

Most commenters concurred with DOT's proposal to make SVT mandatory. Some commenters acknowledged this was necessary because the increase in products designed to adulterate specimens has made tampering with specimens more prevalent. The commenters also supported mandatory SVT because it would bring better control over the SVT process.

A number of commenters expressed concern that the science of SVT has yet to evolve to the same level of accuracy, reliability, and defensibility as the science of drug testing. Some of these commenters recommended that SVT should remain elective.

Several commenters believed that the DOT should require all laboratories to employ two separate SVT methodologies for adulterants because this would ensure more confirmed adulteration results. The commenters reasoned that laboratories would be more likely to report invalid results if they only used one SVT methodology.

Other comments on mandatory SVT included concerns about costs and the extent of adulterant testing. Some commenters believed the DOT's cost estimates for SVT were low. They requested clarification on the anticipated costs of initiating mandatory testing. Commenters also expressed concerns that laboratories were not testing for all adulterants.

DOT Response

The DOT continues to believe that mandatory testing for specimen validity is an appropriate response to the use of adulterants and attempts to subvert the collection and testing process. The HHS Mandatory Guidelines established SVT requirements with which laboratories must comply in order to become and remain HHS-certified. The HHS has stated that its SVT standards are designed to produce the most accurate, reliable, and correctly interpreted test results.

Currently, when DOT specimens are tested for validity, the HHS procedural standards apply. There is no reason to presume that these standards are scientifically insufficient. Therefore, we will require that urine specimens tested under the DOT-industry programs will be subject to the HHS procedural standards for SVT.

We will continue to utilize HHS instructions to laboratories for establishing cutoffs and directing laboratory analysis regarding creatinine levels. Within part 40, we added procedures to allow an employee to provide evidence to the MRO that he or she can produce a urine specimen below the 2.0 mg/dL cutoff. We created this procedural safeguard in the 2000 regulation because a small number of employees assert they may be capable of providing urine specimens with creatinine levels below 2.0 mg/dL, and that such low creatinine levels are not the result of tampering with their specimens. By adding an evidentiary process for results below the 2.0 mg/dL cutoff, we believe that we have created

sufficient safeguards to protect employees from being wrongfully accused of tampering with their specimens.

The DOT shares the commenters' concerns about laboratories choosing to use one adulterant testing methodology because using one methodology instead of two may result in obtaining invalid results rather than confirmed adulterated results. However, HHS mandates all scientific and procedural requirements for drug testing at HHS-certified laboratories. HHS provides guidance to the laboratories on use of a secondary confirmatory methodology when a laboratory performs confirmatory adulteration testing. HHS authorizes, but does not require, laboratories to perform confirmatory adulteration testing. The Omnibus Act requires the DOT to incorporate the HHS scientific and technical guidelines, and we do not have the authority to impose additional scientific and technical requirements upon the laboratories.

While current laboratory testing data show a slight rise in invalid results and a slight decline in adulterated results over previous years, we do not have data based solely upon implementation of full SVT because the DOT has not required full implementation. As a consequence, the DOT will initiate permanent 6-month reviews of laboratory data on DOT-regulated specimens to obtain more specific information about this issue now that SVT will be mandatory for all DOT-regulated specimens. We will look at the reasons drug test results are classified as invalid versus adulterated to determine if use of one methodology instead of two is likely to cause more invalid results and fewer confirmed adulterated results. Part 40 requires laboratories to submit to DOT specific information regarding their SVT following full implementation. The regulatory text requiring this information is at § 40.111; and the required data are listed at Appendix C. We will use this information in our continuing discussions with HHS and others regarding SVT. We also want the information so that we can know the full scope of laboratory data on DOT-regulated tests.

The DOT cost estimates for full SVT and for laboratory data collections are in the regulatory analyses and notices section of this preamble.

Requirement for Laboratories To Contact MROs Before Reporting Invalid Results

The DOT asked if we should continue to require laboratories to contact MROs before reporting invalid results.

Several commenters, mostly MROs, responded to this question and generally indicated that laboratories are not routinely contacting them about invalid results as required by HHS and DOT. Some commenters were concerned that the rule text does not specify whether the MRO or the laboratory has the final decision on the disposition of the specimen. Also, the commenters expressed concern about whether the employer would be required to pay for sending the specimen to another laboratory. One commenter pointed out that DOT is requiring the MRO to discuss the result with "the certifying scientist" while HHS requires the MRO to discuss the result with the "laboratory." Some laboratory personnel other than a certifying scientist, for example the Responsible Person (RP), may discuss invalids with the MRO. This commenter supported having the MRO talk with "a certifying scientist."

DOT Response

The rule continues to require laboratories to contact the MRO prior to reporting an invalid result, a requirement which mirrors the current HHS Mandatory Guidelines. The fact that some laboratories may not be following this requirement is not sufficient reason to suspend or disregard this procedure. The HHS identifies 12 separate criteria for identifying a specimen as invalid. Of these 12, the first three do not require laboratory contact with MROs. It is entirely possible that many of the invalid results fall under these three criteria and may explain the reason that contact between the laboratories and the MROs appears lacking. These three criteria are:

1. Inconsistent creatinine concentration and specific gravity results;
2. The pH is greater than or equal to 3 and less than 4.5, or greater than or equal to 9 and less than 11; or
3. The nitrite concentration is greater than or equal to 200 mcg/mL, but less than 500 mcg/mL.

As indicated before, some laboratory testing methodologies may differ. If the invalid result is related to the criteria listed in the HHS Mandatory Guidelines—under sections 2.4(7), (iv) through (xii), the MRO and laboratory might conclude it is beneficial to conduct another test at a different

laboratory to obtain a result that is not invalid. This would require a certifying scientist and the MRO to discuss the benefit of sending the specimen to another laboratory and to determine which laboratory would be able to conduct the appropriate test.

A few commenters requested that DOT specify whether the MRO or a certifying scientist would make the determination to send a specimen to another laboratory. The DOT believes this is a mutual decision to be made by both the MRO and a certifying scientist.

Regarding payment for additional testing, the DOT's position is similar to our stance on paying for split specimen testing. Regardless of who pays or how, it is the employer's responsibility to ensure that procedures are in place to accomplish the additional testing. We believe the cost of any additional tests would be less than the subsequent cost of recollecting under direct observation when the first laboratory reported the result as invalid.

One commenter said that the NPRM's reference to the MRO's conferring with "the certifying scientist" should remain "a certifying scientist"—as it is in the current rule text. We agree, and our regulation reflects this.

HHS Blind Specimen Certification Criteria

The DOT proposed to adopt the HHS blind specimen certification criteria. HHS provides technical oversight to the laboratories, and quality control is part of that very important oversight. We did not receive comments regarding this proposal. Therefore, the DOT has adopted the HHS criteria for blind specimen certification.

Recollection Under Direct Observation When Creatinine Is in the 2–5 mg/dL Range

The DOT proposed adopting the 2004 IFR's approach to the treatment of negative-dilute specimens with creatinine in the 2–5 mg/dL range, which requires recollection under direct observation. The DOT requested comments about continuing this requirement. The majority of commenters supported the proposal to require recollections under direct observation for negative-dilute results with creatinine in the 2–5 mg/dL range.

Several commenters indicated that there was an increase in positive results from the directly observed recollections, while others stated the results were mostly negative. Most of these commenters provided anecdotal information. However, one commenter's data showed that a significant number

of the directly observed recollections produced non-negative results.

DOT Response

The DOT will continue to require the MRO to direct employers to conduct immediate recollections under direct observation when the original specimen is reported with a creatinine concentration in the 2–5 mg/dL range. We think the number of non-negatives produced during directly observed recollections is significant and justifies continuing the recollection requirement.

Although a few individuals claim the ability to produce urine specimens with this concentration of creatinine, there has been no conclusive evidence that this is a common occurrence. Concentration of creatinine at these levels is not the norm. In the interest of public safety, the DOT believes that a recollection under direct observation is a reasonable requirement.

HHS Requirement That an MRO Report a Negative Result When a Medical Explanation for a Substituted Specimen Appears Legitimate

The DOT proposed not adopting the HHS MRO Manual guidance for an MRO to report a negative result if the MRO believed there was a legitimate medical explanation for the substituted specimen. There were no comments related to this item.

DOT Response

Under part 40, the MRO will continue to have the ability to verify substituted specimens with medical explanations as cancelled tests. Because there are virtually no medical explanations for substituted results, the MRO must continue to report to DOT the medical basis for canceling the test.

Section-by-Section Discussion

The following part of the preamble discusses each of the final rule's sections, including responses to comments on each section.

Index

The DOT proposed to modify some existing section headings and add two new section headings to reflect regulation text changes. Seven section headings have been modified or added. Two commenters responded to this proposal and both supported it.

Section 40.3 What do the terms in this regulation mean?

In order to align more closely the definitions in § 40.3 with definitions contained in the HHS Mandatory Guidelines, the DOT proposed

modifying some existing definitions and adding several new ones.

Commenters supported this proposal and responded by making suggested additions or changes to this section. Several commenters, especially MROs, recommended adoption of the term “hyperdilute” or “superdilute” to distinguish references to those negative-dilute specimens with creatinine concentrations in the 2–5 mg/dL range. They recommended that positive specimens the MROs downgrade to negatives be recollected if they are dilute with creatinine concentrations in the 2–5 mg/dL range. Additionally, the terms “cancelled-invalid” and “confirmatory creatinine and specific gravity tests” are used in the text. Commenters asked if these should be included in the definitions.

The DOT will modify eight definitions and add five new ones. We will include a definition of the term “aliquot” as defined in the HHS Mandatory Guidelines. For the term “Oxidizing adulterant” we did provide HHS’ examples of these agents.

We will not use of the term “hyperdilute” or “superdilute” to describe a dilute specimen with creatinine concentrations in the 2–5 mg/dL range. Laboratories do not report specimens with creatinine concentrations in the 2–5 mg/dL range as “hyperdilute” or “superdilute” but rather as dilute with a numerical value. To require the use of this term in the reporting process would require laboratories to change their reporting format and the DOT will not direct them to do that.

Additionally, some MROs may think that the use of this term would somehow make it easier for them to report these results to the designated employer representative (DER). However, even if we adopted this term, the DERs would still have to be told that the reason for the test result being “hyperdilute” or “superdilute” is that the creatinine concentration fell in the 2–5 mg/dL range. The DOT does not think that adding a different name to a test result would in any way improve laboratory and MRO procedures.

We also proposed to use the term “cancelled-invalid” in the NPRM. However, we will not include this term in the text since laboratories will not report tests as being “cancelled-invalid.” In addition, current requirements call for the MRO to check the cancelled box on the Federal Drug Testing Custody and Control Form (CCF) and, on the remarks line, write that the reason is an invalid result. We think this is sufficiently clear in describing the test outcome. We will not

add another term to the current lexicon of drug testing results. We use the term “cancelled” in the rule text rather than “cancelled-invalid.”

One commenter asked if a definition should be developed to describe what is meant by a confirmatory creatinine and specific gravity test. The DOT believes that the terms “confirmatory creatinine test” and “confirmatory specific gravity test” are self-explanatory and do not need more specific definitions. A confirmatory specimen validity test is just that, a test on a separate aliquot to confirm the results of an initial specimen validity test.

Section 40.89 What is specimen validity testing, and are laboratories required to conduct it?

The DOT will make SVT mandatory by removing the option to conduct SVT and adding text requiring SVT. This proposal had a majority of favorable comments. Specific discussion of this item is listed under Principal Policy Issues.

Section 40.95 What are the adulterant cutoff concentrations for initial and confirmation tests?

Section 40.96 What criteria do laboratories use to establish that a specimen is invalid?

The DOT proposed adding two tables (one at the existing § 40.95, the other at a new § 40.96) to inform MROs and others about the cutoffs and the procedures HHS directs laboratories to use in reporting adulterated and invalid test results. We sought comments on whether this information would be helpful to MROs and others, or would have too much information and be too complicated to add value.

Most commenters supported the proposal to include two tables related to adulterant and invalid testing cutoffs. The DOT, however, did not include these tables because we are concerned that including such tables could provide information useful in developing adulterants to circumvent the testing process. Moreover, the inclusion of these tables would not clarify for laboratories what they are currently required to report by the HHS Mandatory Guidelines nor would it add to the effectiveness of the MRO verification process. Since the cutoff levels are mandated by the HHS, duplicating them in the rule text does not add any value or streamline the overall procedures required by part 40. Therefore, we have indicated in the rule text that laboratories will be required to use cutoff levels for adulterated and

invalid urine specimens that are directed by the HHS.

One commenter stated that an invalid report due to abnormal pH is reported only as "abnormal pH" per HHS direction. For the MRO to find out if it was abnormally high or low, the MRO must contact the laboratory. The commenter suggested that DOT direct laboratories to report either high pH or low pH or the actual pH numbers. This would be consistent with § 40.96(d) which directs laboratories to report the reason a test is invalid and would remove the need for the MRO to call the laboratory on these results.

We agree with the comment that the use of the term abnormal pH creates a requirement for the MRO to contact the laboratory, and we will therefore, direct laboratories to report the actual numerical value for pH.

Finally, one commenter suggested that we clearly point out that the confirmation test is one that uses a different chemical methodology than the initial test on a second aliquot of the specimen. The definition of "confirmatory validity test" clearly states that a confirmation test is performed on a different aliquot of the original specimen.

Section 40.97 What do laboratories report and how do they report it?

Laboratories are reporting and MROs are reviewing a variety of test results, including multiple test results for the same testing event. The DOT proposed using categories to make it easier to understand what laboratories and MROs are to report.

Of the commenters who responded to this proposal, some addressed only the question of categories, while others addressed issues related to multiple reporting. Several commenters agreed that understanding the myriad of results is a difficult situation and supported the DOT's attempt to simplify it through the use of identifying categories.

Some concerns centered on the complexities of reporting multiple results of two separate collections from the same collection event. These commenters were troubled about how the overall process would work—for example, if two CCFs were produced on a collection, what would the MRO do with them and how would the MRO report the results? Additionally, the issue of cost per test to the employer was raised and the difficulty of billing with no documentation (i.e., no CCF for the test not reported). In any situation where the tests are reported negative and non-negative—in any order of collection—commenters agreed that the non-negative test should be the result of

record reported by the MRO for the testing event. These MRO issues are addressed in the discussion of § 40.162.

Some commenters supported the use of categories and some did not. A number believed that laboratories would not use the categories, but would continue to use specific test results because these are more descriptive and useful. A commenter felt that the terms "negative" and "non-negative" are very simple and descriptive and much more useful than a category list.

The DOT never intended for laboratories to report results as "Category 1" or "Category 2" or "Category 3." In the NPRM, we merely said that a laboratory's specimen testing result would fall into one of three distinct and separate categories—negative; non-negative; and rejected for testing—and we described them as Categories 1 through 3. We agree with those commenters who said this delineation made it easier for them to understand that the results reported would fall into one of those three categories. Therefore, we will keep the three separate categories for results being reported with the understanding that laboratories are not to report a result as being in a specific category (i.e., Category 1, Category 2, or Category 3; or non-negative), but must report a specific result.

Section 40.133 Under what circumstances may the MRO verify a test result as positive, or as a refusal to test because of adulteration or substitution, or as cancelled because the specimen was invalid, without interviewing the employee?

MROs have situations in which neither they nor the employers are able to contact employees to complete the interview process for invalid results. The DOT proposed to modify § 40.133 so that invalids would be handled parallel to part 40's directives on positive, adulterated, and substituted specimens when the employee cannot be interviewed. Four commenters responded to this proposal, and all supported the proposed procedure for resolving invalid test results without interviewing the employee. Based on the comments, the DOT will adopt the proposal in § 40.133 with one modification: To refer to this result as a cancelled test due to an invalid result, instead of a cancelled-invalid.

Section 40.159 What does the MRO do when a drug test is invalid?

The DOT made a number of proposals trying to close the potential endless loop of observed collections that could result when the specimen result of a directly

observed recollection, following a first invalid (and in some cases, a second or third observed collection), is again invalid.

If the second invalid result was for the same reason as the first invalid, we proposed having the MRO cancel the test. One commenter wished to call this a negative test. The DOT believes it would be inappropriate for the MRO to call this a negative test. Therefore, we will have the MRO cancel the test if the observed recollection is invalid for the same reason as the first invalid. This is consistent with the HHS guidance to MROs. In addition, in § 40.160 (see below), we have provided a way for MROs to obtain negative results for invalids when employees require negative results for pre-employment, return-to-duty, and follow-up testing.

If the second invalid result was for a different reason than the first invalid, the DOT proposed having the MRO verify the result as a refusal to test. We did this to harmonize with the HHS guidance to MROs. We also proposed adding this to the list of refusals at § 40.191.

Many of the commenters said that calling this an automatic refusal to test is problematic—especially if this were allowed without MRO review. The DOT agrees with these commenters. We have decided not to adopt the proposal to add this to the list of refusals at § 40.191. We will consider this an invalid result requiring another immediate recollection under direct observation—and we will not require the MRO to first contact the employee to discuss the result.

The DOT also proposed that when the MRO reports multiple non-negative results and one of them is invalid, the MRO would not be required to report an "invalid result" if the MRO verified any of the other non-negative results—for example, a positive result. A number of commenters supported this proposal, but one did not understand what DOT wanted the MRO to do about the invalid result.

The DOT believes that § 40.159(f) is clear: When the MRO verifies multiple non-negative results and one of them is invalid, the MRO would report all but the invalid result. The invalid result simply will not be reported and the test would not be cancelled because there would actually be at least one reportable non-negative result. For instance, if a laboratory reported a test result as being positive for phencyclidine (PCP) and invalid, the MRO would conduct an MRO review for both the PCP positive and the invalid. The MRO would verify the PCP positive and report it to the employer. Even if the employee had no

medical explanation for the invalid result, the MRO would not report it to the employer unless the employee requests to have his or her split specimen tested for PCP and the split fails to reconfirm. The MRO would then cancel both tests, report them to the DER, and direct an immediate recollection under direct observation because the primary specimen had also been invalid. The same would hold true for invalid specimens whose splits failed to reconfirm for adulterants and substitutions.

We also proposed to have MROs contact collection sites to confirm that collectors had properly observed the collections. We agree with the majority of commenters who said that having MROs confirm that collections had been directly observed is labor intensive and of little value, especially if CCFs indicate that observed collections were conducted. Therefore, we will not require the MRO to contact the collector.

Finally, if the employee admits to using drugs to the MRO during the invalid result interview, the MRO must report the admission to the DER for additional action under applicable DOT Agency and United States Coast Guard regulations.

Section 40.160 What does the MRO do when a valid test result cannot be produced and a negative result is required?

The DOT proposed adding a new § 40.160 to address procedures when a negative result is required but a valid test result cannot be produced because of an individual's legitimate, albeit rare, medical condition.

In such rare circumstances, we will require the MRO to determine if there is clinical evidence that the individual is an illicit drug user. The evaluation requirements in this section will be parallel to existing requirements at § 40.195—when a permanent or long-term medical condition precludes the employee from providing a sufficient amount of urine and a negative result is needed. If the medical evaluation reveals no clinical evidence of drug use, the MRO would report the result to the employer as a negative test with written notations regarding the medical examination. The same procedures would be used when the primary specimen is reported as invalid and the individual has a legitimate medical explanation.

The DOT also requested comments about findings of illicit drug use during these medical evaluations. Currently, a finding of illicit drug use during the medical evaluation under § 40.195

causes the test to be cancelled. We asked for comments on whether the DOT should continue to require cancellation or treat such findings as positive test results.

Most commenters stated that findings of illicit drug use during the medical evaluation should be considered a positive result. Two commenters felt they should be reported as a refusal. One commenter stated that if the examination discloses evidence of current illicit drug use, this should be reported as a positive result. Another commenter was concerned that this evaluation may identify past drug use and may not provide the employee with due process. One commenter stated that a blood test would be far superior to a medical examination in determining evidence of substance abuse.

Although a number of these commenters believe that a finding of illegal drug use during the medical evaluation should be considered a positive or a refusal, the DOT will require that in these cases, MROs will cancel the test, parallel to the existing procedures for insufficient urine in § 40.195. The Omnibus Transportation Employees Testing Act of 1991 provides only one way to determine that an employee has tested positive for illicit drug use—a drug test confirmed by an HHS-certified laboratory using HHS scientific and testing protocols and verified by an MRO. Therefore, we will continue to cancel these results if there are medical signs and symptoms of illicit drug use. The individual will not be able to perform safety-sensitive duties because a negative result is needed. The MROs, under their authority at § 40.327, must continue to report safety and medical qualification concerns to appropriate parties, such as the employer and the physician or health care provider responsible for determining medical qualifications of the employee.

In response to the commenter who thought a blood test far superior to a medical examination for determining substance abuse, we would remind everyone that as part of this medical evaluation, the evaluating physician may conduct other testing to determine whether the employee shows clinical evidence of drug abuse, including, but not limited to, blood testing.

Section 40.162 What must MROs do with multiple verified results for the same testing event?

The DOT requested comments to proposed procedures addressing how the MRO would report multiple verified results from one testing event—either multiple results from a single specimen

or multiple results from more than one specimen collected during one event. Regarding multiple results from more than one specimen, we asked if it was sensible to require collectors to continue to send two separate specimen collections (*e.g.*, a specimen that showed signs of tampering and the subsequent observed collection) to laboratories. In other words, should we continue requiring collectors to send the observed collection but not the specimen that appeared to show signs of tampering?

Most commenters appreciated the fact that DOT had articulated what MROs are to report after verifying multiple results for the same testing event. Some commenters correctly noted some of the problems associated with multiple specimens collected during the same testing event. For example, these multiple specimens pose administrative difficulties: Tying together two collections and two laboratory results and simultaneously reporting the two verified results. In addition, some commenters noted that testing a second specimen imposes additional cost. None of the comments included credible evidence to show that the results of the observed collections were always non-negative.

Therefore, we will continue to require that collectors send both the specimen suspected of adulteration or substitution and the directly observed specimen on for laboratory testing. At § 40.67(f), collectors are already directed to identify and link both specimens in the Remarks section of the CCFs. When the collector follows the required procedures, and the MRO reviews the MRO copies of CCFs before reporting results, the MRO will know that the specimen appeared to show signs of tampering and that specimen is connected to another specimen taken under direct observation. MROs should have procedures in place to identify and connect these linked specimens.

We will modify the section to authorize MROs to “hold” the result of the first laboratory specimen result received if it is negative until the MRO receives the result of a second specimen. If the first result is non-negative, the MRO reports it immediately. The MRO would then follow the required reporting procedures.

Section 40.171 How does an employee request a test of a split specimen?

The DOT proposed amending § 40.171 to state clearly that there is no split specimen testing for an invalid result. This is consistent with current part 40 split request procedures and with the

HHS MRO Manual. Most commenters who responded to this item supported it. We will retain it as written in the NPRM.

Section 40.177 What does the second laboratory do with the split specimen when it is tested to reconfirm the presence of a drug or drug metabolite?

Section 40.179 What does the second laboratory do with the split specimen when it is tested to reconfirm an adulterated test result?

Section 40.181 What does the second laboratory do with the split specimen when it is tested to reconfirm a substituted test result?

These sections concern the DOT's decision to provide authorization for the split laboratory to send the split specimen or an aliquot of it to another HHS-certified laboratory if the split fails to reconfirm the primary specimen's results. The DOT proposed amending §§ 40.177, 40.179, and 40.181 so that a provision currently contained only in § 40.177 for drug testing would be added to the adulterated and substituted split sections. The DOT sought comment on whether providing authorization to the split laboratory would be sufficient, or whether we should require laboratories to send the split specimen or an aliquot.

Several commenters opposed making it mandatory to send the specimen to another laboratory but believed that providing authorization to do so would be sufficient. One commenter wondered if the term "you may" send a specimen to a third laboratory would become "routine" practice and something that all laboratories would then do. This commenter recommended that Laboratory B send the split to a third laboratory only under special circumstances that are documented and have been discussed with the MRO.

The DOT has amended §§ 40.177, 40.179, and 40.181. We continue to authorize the split laboratory to send the split specimen or an aliquot of it to another HHS-certified laboratory to reconfirm the presence of drugs/drug metabolites. We also authorize the same for adulterated specimens. Because the testing procedures for identifying substituted specimens are the same at each laboratory, there would be no reason to send the split to a third laboratory if it failed to reconfirm at a second laboratory.

We will not require a discussion between the MRO and laboratory. The longstanding requirements at § 40.177 on sending the split specimen to another laboratory, which did not make MRO discussion with the laboratory

mandatory, have not appeared to cause problems. We agree with the commenter who said that sending split specimens to a third laboratory should not be routine. Therefore, a split specimen should only be sent to a second laboratory when it is likely that doing so will confirm the criteria that were reported in the primary specimen.

Several commenters asked for clarification of § 40.181(b), which stated, "if the test fails to reconfirm the validity criteria reported in the primary specimen, the second laboratory may transmit the specimen or an aliquot to another HHS-certified laboratory that has the capability to conduct another reconfirmation test." These commenters asked whether "another reconfirmation test" is a requirement to conduct a different, more specific, test method.

With regard to the language proposed in the NPRM at 40.181(b), we are removing the paragraph because all laboratories use the same confirmation methodologies for creatinine and specific gravity.

We intend § 40.179(b) to provide an option for using another laboratory to make it more likely to reconfirm the adulterated criteria reported for the primary specimen. In writing § 40.179(b), we used the language currently at § 40.177 that addresses the use of another laboratory to confirm the split specimen. We are retaining the word "another" in § 40.179(b), to require the second split laboratory to use a different confirmation test than the one used by the first split laboratory. In the case of pH, all laboratories use the same test methodologies, so this would not apply to pH. However, for other adulterants, we think another confirmation test would be suitable if it is likely to confirm the adulteration criteria reported in the primary specimen. If the first split laboratory is unable to confirm the adulteration criteria of the specimen, a second split laboratory, using a different confirmation procedure, may be able to confirm the test result. Therefore, the DOT will retain most of the specific language proposed in the NPRM at § 40.179(b).

Section 40.187 What does the MRO do with split specimen laboratory results?

The DOT proposed to divide the split results into five distinct categories to make it easier for MROs to understand their responsibilities in cases where they receive any of the more complicated split result possibilities. The majority of commenters supported this proposal. One commenter suggested that these categories would lend themselves to a table.

The DOT will retain the five categories of split results as proposed in the NPRM. We will not include a table, since the description of the five categories in the rule text is specific and self-explanatory.

Section 40.197 What happens when an employer receives a report of a dilute specimen?

The DOT did not propose any changes to the employer policy providing the option for recollection of negative-dilute specimens at § 40.197(b)(2), although we added additional rule text to clarify procedures. Several commenters supported this. One commenter suggested that the rules for dilute specimens should be more rigorous. Another commenter suggested that if the DOT believes it appropriate to recollect a negative dilute, the DOT should require that all results of this type be recollected without giving the employer a choice in the matter.

The DOT will not make any changes in this area, other than to revise paragraph § 40.197(c)(3), re-designate paragraph (c)(4) as (c)(5), and add paragraph (c)(4). Negative specimens that are also dilute will continue to be viewed as negative specimens, but with the option for employer policies to determine if there is to be a recollection. This is in keeping with the current regulation for which there have been no significant issues raised.

Section 40.201 What problems always cause a drug test to be cancelled and may result in a requirement for another collection?

The DOT proposed changes for splits that are reported as invalid. Commenters who responded to this item supported the proposed rule language. We also proposed changes for a situation in which there is no split laboratory available to test the split specimen. One commenter, an MRO, supported this proposal. We will amend this section by revising paragraphs (c), (d), and (e) and maintain the changes as proposed in the NPRM.

Section 40.207 This section was amended by changing the references in the paragraph.

Appendices

Appendix B

As proposed, the DOT will modify the semi-annual laboratory report to employers so that it has the same information required by the HHS Mandatory Guidelines. The three proposed changes, while not dramatic, will help laboratories avoid following different report formats for DOT and HHS.

Appendix C

As discussed earlier, we will also add Appendix C requiring laboratories to provide the Department semi-annual data about their DOT-mandated testing.

Appendix D

We will also modify Appendix D to show DOT's new mailing address and electronic-entry address.

Appendix F

DOT will also amend some Appendix F citations to accurately reflect text changes.

Comments Related to Other NPRM Issues and Questions

The DOT asked a number of other questions related to several issues. Most of these have been addressed in other portions of the preamble. The following issues were not addressed and are discussed below:

We wanted to know if it would be appropriate to require that observers check for realistic-looking prosthetic devices by having employees lower their pants and underwear just before observed collections take place.

Most commenters did not support this proposal on the basis that it was too invasive and that most observers can be trained in ensuring that the urine specimen actually comes from the individual. One commenter indicated that if there is any suspicion during collection, one method that could be used was a one-handed collection (for males) since most devices have a valve that needs to be released and this cannot be done if the donor is holding the collection cup in one hand (with the other hand behind his back).

One association said this proposal would be totally inappropriate since most of their members are female. One TPA and one MRO stated that checks for prosthetic devices should be allowed, but not mandatory, since trained collectors should be expected to know when these checks are needed. Another association supported this proposal and indicated that the Olympic model could be used, where the donors raise their shirts to the chest line and lower their underwear to the knees for initial inspections.

We are also aware that the Omnibus Employee Testing Act of 1991 directed the DOT to utilize procedures that "promoted, to the maximum extent practicable, individual privacy in the collection of specimen samples." We believe that, with the current proliferation of adulteration products, checking for devices prior to observed collections provide individual privacy "to the maximum extent practicable." In

the early 1990's, adulteration was not a significant problem and the current wide variety of products for adulteration of urine were not available. However, because these products and various mechanical devices are now readily available to individuals who want to adulterate or substitute their urine specimen during a drug testing collection, we believe that the measure of what is the maximum extent of privacy has shifted somewhat. Checking for devices prior to observed collections is the most effective way to ensure the integrity of the testing process while providing individual privacy as much as practicable.

We would also point out that employees who may be required to undergo a directly observed collection have provided reasons to necessitate this procedure by providing specimens that: Showed signs of tampering; were invalid with no legitimate medical explanation for the result; or demonstrated a negative and dilute specimen with creatinine concentration in the 2 to 5 mg/dL range, which made the specimen suspect of adulteration or tampering. Some of these employees may have already violated the testing regulations and are having a return-to-duty or follow-up test.

Based on these facts, the DOT will require employees who are undergoing directly observed collections to raise their shirts, blouses, or dresses/skirts, as appropriate, above the waist and lower their pants and underpants to show the observer, by turning around, that they do not have a prosthetic device on their person. After this is done, they may return their clothing to its proper position and contribute a specimen in such manner that the observer can see the urine exiting directly from the individual into the collection container, as required under current regulations. We will also require direct observation collections for all return-to-duty and follow-up drug tests. We are amending § 40.67 to reflect this procedure and this requirement for return-to-duty and follow-up drug tests.

We also asked for comments regarding the consequence when a realistic-looking prosthetic device is found.

Eight commenters responded. Seven commenters indicated that this should definitely be treated as a refusal to test. One association stated that this should be considered on a case-by-case basis and that the collector should request the donor to remove the device and then proceed with the collection. If the donor fails to remove the device, the collector should document this as a refusal to test.

The DOT agrees with the majority of commenters that the use of realistic-looking prosthetic devices to circumvent the urine specimen collection process is a significant and grievous action, in most cases related to an individual attempting to hide drug use; and it is a deliberate attempt to thwart the testing process. We believe that this action is no different than an individual refusing to cooperate or participate in a specimen collection process. The end result of failure to cooperate is a refusal to test. We believe trying to subvert the collection process using a prosthetic device is as serious an offense and will consider this as a refusal to test. We said so in the July 2006 Questions and Answers guidance; and we will add it to the list in Section 40.191 as constituting a refusal to test.

Also, in the July 2006 Questions and Answers that appear on our Web site, we added to the examples of refusals to test at the collection site an individual refusing to wash his or her hands and an individual admitting to adulterating or substituting a specimen. We will add these two examples to the list in Section 40.191 as constituting a refusal to test. In addition, we will add an employee's refusal to allow the observer to check for devices prior to undergoing an observed collection.

Editorial Comments

There were 17 comments (some duplicates) that addressed editorial changes and included typographical errors. We appreciate these comments and included most of them.

Regulatory Analyses and Notices

The statutory authority for this rule derives from the Omnibus Transportation Employee Testing Act of 1991 (49 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 45101 *et seq.*) and the Department of Transportation Act (49 U.S.C. 322).

Executive Order 12866

This rule has been designated as significant by the Office of Management and Budget for purposes of Executive Order 12866 or the DOT's regulatory policies and procedures, because of potential policy interest to Congress, affected industries, and the public. It is a modification to our overall part 40 procedures and is intended to further align our laboratory and MRO procedures with those requirements that are being directed by HHS. Their economic effects will be very small. Consequently, the DOT certifies, under the Regulatory Flexibility Act, that this rule will not have a significant

economic impact on a substantial number of small entities.

In the 2000 part 40 final rule, we estimated that approximately 80% of industry specimens were being tested for SVT and that the costs associated with making SVT mandatory would be about \$1.4 million annually—for the 20% that we estimated were not being tested. One commenter misinterpreted our data, thinking that the cost was for testing of the current 80%, and asked for clarification of how the DOT arrived at these figures. Another commenter questioned the accuracy of our more current information, pointing out that at the time the NPRM was published, complete data for 2005 were not available.

The HHS laboratory data for 2006 are available and show the actual number of Federal tests performed was 7.54 million—7.32 million of which were DOT tests. An estimated 98 to 99% of these DOT tests were tested for SVT. The number of tests not being tested for SVT in 2006 is estimated to be 200,000.

A review of laboratory costs for SVT from a number of HHS-certified laboratories indicated an average additional cost of 75 cents to \$1.25 per specimen. Using the 2006 data, the cost of SVT would then only increase the cost of DOT-mandated testing by about \$200,000. This figure is far less than the \$1.4 million amount estimated and approved for SVT in the 2000 final rule. Information on SVT from the DOT Federal employee drug testing program and from another Federal agency's program revealed that they experienced no increased laboratory costs for drug testing when they implemented SVT.

The DOT believes that \$200,000 is a reasonable cost for the mandatory SVT and should have minimal impact on employers. In fact, it is far less than the 2000 final rule estimate for mandatory SVT.

Executive Order 12372 (Intergovernmental Review)

Executive Order 12372 requires intergovernmental consultation with state and local officials that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance or direct Federal development. The rule would not affect state and local entities in a way that would warrant such consultation.

Unfunded Mandates Reform Act of 1995

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, March 22, 1995, 109 Stat. 48). This rule will not result in the

expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (2 U.S.C. § 1532).

Executive Order 13132 (Federalism)

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This notice does not include requirements that (1) has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government, (2) imposes substantial direct compliance costs on State and local governments, or (3) preempts state law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Executive Order 13084

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments"). Because none of the provisions of the rule would significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

Paperwork Reduction Act

DOT invites public comment about our intention to request the Office of Management and Budget's (OMB) approval for a new information collection, which is summarized below. We will subsequently publish a **Federal Register** notice concerning this proposed collection. We would add a requirement that all HHS-certified laboratories provide testing data to the DOT on a semi-annual basis. This is data readily available in laboratory computer systems—information they provide routinely to HHS. They provide similar company-specific information to employers on a semi-annual basis. We estimate that these semi-annual reports to DOT will take a total of six hours for all the laboratories to complete, at a cost of approximately \$162 to all laboratories, or less than \$4 annually for each laboratory.

List of Subjects in 49 CFR Part 40

Administrative practice and procedures, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

Dated: June 11, 2008.

Mary E. Peters,
Secretary of Transportation.

49 CFR Subtitle A—Authority and Issuance

■ For reasons discussed in the preamble, the Department of Transportation is amending part 40 of Title 49 Code of Federal Regulations, as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESING PROGRAMS

■ 1–2. The authority citation for 49 CFR Part 40 continues to read as follows:

Authority: 40 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 54101 *et seq.*

■ 3. Section 40.3 is amended by revising the definitions of "adulterated specimen," "confirmation (or confirmatory) drug test," "confirmation (or confirmatory) validity test," "dilute specimen," "initial drug test," "initial validity test," "invalid result," and "substituted specimen" and adding definitions for "aliquot," "limit of detection," "non-negative specimen," "oxidizing adulterant," and "screening test" in alphabetical order, all to read as follows:

§ 40.3 What do the terms in this regulation mean?

* * * * *

Adulterated specimen. A urine specimen containing a substance that is not a normal constituent or containing an endogenous substance at a concentration that is not a normal physiological concentration.

* * * * *

Aliquot. A fractional part of a specimen used for testing. It is taken as a sample representing the whole specimen.

* * * * *

Confirmatory drug test. A second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine).

Confirmatory validity test. A second test performed on a different aliquot of the original urine specimen to further support a validity test result.

* * * * *

Dilute specimen. A urine specimen with creatinine and specific gravity values that are lower than expected for human urine.

* * * * *

Initial drug test (also known as a Screening drug test). An immunoassay test to eliminate "negative" urine specimens from further consideration and to identify the presumptively positive specimens that require confirmation or further testing.

Initial validity test. The first test used to determine if a urine specimen is adulterated, diluted, or substituted.

Invalid result. The result reported by a laboratory for a urine specimen that contains an unidentified adulterant, contains an unidentified interfering substance, has an abnormal physical characteristic, or has an endogenous substance at an abnormal concentration that prevents the laboratory from completing testing or obtaining a valid drug test result.

* * * * *

Limit of Detection (LOD). The lowest concentration at which an analyte can be reliably shown to be present under defined conditions.

* * * * *

Non-negative specimen. A urine specimen that is reported as adulterated, substituted, positive (for drug(s) or drug metabolite(s)), and/or invalid.

* * * * *

Oxidizing adulterant. A substance that acts alone or in combination with other substances to oxidize drugs or drug metabolites to prevent the detection of the drug or drug metabolites, or affects the reagents in either the initial or confirmatory drug test.

* * * * *

Screening drug test. See Initial drug test definition above.

* * * * *

Substituted specimen. A urine specimen with creatinine and specific gravity values that are so diminished or so divergent that they are not consistent with normal human urine.

* * * * *

■ 4. Section 40.23 is amended by revising paragraph (f) introductory text and adding paragraph (f)(5), to read as follows:

§ 40.23 What actions do employers take after receiving verified test results?

* * * * *

(f) As an employer who receives a drug test result indicating that the employee's urine specimen test was cancelled because it was invalid and

that a second collection must take place under direct observation—

* * * * *

(5) You must ensure that the collector conducts the collection under direct observation.

* * * * *

■ 5. Section 40.67 is amended by revising paragraph b); redesignating paragraphs (i), (j), (k), (l), and (m) as (j), (k), (l), (m), and (n) respectively, and adding a new paragraph (i) to read as follows:

§ 40.67 When and how is a directly observed collection conducted?

* * * * *

(b) As an employer, you must direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.

* * * * *

(i) As the observer, you must request the employee to raise his or her shirt, blouse, or dress/skirt, as appropriate, above the waist; and lower clothing and underpants to show you, by turning around, that they do not have a prosthetic device. After you have determined that the employee does not have such a device, you may permit the employee to return clothing to its proper position for observed urination.

* * * * *

■ 6. Section 40.83 is amended by revising paragraph (g)(2) to read as follows:

§ 40.83 How do laboratories process incoming specimens?

* * * * *

(g) * * *

(2) If the problem(s) is not corrected, you must reject the test and report the result in accordance with § 40.97(a)(3).

* * * * *

■ 7–8. Section 40.89 is amended by revising paragraph (b) to read as follows:

§ 40.89 What is validity testing, and are laboratories required to conduct it?

* * * * *

(b) As a laboratory, you must conduct validity testing.

■ 9. Section 40.95 is revised to read as follows:

§ 40.95 What are the adulterant cutoff concentrations for initial and confirmation tests?

(a) As a laboratory, you must use the cutoff concentrations for the initial and confirmation adulterant testing as required by the HHS Mandatory Guidelines and you must use two separate aliquots—one for the initial test and another for the confirmation test.

(b) As a laboratory, you must report results at or above the cutoffs (or for pH,

at or above or below the values, as appropriate) as adulterated and provide the numerical value that supports the adulterated result.

■ 10. A new section 40.96 is added to read as follows:

§ 40.96 What criteria do laboratories use to establish that a specimen is invalid?

(a) As a laboratory, you must use the invalid test result criteria for the initial and confirmation testing as required by the HHS Mandatory Guidelines, and you must use two separate aliquots—one for the initial test and another for the confirmation test.

(b) As a laboratory, for a specimen having an invalid result for one of the reasons outlined in the HHS Mandatory Guidelines, you must contact the MRO to discuss whether sending the specimen to another HHS certified laboratory for testing would be useful in being able to report a positive or adulterated result.

(c) As a laboratory, you must report invalid results in accordance with the invalid test result criteria as required by the HHS Guidelines and provide the numerical value that supports the invalid result, where appropriate, such as pH.

(d) As a laboratory, you must report the reason a test result is invalid.

11. Section 40.97 is amended by adding the words, "and Rejected for Testing" between "Non-negative" and "results" in paragraph (b)(2) and by revising paragraph (a) to read as follows:

§ 40.97 What do laboratories report and how do they report it?

(a) As a laboratory, you must report the results for each primary specimen. The result of a primary specimen will fall into one of the following three categories. However, as a laboratory, you must report the actual results (and not the categories):

(1) Category 1: Negative Results. As a laboratory, when you find a specimen to be negative, you must report the test result as being one of the following, as appropriate:

- (i) Negative, or
- (ii) Negative-dilute, with numerical values for creatinine and specific gravity.

(2) Category 2: Non-negative Results. As a laboratory, when you find a specimen to be non-negative, you must report the test result as being one or more of the following, as appropriate:

- (i) Positive, with drug(s)/metabolite(s) noted;
- (ii) Positive-dilute, with drug(s)/metabolite(s) noted, with numerical values for creatinine and specific gravity;

(iii) Adulterated, with adulterant(s) noted, with confirmatory test values (when applicable), and with remark(s);

(iv) Substituted, with confirmatory test values for creatinine and specific gravity; or

(v) Invalid result, with remark(s).

Laboratories will report actual values for pH results.

(3) Category 3: Rejected for Testing.

As a laboratory, when you reject a specimen for testing, you must report the result as being Rejected for Testing, with remark(s).

* * * * *

■ 12. Section 40.103 is amended by removing the word “blank” and adding in its place the word “negative” in paragraph (c) introductory text, by revising paragraphs (c)(1) through (5), and removing paragraph (c)(6) to read as follows:

§ 40.103 What are the requirements for submitting blind specimens to a laboratory?

* * * * *

(c) * * *

(1) All negative, positive, adulterated, and substituted blind specimens you submit must be certified by the supplier and must have supplier-provided expiration dates.

(2) Negative specimens must be certified by immunoassay and GC/MS to contain no drugs.

(3) Drug positive blind specimens must be certified by immunoassay and GC/MS to contain a drug(s)/metabolite(s) between 1.5 and 2 times the initial drug test cutoff concentration.

(4) Adulterated blind specimens must be certified to be adulterated with a specific adulterant using appropriate confirmatory validity test(s).

(5) Substituted blind specimens must be certified for creatinine concentration and specific gravity to satisfy the criteria for a substituted specimen using confirmatory creatinine and specific gravity tests, respectively.

* * * * *

■ 13. Section 40.105(c) is revised to read as follows:

§ 40.105 What happens if the laboratory reports a result different from that expected for a blind specimen?

* * * * *

(c) If the unexpected result is a false positive, adulterated, or substituted result, you must provide the laboratory with the expected results (obtained from the supplier of the blind specimen), and direct the laboratory to determine the reason for the discrepancy. You must also notify ODAPC of the discrepancy by telephone (202–366–3784) or e-mail (addresses are listed on the ODAPC Web

site, <http://www.dot.gov/ost/dapc>). ODAPC will notify HHS who will take appropriate action.

■ 14. Section 40.111 is amended by adding a new paragraph (d) to read as follows:

§ 40.111 When and how must a laboratory disclose statistical summaries and other information it maintains?

* * * * *

(d) As a laboratory, you must transmit an aggregate statistical summary of the data listed in Appendix C to this part to DOT on a semi-annual basis. The summary must be sent by January 31 of each year for July 1 through December 31 of the prior year; it must be sent by July 31 of each year for January 1 through June 30 of the current year.

■ 15. Section 40.129 is amended by revising the section heading and paragraph (a)(5) to read as follows:

§ 40.129 What are the MRO's functions in reviewing laboratory confirmed non-negative drug test results?

(a) * * *

(5) Verify the test result, consistent with the requirements of §§ 40.135 through 40.145, 40.159, and 40.160, as:

(i) Negative; or

(ii) Cancelled; or

(iii) Positive, and/or refusal to test because of adulteration or substitution.

* * * * *

■ 16. Section 40.131 is amended by revising the section heading to read as follows:

§ 40.131 How does the MRO or DER notify an employee of the verification process after receiving laboratory confirmed non-negative drug test results?

* * * * *

■ 17. Section 40.133 is amended by revising the section heading, redesignating paragraphs (b) and (c) as (c) and (d), respectively, revising them, and adding new paragraph (b) to read as follows:

§ 40.133 Without interviewing the employee, under what circumstances may the MRO verify a test result as positive, or as a refusal to test because of adulteration or substitution, or as cancelled because the test was invalid?

* * * * *

(b) As the MRO, you may verify an invalid test result as cancelled (with instructions to recollect immediately under direct observation) without interviewing the employee, as provided at § 40.159:

(1) If the employee expressly declines the opportunity to discuss the test with you;

(2) If the DER has successfully made and documented a contact with the

employee and instructed the employee to contact you and more than 72 hours have passed since the time the DER contacted the employee; or

(3) If neither you nor the DER, after making and documenting all reasonable efforts, has been able to contact the employee within ten days of the date on which you received the confirmed invalid test result from the laboratory.

(c) As the MRO, after you verify a test result as a positive or as a refusal to test under this section, you must document the date and time and reason, following the instructions in § 40.163. For a cancelled test due to an invalid result under this section, you must follow the instructions in § 40.159(a)(5).

(d) As the MRO, after you have verified a test result under this section and reported the result to the DER, you must allow the employee to present information to you within 60 days of the verification to document that serious illness, injury, or other circumstances unavoidably precluded contact with the MRO and/or DER in the times provided. On the basis of such information, you may reopen the verification, allowing the employee to present information concerning whether there is a legitimate medical explanation of the confirmed test result.

■ 18. Section 40.149(a) introductory text and (a)(1) are revised to read as follows:

§ 40.149 May the MRO change a verified drug test result?

(a) As the MRO, you may change a verified test result only in the following situations:

(1) When you have reopened a verification that was done without an interview with an employee (see § 40.133(d)).

* * * * *

■ 19. Section 40.155 is amended by adding paragraph (d) to read as follows:

§ 40.155 What does the MRO do when a negative or positive test result is also dilute?

* * * * *

(d) If the employee's recollection under direct observation, in paragraph (c) of this section, results in another negative-dilute, as the MRO, you must:

(1) Review the CCF to ensure that there is documentation that the recollection was directly observed.

(2) If the CCF documentation shows that the recollection was directly observed as required, report this result to the DER as a negative-dilute result.

(3) If CCF documentation indicates that the recollection was not directly observed as required, do not report a result but again explain to the DER that

there must be an immediate recollection under direct observation.

■ 20. Section 40.159 is amended by revising paragraphs (a)(1) through (3), adding paragraph (a)(4)(iii), and adding paragraphs (d) through (g) to read as follows:

§ 40.159 What does the MRO do when a drug test is invalid?

(a) * * *

(1) Discuss the laboratory results with a certifying scientist to determine if the primary specimen should be tested at another HHS certified laboratory. If the laboratory did not contact you as required by §§ 40.91(e) and 40.96(c), you must contact the laboratory.

(2) If you and the laboratory have determined that no further testing is necessary, contact the employee and inform the employee that the specimen was invalid. In contacting the employee, use the procedures set forth in § 40.131.

(3) After explaining the limits of disclosure (see §§ 40.135(d) and 40.327), you must determine if the employee has a medical explanation for the invalid result. You must inquire about the medications the employee may have taken.

(4) * * *

(iii) If a negative test result is required and the medical explanation concerns a situation in which the employee has a permanent or long-term medical condition that precludes him or her from providing a valid specimen, as the MRO, you must follow the procedures outlined at § 40.160 for determining if there is clinical evidence that the individual is an illicit drug user.

* * * * *

(d) If the employee admits to using a drug, you must, on the same day, write and sign your own statement of what the employee told you. You must then report that admission to the DER for appropriate action under DOT Agency regulations. This test will be reported as cancelled with the reason noted.

(e) If the employee's recollection (required at paragraph (a)(5) of this section) results in another invalid result for the same reason as reported for the first specimen, as the MRO, you must:

(1) Review the CCF to ensure that there is documentation that the recollection was directly observed.

(2) If the CCF review indicates that the recollection was directly observed as required, document that the employee had another specimen with an invalid result for the same reason.

(3) Follow the recording and reporting procedures at (a)(4)(i) and (ii) of this section.

(4) If a negative result is required (i.e., pre-employment, return-to-duty, or

follow-up tests), follow the procedures at § 40.160 for determining if there is clinical evidence that the individual is an illicit drug user.

(5) If the recollection was not directly observed as required, do not report a result but again explain to the DER that there must be an immediate recollection under direct observation.

(f) If the employee's recollection (required at paragraph (a)(5) of this section) results in another invalid result for a different reason than that reported for the first specimen, as the MRO, you must:

(1) Review the CCF to ensure that there is documentation that the recollection was directly observed.

(2) If the CCF review indicates that the recollection was directly observed as required, document that the employee had another specimen with an invalid result for a different reason.

(3) As the MRO, you should not contact the employee to discuss the result, but rather direct the DER to conduct an immediate recollection under direct observation without prior notification to the employee.

(4) If the CCF documentation indicates that the recollection was not directly observed as required, do not report a result but again explain to the DER that there must be an immediate recollection under direct observation.

(g) If, as the MRO, you receive a laboratory invalid result in conjunction with a positive, adulterated, and/or substituted result and you verify any of those results as being a positive and/or refusal to test, you do not report the invalid result unless the split specimen fails to reconfirm the result(s) of the primary specimen.

■ 21. Section 40.160 is added to read as follows:

§ 40.160 What does the MRO do when a valid test result cannot be produced and a negative result is required?

(a) If a valid test result cannot be produced and a negative result is required, (under § 40.159 (a)(5)(iii) and (e)(4)), as the MRO, you must determine if there is clinical evidence that the individual is currently an illicit drug user. You must make this determination by personally conducting, or causing to be conducted, a medical evaluation. In addition, if appropriate, you may also consult with the employee's physician to gather information you need to reach this determination.

(b) If you do not personally conduct the medical evaluation, as the MRO, you must ensure that one is conducted by a licensed physician acceptable to you.

(c) For purposes of this section, the MRO or the physician conducting the

evaluation may conduct an alternative test (e.g., blood) as part of the medically appropriate procedures in determining clinical evidence of drug use.

(d) If the medical evaluation reveals no clinical evidence of drug use, as the MRO, you must report this to the employer as a negative test result with written notations regarding the medical examination. The report must also state why the medical examination was required (i.e., either the basis for the determination that a permanent or long-term medical condition exists or because the recollection under direct observation resulted in another invalid result for the same reason, as appropriate) and for the determination that no signs and symptoms of drug use exist.

(1) Check "Negative" (Step 6) on the CCF.

(2) Sign and date the CCF.

(e) If the medical evaluation reveals clinical evidence of drug use, as the MRO, you must report the result to the employer as a cancelled test with written notations regarding the results of the medical examination. The report must also state why the medical examination was required (i.e., either the basis for the determination that a permanent or long-term medical condition exists or because the recollection under direct observation resulted in another invalid result for the same reason, as appropriate) and state the reason for the determination that signs and symptoms of drug use exist. Because this is a cancelled test, it does not serve the purpose of an actual negative test result (i.e., the employer is not authorized to allow the employee to begin or resume performing safety-sensitive functions, because a negative test result is needed for that purpose).

■ 22. Section 40.162 is added to read as follows:

§ 40.162 What must MROs do with multiple verified results for the same testing event?

(a) If the testing event is one in which there was one specimen collection with multiple verified non-negative results, as the MRO, you must report them all to the DER. For example, if you verified the specimen as being positive for marijuana and cocaine and as being a refusal to test because the specimen was also adulterated, as the MRO, you should report the positives and the refusal to the DER.

(b) If the testing event was one in which two separate specimen collections (e.g., a specimen out of temperature range and the subsequent observed collection) were sent to the laboratory, as the MRO, you must:

(1) If both specimens were verified negative, report the result as negative.

(2) If either of the specimens was verified negative and the other was verified as one or more non-negative(s), report the non-negative result(s) only. For example, if you verified one specimen as negative and the other as a refusal to test because the second specimen was substituted, as the MRO you should report only the refusal to the DER.

(i) If the first specimen is reported as negative, but the result of the second specimen has not been reported by the laboratory, as the MRO, you should hold—not report—the result of the first specimen until the result of the second specimen is received.

(ii) If the first specimen is reported as non-negative, as the MRO, you should report the result immediately and not wait to receive the result of the second specimen.

(3) If both specimens were verified non-negative, report all of the non-negative results. For example, if you verified one specimen as positive and the other as a refusal to test because the specimen was adulterated, as the MRO, you should report the positive and the refusal results to the DER.

(c) As an exception to paragraphs (a) and (b) of this section, as the MRO, you must follow procedures at § 40.159(f) when any verified non-negative result is also invalid.

■ 23. Section 40.171 is amended by revising paragraph (a) to read as follows:

§ 40.171 How does an employee request a split specimen?

(a) As an employee, when the MRO has notified you that you have a verified positive drug test and/or refusal to test because of adulteration or substitution, you have 72 hours from the time of notification to request a test of the split specimen. The request may be verbal or in writing. If you make this request to the MRO within 72 hours, you trigger the requirements of this section for a test of the split specimen. There is no split specimen testing for an invalid result.

* * * * *

■ 24. Section 40.177 is amended by revising paragraph (d) to read as follows:

§ 40.177 What does the second laboratory do with the split specimen when it is tested to reconfirm the presence of a drug or drug metabolite?

* * * * *

(d) In addition, if the test fails to reconfirm the presence of the drug(s)/drug metabolite(s) reported in the primary specimen, you may send the

specimen or an aliquot of it for testing at another HHS-certified laboratory that has the capability to conduct another reconfirmation test.

■ 25. Section 40.179 is revised to read as follows:

§ 40.179 What does the second laboratory do with the split specimen when it is tested to reconfirm an adulterated test result?

(a) As the laboratory testing the split specimen, you must test the split specimen for the adulterant detected in the primary specimen, using the confirmatory test for the adulterant and using criteria in § 40.95 and confirmatory cutoff levels required by the HHS Mandatory Guidelines.

(b) In addition, if the test fails to reconfirm the adulterant result reported in the primary specimen, you may send the specimen or an aliquot of it for testing at another HHS-certified laboratory that has the capability to conduct another reconfirmation test.

■ 26. Section 40.181 is revised to read as follows:

§ 40.181 What does the second laboratory do with the split specimen when it is tested to reconfirm a substituted test result?

As the laboratory testing the split specimen, you must test the split specimen using the confirmatory tests for creatinine and specific gravity, and using the confirmatory criteria set forth in § 40.93(b).

■ 27. Section 40.183 amended by revising paragraph (a), removing paragraph (b), and re-designating paragraph (c) as paragraph (b).

§ 40.183 What information do laboratories report to MROs regarding split specimen results?

(a) As the laboratory responsible for testing the split specimen, you must report split specimen test results by checking the “Reconfirmed” box and/or the “Failed to Reconfirm” box (Step 5(b)) on Copy 1 of the CCF, as appropriate, and by providing clarifying remarks using current HHS Mandatory Guidelines requirements.

* * * * *

■ 28. Section 40.187 is revised to read as follows:

§ 40.187 What does the MRO do with split specimen laboratory results?

As the MRO, the split specimen laboratory results you receive will fall into five categories. You must take the following action, as appropriate, when a laboratory reports split specimen results to you.

(a) *Category 1:* The laboratory reconfirmed one or more of the primary specimen results. As the MRO, you

must report to the DER and the employee the result(s) that was/were reconfirmed.

(1) In the case of a reconfirmed positive test(s) for drug(s) or drug metabolite(s), the positive is the final result.

(2) In the case of a reconfirmed adulterated or substituted result, the refusal to test is the final result.

(3) In the case of a combination positive and refusal to test results, the final result is both positive and refusal to test.

(b) *Category 2:* The laboratory failed to reconfirm all of the primary specimen results because, as appropriate, drug(s)/drug metabolite(s) were not detected; adulteration criteria were not met; and/or substitution criteria were not met. As the MRO, you must report to the DER and the employee that the test must be cancelled.

(1) As the MRO, you must inform ODAPC of the failure to reconfirm using the format in Appendix D to this part.

(2) In a case where the split failed to reconfirm because the substitution criteria were not met and the split specimen creatinine concentration was equal to or greater than 2mg/dL but less than or equal to 5mg/dL, as the MRO, you must, in addition to step (b)(1) of this paragraph, direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(3) In a case where the split failed to reconfirm and the primary specimen’s result was also invalid, direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(c) *Category 3:* The laboratory failed to reconfirm all of the primary specimen results, and also reported that the split specimen was invalid, adulterated, and/or substituted.

(1) In the case where the laboratory failed to reconfirm all of the primary specimen results and the split was reported as invalid, as the MRO, you must:

(i) Report to the DER and the employee that the test must be cancelled and the reason for the cancellation.

(ii) Direct the DER to ensure the immediate collection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection.

(iii) Inform ODAPC of the failure to reconfirm using the format in Appendix D to this part.

(2) In the case where the laboratory failed to reconfirm any of the primary specimen results, and the split was reported as adulterated and/or substituted, as the MRO, you must:

(i) Contact the employee and inform the employee that the laboratory has determined that his or her split specimen is adulterated and/or substituted, as appropriate.

(ii) Follow the procedures of § 40.145 to determine if there is a legitimate medical explanation for the laboratory finding of adulteration and/or substitution, as appropriate.

(iii) If you determine that there is a legitimate medical explanation for the adulterated and/or substituted test result, report to the DER and the employee that the test must be cancelled; and inform ODAPC of the failure to reconfirm using the format in Appendix D to this part.

(iv) If you determine that there is not a legitimate medical explanation for the adulterated and/or substituted test result, you must take the following steps:

(A) Report the test to the DER and the employee as a verified refusal to test. Inform the employee that he or she has 72 hours to request a test of the primary specimen to determine if the adulterant found in the split specimen is also present in the primary specimen and/or to determine if the primary specimen meets appropriate substitution criteria.

(B) Except when the request is for a test of the primary specimen and is being made to the laboratory that tested the primary specimen, follow the procedures of §§ 40.153, 40.171, 40.173, 40.179, 40.181, and 40.185, as appropriate.

(C) As the laboratory that tests the primary specimen to reconfirm the presence of the adulterant found in the split specimen and/or to determine that the primary specimen meets appropriate substitution criteria, report your result to the MRO on a photocopy (faxed, mailed, scanned, couriered) of Copy 1 of the CCF.

(D) If the test of the primary specimen reconfirms the adulteration and/or substitution finding of the split specimen, as the MRO you must report the result as a refusal to test as provided in paragraph (a)(2) of this section.

(E) If the test of the primary specimen fails to reconfirm the adulteration and/or substitution finding of the split specimen, as the MRO you must cancel the test, following procedures in paragraph (b) of this section.

(d) *Category 4:* The laboratory failed to reconfirm one or more but not all of the primary specimen results, and also reported that the split specimen was invalid, adulterated, and/or substituted. As the MRO, in the case where the laboratory reconfirmed one or more of the primary specimen result(s), you must follow procedures in paragraph (a) of this section and:

(1) Report that the split was also reported as being invalid, adulterated, and/or substituted (as appropriate).

(2) Inform the DER to take action only on the reconfirmed result(s).

(e) *Category 5:* The split specimen was not available for testing or there was no split laboratory available to test the specimen. As the MRO, you must:

(1) Report to the DER and the employee that the test must be cancelled and the reason for the cancellation;

(2) Direct the DER to ensure the immediate recollection of another specimen from the employee under direct observation, with no notice given to the employee of this collection requirement until immediately before the collection; and

(3) Notify ODAPC of the failure to reconfirm using the format in Appendix D to this part.

(f) For all split specimen results, as the MRO you must:

(1) Enter your name, sign, and date (Step 7) of Copy 2 of the CCF.

(2) Send a legible copy of Copy 2 of the CCF (or a signed and dated letter, see § 40.163) to the employer and keep a copy for your records. Transmit the document as provided in § 40.167.

■ 29. Section 40.191 is amended by revising paragraph (a)(8) and adding paragraphs (a)(9), (10) and (11) to read as follows:

§ 40.191 What is a refusal to take a DOT drug test, and what are the consequences?

(a) * * *

(8) Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when directed by the collector, behave in a confrontational way that disrupts the collection process, fail to wash hands after being directed to do so by the collector).

(9) For an observed collection, fail to follow the observer's instructions to raise your clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if you have any type of prosthetic or other device that could be used to interfere with the collection process.

(10) Possess or wear a prosthetic or other device that could be used to interfere with the collection process.

(11) Admit to the collector or MRO that you adulterated or substituted the specimen.

* * * * *

■ 30. Section 40.197 is amended by revising paragraph (c)(3), redesignating paragraph (c)(4) as (c)(5), and adding new paragraph (c)(4) to read as follows:

§ 40.197 What happens when an employer receives a report of a dilute specimen?

* * * * *

(c) * * *

(3) If the result of the test you directed the employee to take under paragraph (b)(1) of this section is also negative and dilute, you are not permitted to make the employee take an additional test because the result was dilute.

(4) If the result of the test you directed the employee to take under paragraph (b)(2) of this section is also negative and dilute, you are not permitted to make the employee take an additional test because the result was dilute. Provided, however, that if the MRO directs you to conduct a recollection under direct observation under paragraph (b)(1) of this section, you must immediately do so.

* * * * *

■ 31. Section 40.201 is amended by revising paragraphs (c), (d), and (e) to read as follows:

§ 40.201 What problems always cause a drug test to be cancelled and may result in a requirement for another collection?

* * * * *

(c) The laboratory reports that the split specimen failed to reconfirm all of the primary specimen results because the drug(s)/drug metabolite(s) were not detected; adulteration criteria were not met; and/or substitution criteria were not met. You must follow the applicable procedures in § 40.187(b)—no recollection is required in this case, unless the split specimen creatinine concentration for a substituted primary specimen was greater than or equal to 2mg/dL but less than or equal to 5mg/dL, or the primary specimen had an invalid result which was not reported to the DER. Both these cases require recollection under direct observation.

(d) The laboratory reports that the split specimen failed to reconfirm all of the primary specimen results, and that the split specimen was invalid. You must follow the procedures in § 40.187(c)(1)—recollection under direct observation is required in this case.

(e) The laboratory reports that the split specimen failed to reconfirm all of the primary specimen results because the split specimen was not available for testing or there was no split laboratory available to test the specimen. You must

follow the applicable procedures in § 40.187(e)—recollection under direct observation is required in this case.

* * * * *

§ 40.207 [Amended]

■ 32. Section 40.207 is amended by removing, in paragraph (a)(3), the reference to “40.187(b)” and adding in its place “40.187(b)(2), (c)(1), and (e)”.

■ 33. Appendix B to Part 40 is revised to read as follows:

Appendix B to Part 40—DOT Drug Testing Semi-Annual Laboratory Report to Employers

The following items are required on each report:

Reporting Period: (inclusive dates)

Laboratory Identification: (name and address)

Employer Identification: (name; may include Billing Code or ID code)

C/TPA Identification: (where applicable; name and address)

1. Specimen Results Reported (total number) By Type of Test

(a) Pre-employment (number)

(b) Post-Accident (number)

(c) Random (number)

(d) Reasonable Suspicion/Cause (number)

(e) Return-to-Duty (number)

(f) Follow-up (number)

(g) Type of Test Not Noted on CCF (number)

2. Specimens Reported

(a) Negative (number)

(b) Negative and Dilute (number)

3. Specimens Reported as Rejected for Testing (total number)

By Reason

(a) Fatal flaw (number)

(b) Uncorrected Flaw (number)

4. Specimens Reported as Positive (total number) By Drug

(a) Marijuana Metabolite (number)

(b) Cocaine Metabolite (number)

(c) Opiates (number)

(1) Codeine (number)

(2) Morphine (number)

(3) 6-AM (number)

(d) Phencyclidine (number)

(e) Amphetamines (number)

(1) Amphetamine (number)

(2) Methamphetamine (number)

5. Adulterated (number)

6. Substituted (number)

7. Invalid Result (number)

■ 34. Appendix C to Part 40 is added to read as follows:

Appendix C to Part 40—DOT Drug Testing Semi-Annual Laboratory Report to DOT

Mail, fax, or e-mail to: U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, W62–300, 1200 New Jersey Avenue, SE., Washington, DC 20590, Fax: (202) 366–3897, E-mail: ODAPCWebMail@dot.gov.

The following items are required on each report:

Reporting Period: (inclusive dates)

Laboratory Identification: (name and address)

1. DOT Specimen Results Reported (number)

2. Negative Results Reported (number)

3. Rejected for Testing Reported (number) By Reason (number)

4. Positive Results Reported (number) By Drug (number)

5. Adulterated Results Reported (number) By Reason (number)

6. Substituted Results Reported (number)

7. Invalid Results Reported (number) By Reason (number)

■ 35. Appendix D to Part 40 is revised to read as follows:

Appendix D to Part 40—Report Format: Split Specimen Failure To Reconfirm

Mail, fax, or submit electronically to: U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, W62–300, 1200 New Jersey Avenue, SE., Washington, DC 20590, Fax: (202) 366–3897, Submit Electronically: http://www.dot.gov/ost/dapc/mro_split.html.

The following items are required on each report:

1. MRO name, address, phone number, and fax number.

2. Collection site name, address, and phone number.

3. Date of collection.

4. Specimen I.D. number.

5. Laboratory accession number.

6. Primary specimen laboratory name, address, and phone number.

7. Date result reported or certified by primary laboratory.

8. Split specimen laboratory name, address, and phone number.

9. Date split specimen result reported or certified by split specimen laboratory.

10. Primary specimen results (e.g., name of drug, adulterant) in the primary specimen.

11. Reason for split specimen failure-to-reconfirm result (e.g., drug or adulterant not present, specimen invalid, split not collected, insufficient volume).

12. Actions taken by the MRO (e.g., notified employer of failure to reconfirm and requirement for recollection).

13. Additional information explaining the reason for cancellation.

14. Name of individual submitting the report (if not the MRO).

Appendix F to Part 40 [Amended]

■ 36. Appendix F to Part 40 is amended by removing the references to § 40.187(a)–(f) and adding in its place § 40.187(a) through (e).

[FR Doc. E8–14218 Filed 6–24–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385 and 395

[Docket No. FMCSA–2004–19608]

RIN 2126–AB14

Hours of Service of Drivers; Availability of Supplemental Documents

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of availability of supplemental documents.

SUMMARY: This notice advises the public that FMCSA is placing in the public docket four additional documents concerning hours of service (HOS) for commercial motor vehicle (CMV) drivers. FMCSA published an interim final rule (IFR) on this issue on December 17, 2007. The Agency now docketed the supplemental documents.

ADDRESSES: You may submit comments, identified by docket number FMCSA–2004–19608, by one of the following methods: Internet, facsimile, regular mail, or hand delivery. Please do not submit the same comments by more than one method. FMCSA encourages use of the Federal eRulemaking portal. It provides the most efficient and timely method of receiving and processing your comments.

• *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

• *Fax:* 1–202–493–2251.

• *Mail:* Docket Management Facility; U.S. Department of Transportation; 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

• *Hand Delivery:* Ground floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number (FMCSA–2004–19608) or Regulatory Identification Number (RIN 2126–AB14) for this action. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Refer to the Privacy Act heading at <http://www.regulations.gov> for further information.

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 the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476) or you may visit <http://DocketsInfo.dot.gov>.

Submitting Comments:

- You can find electronic submission and retrieval help and guidelines under the "help" section of the Web site.
- For notification that FMCSA received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments on line.
- All comments received will be available for examination in the docket at the above address or on the Web site.
- Comments received will be considered to the extent practicable.

FMCSA will continue to put relevant information in the docket as it becomes available and interested persons should continue to examine the docket for new material.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations. Telephone (202) 366-4325 or E-mail MCPSD@dot.gov. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: On August, 25, 2005, FMCSA published a final HOS rule ("2005 rule") (70 FR 49978). On July 24, 2007, the DC Circuit Court vacated the 11-hour driving time and 34-hour restart provisions of the 2005 rule (*Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 494 F.3d 188 (DC Cir. 2007)). In response to the DC Circuit Court decision, FMCSA published an interim final rule (IFR) on December 17, 2007 (72 FR 71247) that reinstated the two provisions vacated by the Court and sought further comments on those provisions.

For a full background on this rulemaking, please see the preamble to the December 2007 HOS IFR. The docket for this rulemaking (FMCSA-2004-19608) contains all of the background information for this rulemaking, including comments.

This notice advises of the availability of four additional documents. FMCSA remains committed to issuing a final rule in 2008 and any comments on the four documents should be submitted as soon as possible.

FMCSA is placing the following four documents in the docket:

- "Integrated Report: Peer Review of R. J. Hanowski *et al.*, "Analysis of Risk as a Function of Driving Hours: Assessment of Driving Hours 1 through 11." The separate reviews were conducted by D.A. Perrin (January 23, 2008), G. Belenky and L.J. Wu (February 6, 2008), and S.R. Hursh and J. Fanzone (February 7, 2008). This peer review was conducted at the request of FMCSA.

- "Review of Hours of Service Regulatory Impact Analysis (RIA) Report," conducted by Linda Ng Boyle, Ron Knipling, and Greg Belenky, and dated December 27, 2007. This peer review was conducted at the request of FMCSA.

- "Hours of Service Regulatory Impact Analysis: Peer Review Results and FMCSA Responses," dated May 2008. This document was prepared in response to the requested peer review of the RIA that accompanied the 2007 HOS IFR.

- "Analysis of Fatigue-Related Large Truck Crashes, the Assignment of Critical Reason, and Other Variables Using the Large Truck Crash Causation Study." This analysis, dated May 30, 2008, was prepared by FMCSA.

Issued on: June 20, 2008.

John H. Hill,

Administrator.

[FR Doc. E8-14491 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1002

[STB Ex Parte No. 542 (Sub-No. 15)]

Regulations Governing Fees for Services Performed in Connection With Licensing Related Services—2008 Update

AGENCY: Surface Transportation Board, DOT.

ACTION: Stay of effective date.

SUMMARY: This document contains corrections to the preamble of the Board's Final Rules, which was published in the **Federal Register** of Wednesday, June 18, 2008 (73 FR 34649). The Final Rules adopted the 2008 User Fee Update and revised the fee schedule to reflect increased costs associated with the January 2008 Government salary increases, and the Board's overhead costs, and to reflect changes in Government fringe benefits. After the rules were published, an inadvertent error involving the effective dates of the rules was noticed. The effective dates of these final rules are July 18, 2008, rather than June 18, 2008.

DATES: The amendments to 49 CFR 1002.1 (a) through (e), (f)(1), and (g)(6), and 49 CFR 1002.2(f), published June 18, 2008 (73 FR 34649) are stayed until July 18, 2008.

FOR FURTHER INFORMATION CONTACT: David T. Groves, (202) 245-0327, or Anne Quinlan, (202) 245-0309. [TDD for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: On June 18, 2008, the Board issued Final Rules in the above-docketed proceeding, *Regulations Governing Fees for Services Performed in Connection With Licensing Related Services—2008 Update*, 73 FR 34649 (June 18, 2008). After the rules were published, an inadvertent error involving the effective dates of the rules was noticed. The effective dates of the final rules are July 18, 2008, rather than June 18, 2008.

Decided: June 20, 2008.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Anne Quinlan,

Acting Secretary.

[FR Doc. E8-14346 Filed 6-24-08; 8:45 am]

BILLING CODE 4915-01-P

Proposed Rules

Federal Register

Vol. 73, No. 123

Wednesday, June 25, 2008

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.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 723

RIN 3133-AD42

Member Business Loans

AGENCY: National Credit Union Administration (NCUA).

ACTION: Advance notice of proposed rulemaking and request for comment (ANPR).

SUMMARY: NCUA is considering amending its member business loans (MBL) rule to clarify or revise current provisions including those related to: loan-to-value (LTV) ratio requirements; collateral and security requirements; credit union service organization (CUSO) involvement in the MBL process; MBL loan participation; and waivers. NCUA seeks comment on these issues and any others commenters think NCUA should consider.

DATES: Comments must be received on or before August 25, 2008.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *NCUA Web Site:* http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html. Follow the instructions for submitting comments.

- *E-mail:* Address to regcomments@ncua.gov. Include “[Your name]—Comments on Advanced Notice of Proposed Rulemaking for Part 723” in the e-mail subject line.

- *Fax:* (703) 518-6319. Use the subject line described above for e-mail.

- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

- *Hand Delivery/Courier:* Same as mail address.

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Staff Attorney, Office of General Counsel, at the above address or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

A. Background

In addition to making regulatory changes as the need arises, NCUA’s policy is to review all of its existing regulations every three years. Interpretive Ruling and Policy Statement (IRPS) 87-2, Developing and Reviewing Government Regulations, (Sept. 18, 1987), as amended by IRPS 03-2 (May 29, 2003). This review is conducted on a rolling basis so that a third of the regulations is reviewed each year. This helps NCUA update its regulations to address current regulatory concerns. NCUA provides notice to the public of the regulations under review so the public has an opportunity to comment. This ANPR is the result of that process and comments received from the public and NCUA offices.

Under Part 723, an MBL is any loan, line of credit, or letter of credit, where the proceeds will be used for a commercial, corporate, other business investment property or venture, or agricultural purpose. 12 CFR § 723.1. There are several exceptions to this general definition. The MBL rule contains statutory and regulatory requirements and limitations, such as collateral and security requirements, equity requirements, and loan limits. The potential amendments discussed below cover a wide variety of MBL issues.

B. Discussion of MBL Issues

1. Loan-to-Value Ratio Requirements and Unsecured MBLs

Generally, the MBL rule requires all MBLs to be secured by collateral. 12 CFR 723.7(a). The maximum LTV ratio permitted for all liens is 80% unless the amount in excess of 80% is covered by private mortgage insurance or is otherwise insured, guaranteed or subject to an advance commitment to purchase by certain government agencies. 12 CFR 723.7(a)(1). In any event, the LTV ratio may not exceed 95%.

The MBL rule has various exceptions to the LTV requirement. One exception permits well capitalized natural person credit unions and corporate credit unions that maintain required minimum capital levels to make unsecured MBLs.

12 CFR 723.7(c)(1). Unsecured MBLs to any one member or group of associated members are limited to the lesser of \$100,000 or 2.5% of a credit union’s net worth and all unsecured MBLs may not exceed 10% of net worth. 12 CFR 723.7(c)(2) and (3). Another exception available under certain circumstances is that the requirements and limits in § 723.7 do not apply to credit card lines of credit offered to nonnatural person members. 12 CFR 723.7(d). Finally, a credit union can make vehicle MBLs, without being subject to LTV requirements, if the vehicle is a car, van, pick-up truck, or SUV and not part of a fleet.

NCUA has received comments on several aspects of the LTV requirements. One commenter suggested lowering the borrower equity requirement for construction and development loans (C&D loans) from the current 25% to 20%. This translates to raising the maximum LTV limit for C&D loans from the current 75% to 80% and making it the same as the general LTV requirement. The commenter suggested this will make credit unions more competitive in this lending area.

NCUA believes C&D loans are the riskiest of all MBLs and, therefore, require greater regulatory restrictions to ensure safe and sound lending. NCUA is willing, however, to consider comments in support of easing restrictions on C&D loans. Commenters should address the greater safety and soundness concerns of C&D loans. NCUA notes that credit unions can seek approval to waive the borrower equity requirement under the MBL rule’s waiver provision. 12 CFR 723.10(c). If commenters support easing LTV requirements for C&D loans, they should address the sufficiency of the waiver provision. As noted below, NCUA is inviting comments generally on the sufficiency of the MBL rule’s waiver provisions.

Other comments have included a request to modify the LTV requirements for loans on fleet vehicles to make credit unions more competitive and a request for NCUA to narrow the definition of “fleet” from that articulated in OGC Legal Op. 05-1038 (December 8, 2005) so it would capture fewer business vehicles. See, http://www.ncua.gov/RegulationsOpinionsLaws/opinion_letters/2005/05-1038.pdf. NCUA would appreciate comments on this suggestion and asks commenters to

address relevant safety and soundness ramifications.

NCUA welcomes general comments on any aspect of the MBL LTV requirements and unsecured MBL exception including if there should be a regulatory credit limit placed on business credit cards. One commenter suggested the LTV limits should be raised or eliminated. Although it is unlikely NCUA would entirely eliminate LTV requirements for MBLs, commenters are encouraged to comment and provide suggestions on improving or clarifying these provisions. This includes comments on whether NCUA has clearly explained how a credit union is to establish the value of a property for purposes of calculating the LTV ratio, defined what costs and fees may properly be included in calculating a borrower's equity in a project, and how the unsecured MBL exception should be applied when a credit union is making an MBL under a Small Business Administration guaranteed loan program. NCUA also is interested in comments on whether the differences between various kinds of collateral would support using a tiered approach to LTV limits so that a loan secured by safer collateral would have a higher LTV limit.

2. Experience Requirement and CUSO Activities

The MBL rule requires a credit union making MBLs to use the services of an individual with at least two years direct experience with the type of lending in which the credit union will engage. 12 CFR 723.5(a). The experience must provide the credit union with sufficient expertise given the complexity and risk exposure of the contemplated MBLs. *Id.*

NCUA solicits comment on the adequacy of the two-year experience requirement. Also, there appears to be some confusion among credit unions regarding how this requirement can be met or is to be calculated using both in-house employees and third party contractors. Also, there appears to be confusion as to what role CUSOs may play in providing that expertise to non-owner credit unions and credit unions that wholly or partially own the CUSO. Additionally, credit unions appear uncertain on the application of the conflict of interest provision in the MBL rule to circumstances where a CUSO or other third party is used to meet the two-year experience requirement. 12 CFR 723.5(b).

NCUA solicits comment on the need to clarify § 723.5 and, if commenters believe it needs clarification, NCUA welcomes specific suggestions for amending the regulation. For instance, it

would be helpful to know if commenters think § 723.5 needs substantive revision or if adding specific examples in the regulatory text would be sufficient to clarify the standards. NCUA is also interested if commenters believe other aspects of CUSO involvement in the MBL process could be improved.

3. Loan Participations

Credit unions are authorized to sell participation interests in their MBLs to the same extent as non-business loans. In noting many of the benefits of engaging in loan participations, NCUA stated:

Specifically, engaging in loan participations is an effective tool for FCUs to manage liquidity and concentration risk. Loan participation is also a way for FCUs to comply with NCUA or self-imposed lending limits. Small FCUs are able to improve the diversification of their loan portfolios by participating in loans originated by larger FCUs that have the resources to underwrite a wider variety of loan types.

68 FR 75110 (December 30, 2003). NCUA's loan participation rule provides the basic regulatory requirements for all loan participations, including participations of MBL loans, and credit unions that purchase or sell MBL participations must comply with the loan participation rule requirements as well as the MBL rule. 12 CFR 701.22.

The MBL rule specifically addresses MBL loan participations by instructing credit unions how they must account for MBL participations in member and non-member loans and how the participations will affect the credit union's aggregate limit on net member business loan balances. 12 CFR 723.1(d) and (e); § 723.16(b).

NCUA believes some credit unions overlook the link between the MBL and loan participation rules and have had difficulty in accurately accounting for MBL participations. In addition, it appears some credit unions may not understand or be aware of the waiver process available where nonmember MBL participations may otherwise cause a credit union to exceed the aggregate limit on MBLs.

Accordingly, NCUA would like comments to help it assess the degree to which credit unions need additional guidance in this respect and solicits suggestions for how best to address this. For example, NCUA would appreciate comments on the utility of including cross-references in § 701.22 and part 723 and revising existing regulatory provisions to enhance clarity. Specific suggestions and supporting rationales for those suggestions would be appreciated.

4. Waivers

Section 723.10 enables credit unions to seek waivers from a variety of limitations and requirements in the MBL rule. While NCUA may not grant waivers from statutory provisions carried over into the MBL rule, the menu of available waivers is extensive. Despite this, it appears credit unions may not be taking full advantage of waiver opportunities. NCUA solicits comments on whether this is the case and, if so, why. Also, it would be helpful to know if this perceived issue is the result of a procedural problem and what NCUA can do to resolve it.

5. Degree of Regulatory Limits

Some observers believe credit unions that are experienced business lenders are well equipped to manage the risks associated with making MBLs and should be given more flexibility with fewer regulatory restrictions. Others believe the increasing amount of MBL risk on credit union balance sheets is cause for concern and NCUA should impose greater regulatory restrictions to protect against the increased risk. One commenter suggested greater restrictions should include increasing the list of underwriting factors required by § 723.6(g). 12 CFR 723.6(g). NCUA would appreciate comments on whether part 723 would be a more effective regulation with more, less, or the current degree of regulatory limits. Commenters are reminded that some limitations in part 723 are required by statute and should take that into account when providing comments.

C. Request for Comments

The NCUA Board invites comment on any of the issues discussed above including if, and how, NCUA's regulations should be amended to address the issues discussed in this ANPR. Commenters should not feel constrained to limit their comments to the above issues. Rather, commenters are encouraged to discuss any other relevant MBL issues they believe NCUA should consider.

By the National Credit Union Administration Board on June 19, 2008.

Mary F. Rupp,

Secretary of the Board.

[FR Doc. E8-14294 Filed 6-24-08; 8:45 am]

BILLING CODE 7535-01-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 23**

[Docket No. CE287, Notice No. 23-08-04-SC]

Special Conditions; Honda Aircraft Company, Model HA-420 HondaJet Airplane; Fire Extinguishing**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Notice of proposed special conditions.

SUMMARY: This notice proposes special conditions for the Honda Aircraft Company, Model HA-420 HondaJet Airplane. This new airplane will have novel and unusual design features not typically associated with normal, utility, acrobatic, and commuter category airplanes. These design features include turbofan engines and engine location, for which the applicable regulations do not contain adequate or appropriate airworthiness standards. These proposed special conditions contain the additional airworthiness standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Comments must be received on or before July 25, 2008.

ADDRESSES: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE-7, Attention: Rules Docket Clerk, Docket No. CE287, Room 506, 901 Locust, Kansas City, Missouri 64106. All comments must be marked: Docket No. CE287. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Leslie B. Taylor, Aerospace Engineer, Standards Office (ACE-110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, Room 301, 901 Locust Street, Kansas City, Missouri 64106; telephone (816) 329-4134, e-mail: leslie.b.taylor@faa.gov.

SUPPLEMENTARY INFORMATION:**Comments Invited**

Interested persons are invited to participate in the making of these special conditions by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above.

All communications received on or before the closing date for comments will be considered by the Administrator. The proposals described in this notice may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to Docket No. CE287." The postcard will be date stamped and returned to the commenter.

Background

On October 11, 2006, Honda Aircraft Company; Greensboro, North Carolina, made an application to the FAA for a new Type Certificate for the Honda Model HA-420 HondaJet. The Honda Model HA-420 HondaJet is an all new very light jet, twin engine, high performance, low wing, aft overwing mounted turbofan engine powered aircraft in the Normal Category including flight into known icing conditions, Reduced Vertical Separation Minimum (RVSM) and single pilot operations. The Model HA-420 HondaJet design criteria includes: 9963 pounds maximum gross weight, estimated maximum speed of 258 KIAS/0.72 Mach, cruise speed of 420 KTAS at 30,000 feet, and a 43,000 foot maximum altitude.

Part 23 has historically addressed fire protection through prevention, identification, and containment. Prevention has been provided through minimizing the potential for ignition of flammable fluids and vapors. Identification has traditionally been provided by the location of the engines within the pilot's primary field of view and/or with the incorporation of fire detection systems. This philosophy has provided for both the rapid detection of a fire and confirmation when it has been extinguished. Containment has been provided through the isolation of designated fire zones through flammable fluid shutoff valves and firewalls. The containment philosophy also ensures that components of the engine control system will function effectively to permit a safe shutdown of the engine. However, containment has only been required to be demonstrated for 15 minutes. In the event of a fire in a traditional part 23 airplane, the

corrective action is to land as soon as possible. For a small, simple aircraft originally envisioned by part 23, it is possible to descend the aircraft to a suitable landing site within 15 minutes. Thus, if the fire is not extinguished, the occupants can safely exit the aircraft prior to the firewall being breached. These simple and traditional aircraft normally have the engine located away from critical flight control systems and primary structure. This has ensured that throughout the fire event the pilot can continue safe flight and control and has made predicting the effects of a fire relatively easy. Other design features of these simple and traditional aircraft, such as low stall speeds and short landing distances, ensure that even in the event of an off field landing the potential for a catastrophic outcome has been minimized.

While the certification basis for the Model HA-420 HondaJet does require that a fire detection system be installed due to the engine location, fire extinguishing is also considered a requirement. A sustained fire could result in loss of control of the airplane and damage to this primary structure before an emergency landing could be made.

Type Certification Basis

Under the provisions of 14 CFR, part 21, § 21.17, Honda Aircraft Company must show that the Model HA-420 HondaJet meets the applicable provisions of 14 CFR, part 23, effective February 1, 1965, as amended by Amendments 23-1 through Amendment 23-55, effective March 1, 2002; 14 CFR, part 36, effective December 1, 1969, through the amendment effective on the date of type certification; 14 CFR, part 34; exemptions, if any; and the special conditions adopted by this rulemaking action.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 23) do not contain adequate or appropriate safety standards for the HondaJet because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Discussion

Special conditions, as appropriate, as defined in § 11.19, are issued in accordance with § 11.38, and become part of the type certification basis in accordance with § 21.17.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual

design feature, the special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

The Honda Aircraft Company, Model HA-420 HondaJet will incorporate the following novel or unusual design features: Engines mounted on the top of the wings behind the pilot's field of view.

Engine Fire Extinguishing System

The Model HA-420 HondaJet design includes engines mounted on the top of the wings behind the pilot's field of view; therefore, early visual detection of engine fires is precluded. The applicable existing regulations do not require fire extinguishing systems for engines. Engine installations mounted behind the pilots field of view were not envisaged in the development of part 23; therefore, special conditions for a fire extinguishing system with the applicable agents, containers, and materials for the engines of the Model HA-420 HondaJet are appropriate.

Applicability

As discussed above, these special conditions are applicable to the Model HA-420 HondaJet. Should Honda Aircraft Company apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability, and it affects only the applicant who applied to the FAA for approval of these features on the airplane identified.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g); 40113 and 44701; 14 CFR 21.16 and 21.17; and 14 CFR 11.38 and 11.19.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Honda Aircraft Company, Model HA-420 HondaJet airplane:

SC 23.1195, Fire extinguishing systems—Add the requirements of

§ 23.1195 as modified below while deleting, “For commuter category airplanes.”

(a) Fire extinguishing systems must be installed and compliance must be shown with the following:

(1) Except for combustor, turbine, and tailpipe sections of turbine-engine installations that contain lines or components carrying flammable fluids or gases for which a fire originating in these sections is shown to be controllable, a fire extinguisher system must serve each engine compartment.

(2) The fire extinguishing system, the quantity of the extinguishing agent, the rate of discharge, and the discharge distribution must be adequate to extinguish fires. An individual “one shot” system may be used except for embedded engines where a “two-shot” system is required.

(3) The fire extinguishing system for a nacelle must be able to simultaneously protect each compartment of the nacelle for which protection is provided.

(b) If an auxiliary power unit is installed in any airplane certificated to this part, that auxiliary power unit compartment must be served by a fire extinguishing system meeting the requirements of paragraph (a)(2) of this section.

SC 23.1197, Fire extinguishing agents—Add the requirement of § 23.1197 while deleting, “For commuter category airplanes.”

(a) Fire extinguishing agents must:

(1) Be capable of extinguishing flames emanating from any burning fluids or other combustible materials in the area protected by the fire extinguishing system; and

(2) Have thermal stability over the temperature range likely to be experienced in the compartment in which they are stored.

(b) If any toxic extinguishing agent is used, provisions must be made to prevent harmful concentrations of fluid or fluid vapors (from leakage during normal operation of the airplane or as a result of discharging the fire extinguisher on the ground or in flight) from entering any personnel compartment, even though a defect may exist in the extinguishing system. This must be shown by test except for built-in carbon dioxide fuselage compartment fire extinguishing systems for which:

(1) Five pounds or less of carbon dioxide will be discharged, under established fire control procedures, into any fuselage compartment; or

(2) Protective breathing equipment is available for each flight crewmember on flight deck duty.

SC 23.1199, Extinguishing agent containers—Add the requirements of

§ 23.1199 while deleting, “For commuter category airplanes.”

(a) Each extinguishing agent container must have a pressure relief to prevent bursting of the container by excessive internal pressures.

(b) The discharge end of each discharge line from a pressure relief connection must be located so that discharge of the fire extinguishing agent would not damage the airplane. The line must also be located or protected to prevent clogging caused by ice or other foreign matter.

(c) A means must be provided for each fire extinguishing agent container to indicate that the container has discharged or that the charging pressure is below the established minimum necessary for proper functioning.

(d) The temperature of each container must be maintained, under intended operating conditions, to prevent the pressure in the container from—

(1) Falling below that necessary to provide an adequate rate of discharge; or

(2) Rising high enough to cause premature discharge.

(e) If a pyrotechnic capsule is used to discharge the extinguishing agent, each container must be installed so that temperature conditions will not cause hazardous deterioration of the pyrotechnic capsule.

SC 23.1201, Fire extinguishing systems materials—Add the requirements of § 23.1201 while deleting, “For commuter category airplanes.”

Fire extinguisher system materials must meet the following requirements:

(a) No material in any fire extinguishing system may react chemically with any extinguishing agent so as to create a hazard.

(b) Each system component in an engine compartment must be fireproof.

Issued in Kansas City, Missouri on June 18, 2008.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-14380 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2008-0681; Directorate Identifier 2008-NE-13-AD]

RIN 2120-AA64

Airworthiness Directives; Turbomeca S.A. Models Arriel 1E2, 1S, and 1S1 Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

Turbomeca S.A. has informed EASA of a case of a "red disk" plug that has been actually installed on an engine which has been subsequently released for service operation. This engine experienced an in-service high pressure leak event (at the fuel pump outlet) due to cracking of this "red disk" plug. This leak could lead to in-flight flame-out and/or possibly a fire.

We are proposing this AD to prevent fuel leaks, which could result in a fire and possible damage to the helicopter.

DATES: We must receive comments on this proposed AD by July 25, 2008.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- *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.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains 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.

FOR FURTHER INFORMATION CONTACT:

James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: james.lawrence@faa.gov; telephone (781) 238-7176; fax (781) 238-7199.

SUPPLEMENTARY INFORMATION:**Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2008-0681; Directorate Identifier 2008-NE-13-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://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2008-0014, dated January 17, 2008 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

A plug adapted for engine bench testing (called "red disk" plug) and not approved for service operation, could inadvertently be installed on the engine Fuel Control Unit 3-way union, instead of the sealed plug approved for service operation.

Turbomeca S.A. has informed EASA of a case of a "red disk" plug that has been actually installed on an engine which has been subsequently released for service operation. This engine experienced an in-service high pressure leak event (at the fuel pump outlet) due to cracking of this "red disk" plug. This leak could lead to in-flight flame-out and/or possibly a fire.

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

Relevant Service Information

Turbomeca has issued Service Bulletin No. 292 73 0817, dated March 13, 2008. 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 France, and is approved for operation in the United States. Pursuant to our bilateral agreement with France, they have notified us of the unsafe condition described in the EASA AD and service information referenced above. We are proposing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This proposed AD would require performing a onetime inspection of the correct reference of the plug installed on the FCU 3-way union (P/N 9 932 30 706 0) and verifying its torque.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 179 products installed on helicopters of U.S. registry. We also estimate that it would take about 0.5 work-hour per product to comply with this proposed AD. The average labor rate is \$80 per work-hour. Required parts would cost about \$14 per product. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be \$9,666. Our cost estimate is exclusive of possible 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 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:

Turbomeca S.A. Docket No. FAA-2008-0681; Directorate Identifier 2008-NE-13-AD.

Comments Due Date

(a) We must receive comments by July 25, 2008.

Affected Airworthiness Directives (ADs)

(b) None.

Applicability

(c) This AD applies to Turbomeca S.A. Models Arriel 1E2, 1S, and 1S1 turboshaft engines. These engines are installed on, but not limited to, Eurocopter Deutschland MBB-BK 117 series and Sikorsky S-76A series helicopters.

Reason

(d) Turbomeca S.A. has informed EASA of a case of a "red disk" plug that has been actually installed on an engine which has

been subsequently released for service operation. This engine experienced an in-service high pressure leak event (at the fuel pump outlet) due to cracking of this "red disk" plug. This leak could lead to in-flight flame-out and/or possibly a fire.

We are issuing this AD to prevent fuel leaks, which could result in a fire and possible damage to the helicopter.

Actions and Compliance

(e) Unless already done, do the following actions.

(1) Within 100 operating hours from effective date of this AD, perform a one-time inspection of the correct reference of the plug installed on the FCU 3-way union (9 932 30 706 0) and verify its torque to be set between 1.3 and 1.5 daN.m in accordance with Turbomeca Mandatory Service Bulletin 292 73 0817.

Other FAA AD Provisions

(f) *Alternative Methods of Compliance (AMOCs):* The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(g) Refer to MCAI EASA Airworthiness Directive 2008-0014, dated January 17, 2008, and Turbomeca Mandatory Service Bulletin No. 292 73 0817, Version C, dated March 13, 2008, for related information.

(h) Contact James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: james.lawrence@faa.gov; telephone (781) 238-7176; fax (781) 238-7199, for more information about this AD.

Issued in Burlington, Massachusetts, on June 19, 2008.

Diane Cook,

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

[FR Doc. E8-14321 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2007-0219; Directorate Identifier 2007-NE-46-AD]

RIN 2120-AA64

Airworthiness Directives; Pratt & Whitney Canada PW206A, PW206B, PW206B2, PW206C, PW206E, PW207C, PW207D, and PW207E Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the

products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by the aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

PW206 and PW207 compressor turbine (CT) disc bore areas may experience impact damage resulting from bending or fracture of the CT disc retaining nut. Damage of the CT disc bore area can reduce LCF capabilities of the CT disc, resulting in disc fracture.

We are proposing this AD to prevent damage to the CT disc bore area, which could result in possible uncontained failure of the engine and damage to the helicopter.

DATES: We must receive comments on this proposed AD by July 25, 2008.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- *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.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains 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.

FOR FURTHER INFORMATION CONTACT: Ian Dargin, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: ian.dargin@faa.gov; telephone (781) 238-7178; fax (781) 238-7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the

ADDRESSES section. Include “Docket No. FAA–2007–0219; Directorate Identifier 2007–NE–46–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://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Transport Canada, which is the aviation safety authority for Canada, has issued AD CF–2007–24R1, dated December 21, 2007, (referred to after this as “the MCAI”) to correct an unsafe condition for the specified products. The MCAI states:

PW206 and PW207 compressor turbine (CT) disc bore areas may experience impact damage resulting from bending or fracture of the CT disc retaining nut. Damage of the CT disc bore area can reduce LCF capabilities of the CT disc, resulting in disc fracture.

Under high centrifugal loads, the CT disk retaining nut castellations might bend outward, then contact and mark the CT disk internal bore. Worldwide, a total of 5 events of CT nut damage and associated damage to the CT disk bore have been reported. A total of 195 out of 402 engines in the U.S. fleet have been inspected, with two cases of CT nut damage and no findings of disk damage, to date. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

PWC has issued Alert Service Bulletin (ASB) PW200–72–A28280, Revision 4, dated August 28, 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 Canada, and is approved for operation in the United States. Pursuant to our bilateral agreement with Canada, 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 provided by Canada and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This

proposed AD would require (1) inspecting the CT disc bore area for damage and if any damage is noticed, replacing the CT disc before further flight; and (2) replacing the existing CT disc retaining nut and associated hardware.

Differences Between the Proposed AD and the MCAI

Although the MCAI allows use of future revisions of PWC ASB PW200–72–A28280, we require the use of Revision 4 of that ASB.

Although the MCAI has a March 21, 2008 compliance date, we have a December 21, 2008 compliance date, based on a review of the risk assessment and the fleet inspection results to date.

Costs of Compliance

We estimate that this proposed AD would affect 402 engines of U.S. registry. We also estimate that it would take 8 work-hours per product to comply with this proposed AD. The average labor rate is \$80 per work-hour. Required parts would cost about \$500 per product. We expect that 1 disk on the remaining 207 engines will be replaced, at an estimated cost of \$20,000. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be \$478,280. Our cost estimate is exclusive of possible 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 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:

Pratt & Whitney Canada: Docket No. FAA–2007–0219; Directorate Identifier 2007–NE–46–AD.

Comments Due Date

- (a) We must receive comments by July 25, 2008.

Affected ADs

- (b) None.

Applicability

(c) This airworthiness directive (AD) applies to Pratt & Whitney Canada (PWC) PW206A, PW206B, PW206B2, PW206C, PW206E, PW207C, PW207D, and PW207E turboshaft engines.

(d) These engines are installed on, but not limited to, MD Explorer, Agusta S.p.A. A109, A109E, A109S, Bell Helicopter Textron Canada Limited 427, Bell 429, and Eurocopter Deutschland GmbH EC135 P1, and EC135 P2 helicopters.

(e) For engines that have been converted from one model to another, see Effectivity paragraph 1.A. of PWC Alert Service Bulletin (ASB) PW200–72–A28280, Revision 4, dated August 28, 2007.

Reason

- (f) Transport Canada AD CF–2007–24R1, dated December 21, 2007, states:

PW206 and PW207 compressor turbine (CT) disc bore areas may experience impact damage resulting from bending or fracture of the CT disc retaining nut. Damage of the CT disc bore area can reduce LCF capabilities of the CT disc, resulting in disc fracture.

We are issuing this AD to prevent damage to the CT disc bore area, which could result in possible uncontained failure of the engine and damage to the helicopter.

Actions and Compliance

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

(1) For engines that have never had a shop visit and have accumulated 4,000 CT cycles or more since new; or for engines that accumulated 2,700 CT cycles or more since last shop visit, last CT disc inspection, or incorporation of PWC SB PW200-72-28287; within 1,150 hours of engine operating time since April 28, 2006 (original issue date of Alert Service Bulletin (ASB) PW200-72-A28280), but not later than December 21, 2008, whichever occurs first, accomplish the following in accordance with PWC ASB PW200-72-A28280, Revision 4, dated August 28, 2007:

(i) Inspect the CT disc bore area for damage and if any damage is noticed, replace the CT disc before further flight.

(ii) Replace the existing CT disc retaining nut and associated hardware.

(2) For engines that have never had a shop visit and have accumulated less than 4,000 CT cycles since new, before the engine reaches 4,000 CT cycles or by December 21, 2008, whichever occurs later, accomplish the following in accordance with PWC ASB PW200-72-A28280, Revision 4, dated August 28, 2007:

(i) Inspect the CT disc bore area for damage and if any damage is noticed, replace the CT disc before further flight.

(ii) Replace the existing CT disc retaining nut and associated hardware.

(3) For engines that have accumulated fewer than 2,700 CT cycles since last shop visit, last CT disc inspection, or incorporation of PWC SB PW200-72-28287; before the engine reaches 2,700 CT cycles or by December 21, 2008, whichever occurs later, accomplish the following in accordance with PWC ASB PW200-72-A28280, Revision 4, dated August 28, 2007:

(i) Inspect the CT disc bore area for damage and if any damage is noticed, replace the CT disc before further flight.

(ii) Replace the existing CT disc retaining nut and associated hardware.

Previous Credit

(h) Inspection of the CT disc bore and replacement of the CT disc retaining nut using PWC ASB PW200-72-A28280, dated April 28, 2006, or Revision 1, dated May 11, 2006, or Revision 2, dated September 29, 2006, or Revision 3, dated December 11, 2006, before the effective date of this AD, meet the requirements of this AD.

(i) *Alternative Methods of Compliance (AMOCs)*: The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(j) Refer to Transport Canada Airworthiness Directive 2007-24R1, dated December 21, 2007, for related information.

(k) Contact Ian Dargin, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park; Burlington, MA 01803; e-mail: ian.dargin@faa.gov; telephone (781) 238-7178; fax (781) 238-7199.

Issued in Burlington, Massachusetts, on June 19, 2008.

Diane Cook,

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

[FR Doc. E8-14320 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 552

[BOP-1146-P]

RIN 1120-AB46

Use of Non-Lethal Force: Delegation

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) proposes to amend its regulation on the use of chemical agents and non-lethal force to clarify that the authority of the Warden to authorize the use of chemical agents or non-lethal weapons may not be delegated below the position of Lieutenant.

DATES: Comments are due by August 25, 2008.

ADDRESSES: Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307-2105.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments. Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING

INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

Discussion

In this document, the Bureau proposes to amend its regulation on the use of chemical agents and non-lethal force to clarify that the authority of the Warden to authorize the use of chemical agents or non-lethal weapons may not be delegated below the position of Lieutenant. The current regulation states that the Warden may authorize the use of chemical agents or non-lethal weapons only when the situation is such that the inmate:

- (1) Is armed and/or barricaded; or
- (2) Cannot be approached without danger to self or others; and

(3) It is determined that a delay in bringing the situation under control would constitute a serious hazard to the inmate or others, or would result in a major disturbance or serious property damage.

This revision resulted from a routine check of the Bureau's policies. The revised regulation will enable the Warden to further delegate the authority to make the determination that a situation warrants the use of chemical agents or non-lethal weapons to the senior facility supervisor on duty and physically present, but not below the position of Lieutenant. Currently, this regulation requires that such authority not be delegated below the level of

Warden. We make this revision to expedite decision-making by qualified staff, as needed to ensure the safety, security, and good order of the institution and the protection of the public.

Executive Order 12866. This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review" section 1(b), Principles of Regulation. This regulation has been determined to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132. This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, we determine that this regulation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act. The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities for the following reasons: This regulation pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

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

Small Business Regulatory Enforcement Fairness Act of 1996. This regulation is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This regulation will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-

based companies in domestic and export markets.

List of Subjects in 28 CFR Part 552

Prisoners.

Harley G. Lappin,

Director, Bureau of Prisons.

Under rulemaking authority vested in the Attorney General in 5 U.S.C 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we propose to amend 28 CFR part 552 as follows.

Subchapter C—Institutional Management

PART 552—CUSTODY

1. The authority citation for 28 CFR part 552 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

2. Revise § 552.25 to read as follows:

§ 552.25 Use of chemical agents or non-lethal weapons.

(a) The Warden may authorize the use of chemical agents or non-lethal weapons only when the situation is such that the inmate:

- (1) Is armed and/or barricaded; or
- (2) Cannot be approached without danger to self or others; and

(3) It is determined that a delay in bringing the situation under control would constitute a serious hazard to the inmate or others, or would result in a major disturbance or serious property damage.

(b) The Warden may delegate the authority under this regulation to the senior facility supervisor on duty and physically present, but not below the position of Lieutenant.

[FR Doc. E8–14363 Filed 6–24–08; 8:45 am]

BILLING CODE 4410–05–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–0478]

RIN 1625–AA09

Drawbridge Operation Regulation; LaLoutre Bayou, Yscloskey, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the regulation governing the operation of the State Route 46 (LA 46) Bridge across LaLoutre Bayou, mile 22.9, at Yscloskey, St. Bernard Parish, Louisiana. Due to Hurricane Katrina, the Louisiana Department of Transportation and Development (LDOTD) has experienced a shortage of bridge tender personnel in the area where the bridge is located. This proposed rule change allows for more efficient use of personnel by requiring a two hour notice for night time openings.

DATES: Comments and related material must reach the Coast Guard on or before August 25, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2008–0478 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

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

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

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

(4) *Fax:* 202–493–2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Kay Wade, Bridge Administration Branch, telephone 504–671–2128. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's "Privacy Act" paragraph below.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2008–0478), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8 ½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov> at any time. Enter the docket number for this rulemaking (USCG–2008–0478) in the Search box, and click “Go>>.” You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays or the Bridge Administration Office in Room 1313 of the Hale Boggs Federal Building, 500 Poydras Street, New Orleans, LA 70130 between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation’s Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit <http://DocketsInfo.dot.gov>.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

Due to a personnel shortage, the bridge owner, LDOTD, has requested a change in the operating regulation of the LA 46 vertical lift span bridge across LaLoutre Bayou, mile 22.9 at Yscloskey, St. Bernard Parish, Louisiana, in order to make more efficient use of operating resources. The bridge has a horizontal clearance of 45 feet. It has a vertical clearance of 2 feet in the closed position and 53 feet in the open position. In accordance with 33 CFR 117.5, the bridge is required to open on signal for the passage of marine vessels.

The LA 46 Bridge has been closed to marine traffic since August 2005, when it sustained damage during Hurricane Katrina. The Coast Guard has received no complaints about the bridge closure. The bridge has been repaired and will soon reopen to marine traffic.

Discussion of Proposed Rule

The bridge owner has requested a change in the operating regulation which would allow the draw of the LA 46 Bridge to open on signal; except that from 8 p.m. to 4 a.m., the draw would open on signal if at least two hours notice is given. The proposed rule change to 33 CFR 117.5 would reduce the hours the bridge must be manned between 8 p.m. and 4 a.m., making more efficient use of operating resources. The LDOTD believes the proposed operating regulation will accommodate vehicular traffic and meet the needs of navigation, while making the best use of available personnel to operate the bridge.

We have already issued a Test Deviation to allow the LDOTD to test the proposed schedule and to obtain data and public comments. This document is available in the docket (see “Viewing comments and documents”). The test period will be in effect during the entire Notice of Proposed Rulemaking comment period. The Coast Guard will review the logs of the drawbridge and evaluate public comments from the Notice of Proposed Rulemaking and the above referenced Temporary Deviation to determine if a permanent special drawbridge operating regulation is warranted.

Regulatory Analyses

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

Regulatory Planning and Review

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

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

There has been no waterway passage of marine vessels at the bridge site since August 2005. The proposed change will have little to no impact on the public.

Small Entities

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

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

Although the change will require 2 hours advance notice for openings between 8 p.m. and 4 a.m., an alternate route, via Yscloskey Bayou, to the Mississippi River Gulf Outlet and Lake Borgne is available with no additional transit time. Additionally, most users of this waterway are able to give notice prior to transiting through the bridge. Before the effective period, we will issue maritime advisories widely available to users of the waterway.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the Eighth Coast Guard District Bridge Administration Branch at the address above. 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 proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. Though this proposed 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 proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.ID and Department of Homeland Security Management Directive 5100.1, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is not likely to have a significant effect on the human environment because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

Add new § 117.468 to read as follows:

§ 117.468 LaLoutre Bayou.

The draw of the LA 46 Bridge, mile 22.9, at Yscloskey, shall open on signal; except that from 8 p.m. to 4 a.m., the draw shall open on signal if at least two hours notice is given.

Dated: June 16, 2008.

J. R. Whitehead,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. E8–14367 Filed 6–24–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2008–0451]

RIN 1625–AA00

Safety Zone; Citron Energy Drink Offshore Challenge, Lake St. Clair, Harrison Township, MI

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes establishing a temporary safety zone on

Lake St. Clair, Harrison Township, Michigan. This zone is intended to restrict vessels from portions of Lake St. Clair during the Citron Energy Drink Offshore Challenge. This temporary safety zone is necessary to protect spectators and vessels from the hazards associated with powerboat races.

DATES: Comments and related material must reach the Coast Guard on or before July 10, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2008–0451 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online:* <http://www.regulation.gov>.

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

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

(4) *Fax:* 202–493–2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call LT Jeff Ahlgren, Waterways Management, U.S. Coast Guard Sector Detroit, 110 Mount Elliot Ave., Detroit, MI, 48207, (313) 568–9580. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's "Privacy Act" paragraph below.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2008–0451), indicate the specific section of this document to which each comment applies, and give the reason for each comment. We recommend that you include your name, mailing address,

and an e-mail address or other contact information in the body of your document to ensure that you can be identified as the submitter. This also allows us to contact you in the event further information is needed or if there are questions. For example, if we cannot read your submission due to technical difficulties and you cannot be contacted; your submission may not be considered. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov> at any time. Enter the docket number for this rulemaking (USCG–2008–0451) in the search box, and click "go". You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or the U.S. Coast Guard Sector Detroit, 110 Mount Elliot Ave., Detroit, MI, 48207, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit <http://DocketsInfo.dot.gov>.

SUPPLEMENTARY INFORMATION:

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to U.S. Coast Guard Sector Detroit at the address

under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

This temporary safety zone is necessary to ensure the safety of vessels and spectators from hazards associated with a powerboat race. The Captain of the Port Detroit has determined powerboat races in close proximity to watercraft and infrastructure pose significant risk to public safety and property. The likely combination of large numbers of recreation vessels, powerboats traveling at high speeds, possible alcohol use, and large numbers of spectators in close proximity to the water could easily result in serious injuries or fatalities. Establishing a safety zone around the location of the race course will help ensure the safety of persons and property at these events and help minimize the associated risks.

Discussion of Proposed Rule

This proposed rule is intended to ensure safety of the public and vessels during the setup, course familiarization, testing and race in conjunction with the Citron Energy Drink Offshore Challenge. The powerboat race and associated testing will occur between 12 p.m., July 18, 2008 and 5 p.m., July 20, 2008. The safety zone will be effective from 12 p.m. to 4 p.m. on July 18 and 19, 2008, and from 12 p.m. to 5 p.m. on July 20, 2008.

The safety zone will encompass all U.S. waters of Lake St. Clair, Harrison Township, MI, bound by a line extending from a point in Lake St. Clair located at position 082°48'45" W; 42°34'05" N, east to position 082°47'45" W; 42°34'04" N, southeast to position 082°47'03" W; 42°33'38" N, southwest to position 082°48'32" W; 42°32'35" N, south to position 082°49'53" W; 42°32'08" N, northwest to position 082°50'27" W; 42°32'30" N, and northeast to the point of origin at position 082°48'45" W; 42°34'05" N. (DATUM: NAD 83).

The Captain of the Port will cause notice of enforcement of the safety zone established by this section to be made by all appropriate means to the affected segments of the public. Such means of notification will include, but are not limited to, Broadcast Notice to Mariners and Local Notice to Mariners. The Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone is terminated.

Regulatory Evaluation

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

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

This determination is based on the minimal time that vessels will be restricted from the zone and the zone is an area where the Coast Guard expects insignificant adverse impact to mariners from the zone’s activation.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in the above portion of Lake St. Clair between 12 p.m. and 4 p.m. on July 18 and 19, 2008, and between 12 p.m. and 5 p.m. on July 20, 2008.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect for approximately four hours each day of testing and five hours the day of the race. In the event that this temporary safety zone affects shipping, commercial vessels may request permission from the Captain of the Port Detroit to transit through the safety zone. The Coast Guard will give notice to the public via a Broadcast Notice to Mariners that the regulation is in effect. Additionally, the COTP will suspend enforcement of the safety zone if the event for which the zone is established ends earlier than the expected time.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity

and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LT Jeff Ahlgren, Waterways Management, U.S. Coast Guard Sector Detroit, 110 Mount Elliot Ave., Detroit, MI 48207; (313) 568–9580. 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 proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Protection of Children

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

Indian Tribal Governments

The Coast Guard recognizes the treaty rights of Native American Tribes. Moreover, the Coast Guard is committed to working with Tribal Governments to implement local policies and to mitigate tribal concerns. We have determined that these regulations and fishing rights protection need not be incompatible. We have also determined that this Proposed Rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Nevertheless, Indian tribes that have questions concerning the provisions of this Proposed Rule or options for compliance are encouraged to contact the point of contact listed under **FOR FURTHER INFORMATION CONTACT**.

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.ID which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is not likely to have a significant effect on the human environment. A preliminary “Environmental Analysis Check List” supporting this preliminary determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from the proposed rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 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. Section 165.T09–0451 is added to read as follows:

§ 165.T09–0451 Safety Zone; Citron Energy Drink Offshore Challenge, Lake St. Clair, Harrison Township, MI.

(a) *Location.* The following area is a temporary safety zone: all U.S. waters of Lake St. Clair, Harrison Township, MI,

bound by a line extending from a point in Lake St. Clair located at position 082°48'45" W; 42°34'05" N, east to position 082°47'45" W; 42°34'04" N, southeast to position 082°47'03" W; 42°33'38" N, southwest to position 082°48'32" W; 42°32'35" N, south to position 082°49'53" W; 42°32'08" N, northwest to position 082°50'27" W; 42°32'30" N, and northeast to the point of origin at position 082°48'45" W; 42°34'05" N. (DATUM: NAD 83).

(b) *Effective Period.* This regulation is effective from 12 p.m. on July 18, 2008 through 5 p.m. on July 20, 2008.

(c) *Regulations.* (1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Detroit, or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his designated on-scene representative.

(3) The “on-scene representative” of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated on scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Detroit or his on-scene representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port or his on-scene representative.

Dated: June 11, 2008.

P.W. Brennan,

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

[FR Doc. E8–14372 Filed 6–24–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2006–0406, FRL–8684–7]

RIN 2060–AM74

National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Dispensing Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Dispensing Facilities, which EPA promulgated on January 10, 2008, and amended on March 7, 2008. The January 10, 2008 rule established national emission standards for hazardous air pollutants for the facilities in the gasoline distribution (Stage I) area source category. This action only affects area source gasoline dispensing facilities with a monthly throughput of 100,000 gallons of gasoline or more. In this action, EPA is proposing to amend the pressure and vacuum vent valve cracking pressure and leak rate requirements for vapor balance systems used to control emissions from gasoline storage tanks at gasoline dispensing facilities. Newly constructed or reconstructed gasoline dispensing facilities must comply with the new vapor balance system requirements as explained in the parallel direct final rule published in today’s Regulations and Rules section of this **Federal Register**.

DATES: *Comments.* Written comments must be received on or before August 11, 2008.

Public Hearing. If anyone contacts EPA requesting to speak at a public hearing by July 7, 2008, a public hearing will be held on July 10, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2006–0406, by mail to Air and Radiation Docket (2822T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of two copies. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

We request that you also send a separate copy of each comment to the

contact persons listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT:

General and Technical Information: Mr. Stephen Shedd, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Coatings and Chemicals Group (E143-01), EPA, Research Triangle Park, NC 27711, telephone: (919) 541-5397, facsimile number: (919) 685-3195, e-mail address: shedd.steve@epa.gov.

Compliance Information: Ms. Maria Malave, Office of Compliance, Air Compliance Branch (2223A), EPA, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, telephone: (202) 564-7027, facsimile number: (202) 564-0050, e-mail address: malave.maria@epa.gov.

SUPPLEMENTARY INFORMATION:

Why is EPA issuing this proposed rule? This document proposes to take action on the National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Dispensing Facilities. Based on our discussions with industry stakeholders, we have concluded that pressure and vacuum (PV) vent valves capable of meeting the requirements in entry 1.(g)

of Table 1 to subpart CCCCCC in the January 10, 2008 final rule (73 FR 1916) are not currently manufactured and thus are not available to affected sources. Therefore, we are proposing to amend the PV vent valve cracking pressure and leak rate requirements for vapor balance systems used to control emissions from gasoline storage tanks at gasoline dispensing facilities. We have published a parallel direct final rule in the Regulations and Rules section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule. Newly constructed or reconstructed gasoline dispensing facilities are proposed to comply with the new vapor balance system requirements as explained in the parallel direct final rule. Existing sources must comply with the new vapor balance system requirements by the compliance date contained in the January 10, 2008 final rule, which is January 10, 2011. The compliance dates for all other requirements in the January 10, 2008 final rule remain unchanged for both new and existing sources.

If we receive no adverse comment and no request for a public hearing on the parallel direct final rule, we will not take further action on this proposed rule. If we receive adverse comment on a distinct portion of the direct final rule, we will withdraw that portion of the rule and it will not take effect. In this instance, we would address all public comments in any subsequent final rule based on this proposed rule.

If we receive adverse comment on a distinct provision of the direct final rule, we will publish a timely withdrawal in the **Federal Register** indicating which provisions we are withdrawing. The provisions that are not withdrawn will become effective on the date set out in the direct final rule, notwithstanding adverse comment on any other provision.

We do not intend to institute a second comment period on this action. Any parties interested in commenting, must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

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

Category	NAICS *	Examples of regulated entities
Industry	447110 447190	Operations at area source gasoline dispensing facilities.
Federal/State/local/tribal governments.		

* North American Industry 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 part 63, subpart CCCCCC. If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as listed in 40 CFR 63.13.

Public Hearing. Persons interested in presenting oral testimony or inquiring as to whether a hearing is to be held should contact Ms. Janet Eck, U.S. EPA, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Coatings and Chemicals Group (E143-01), Research Triangle Park, NC 27711; telephone number: (919) 541-7946, e-mail address: eck.janet@epa.gov, at least 2 days in advance of the potential date of the public hearing. If a public hearing is held, it will be held at 10 a.m. at EPA's Campus located at 109 T.W. Alexander Drive in Research

Triangle Park, NC, or an alternate site nearby. If no one contacts EPA requesting to speak at a public hearing concerning this rule by July 7, 2008 this hearing will be cancelled without further notice.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of today's proposal will also be available through the WWW. Following the Administrator's signature, a copy of this action will be posted on EPA's Technology Transfer Network (TTN) policy and guidance page for newly proposed or promulgated rules <http://www.epa.gov/ttn/oarpg/>. The TTN at EPA's Web site provides information and technology exchange in various areas of air pollution control.

Statutory and Executive Order Reviews

For a complete discussion of all of the administrative requirements applicable to this action, see the direct final rule in the Rules and Regulations section of this **Federal Register**.

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: June 19, 2008.

Stephen L. Johnson,
Administrator.

[FR Doc. E8-14373 Filed 6-24-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 1051

[EPA-HQ-OAR-2008-0124; FRL-8684-5]

Exhaust Emission Standards for 2012 and Later Model Year Snowmobiles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In a November 2002 final rule, we established the first U.S.

emission standards for new snowmobiles. Subsequent litigation regarding that final rule resulted in a court decision which requires us to: Remove the oxides of nitrogen (NO_x) component from the Phase 3 snowmobile standards set to take effect in 2012, and; clarify the evidence and analysis upon which the Phase 3 carbon monoxide (CO) and hydrocarbon (HC) standards were based. In accordance with the court decision, we are proposing to remove the NO_x component from the Phase 3 emission standard calculation. We are deferring action on the 2012 CO and HC emission standards portion of the court's remand to a separate rulemaking action. In the "Rules and Regulations" section of this **Federal Register**, we are making this revision as a direct final rule without a prior proposed rule. If we receive no adverse comment, we will not take further action on this proposed rule.

DATES: Written comments must be received by July 25, 2008, unless a public hearing is requested. If a public hearing is requested no later than July 15, 2008, it will be held at a time and place to be published in the **Federal Register** and a new deadline for comments will be provided.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2008-0124, by mail to Environmental Protection Agency, Mail Code: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460. Please include two copies. Comments may also be submitted electronically or through hand delivery/courier, or a public hearing may be requested, by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: John Mueller, Assessment and Standards Division, Office of Transportation and Air Quality, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214-4275; fax number: (734) 214-4050; e-mail address: mueller.john@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Why Is EPA Issuing This Proposed Rule?

This document proposes to remove the NO_x component from the Phase 3 snowmobile emission standard equation as required by the court decision in *Bluewater Network v. EPA*, 370 F. 3d 1 (D.C.Cir 2004). We have published a direct final rule making this revision in

the "Rules and Regulations" section of this **Federal Register** because we view this as a relatively noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If we receive no adverse comment or a request for a public hearing, we will not take further action on this proposed rule. Otherwise, we will withdraw the direct final rule and it will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

II. Does This Action Apply to Me?

This action will affect companies that manufacture, sell, or import into the United States new snowmobiles and new spark-ignition engines for use in snowmobiles. This action may also affect companies and persons that rebuild or maintain these engines. Affected categories and entities include the following:

Category	NAICS code ^a	Examples of potentially affected entities
Industry	333618	Manufacturers of new nonroad spark-ignition engines.
Industry	336999	Snowmobile manufacturers.
Industry	811310	Engine repair and maintenance.
Industry	421110	Independent commercial importers of vehicles and parts.

^a North American Industry Classification System (NAICS).

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 particular activities may be affected by this action, you should carefully examine the regulations. You may direct questions regarding the applicability of this action as noted in **FOR FURTHER INFORMATION CONTACT**.

III. Summary of Rule

This proposed rule would make a revision to the regulations to implement the following amendment:

- Remove the NO_x component from the Phase 3 snowmobile emission standard equation.

For additional discussion of the proposed rule change, see the direct final rule EPA has published in the "Rules and Regulations" section of today's **Federal Register**. This proposal incorporates by reference all the reasoning, explanation, and regulatory text from the direct final rule.

Furthermore, elsewhere in today's **Federal Register**, EPA is publishing an Advance Notice of Proposed Rulemaking which describes EPA's current thinking with regard to potential new requirements for C3 marine engines and identifies and discusses a number of important issues upon which EPA is seeking comment.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This proposed rule is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order. This proposed rule merely removes the NO_x component from the snowmobile Phase 3 emission standards equation, as directed by the court's ruling. There are no new costs associated with this proposed rule.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This proposed rule merely removes the NO_x component from the snowmobile Phase 3 emission standards equation, as directed by the court's ruling. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations [40 CFR part 1051] under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060-0388, EPA ICR number 1695. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566-1672.

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 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 Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed rule on small entities, a small entity is defined as: (1) A small business that meet the definition for business based on SBA size standards 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 today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule

on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This proposed rule merely removes the NO_x component from the snowmobile Phase 3 emission standards equation, as directed by the court's ruling. We have therefore concluded that today's proposed rule will not affect regulatory burden for all affected small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This proposed rule contains no federal mandates for state, local, tribal governments, or the private sector as defined by the provisions of Title II of the UMRA. The proposed rule imposes no enforceable duties on any of these governmental entities. This proposed rule contains no regulatory requirements that would significantly or uniquely affect small governments. EPA has determined that this proposed rule contains no federal mandates that may result in expenditures of more than \$100 million to the private sector in any single year. This proposed rule merely removes the NO_x component from the snowmobile Phase 3 emission standards equation, as directed by the court's ruling. See the direct final rule EPA has published in the "Rules and Regulations" section of today's **Federal Register** for a more extensive discussion of UMRA policy.

E. Executive Order 13132: Federalism

This proposed 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. This proposed rule merely removes the NO_x component from the snowmobile Phase 3 emission standards equation, as directed by the court's ruling. See the direct final rule EPA has published in the "Rules and Regulations" section of today's **Federal Register** for a more extensive discussion of Executive Order 13132.

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

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, 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, as specified in Executive Order 13175. This proposed rule does not uniquely affect the communities of Indian Tribal Governments. Further, no circumstances specific to such communities exist that would cause an impact on these communities beyond those discussed in the other sections of this rule. This proposed rule merely removes the NO_x component from the snowmobile Phase 3 emission standards equation, as directed by the court's ruling. Thus, Executive Order 13175 does not apply to this rule. See the direct final rule EPA has published in the "Rules and Regulations" section of today's **Federal Register** for a more extensive discussion of Executive Order 13132.

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

This proposed rule is not subject to the Executive Order because it is not economically significant, and does not involve decisions on environmental health or safety risks that may disproportionately affect children. See the direct final rule EPA has published in the "Rules and Regulations" section of today's **Federal Register** for a more extensive discussion of Executive Order 13045.

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

This proposed rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This proposed rule merely removes the NO_x component from the snowmobile Phase 3 emission standards equation, as directed by the court's ruling.

I. National Technology Transfer and Advancement Act

This proposed rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. This proposed rule merely removes the NO_x

component from the snowmobile Phase 3 emission standards equation, as directed by the court's ruling. Thus, we have determined that the requirements of the NTTAA do not apply. See the direct final rule EPA has published in the "Rules and Regulations" section of today's **Federal Register** for a more extensive discussion of NTTAA policy.

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

EPA has determined that this proposed 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. See the direct final rule EPA has published in the "Rules and Regulations" section of today's **Federal Register** for a more extensive discussion of Executive Order 13045.

K. Statutory Authority

The statutory authority for this action comes from section 213 of the Clean Air Act as amended (42 U.S.C. 7547). This action is a notice of proposed rulemaking subject to the provisions of Clean Air Act section 307(d). See 42 U.S.C. 7607(d).

List of Subjects in 40 CFR Part 1051

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential business information, Imports, Penalties, Reporting and recordkeeping requirements, Warranties.

Dated: June 19, 2008.

Stephen L. Johnson,

Administrator.

[FR Doc. E8-14414 Filed 6-24-08; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA-B-7787]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1 percent annual-

chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents, and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before September 23, 2008.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community are available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA-B-7787, to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3151, or (e-mail) bill.blanton@dhs.gov.

FOR FURTHER INFORMATION CONTACT:

William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3151 or (e-mail) bill.blanton@dhs.gov.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other

Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

Administrative Procedure Act Statement. This matter is not a rulemaking governed by the Administrative Procedure Act (APA), 5 U.S.C. 553. FEMA publishes flood elevation determinations for notice and comment; however, they are governed by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and do not fall under the APA.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601-612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

Flooding source(s)	Location of referenced elevation**	* Elevation in feet(NGVD) + Elevation in feet(NAVD) # Depth in feet above ground		Communities affected
		Effective	Modified	
McCreary County, Kentucky, and Incorporated Areas				
South Fork Cumberland River.	At confluence with Cooper Creek (At north western county boundary).	None	+760	Unincorporated Areas of McCreary County.
	Approximately 8000 feet upstream Alum Creek	None	+760	

* National Geodetic Vertical Datum.
+North American Vertical Datum.
#Depth in feet above ground.

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of McCreary County

Maps are available for inspection at 1 N Main St, Whitley City, KY 42563.

Iberia Parish, Louisiana, and Incorporated Areas

Gulf of Mexico	Base Flood Elevation changes ranging from 9 to 11 feet in the form of Coastal AE zones have been made.	+9-11	+9-11	Town of Delcambre.
Gulf of Mexico	Base Flood Elevations changes ranging from 9 to 15 feet in the form of AE and VE zones have been made.	+9-17	+9-15	Unincorporated Areas of Iberia Parish.

* National Geodetic Vertical Datum.
+North American Vertical Datum.
#Depth in feet above ground.

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472.

ADDRESSES

Town of Delcambre

Maps are available for inspection at 107 North Railroad, Delcambre, LA 70528.

Unincorporated Areas of Iberia Parish

Maps are available for inspection at 209 W. Main Street, Suite 102, New Iberia, LA 70560.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: June 17, 2008.

David I. Maurstad,

Federal Insurance Administrator of the National Flood Insurance Program, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8-14325 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-12-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 27, 74, 78, and 101

[WT Docket No. 07-195; WT Docket No. 04-356; FCC 08-158]

Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2155-2175 MHz, and 2175-2180 MHz Bands

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, we seek comment on service rules for licensed fixed and mobile services, including Advanced Wireless Services (AWS), in

the 1915-1920 MHz, 1995-2000 MHz, 2155-2175 MHz, and 2175-2180 MHz bands. We seek comment on rules for licensing this newly designated spectrum in a manner that will permit it to be fully and promptly utilized to bring advanced wireless services to American consumers. Our objective is to allow for the most effective and efficient use of spectrum in this band, while also encouraging development of robust wireless broadband services. We propose to apply our flexible, market-oriented rules to the band in order to meet this objective.

DATES: Comments must be filed on or before July 9, 2008, and reply comments must be filed on or before July 16, 2008.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. You may submit comments, identified by WT Docket No. 07–195, by any of the following methods:

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

- *Federal Communications Commission's Web Site:* <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.

- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT:

Peter Daronco Esq., or Paul Malmud Esq., at 202–418–2486.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Further Notice of Proposed Rule Making (FNPRM)*, released June 20, 2008. The complete text of this document, including attachments and related Commission documents, is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of the *FNPRM* and related Commission documents may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room, CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or you may contact BCPI at its web site <http://www.BCPIWEB.com>. When ordering documents from BCPI please provide the appropriate FCC document number, for example, FCC 07–38. The *FNPRM* is also available on the Commission's Web site: <http://wireless.fcc.gov/index.htm?job=headlines>.

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before July 9, 2008, and reply comments must be filed on or before July 16, 2008. *Comments may be filed using:* (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the Web site for submitting comments.

- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call

the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

I. Summary of Notice of Proposed Rulemaking

1. In a In this Further Notice of Proposed Rule Making (FNPRM), we seek comment on proposed service rules for Advanced Wireless Service (AWS)¹ spectrum in the 1915–1920 MHz, 1995–2000 MHz, and 2155–2180 MHz bands, as set forth in Appendix A. In taking a further step towards adoption of service rules for these bands, our goal is to promote the deployment and ubiquitous availability of broadband services across the country and to facilitate the use of AWS spectrum for the benefit of consumers.

2. In a Notice of Proposed Rulemaking in WT Docket No. 04–356, the Commission sought comment on rules for AWS spectrum in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz, and 2175–2180 MHz bands.² In a Notice of Proposed Rulemaking in WT Docket No. 07–195, we sought comment on rules for AWS spectrum in the 2155–2175 MHz band.³ To further supplement these *Notices of Proposed Rulemaking* and the current extensive record in these proceedings, we are seeking expedited comment on a proposed set of rules for these bands. We will consider comments on these proposed rules in conjunction with the record developed in response to the various proposals set out in the earlier *NPRM's*.

3. Specifically, we propose to adopt application, licensing, operating, and technical rules for the 2155–2180 MHz band (AWS–3 band), including rules that would:

¹ Advanced Wireless Services is the collective term we use for new and innovative fixed and mobile terrestrial wireless applications using bandwidth that is sufficient for the provision of a variety of applications, including those using voice and data (such as Internet browsing, message services, and full-motion video) content. Although AWS is commonly associated with so-called third generation (3G) applications and has been predicted to build on the successes of such current-generation commercial wireless services as cellular and Broadband Personal Communications Services (PCS), the services ultimately provided by AWS licenses are limited only by the Fixed and Mobile designation of the spectrum we allocate for AWS and the service rules we ultimately adopt for the bands.

² Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands, WT Docket No. 04–356, Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02–353, *Notice of Proposed Rulemaking*, 19 FCC Rcd 19263 (2004) (AWS–2 *NPRM*).

³ Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band, WT Docket No. 07–195, *Notice of Proposed Rulemaking*, 22 FCC Rcd 17035 (2007) (AWS–3 *NPRM*).

- Combine the 2155–2175 MHz band with the 2175–2180 MHz band in order to create a 25 megahertz block of spectrum.

- Permit downlink and uplink transmissions throughout the entire 2155–2180 MHz band.

- Adopt a single nationwide license for the 2155–2180 MHz band.

- Adopt open eligibility for the 2155–2180 MHz band.

- Require the licensee to provide free, two-way broadband Internet service including:

- engineered data rates of at least 768 kbps downstream using up to 25 percent of the licensee's wireless network capacity.

- an “always on” network-based filtering mechanism.

- Require the licensee to provide for open devices and open applications for its premium service and open devices for its free service.

- Provide an initial license term of ten years and subsequent renewal terms of ten years.

- Require the licensee to provide signal coverage and offer service to: (1) At least 50 percent of the total population of the nation within four years of commencement of the license term and (2) at least 95 percent of the total population of the nation at the end of the 10-year license term.

- Allow licensees to disaggregate, partition, and lease the spectrum.

- Provide that mutually exclusive applications should be resolved through competitive bidding.

- Require AWS–3 mobiles to attenuate out-of-band emissions (OOBE) by $60 + 10\log(P)$ dB outside of the AWS–3 band, and establish a power limit for AWS–3 mobile devices of 23 dBm/MHz equivalent isotropically radiated power (EIRP).

- Require an OOBE limit of $43 + 10\log(P)$ dB for AWS–3 base and fixed downlink stations and a power limit of 1640 watts peak EIRP in non-rural areas and 3280 watts peak EIRP in rural areas.

4. We also propose to adopt application, licensing, operating, and technical rules for the 1915–1920 MHz and 1995–2000 MHz bands (H Block), including rules that would:

- License the H Block using exclusive geographic area licensing on a Basic Trading Area (BTA) basis.

- Adopt open eligibility for the H Block.

- Provide an initial license term of ten years and subsequent renewal terms of ten years.

- Require an H Block licensee to provide signal coverage and offer service to: (1) At least 35 percent of the population in each licensed area within

four years and (2) at least 70 percent of the population in each licensed area at the end of the license term.

- Allow licensees to disaggregate, partition, and lease the spectrum.

- Provide that mutually exclusive applications should be resolved through competitive bidding.

- Require H Block licensees in the 1915–1920 MHz band to pay a *pro rata* share of expenses previously incurred by UTAM Inc. in clearing that band.

- Adopt both relocation requirements for H Block entrants in the 1995–2000 MHz band and procedures for cost-sharing among other new entrants in the Broadcast Auxiliary Service band, including Sprint Nextel and Mobile Satellite Service entrants.

- Prohibit base and fixed transmission in the 1915–1920 MHz band.

- Require mobiles at 1915–1920 MHz to attenuate OOBE by $90 + 10\log P$ dB within the PCS band (1930–1990 MHz band), and establish a power limit for mobiles of 23 dBm/MHz EIRP.

- Prohibit mobile transmission in the 1995–2000 MHz band.

- Adopt an OOBE limit of $43 + 10\log(P)$ dB for base and fixed stations at 1995–2000 MHz and a power limit of 1640 watts peak EIRP in non-rural areas and 3280 watts peak EIRP in rural areas.

5. We seek comment on these proposed rules for the AWS–3 band and the H Block, as set forth in Appendix A. We note that combining the 2155–2175 MHz band with the 2175–2180 MHz band may allow an AWS–3 licensee to make more robust use of this spectrum block while meeting a stricter OOBE limit than traditionally applied in bands designated for flexible use, such as the AWS–1 and 700 MHz bands.⁴ To the extent that commenters do not support combining the 2155–2175 MHz band with the 2175–2180 MHz band, they should indicate whether, in the alternative, a more traditional OOBE limit of $43+10\log(P)$ dB would be appropriate for the 2155–2175 MHz band.

Procedural Matters

Ex Parte Rules—Permit-But-Disclose

6. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules.⁵

Initial Paperwork Reduction Analysis

7. This document contains proposed new or modified information collection

requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due 60 days after date of publication in the **Federal Register**. *Comments should address:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002,⁶ we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

Supplemental Initial Regulatory Flexibility Analysis

8. As required by the Regulatory Flexibility Act of 1980 (RFA),⁷ the Commission has prepared a Supplemental Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the *FNPRM*. The analysis is found in the attached Appendix B of the *FNPRM*. We request written public comment on the analysis. Comments must be filed on or before July 9, 2008, and reply comments must be filed on or before July 16, 2008 and must have a separate and distinct heading designating them as responses to the Supplemental IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *FNPRM*, including the Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

A. Need for, and Objectives of, the Proposed Rules

9. The *FNPRM* contemplates service rules for licensed fixed and mobile services, including advanced wireless services (AWS), in the 1915–1920 MHz

⁴ See, e.g., 47 CFR 27.53(c)(1)(2), 27.53(h).

⁵ See generally 47 CFR 1.1202, 1.1203, 1.1206.

⁶ Public Law 107–198, see 44 U.S.C. 3506(c)(4).

⁷ 5 U.S.C. 603.

and 1995–2000 MHz bands (collectively the “H Block”) and the 2155–2175 MHz and 2175–2180 MHz bands (collectively the “AWS–3 band”). These service rules include application, licensing, operating and technical rules for the AWS–3 band and H Block. Consistent with the Commission’s policy objective of affording licensees the flexibility to deploy new technologies, to implement service innovations, and to respond to market forces, the *FNPRM* proposes service rules that provide AWS–3 and H Block licensees with the flexibility to provide any fixed or mobile service, including advanced wireless services, which is consistent with the allocations for this spectrum. The market-oriented licensing framework for these bands would ensure that this spectrum is efficiently utilized and will foster the development of new and innovative technologies and services, as well as encourage the growth and development of broadband services, ultimately leading to greater benefits to consumers.

10. The *FNPRM* seeks to adopt rules that will reduce regulatory burdens, promote innovative services, and encourage flexible use of this spectrum. Such an approach opens up economic opportunities to a variety of spectrum users, which could include small businesses.

11. The *FNPRM* proposes combining the 2155–2175 MHz band with the 2175–2180 MHz band to form a 25 MHz block of spectrum.

12. In the *FNPRM*, the Commission also seeks comments on its proposal to permit both downlink and uplink transmissions throughout the entire AWS–3 band.

13. In the *FNPRM*, the Commission also seeks comments on its proposal to require an AWS–3 licensee to provide free, two-way broadband Internet service that includes engineered data rates of at least 768 kps downstream for the average user experience using up to 25 percent of the licensee’s wireless network capacity and an “always on” network-based filtering mechanism.

14. In the *FNPRM*, the Commission seeks comments on its proposal to require the licensee to provide for open devices and open applications for its premium service and open devices for its free service.

15. In the *FNPRM*, the Commission seeks comments on its proposal to adopt a single nationwide license for the 2155–2180 MHz band.

16. In the *FNPRM*, the Commission seeks comments on its proposal to adopt open eligibility for the AWS–3 band.

17. In the *FNPRM*, the Commission seeks comments on its proposal to allow

licensees to disaggregate, partition, and lease the spectrum.

18. In the *FNPRM*, the Commission seeks comments on its proposal to require AWS–3 licensees to provide signal coverage and offer service to: (1) At least 50 percent of the total population of the nation within four years of commencement of the license term and (2) at least 95 percent of the total population of the nation at the end of the 10-year license term.

19. In the *FNPRM*, the Commission seeks comments on its proposal to provide initial license term of ten years and subsequent renewal terms of ten years.

20. In the *FNPRM*, the Commission seeks comments on its proposal to provide that mutually exclusive applications should be resolved through competitive bidding.

21. In the *FNPRM*, the Commission seeks comments on its proposal to require AWS–3 mobiles to attenuate out-of-band emissions (OOBE) by $60 + 10 \log(P)$ dB outside of the AWS–3 band, and establish a power limit for AWS–3 mobile devices of 23 dBm/MHz equivalent isotropically radiated power (EIRP).

22. In the *FNPRM*, the Commission seeks comments on its proposal to require an OOBE limit of $43 + 10 \log(P)$ dB for AWS–3 base and fixed downlink stations and a power limit of 1640 watts peak EIRP in non-rural areas and 3280 watts peak EIRP in rural areas.

23. In the *FNPRM*, the Commission seeks comments on its proposal to license the H Block using exclusive geographic area licensing on a Basic Trading Area (BTA) basis.

24. In the *FNPRM*, the Commission seeks comments on its proposal to adopt open eligibility for the H Block.

25. In the *FNPRM*, the Commission seeks comments on its proposal to allow licensees to disaggregate, partition, and lease the spectrum.

26. In the *FNPRM*, the Commission seeks comments on its proposal to require an H Block licensee to provide signal coverage and offer service to: 1) at least 35 percent of the population in each licensed area within four years and 2) at least 70 percent of the population in each licensed area at the end of the license term.

27. In the *FNPRM*, the Commission seeks comments on its proposal to provide an initial license term of ten years and subsequent renewal terms of ten years.

28. In the *FNPRM*, the Commission seeks comments on its proposal to provide that mutually exclusive applications should be resolved through competitive bidding.

29. In the *FNPRM*, the Commission seeks comments on its proposal to require H Block licensees in the 1915–1920 MHz band to pay a *pro rata* share of expenses previously incurred by UTAM Inc. in clearing that band.

30. In the *FNPRM*, the Commission seeks comments on its proposal to adopt both relocation requirements for H Block entrants in the 1995–2000 MHz band and procedures for cost-sharing among other new entrants in the Broadcast Auxiliary Service band, including Sprint Nextel and Mobile Satellite Service entrants.

31. In the *FNPRM*, the Commission seeks comments on its proposal to prohibit base and fixed transmission in the 1915–1920 MHz band.

32. In the *FNPRM*, the Commission seeks comments on its proposal to require mobiles at 1915–1920 MHz to attenuate OOBE by $90 + 10 \log(P)$ dB within the PCS band (1930–1990 MHz band), and establish a power limit for mobiles of 23 dBm/MHz EIRP.

33. In the *FNPRM*, the Commission seeks comments on its proposal to prohibit mobile transmission in the 1995–2000 MHz band.

34. In the *FNPRM*, the Commission seeks comments on its proposal to adopt an OOBE limit of $43 + 10 \log(P)$ dB for base and fixed stations at 1995–2000 MHz and a power limit of 1640 watts peak EIRP in non-rural areas and 3280 watts peak EIRP in rural areas.

35. Our actions today bring us closer to our goals of achieving the universal availability of broadband access and increasing competition in the provision of such broadband services both in terms of the types of services offered and in the technologies utilized to provide those services. The widespread deployment of broadband will bring new services to consumers, stimulate economic activity, improve national productivity, and advance many other objectives—such as improving education, and advancing economic opportunity for more Americans. By encouraging the growth and development of broadband, our actions today also foster the development of facilities-based competition. We achieve these objectives by taking a market-oriented approach to licensing this spectrum that provides greater certainty, minimal regulatory intervention, and leads to greater benefits to consumers.

B. Legal Basis

36. The proposed action is authorized pursuant to Sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332 and 333 of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 157, 160, 201, 214, 301,

302, 303, 307, 308, 309, 310, 319, 324, 332, 333.

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

37. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁸ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁰ A “small business concern” is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹¹

38. The Commission has not yet determined how many licenses will be awarded in the 1915–1920 MHz, 1995–2000 MHz, and 2155–2180 MHz bands. Moreover, the Commission does not yet know how many applicants or licensees in these bands will be small entities. Though the Commission does not know for certain which entities are likely to apply for these frequencies, we note that the H Block and AWS–3 band are comparable to cellular service and personal communications service.¹² Accordingly, we believe the following sorts of regulated entities might ultimately also be applicants or licensees in this context and thus might be directly affected by our contemplated rules.

39. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.¹³

40. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.¹⁴

41. *Small Governmental Jurisdictions.* The term “small governmental jurisdiction” is defined as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹⁵ As of 2002, there were approximately 87,525 governmental jurisdictions in the United States.¹⁶ This number includes 38,967 county governments, municipalities, and townships, of which 37,373 (approximately 95.9%) have populations of fewer than 50,000, and of which 1,594 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 85,931 or fewer.

42. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.¹⁷ Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”¹⁸ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹⁹ Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.²⁰ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.²¹ For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397

firms that operated for the entire year.²² Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.²³ Thus, we estimate that the majority of wireless firms are small.

43. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted above, the SBA has developed a small business size standard for “Wireless Telecommunications Carriers (except Satellite)” services.²⁴ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.²⁵ According to Commission data, 432 carriers reported that they were engaged in the provision of wireless telephony.²⁶ We have estimated that 221 of these are small under the SBA small business size standard.

44. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.²⁷ For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²⁸ These small business size standards, in the context of

¹⁵ 5 U.S.C. 601(5).

¹⁶ U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, pages 272–273, Tables 415 and 417.

¹⁷ U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

¹⁸ U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

¹⁹ 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

²⁰ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization)” Table 5, NAICS code 517211 (issued Nov. 2005).

²¹ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

²² U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization)” Table 5, NAICS code 517212 (issued Nov. 2005).

²³ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

²⁴ 13 CFR 121.201, NAICS code 517210.

²⁵ 13 CFR 121.201, NAICS code 517210.

²⁶ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5–5 (Feb. 2007). This source uses data that are current as of October 2005.

²⁷ See Amendment of parts 20 and 24 of the Commission’s Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850–7852, paras. 57–60 (1996); see also 47 CFR 24.720(b).

²⁸ See Amendment of parts 20 and 24 of the Commission’s Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852, para. 60.

⁸ 5 U.S.C. 603(b)(3).

⁹ 5 U.S.C. 601(6).

¹⁰ 5 U.S.C. 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*.”

¹¹ 15 U.S.C. 632.

¹² See, e.g., *AWS–2 Service Rules NPRM*; *AWS–3 Service Rules NPRM*.

¹³ See SBA, Programs and Services, SBA Pamphlet No. CO–0028, at page 40 (July 2002).

¹⁴ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

broadband PCS auctions, have been approved by the SBA.²⁹ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 “small” and “very small” business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.³⁰ On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.³¹

45. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses.³² Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

46. *Cellular Licensees.* As noted, the SBA has developed a small business size standard for wireless firms within the broad economic census category “Wireless Telecommunications Carriers (except Satellite).”³³ Under this category, a wireless business is small if it has 1,500 or fewer employees. Also, as noted, using Commission data we have estimated that most of these entities are small.

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

47. The projected reporting, recordkeeping, and other compliance requirements resulting from the *FNPRM* will apply to all entities in the same manner. The Commission believes that applying the same rules equally to all entities in this context promotes fairness. The Commission does not believe that the costs and/or administrative burdens associated with the rules will unduly burden small entities. The revisions the Commission adopts should benefit small entities by

giving them more information, more flexibility, and more options for gaining access to valuable wireless spectrum.

48. Applicants for AWS licenses in the H Block and AWS-3 band will be required to file license applications using the Commission’s automated Universal Licensing System (ULS). ULS is an online electronic filing system that also serves as a powerful information tool that enables potential licensees to research applications, licenses, and antennae structures. It also keeps the public informed with weekly public notices, FCC rulemakings, processing utilities, and a telecommunications glossary. Applicants will be required to submit short-form auction applications using FCC Form 175.³⁴ In addition, winning bidders must submit long-form license applications through ULS using Form 601,³⁵ FCC Ownership Disclosure Information for the Wireless Telecommunications Services using FCC Form 602, and other appropriate forms.³⁶

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

49. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”³⁷

50. Here, we propose service rules that are efficient and also fair to all entities, including small entities. We also note that, specifically to assist small businesses, the associated *AWS-2 NPRM* and the *AWS-3 NPRM* propose to establish small business size standards and associated small business bidding credits for the 1915–1920 MHz, 1995–2000 MHz, 2155–2175 MHz, and 2175–2180 MHz bands.³⁸ The *AWS-2 NPRM* and the *AWS-3 NPRM* propose to define a small business as an entity with average annual gross revenues for the

preceding three years not exceeding \$40 million, and a very small business as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million, if licenses are not nationwide.³⁹ The *AWS-2 NPRM* and the *AWS-3 NPRM* propose a bidding credit of 15 percent for small businesses and a bidding credit of 25 percent for very small businesses under certain circumstances.⁴⁰

51. The *AWS-2 NPRM* and the *AWS-3 NPRM* also solicit comment on a number of proposals and alternatives regarding the service rules for the 1915–1920 MHz, 1995–2000 MHz, 2155–2175 MHz, and 2175–2180 MHz bands.⁴¹ The *AWS-2 NPRM* and the *AWS-3 NPRM* seek to adopt rules that will reduce regulatory burdens, promote innovative services and encourage flexible use of this spectrum. It opens up economic opportunities to a variety of spectrum users, which could include small businesses. The *AWS-2 NPRM* and the *AWS-3 NPRM* consider various proposals and alternatives partly because the Commission seeks to minimize, to the extent possible, the economic impact on small businesses.⁴²

52. The *AWS-2 NPRM* and the *AWS-3 NPRM* invite comment on various alternative licensing and service rules and on a number of issues relating to how the Commission should craft service rules for this spectrum, which could have an impact on small entities. For example, the Commission seeks comment on the licensing approach for these frequencies and how the size of spectrum blocks would impact small entities.⁴³ The *AWS-2 NPRM* and the *AWS-3 NPRM* seek proposals for a geographic area approach to geographic areas as opposed to a station-defined licensing approach.⁴⁴

53. The regulatory burdens proposed in the *AWS-2 NPRM* and the *AWS-3 NPRM*, such as filing applications on appropriate forms, appear necessary in order to ensure that the public receives the benefits of innovative new services, or enhanced existing services, in a prompt and efficient manner. The Commission will continue to examine

²⁹ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

³⁰ FCC News, “Broadband PCS, D, E and F Block Auction Closes,” No. 71744 (released January 14, 1997).

³¹ See “C, D, E, and F Block Broadband PCS Auction Closes,” *public notice*, 14 FCC Rcd 6688 (WTB 1999).

³² See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *public notice*, 16 FCC Rcd 2339 (2001).

³³ 13 CFR 121.201, NAICS code 517210.

³⁴ See generally, 47 CFR 1.2105.

³⁵ 47 CFR 1.913(a)(1).

³⁶ 47 CFR 1.2107.

³⁷ 5 U.S.C. 603(c)(1)–(c)(4).

³⁸ See *AWS-2 NPRM*, 19 FCC Rcd at 19307–10 para 119–124; *AWS-3 NPRM*, 22 FCC Rcd at 17096–98 para 150–54.

³⁹ *AWS-2 NPRM*, 19 FCC Rcd at 19308–09 para 122; *AWS-3 NPRM*, 22 FCC Rcd at 17097 para 152.

⁴⁰ *AWS-2 NPRM*, 19 FCC Rcd at 19309–10 para 123–24; *AWS-3 NPRM*, 22 FCC Rcd at 17097–98 para 153–54.

⁴¹ See generally *AWS-2 NPRM*; *AWS-3 NPRM*.

⁴² *AWS-2 NPRM*, 19 FCC Rcd at 19325–26 para 26–31; *AWS-3 NPRM*, 22 FCC Rcd at 17106–08 para 21–25.

⁴³ See *AWS-2 NPRM*, 19 FCC Rcd at 19272–77 para 21–31; *AWS-3 NPRM*, 22 FCC Rcd at 17106–08 para 34–38.

⁴⁴ See *AWS-2 NPRM*, 19 FCC Rcd at 19271–72 para 18–20; *AWS-3 NPRM*, 22 FCC Rcd at 17050–51 para 31–33.

alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. The Commission invites comment on any additional significant alternatives parties believe should be considered and on how the approach outlined in the *AWS-2 NPRM* and the *AWS-3 NPRM* will impact small entities, including small businesses and small government entities.

54. In addition, we seek comment on proposed rules that would permit licensees, including small entity licensees, to disaggregate, partition, and lease the spectrum. These options are helpful to small entities, and we seek comment on these proposals.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

55. None.

Ordering Clauses

56. Pursuant to sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332 and 333 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, that this *FNPRM* is hereby adopted.

57. Notice is given of the proposed regulatory changes described in this *FNPRM*, and that comment is sought on these proposals.

58. *It is further ordered* that the Supplemental Initial Regulatory Flexibility Analysis is adopted.

59. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 27, 74, 78 and 101 as follows:

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

1. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336, and 337 unless otherwise noted.

2. Section 27.1 is revised to read as follows:

§ 27.1 Basis and purpose.

This section contains the statutory basis for this part of the rules and provides the purpose for which this part is issued.

(a) *Basis.* The rules for miscellaneous wireless communications services (WCS) in this part are promulgated under the provisions of the Communications Act of 1934, as amended, that vest authority in the Federal Communications Commission to regulate radio transmission and to issue licenses for radio stations.

(b) *Purpose.* This part states the conditions under which spectrum is made available and licensed for the provision of wireless communications services in the following bands.

(1) 2305–2320 MHz and 2345–2360 MHz.

(2) 746–763 MHz, 775–793 MHz, and 805–806 MHz.

(3) 698–746 MHz.

(4) 1390–1392 MHz.

(5) 1392–1395 MHz and 1432–1435 MHz.

(6) 1670–1675 MHz.

(7) [Reserved]

(8) 1710–1755 MHz and 2110–2155 MHz.

(9) 2495–2690 MHz.

(10) 2155–2180 MHz.

(11) 1915–1920 MHz and 1995–2000 MHz.

(c) *Scope.* The rules in this part apply only to stations authorized under this part.

3. Section 27.4 is amended by adding the definitions for “*Downlink Fixed Station*” and “*Uplink Fixed Station*” in alphabetical order to read as follows:

§ 27.4 Terms and definitions.

* * * * *

Downlink Fixed Station. A fixed station employed by a carrier or licensee to transmit to an end user's fixed station.

* * * * *

Uplink Fixed Station. A fixed station employed by an end user to transmit to a carrier's or licensee's fixed stations.

* * * * *

4. Section 27.5 is revised by adding paragraphs (j) and (k) to read as follows:

§ 27.5 Frequencies.

* * * * *

(j) *2155–2180 MHz band.* The 2155–2180 MHz band is available for assignment for Advanced Wireless Services.

(k) *The paired 1915–1920 MHz and 1995–2000 MHz.* The paired 1915–1920 MHz and 1995–2000 MHz bands are available for assignment for Advanced Wireless Services. Each winning bidder awarded a license in the initial AWS

auction for spectrum authorizations in the 1915–1920 MHz band must reimburse UTAM, Inc. a *pro rata share* of the total expenses incurred by UTAM, Inc. as of the date that the new entrants gain access to the band. Specifically, AWS licensees in the 1915–1920 MHz band, which constitutes 25% of the 1910–1930 MHz band, shall, on a *pro rata* shared basis, reimburse 25% of the total relocation costs incurred by UTAM, Inc. in clearing the 1910–1930 MHz band of part 101 Fixed Microwave Service (FS) links. We will require a winning bidder of an AWS H Block license (1915–1920 MHz; 1995–2000 MHz) to reimburse UTAM, Inc., pursuant to the following formula within 30 days of grant of their long-form application for the license. The amount owed will be determined by multiplying the net winning bid for an H Block license (*i.e.*, an individual BTA) by \$12,629,857 and then dividing by the sum of the net winning bids for all H Block licenses won in the initial auction. New entrants will be responsible for the actual costs associated with future relocation activities in their licensed spectrum, but will be entitled to seek reimbursement from UTAM, Inc. for the proportion of those band clearing costs that benefit users of the 1910–1915 MHz and 1920–1930 MHz band. Because the Commission's rules governing the relocation of FS licensees from this band and the right to compensation for costs associated with such relocation has already sunset on April 4, 2005, AWS licensees at 1915–1920 MHz are not responsible for reimbursing PCS entities for any costs incurred by PCS entities, other than those incurred by UTAM, Inc., as noted above, for the relocation of FS links that may otherwise have triggered a cost-sharing obligation absent the sunset date for those rules.

5. Section 27.6 is amending by paragraphs (a) introductory text and (h) to read as follows:

§ 27.6 Service areas.

(a) WCS and AWS service areas include Basic Trading Areas (as defined in § 24.202(b) of this chapter), Economic Areas (EAs), Major Economic Areas (MEAs), Regional Economic Area Groupings (REAGs), cellular markets comprising Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs), and a nationwide area. MEAs and REAGs are defined in the Table immediately following paragraph (a)(1) of this section. Both MEAs and REAGs are based on the U.S. Department of Commerce's EAs. See 60 FR 13114 March 10, 1995. In addition, the

Commission shall separately license Guam and the Northern Mariana Islands, Puerto Rico and the United States Virgin Islands, American Samoa, and the Gulf of Mexico, which have been assigned Commission-created EA numbers 173–176, respectively. The nationwide area is composed of the contiguous 48 states, Alaska, Hawaii, the Gulf of Mexico, and the U.S. territories. Maps of the EAs, MEAs, MSAs, RSAs, and REAGs and the **Federal Register** notice that established the 172 EAs are available for public inspection and copying at the Reference Information Center, Consumer and Governmental Affairs Bureau, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

* * * * *

(h) *Advanced Wireless Services (AWS)*. AWS service areas for the 1710–1755 MHz and 2110–2155 MHz, 1915–1920 MHz and 1995–2000 MHz, and 2155–2180 MHz bands are as follows:

(1) Service areas for Block A (1710–1720 MHz and 2110–2120 MHz) are based on cellular markets comprising Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs) as defined by Public Notice Report No. CL–92–40 “Common Carrier Public Mobile Services Information, Cellular MSA/RSA Markets and Counties,” dated January 24, 1992, DA 92–109, 7 FCC Rcd 742 (1992), with the following modifications:

(i) The service areas of cellular markets that border the U.S. coastline of the Gulf of Mexico extend 12 nautical miles from the U.S. Gulf coastline.

(ii) The service area of cellular market 306 that comprises the water area of the Gulf of Mexico extends from 12 nautical miles off the U.S. Gulf coast outward into the Gulf.

(2) Service areas for Blocks B (1720–1730 MHz and 2120–2130 MHz) and C (1730–1735 MHz and 2130–2135 MHz) are based on Economic Areas (EAs) as defined in paragraph (a) of this section.

(3) Service areas for blocks D (1735–1740 MHz and 2135–2140 MHz), E (1740–1745 MHz and 2140–2145 MHz) and F (1745–1755 MHz and 2145–2155 MHz) are based on Regional Economic Area Groupings (REAGs) as defined by paragraph (a) of this section.

(4) The service areas for 1915–1920 and 1995–2000 MHz Service are based on Basic Trading Areas as defined in paragraph (a) of this section.

(5) The service area for 2155–2180 MHz is nationwide as defined by paragraph (a) of this section.

6. Section 27.11 is amended by adding paragraphs (j) and (k) to read as follows:

§ 27.11 Initial authorization.

* * * * *

(j) *2155–2180 MHz band.*

Authorization for the 2155–2180 MHz band shall consist of a single 25 megahertz block of spectrum based on the geographic area specified in § 27.6(h).

(k) *The paired 1915–1920 MHz and 1995–2000 MHz bands.* Authorizations for the paired 1915–1920 MHz and 1995–2000 MHz bands shall consist of two paired channels of 5 megahertz each based on the geographic areas specified in § 27.6(h).

7. Section 27.13 is amended by adding paragraphs (i) and (j) to read as follows:

§ 27.13 License period.

* * * * *

(i) *2155–2180 MHz band.* Initial authorizations for the 2155–2180 MHz band will have a term not to exceed ten years from the date of initial issuance or renewal.

(j) *The paired 1915–1920 MHz and 1995–2000 MHz bands.* Initial authorizations for the paired 1915–1920 MHz and 1995–2000 MHz bands will have a term not to exceed ten years from the date of initial issuance or renewal.

8. Section 27.14 is revised to read as follows:

§ 27.14 Construction requirements; Criteria for renewal.

(a) AWS and WCS licensees, with the exception of WCS licensees holding authorizations for Block A in the 698–704 MHz and 728–734 MHz bands, Block B in the 704–710 MHz and 734–740 MHz bands, Block E in the 722–728 MHz band, Block C, C1, or C2 in the 746–757 MHz and 776–787 MHz bands, or Block D in the 758–763 MHz and 788–793 MHz bands, and with the exception of AWS licensees holding authorizations in the 1915–1920 MHz, 1995–2000 MHz, and 2155–2180 MHz bands, must, as a performance requirement, make a showing of “substantial service” in their license area within the prescribed license term set forth in § 27.13. “Substantial service” is defined as service which is sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal. Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.

(b) A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, which is the most important comparative factor to be considered in the proceeding, if its past

record for the relevant license period demonstrates that:

(1) The renewal applicant has provided “substantial” service during its past license term; and

(2) The renewal applicant has substantially complied with applicable FCC rules, policies and the Communications Act of 1934, as amended.

(c) In order to establish its right to a renewal expectancy, a WCS renewal applicant involved in a comparative renewal proceeding must submit a showing explaining why it should receive a renewal expectancy. At a minimum, this showing must include:

(1) A description of its current service in terms of geographic coverage and population served;

(2) An explanation of its record of expansion, including a timetable of new construction to meet changes in demand for service;

(3) A description of its investments in its WCS system; and

(4) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and a list of any pending proceedings that relate to any matter described in this paragraph.

(d) In making its showing of entitlement to a renewal expectancy, a renewal applicant may claim credit for any system modification applications that were pending on the date it filed its renewal application. Such credit will not be allowed if the modification application is dismissed or denied.

(e) Comparative renewal proceedings do not apply to AWS licensees holding authorizations in the 1915–1920 MHz, 1995–2000 MHz, and 2155–2180 MHz bands or to WCS licensees holding authorizations for Block A in the 698–704 MHz, 728–734 MHz bands, Block B in the 704–710 MHz and 734–740 MHz bands, Block C in the 710–716 MHz and 740–746 MHz bands, Block D in the 716–722 MHz band, Block E in the 722–728 MHz band, Block C, C1, or C2 in the 746–757 MHz and 776–787 MHz bands, or Block D in the 758–763 MHz and 788–793 MHz bands. Each of these licensees must file a renewal application in accordance with the provisions set forth in § 1.949 of this chapter, and must make a showing of substantial service, independent of its performance requirements, as a condition for renewal at the end of each license term.

(f) Comparative renewal proceedings do not apply to WCS licensees holding authorizations for the 698–746 MHz, 747–762 MHz, and 777–792 MHz bands. These licensees must file a renewal application in accordance with the

provisions set forth in § 1.949 of this chapter.

(g) WCS licensees holding EA authorizations for Block A in the 698–704 MHz and 728–734 MHz bands, cellular market authorizations for Block B in the 704–710 MHz and 734–740 MHz bands, or EA authorizations for Block E in the 722–728 MHz band, if the results of the first auction in which licenses for such authorizations are offered satisfy the reserve price for the applicable block, shall provide signal coverage and offer service over at least 35 percent of the geographic area of each of their license authorizations no later than February 17, 2013 (or within four years of initial license grant if the initial authorization in a market is granted after February 17, 2009), and shall provide such service over at least 70 percent of the geographic area of each of these authorizations by the end of the license term. In applying these geographic benchmarks, licensees are not required to include land owned or administered by government as a part of the relevant service area. Licensees may count covered government land for purposes of meeting their geographic construction benchmark, but are required to add the covered government land to the total geographic area used for measurement purposes. Licensees are required to include those populated lands held by tribal governments and those held by the Federal Government in trust or for the benefit of a recognized tribe.

(1) If an EA or CMA licensee holding an authorization in these particular blocks fails to provide signal coverage and offer service over at least 35 percent of the geographic area of its license authorization by no later than February 17, 2013 (or within four years of initial license grant, if the initial authorization in a market is granted after February 17, 2009), the term of that license authorization will be reduced by two years and such licensee may be subject to enforcement action, including forfeitures. In addition, an EA or CMA licensee that provides signal coverage and offers service at a level that is below this interim benchmark may lose authority to operate in part of the remaining unserved areas of the license.

(2) If any such EA or CMA licensee fails to provide signal coverage and offer service to at least 70 percent of the geographic area of its license authorization by the end of the license term, that licensee's authorization will terminate automatically without Commission action for those geographic portions of its license in which the licensee is not providing service, and those unserved areas will become

available for reassignment by the Commission. Such licensee may also be subject to enforcement action, including forfeitures. In addition, an EA or CMA licensee that provides signal coverage and offers service at a level that is below this end-of-term benchmark may be subject to license termination. In the event that a licensee's authority to operate in a license area terminates automatically without Commission action, such areas will become available for reassignment pursuant to the procedures in paragraph (j) of this section.

(3) For licenses under paragraph (g) of this section, the geographic service area to be made available for reassignment must include a contiguous area of at least 130 square kilometers (50 square miles), and areas smaller than a contiguous area of at least 130 square kilometers (50 square miles) will not be deemed unserved.

(h) WCS licensees holding REAG authorizations for Block C in the 746–757 MHz and 776–787 MHz bands or REAG authorizations for Block C2 in the 752–757 MHz and 782–787 MHz bands shall provide signal coverage and offer service over at least 40 percent of the population in each EA comprising the REAG license area no later than February 17, 2013 (or within four years of initial license grant, if the initial authorization in a market is granted after February 17, 2009), and shall provide such service over at least 75 percent of the population of each of these EAs by the end of the license term. For purposes of compliance with this requirement, licensees should determine population based on the most recently available U.S. Census Data.

(1) If a licensee holding a Block C authorization fails to provide signal coverage and offer service over at least 40 percent of the population in each EA comprising the REAG license area by no later than February 17, 2013 (or within four years of initial license grant if the initial authorization in a market is granted after February 17, 2009), the term of the license authorization will be reduced by two years and such licensee may be subject to enforcement action, including forfeitures. In addition, a licensee that provides signal coverage and offers service at a level that is below this interim benchmark may lose authority to operate in part of the remaining unserved areas of the license.

(2) If a licensee holding a Block C authorization fails to provide signal coverage and offer service over at least 75 percent of the population in any EA comprising the REAG license area by the end of the license term, for each such EA that licensee's authorization

will terminate automatically without Commission action for those geographic portions of its license in which the licensee is not providing service. Such licensee may also be subject to enforcement action, including forfeitures. In the event that a licensee's authority to operate in a license area terminates automatically without Commission action, such areas will become available for reassignment pursuant to the procedures in paragraph (j) of this section. In addition, a REAG licensee that provides signal coverage and offers service at a level that is below this end-of-term benchmark within any EA may be subject to license termination within that EA.

(3) For licenses under paragraph (h) of this section, the geographic service area to be made available for reassignment must include a contiguous area of at least 130 square kilometers (50 square miles), and areas smaller than a contiguous area of at least 130 square kilometers (50 square miles) will not be deemed unserved.

(i) WCS licensees holding EA authorizations for Block A in the 698–704 MHz and 728–734 MHz bands, cellular market authorizations for Block B in the 704–710 MHz and 734–740 MHz bands, or EA authorizations for Block E in the 722–728 MHz band, if the results of the first auction in which licenses for such authorizations in Blocks A, B, and E are offered do not satisfy the reserve price for the applicable block, as well as EA authorizations for Block C1 in the 746–752 MHz and 776–782 MHz bands, are subject to the following:

(1) If a licensee holding a cellular market area or EA authorization subject to this paragraph (i) fails to provide signal coverage and offer service over at least 40 percent of the population in its license area by no later than February 17, 2013 (or within four years of initial license grant, if the initial authorization in a market is granted after February 17, 2009), the term of that license authorization will be reduced by two years and such licensee may be subject to enforcement action, including forfeitures. In addition, such licensee that provides signal coverage and offers service at a level that is below this interim benchmark may lose authority to operate in part of the remaining unserved areas of the license. For purposes of compliance with this requirement, licensees should determine population based on the most recently available U.S. Census Data.

(2) If a licensee holding a cellular market area or EA authorization subject to this paragraph (i) fails to provide signal coverage and offer service over at

least 75 percent of the population in its license area by the end of the license term, that licensee's authorization will terminate automatically without Commission action for those geographic portions of its license in which the licensee is not providing service, and those unserved areas will become available for reassignment by the Commission. Such licensee may also be subject to enforcement action, including forfeitures. In the event that a licensee's authority to operate in a license area terminates automatically without Commission action, such areas will become available for reassignment pursuant to the procedures in paragraph (j) of this section. In addition, such a licensee that provides signal coverage and offers service at a level that is below this end-of-term benchmark may be subject to license termination. For purposes of compliance with this requirement, licensees should determine population based on the most recently available U.S. Census Data.

(3) For licenses under this paragraph (i), the geographic service area to be made available for reassignment must include a contiguous area of at least 130 square kilometers (50 square miles), and areas smaller than a contiguous area of at least 130 square kilometers (50 square miles) will not be deemed unserved.

(j) In the event that a licensee's authority to operate in a license area terminates automatically under paragraphs (g), (h), (i), (p) or (q) of this section, such areas will become available for reassignment pursuant to the following procedures:

(1) The Wireless Telecommunications Bureau is delegated authority to announce by public notice that these license areas will be made available and establish a 30-day window during which third parties may file license applications to serve these areas. During this 30-day period, licensees that had their authority to operate terminate automatically for unserved areas may not file applications to provide service to these areas. Applications filed by third parties that propose areas overlapping with other applications will be deemed mutually exclusive, and will be resolved through an auction. The Wireless Telecommunications Bureau, by public notice, may specify a limited period before the filing of short-form applications (FCC Form 175) during which applicants may enter into a settlement to resolve their mutual exclusivity, subject to the provisions of § 1.935 of this chapter.

(2) Following this 30-day period, the original licensee and third parties can file license applications for remaining unserved areas where licenses have not

been issued or for which there are no pending applications. If the original licensee or a third party files an application, that application will be placed on public notice for 30 days. If no mutually exclusive application is filed, the application will be granted, provided that a grant is found to be in the public interest. If a mutually exclusive application is filed, it will be resolved through an auction. The Wireless Telecommunications Bureau, by public notice, may specify a limited period before the filing of short-form applications (FCC Form 175) during which applicants may enter into a settlement to resolve their mutual exclusivity, subject to the provisions of § 1.935 of this chapter.

(3) The licensee will have one year from the date the new license is issued to complete its construction and provide signal coverage and offer service over 100 percent of the geographic area of the new license area. If the licensee fails to meet this construction requirement, its license will automatically terminate without Commission action and it will not be eligible to apply to provide service to this area at any future date.

(k) AWS and WCS licensees holding authorizations in the spectrum blocks enumerated in paragraphs (g), (h), (i), (p), or (q) of this section, including any licensee that obtained its license pursuant to the procedures set forth in paragraph (j) of this section, shall demonstrate compliance with performance requirements by filing a construction notification with the Commission, within 15 days of the expiration of the applicable benchmark, in accordance with the provisions set forth in § 1.946(d) of this chapter. The licensee must certify whether it has met the applicable performance requirements. The licensee must file a description and certification of the areas for which it is providing service. The construction notifications must include electronic coverage maps, supporting technical documentation and any other information as the Wireless Telecommunications Bureau may prescribe by public notice.

(l) AWS and WCS licensees holding authorizations in the spectrum blocks enumerated in paragraphs (g), (h), (i), (p), or (q) of this section, excluding any licensee that obtained its license pursuant to the procedures set forth in paragraph (j) of this section, shall file reports with the Commission that provide the Commission, at a minimum, with information concerning the status of their efforts to meet the performance requirements applicable to their authorizations in such spectrum blocks and the manner in which that spectrum

is being utilized. The information to be reported will include the date the license term commenced, a description of the steps the licensee has taken toward meeting its construction obligations in a timely manner, including the technology or technologies and service(s) being provided, and the areas within the license area in which those services are available.

(1) Each WCS licensee holding an authorization in the spectrum blocks enumerated in paragraphs (g), (h), or (i) of this section shall file its first report with the Commission no later than February 17, 2011 and no sooner than 30 days prior to this date. Each licensee that meets its interim benchmarks shall file a second report with the Commission no later than February 17, 2016 and no sooner than 30 days prior to this date. Each licensee that does not meet its interim benchmark shall file this second report no later than on February 17, 2015 and no sooner than 30 days prior to this date.

(2) Each AWS licensee holding an authorization in the spectrum blocks enumerated in paragraphs (p) or (q) of this section shall file its first report with the Commission no later than two years from the date on which the original license was issued and no sooner than 30 days prior to this date. Each licensee that meets its interim benchmarks shall file a second report with the Commission no later than seven years from the date on which the original license was issued and no sooner than 30 days prior to this date. Each licensee that does not meet its interim benchmark shall file this second report no later than six years from the date on which the original license was issued and no sooner than 30 days prior to this date.

(m) The WCS licensee holding the authorization for the D Block in the 758–763 MHz and 788–793 MHz bands (the Upper 700 MHz D Block licensee) shall comply with the following construction requirements.

(1) The Upper 700 MHz D Block licensee shall provide a signal coverage and offer service over at least 75 percent of the population of the nationwide Upper 700 MHz D Block license area within four years from February 17, 2009, 95 percent of the population of the nationwide license area within seven years, and 99.3 percent of the population of the nationwide license area within ten years.

(2) The Upper 700 MHz D Block licensee may modify, to a limited degree, its population-based construction benchmarks with the agreement of the Public Safety

Broadband Licensee and the prior approval of the Commission, where such a modification would better serve to meet commercial and public safety needs.

(3) The Upper 700 MHz D Block licensee shall meet the population benchmarks based on a performance schedule specified in the Network Sharing Agreement, taking into account performance pursuant to § 27.1327 as appropriate under that rule, and using the most recently available U.S. Census Data. The network and signal levels employed to meet these benchmarks must be adequate for public safety use, as defined in the Network Sharing Agreement, and the services made available must include those appropriate for public safety entities that operate in those areas. The schedule shall include coverage for major highways and interstates, as well as such additional areas that are necessary to provide coverage for all incorporated communities with a population in excess of 3,000, unless the Public Safety Broadband Licensee and the Upper 700 MHz D Block licensee jointly determine, in consultation with a relevant community, that such additional coverage will not provide significant public benefit.

(4) The Upper 700 MHz D Block licensee shall demonstrate compliance with performance requirements by filing a construction notification with the Commission within 15 days of the expiration of the applicable benchmark, in accordance with the provisions set forth in § 1.946(d) of this chapter. The licensee must certify whether it has met the applicable performance requirement and must file a description and certification of the areas for which it is providing service. The construction notifications must include the following:

(i) Certifications of the areas that were scheduled for construction and service by that date under the Network Sharing Agreement for which it is providing service, the type of service it is providing for each area, and the type of technology it is utilizing to provide this service.

(ii) Electronic coverage maps and supporting technical documentation providing the assumptions used by the licensee to create the coverage maps, including the propagation model and the signal strength necessary to provide service.

(n) At the end of its license term, the Upper 700 MHz D Block licensee must, in order to renew its license, make a showing of its success in meeting the material requirements set forth in the Network Sharing Agreement as well as

all other license conditions, including the performance benchmark requirements set forth in this section.

(p) AWS licensees holding authorizations in the 1915–1920 MHz and 1995–2000 MHz shall provide signal coverage and offer service to at least 35 percent of the population in each licensed area within four years of the date on which the original license was issued and at least 70 percent of the population in each licensed area at the end of the license term.

(1) If any AWS licensee holding an authorization in the 1915–1920 MHz and 1995–2000 MHz bands fails to provide signal coverage and offer service to at least 35 percent of the population in the licensed area within four years of the date on which the original license was issued, the term of that license authorization will be reduced by two years and such licensee may be subject to enforcement action, including forfeitures. In addition, the licensee may lose authority to operate in part of the remaining unserved areas of the license.

(2) If any AWS licensee holding an authorization in the 1915–1920 MHz and 1995–2000 MHz fails to provide signal coverage and offer service to at least 70 percent of the population in each licensed area at the end of the license term, that licensee's authorization will terminate automatically without Commission action for those geographic portions of its license in which the licensee is not providing service, and those unserved areas will become available for reassignment by the Commission. Such licensee may also be subject to enforcement action, including forfeitures. In addition, a licensee that provides signal coverage and offers service at a level that is below the end-of-term benchmark may be subject to license termination. In the event that a licensee's authority to operate in a license area terminates automatically without Commission action, such areas will become available for reassignment pursuant to the procedures in paragraph (j) of this section.

(3) For licenses under paragraphs (g), (h), and (i), the geographic service area to be made available to new entrants must include a contiguous area of at least 130 square kilometers (50 square miles), and areas smaller than a contiguous area of at least 130 square kilometers (50 square miles) will not be deemed unserved.

(4) To demonstrate compliance with these performance requirements, licensees shall use the most recently available U.S. Census Data at the time of measurement and shall base their

measurements of population served on areas no larger than the Census Tract level. The population within a specific Census Tract (or other acceptable identifier) will only be deemed served by the licensee if it provides signal coverage to and offers service within the specific Census Tract (or other acceptable identifier). To the extent the Census Tract (or other acceptable identifier) extends beyond the boundaries of a license area, a licensee with authorizations for such areas may only include the population within the Census Tract (or other acceptable identifier) towards meeting the performance requirement of a single, individual license.

(q) Any AWS licensee holding an authorization in the 2155–2180 MHz band shall provide signal coverage and offer service to at least 50 percent of the total U.S. population within four years of the date on which the original license was issued and at least 95 percent of the total U.S. population at the end of the license term. If any licensee in this band elects not to meet its performance requirements based on the percent of the U.S. population served, it shall provide signal coverage and offer service to at least 35 percent of the population in each Cellular Market Area (CMA) or Economic Area (EA) in its licensed area within four years and at least 70 percent of the population in each CMA or EA in its licensed area at the end of the license term.

(1) If any AWS licensee holding an authorization in the 2155–2180 MHz band fails to establish that it meets the applicable performance requirement within four years of the date on which the original license was issued, the term of that license authorization will be reduced by two years and such licensee may be subject to enforcement action, including forfeitures. In addition, the licensee may lose authority to operate in part of the remaining unserved areas of the license.

(2) If any AWS licensee holding an authorization in the 2155–2180 MHz band fails to establish that it meets the applicable performance requirement at the end of the license term, that licensee's authorization will terminate automatically without Commission action for those geographic portions of its license in which the licensee is not providing service, and those unserved areas will become available for reassignment by the Commission. Such licensee may also be subject to enforcement action, including forfeitures. In addition, a licensee that provides signal coverage and offers service at a level that is below the end-of-term benchmark may be subject to

license termination. In the event that a licensee's authority to operate in a license area terminates automatically without Commission action, such areas will become available for reassignment pursuant to the procedures in paragraph (j) of this section.

9. Section 27.15 is revised to read as follows:

§ 27.15 Geographic partitioning and spectrum disaggregation.

(a) *Eligibility.* (1) Parties seeking approval for partitioning and disaggregation shall request from the Commission an authorization for partial assignment of a license pursuant to § 1.948 of this chapter.

(2) AWS and WCS licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum at any time following the grant of their licenses.

(b) *Technical Standards:* (1) Partitioning. In the case of partitioning, applicants and licensees must file FCC Form 603 pursuant to § 1.948 of this chapter and list the partitioned service area on a schedule to the application. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1983 North American Datum (NAD83).

(2) *Disaggregation.* Spectrum may be disaggregated in any amount.

(3) *Combined partitioning and disaggregation.* The Commission will consider requests for partial assignment of licenses that propose combinations of partitioning and disaggregation.

(4) *Signal levels.* For purposes of partitioning and disaggregation, part 27 systems must be designed so as not to exceed the signal level specified for the particular spectrum block in § 27.55 at the licensee's service area boundary, unless the affected adjacent service area licensees have agreed to a different signal level.

(c) *License term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in § 27.13.

(d) *Compliance with construction requirements:* (1) Partitioning. (i) Except for AWS licensees in the 1915–1920 MHz, 1995–2000 MHz, and 2155–2180 MHz bands and WCS licensees holding authorizations for Block A in the 698–704 MHz and 728–734 MHz bands, Block B in the 704–710 MHz and 734–740 MHz bands, Block E in the 722–728 MHz band, Blocks C, C1, or C2 in the 746–757 MHz and 776–787 MHz bands, or Block D in the 758–763 MHz and 788–793 MHz bands, the following rules

apply to WCS and AWS licensees holding authorizations for purposes of implementing the construction requirements set forth in § 27.14. Parties to partitioning agreements have two options for satisfying the construction requirements set forth in § 27.14. Under the first option, the partitioner and partitionee each certifies that it will independently satisfy the substantial service requirement for its respective partitioned area. If a licensee subsequently fails to meet its substantial service requirement, its license will be subject to automatic cancellation without further Commission action. Under the section option, the partitioner certifies that it has met or will meet the substantial service requirement for the entire, pre-partitioned geographic service area. If the partitioner subsequently fails to meet its substantial service requirement, only its license will be subject to automatic cancellation without further Commission action.

(ii) For AWS licensees in the 1915–1920 MHz, 1995–2000 MHz, and 2155–2180 MHz bands and WCS licensees holding authorizations for Block A in the 698–704 MHz and 728–734 MHz bands, Block B in the 704–710 MHz and 734–740 MHz bands, Block E in the 722–728 MHz band, or Blocks C, C1, and C2 in the 746–757 MHz and 776–787 MHz bands, the following rules apply for purposes of implementing the construction requirements set forth in § 27.14. Parties to partitioning agreements have two options for satisfying the construction requirements set forth in § 27.14. Under the first option, the partitioner and partitionee each certifies that they will collectively share responsibility for meeting the construction requirement for the entire pre-partition geographic license area. If the partitioner and partitionee collectively fail to meet the construction requirement, then both the partitioner and partitionee will be subject to the consequences enumerated in § 27.14(g) and (h) for this failure. Under the second option, the partitioner and partitionee each certifies that it will independently meet the construction requirement for its respective partitioned license area. If the partitioner or partitionee fails to meet the construction requirement for its respective partitioned license area, then the consequences for this failure shall be those enumerated in § 27.14(g) and (h).

(2) *Disaggregation.* (i) Except for AWS licensees in the 1915–1920 MHz, 1995–2000 MHz, and 2155–2180 MHz bands and WCS licensees holding authorizations for Block A in the 698–704 MHz and 728–734 MHz bands,

Block B in the 704–710 MHz and 734–740 MHz bands, Block E in the 722–728 MHz band, Blocks C, C1, or C2 in the 746–757 MHz and 776–787 MHz bands, or Block D in the 758–763 MHz and 788–793 MHz bands, the following rules apply to WCS and AWS licensees holding authorizations for purposes of implementing the construction requirements set forth in § 27.14. Parties to disaggregation agreements have two options for satisfying the construction requirements set forth in § 27.14. Under the first option, the disaggregator and disaggregatee each certifies that it will share responsibility for meeting the substantial service requirement for the geographic service area. If the parties choose this option and either party subsequently fails to satisfy its substantial service responsibility, both parties' licenses will be subject to forfeiture without further Commission action. Under the second option, both parties certify either that the disaggregator or the disaggregatee will meet the substantial service requirement for the geographic service area. If the parties choose this option, and the party responsible subsequently fails to meet the substantial service requirement, only that party's license will be subject to forfeiture without further Commission action.

(ii) For AWS licensees in the 1915–1920 MHz, 1995–2000 MHz, and 2155–2180 MHz bands and WCS licensees holding authorizations for Block A in the 698–704 MHz and 728–734 MHz bands, Block B in the 704–710 MHz and 734–740 MHz bands, Block E in the 722–728 MHz band, and Blocks C, C1, or C2 in the 746–757 MHz and 776–787 MHz bands, the following rules apply for purposes of implementing the construction requirements set forth in § 27.14. If either the disaggregator or the disaggregatee meets the construction requirements set forth in § 27.14, then these requirements will be considered to be satisfied for both parties. If neither the disaggregator nor the disaggregatee meets the construction requirements, then both parties will be subject to the consequences enumerated in § 27.14(g) and (h) for this failure.

10. Section 27.16 is revised to read as follows:

§ 27.16. Network access requirements for Block C in the 746–757 and 776–787 MHz bands and for the 2155–2180 MHz band (the AWS-3 Band).

(a) *Applicability.* This section shall apply only to the authorizations for Block C in the 746–757 and 776–787 MHz bands (700 C Block) assigned as a result of Auction 73 and to the 2155–2180 MHz band (AWS-3 Band).

(b) *Use of devices and applications.* Licensees offering service on the 700 C Block and the licensee offering premium or paid services on the AWS-3 Band subject to this section shall not deny, limit, or restrict the ability of their customers to use the devices and applications of their choice on the licensee's network, and the licensee providing free broadband service on the AWS-3 band subject to this section shall not deny, limit, or restrict the ability of their customers to use the devices of their choice on the licensee's network, except:

(1) Insofar as such use would not be compliant with published technical standards reasonably necessary for the management or protection of the licensee's network,

(2) Licensees or lessees providing free broadband service required under § 27.1192 of this part shall not deny, limit, or restrict the ability of users to use the devices of their choice on the licensee's or lessee's network, or

(3) As required to comply with statute or applicable government regulation.

(c) *Technical standards.* For purposes of paragraph (b)(1) of this section:

(1) Standards shall include technical requirements reasonably necessary for third parties to access a licensee's network via devices or applications without causing objectionable interference to other spectrum users or jeopardizing network security. The potential for excessive bandwidth demand alone shall not constitute grounds for denying, limiting or restricting access to the network, except as provided in § 27.1192(a)(2) part for the AWS-3 Band.

(2) To the extent a licensee relies on standards established by an independent standards-setting body which is open to participation by representatives of service providers, equipment manufacturers, application developers, consumer organizations, and other interested parties, the standards will carry a presumption of reasonableness.

(3) A licensee shall publish its technical standards, which shall be non-proprietary, no later than the time at which it makes such standards available to any preferred vendors, so that the standards are readily available to customers, equipment manufacturers, application developers, and other parties interested in using or developing products for use on a licensee's networks.

(d) *Access requests.* (1) Licensees shall establish and publish clear and reasonable procedures for parties to seek approval to use devices or applications on the licensees' networks. A licensee

must also provide to potential customers notice of the customers' rights to request the attachment of a device or application to the licensee's network, and notice of the licensee's process for customers to make such requests, including the relevant network criteria.

(2) If a licensee determines that a request for access would violate its technical standards or regulatory requirements, the licensee shall expeditiously provide a written response to the requester specifying the basis for denying access and providing an opportunity for the requester to modify its request to satisfy the licensee's concerns.

11. Section 27.50(d) is revised to read as follows:

§ 27.50 Power and antenna height limits.

* * * * *

(d) The following power and antenna height requirements apply to stations transmitting in the 1710-1755 MHz, 1915-1920 MHz, 1995-2000 MHz, and 2110-2180 MHz bands:

(1) The power of each fixed or base station transmitting in the 1995-2000 MHz and 2110-2155 MHz bands and each base or downlink fixed station transmitting in the 2155-2180 MHz band, and located in any county with population density of 100 or fewer persons per square mile, based upon the most recently available population statistics from the Bureau of the Census, is limited to:

(i) An equivalent isotropically radiated power (EIRP) of 3280 watts when transmitting with an emission bandwidth of 1 MHz or less;

(ii) An EIRP of 3280 watts/MHz when transmitting with an emission bandwidth greater than 1 MHz.

(2) The power of each fixed or base station transmitting in the 1995-2000 MHz and 2110-2155 MHz band and each base or downlink fixed station transmitting in the 2155-2180 MHz band, and located in any geographic location other than that described in paragraph (d)(1) of this section is limited to:

(i) An equivalent isotropically radiated power (EIRP) of 1640 watts when transmitting with an emission bandwidth of 1 MHz or less;

(ii) An EIRP of 1640 watts/MHz when transmitting with an emission bandwidth greater than 1 MHz.

(3) A licensee operating a base or fixed station in the 2110-2155 MHz band or a base or downlink fixed station in the 2155-2180 MHz band and utilizing a power greater than 1640 watts EIRP and greater than 1640 watts/MHz EIRP must coordinate such

operations in advance with the following licensees authorized to operate within 120 kilometers (75 miles) of the base or fixed station operating in this band: all Government and non-Government satellite entities in the 2025-2110 MHz band; all Broadband Radio Service (BRS) licensees authorized under Part 27 in the 2155-2160 MHz band; and all advanced wireless services (AWS) licensees authorized to operate on adjacent frequency blocks in the 2110-2180 MHz band.

(4) Fixed, mobile, and portable (hand-held) stations operating in the 1710-1755 MHz band are limited to 1 watt (W) EIRP. Fixed stations operating in the 1710-1755 MHz band are limited to a maximum antenna height of 10 meters above ground. Uplink fixed stations operating in the 1915-1920 MHz and 2155-2180 MHz bands are limited to 2 watts/MHz (W/MHz) peak EIRP. Mobile and portable stations operating in the 1915-1920 MHz and 2155-2180 MHz bands are limited to 200 milliwatts/MHz (mW/MHz) peak EIRP. Mobile and portable stations operating in the 1710-1755 MHz, 1915-1920 MHz, and 2155-2180 MHz bands must employ a means for limiting power to the minimum necessary for successful communications.

(5) Equipment employed must be authorized in accordance with the provisions of Sec. 27.51. Except for mobile, portable, and uplink fixed stations operating in the 1915-1920 MHz and 2155-2180 MHz bands, power measurements for transmissions by stations authorized under this section may be made either in accordance with a Commission-approved average power technique or in compliance with paragraph (d)(6) of this section. In measuring transmissions in this band using an average power technique, the peak-to-average ratio (PAR) of the transmission may not exceed 13 dB.

(6) Peak transmit power must be measured over any interval of continuous transmission using instrumentation calibrated in terms of an RMS-equivalent voltage. The measurement results shall be properly adjusted for any instrument limitations, such as detector response times, limited resolution bandwidth capability when compared to the emission bandwidth, sensitivity, etc., so as to obtain a true peak measurement for the emission in question over the full bandwidth of the channel.

* * * * *

12. In § 27.53 paragraph (h) is revised to read as follows:

§ 27.53 Emission limits.

* * * * *

(h) For operations in the 1710–1755 MHz, 1915–1920 MHz, 1995–2000 MHz, and 2110–2180 MHz bands, the power of any emission outside a licensee's frequency block shall be attenuated in accordance with the following:

(1) For all operations in the 1710–1755 MHz, 1995–2000 MHz, and 2110–2155 MHz bands and for all base and downlink fixed station operations in the 2155–2180 MHz band, the power of any emission outside a licensee's frequency block shall be attenuated below the transmitter power (P) by at least $43 + 10 \log_{10}(P)$ dB;

(2) For all mobile, portable, and uplink fixed station operations in the 2155–2180 MHz band, the power of any emission outside a licensee's frequency block shall be attenuated below the transmitter power (P) by at least $60 + 10 \log_{10}(P)$ dB;

(3) For all operations in the 1915–1920 MHz band, the power of any emission outside a licensee's frequency block shall be attenuated below the transmitter power (P) by at least $43 + 10 \log_{10}(P)$ dB and the power of any emission on frequencies above 1930 MHz shall be attenuated below the transmitter power (P) by at least $90 + 10 \log_{10}(P)$ dB;

(4) Compliance with these provisions are based on the use of measurement instrumentation employing a resolution bandwidth of 1 megahertz or greater. However, in the 1 megahertz bands immediately outside and adjacent to the licensee's frequency block, a resolution bandwidth of at least one percent of the emission bandwidth of the fundamental emission of the transmitter may be employed. The emission bandwidth is defined as the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, outside of which all emissions are attenuated at least 26 dB below the transmitter power;

(5) When measuring the emission limits, the nominal carrier frequency shall be adjusted as close to the licensee's frequency block edges, both upper and lower, as the design permits;

(6) The measurements of emission power can be expressed in peak or average values, provided they are expressed in the same parameters as the transmitter power.

* * * * *

13. Section 27.55 is revised to read as follows:

§ 27.55 Power strength limits.

(a) Field strength limits. For the following bands, the predicted or measured median field strength at any

location on the geographical border of a licensee's service area shall not exceed the value specified unless the adjacent affected service area licensee(s) agree(s) to a different field strength. This value applies to both the initially offered service areas and to partitioned service areas.

(1) 1995–2000, 2110–2180, 2305–2320 and 2345–2360 MHz bands: 47 dB μ V/m.

(2) 698–758 and 775–787 MHz bands: 40 dB μ V/m.

(3) The paired 1392–1395 MHz and 1432–1435 MHz bands and the unpaired 1390–1392 MHz band (1.4 GHz band): 47 dB μ V/m.

(4) BRS and EBS: The predicted or measured median field strength at any location on the geographical border of a licensee's service area shall not exceed the value specified unless the adjacent affected service area licensee(s) agree(s) to a different field strength. This value applies to both the initially offered services areas and to partitioned services areas. Licensees may exceed this signal level where there is no affected licensee that is constructed and providing service. Once the affected licensee is providing service, the original licensee will be required to take whatever steps necessary to comply with the applicable power level at its GSA boundary, absent consent from the affected licensee.

(i) Prior to transition, the signal strength at any point along the licensee's GSA boundary does not exceed the greater of that permitted under the licensee's Commission authorizations as of January 10, 2005 or 47 dB μ V/m.

(ii) Following transition, for stations in the LBS and UBS, the signal strength at any point along the licensee's GSA boundary must not exceed 47 dB μ V/m. This field strength is to be measured at 1.5 meters above the ground over the channel bandwidth (*i.e.*, each 5.5 MHz channel for licensees that hold a full channel block, and for the 5.5 MHz channel for licensees that hold individual channels).

(iii) Following transition, for stations in the MBS, the signal strength at any point along the licensee's GSA boundary must not exceed the greater of $-73.0 + 10 \log(X/6)$ dBW/m², where X is the bandwidth in megahertz of the channel, or for facilities that are substantially similar to the licensee's pre-transition facilities (including modifications that do not alter the fundamental nature or use of the transmissions), the signal strength at such point that resulted from the station's operations immediately prior to the transition, provided that such

operations complied with paragraph (a)(4)(i) of this section.

(b) Power flux density limit for stations operating in the 698–746 MHz bands. For base and fixed stations operating in the 698–746 MHz band in accordance with the provisions of § 27.50(c)(6), the power flux density that would be produced by such stations through a combination of antenna height and vertical gain pattern must not exceed 3000 microwatts per square meter on the ground over the area extending to 1 km from the base of the antenna mounting structure.

(c) Power flux density limit for stations operating in the 746–757 MHz, 758–763 MHz, 776–787 MHz, and 788–793 MHz bands. For base and fixed stations operating in the 746–757 MHz, 758–763 MHz, 776–787 MHz, and 788–793 MHz bands in accordance with the provisions of § 27.50(b)(6), the power flux density that would be produced by such stations through a combination of antenna height and vertical gain pattern must not exceed 3000 microwatts per square meter on the ground over the area extending to 1 km from the base of the antenna mounting structure.

14. Section 27.1191 and an undesignated center heading is added to read as follows:

Special Provisions Governing the 2155–2180 MHz Band**§ 27.1191 Free wireless broadband service requirement in the 2155–2180 MHz band.**

(a) *Applicability.* This section shall apply only to an authorization in the 2155–2180 MHz “AWS–3” band.

(b) *Provision of free broadband service.* A licensee (including lessees) offering any service on spectrum subject to this section must utilize up to twenty-five percent of its AWS–3 wireless network capacity to provide free two-way wireless broadband Internet service (“free broadband service”) at a minimum engineered data rate of 768 kbps downstream per user.

(1) To the extent that a licensee meets all demand for the free broadband service and is providing such service at a minimum engineered data rate of 768 kbps downstream per user, such licensee can utilize more than seventy-five percent of its wireless network capacity for any other service authorized to operate in this band.

(2) On a per base-station or per market basis, a 2155–2180 MHz licensee will not be required to maintain the minimum data rate when and where meeting additional demand for the free broadband service would require more than twenty-five percent of wireless network capacity. Once demand reaches

twenty-five percent of wireless network capacity, a 2155–2180 MHz licensee has the discretion to manage any additional demand for free service using any lawful network management protocol.

(3) Broadband users not required to pay any compensation for any of the broadband services that they receive are considered to receive free broadband service. If a broadband user pays any compensation for any broadband service directly or indirectly affiliated with the licensee, the user does not receive free service. For purposes of this requirement, wireless broadband users receive either free or fee-based service, not both. The compensation paid for broadband service does not include any compensation paid for user/customer equipment. A minimum engineered data rate means that the wireless network is designed, constructed, and implemented to provide meet or exceed the minimum data rate as measured to/from user devices and the AWS–3 licensee's wireless facilities. The minimum engineered data rate is subject to future reassessments by the Commission, including during the term of the license.

(c) *Availability of free broadband service.* A 2155–2180 MHz licensee must make available free broadband service whenever and wherever the licensee offers any other service that uses AWS–3 spectrum (even if other such services are offered prior to the performance deadlines set forth in § 27.14 for the AWS–3 band).

(d) *Geographic partitioning, spectrum disaggregation, license assignment, and transfer.* A licensee is not restricted from assigning, transferring, partitioning, or leasing 2155–2180 MHz spectrum. In such case, the free broadband requirement would apply to the licensee's or lessee's network in the AWS–3 band.

(e) *User equipment.* A 2155–2180 MHz licensee and/or third party vendor is authorized to determine user/customer equipment pricing, features, and availability, so long as such determinations are reasonable and non-discriminatory and in compliance with § 27.16.

(f) *Fee-based services.* Subject to the provisions in this section, a 2155–2180 MHz licensee may provide and prioritize fee-based services as set forth in paragraph (b) of this section. Users and use of the wireless network for any fee-based service may not be counted towards satisfaction of the requirement to provide free broadband service.

(g) *Fee-based broadband services provided by non-facilities based wholesale customers of a 2155–2180 MHz licensee.* Fee-based broadband

services provided by non-facilities based wholesale customers of a 2155–2180 MHz licensee that use such licensee's network capacity is not required to provide free broadband service, although such use of the licensee's network capacity shall be included in any determination of the licensee's compliance with the free broadband service requirement.

(h) *Burden of proof.* Once a complainant sets forth a *prima facie* case that a 2155–2180 MHz licensee is in violation of the free broadband service requirement, such licensee shall have the burden of proof to demonstrate that it is in compliance. Application of the same lawful network management protocol utilized by the licensee to manage fee-based traffic is presumptively reasonable.

15. Add new § 27.1193 to read as follows:

§ 27.1193 Content Network Filtering Requirement.

(a) The licensee of the 2155–2188 MHz band (AWS–3 licensee) must provide as part of its free broadband service a network-based mechanism:

(1) That filters or blocks images and text that constitute obscenity or pornography and, in context, as measured by contemporary community standards and existing law, any images or text that otherwise would be harmful to teens and adolescents. For purposes of this rule, teens and adolescents are children 5 through 17 years of age;

(2) That must be active at all times on any type of free broadband service offered to customers or consumers through an AWS–3 network. In complying with this requirement, the AWS–3 licensee must use viewpoint-neutral means in instituting the filtering mechanism and must otherwise subject its own content—including carrier-generated advertising—to the filtering mechanism.

(b) The AWS–3 licensee must:

(1) Inform new customers that the filtering is in place and must otherwise provide on-screen notice to users. It may also choose additional means to keep the public informed of the filtering, such as storefront or Web site notices;

(2) Use best efforts to employ filtering to protect children from exposure to inappropriate material as defined in paragraph (a)(1) of this section. Should any commercially-available network filters installed not be capable of reviewing certain types of communications, such as peer-to-peer file sharing, the licensee may use other means, such as limiting access to those types of communications as part of the AWS–3 free broadband service, to

ensure that inappropriate content as defined in paragraph (a)(1) of this section not be accessible as part of the service.

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCASTING AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

16. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, 336(f), 336(h) and 554.

17. Revise § 74.690 to read as follows:

§ 74.690 Transition of the 1990–2025 MHz band from the Broadcast Auxiliary Service to emerging technologies.

(a) New Entrants are collectively defined as those licensees proposing to use emerging technologies to implement Mobile Satellite Services in the 2000–2020 MHz band (MSS licensees), those licensees authorized after July 1, 2004 to implement new Fixed and Mobile services in the 1990–1995 MHz band, and those licensees authorized after September 9, 2004 in the 1995–2000 MHz and 2020–2025 MHz bands. New entrants may negotiate with Broadcast Auxiliary Service licensees operating on a primary basis and fixed service licensees operating on a primary basis in the 1990–2025 MHz band (Existing Licensees) for the purpose of agreeing to terms under which the Existing Licensees would relocate their operations to the 2025–2110 MHz band, to other authorized bands, or to other media; or, alternatively, would discontinue use of the 1990–2025 MHz band. New Entrants in the 2020–2025 MHz band are subject to the specific relocation procedures adopted in WT Docket 04–356.

(b) An Existing Licensee in the 1990–2025 MHz band allocated for licensed emerging technology services will maintain primary status in the band until the Existing Licensee's operations are relocated by a New Entrant, are discontinued under the terms of paragraph (a) of this section, or become secondary under the terms of paragraphs (e)(6) or (f)(1)(a) of this section or the Existing Licensee indicates to a New Entrant that it declines to be relocated.

(c) The Commission will amend the operating license of the Existing Licensee to secondary status only if the following requirements are met:

(1) The service applicant, provider, licensee, or representative using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment,

site and FCC fees, as well as any reasonable additional costs that the relocated Existing Licensee might incur as a result of operation in another authorized band or migration to another medium;

(2) The New Entrant completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new microwave or Local Television Transmission Service frequencies and frequency coordination.

(3) The New Entrant builds the replacement system and tests it for comparability with the existing system.

(d) The Existing Licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff. If, within one year after the relocation to new facilities the Existing Licensee demonstrates that the new facilities are not comparable to the former facilities, the New Entrant must remedy the defects.

(e) Subject to the terms of this paragraph (e), the relocation of Existing Licensees will be carried out by MSS licensees in the following manner:

(1) Existing Licensees and MSS licensees may negotiate individually or collectively for relocation of Existing Licensees to one of the channel plans specified in § 74.602(a)(3) of this chapter. Parties may not decline to negotiate, though Existing Licensees may decline to be relocated.

(i) MSS licensees must relocate all Existing Licensees in Nielsen Designated Market Areas (DMAs) 1–30, as such DMAs existed on September 6, 2000, and all fixed stations operating in the 1990–2025 MHz band on a primary basis, prior to beginning operations, except those Existing Licensees that decline relocation. Such relocation negotiations shall be conducted as “mandatory negotiations,” as that term is used in § 101.73 of this chapter. If these parties are unable to reach a negotiated agreement, MSS Licensees may involuntarily relocate such Existing Licensees and fixed stations after December 8, 2004.

(ii) [Reserved]

(iii) On the date that the first MSS licensee begins operations in the 2000–2020 MHz band, a one-year mandatory negotiation period begins between MSS licensees and Existing Licensees in Nielsen DMAs 31–210, as such DMAs existed on September 6, 2000. After the end of the mandatory negotiation period, MSS licensees may involuntarily

relocate any Existing Licensees with which they have been unable to reach a negotiated agreement. As described elsewhere in this paragraph (e), MSS Licensees are obligated to relocate these Existing Licensees within the specified three- and five-year time periods.

(2) Before negotiating with MSS licensees, Existing Licensees in Nielsen Designated Market Areas where there is a BAS frequency coordinator must coordinate and select a band plan for the market area. If an Existing Licensee wishes to operate in the 2025–2110 MHz band using the channels A03–A07 as specified in the Table in § 74.602(a) of this part, then all licensees within that Existing Licensee's market must agree to such operation and all must operate on a secondary basis to any licensee operating on the channel plan specified in § 74.602(a)(3) of this part. All negotiations must produce solutions that adhere to the market area's band plan.

(3) [Reserved]

(4) [Reserved]

(5) As of the date the first MSS licensee begins operations in the 1990–2025 MHz band, MSS Licensees must relocate Existing Licensees in DMAs 31–100, as they existed as of September 6, 2000, within three years, and in the remaining DMAs, as they existed as of September 6, 2000, within five years.

(6) On December 9, 2013, all Existing Licensees will become secondary in the 1990–2025 MHz band. Upon written demand by any MSS licensee, Existing Licensees must cease operations in the 1990–2025 MHz band within six months.

(f) The 1995–2000 MHz band is allocated for Advanced Wireless Services (AWS). AWS licensees in this band are New Entrants as defined in paragraph (a) of this section and therefore must comply with sections (a), (b), (c), (d), and (f) of this section to the extent AWS entrants seek to relocate Broadcast Auxiliary Service licensees operating on a primary basis and fixed service licensees operating on a primary basis in the 1990–2025 MHz band (Existing Licensees).

(1) New entrants are required to protect Existing Licensees in this band from interference.

(i) An AWS licensee may not begin operations in a specific Nielsen Designated Market Area (DMA) until all incumbent operations in that DMA have been either relocated by an MSS licensee, an AWS entrant, or another licensee; or discontinued pursuant to the terms of paragraph (a) of this section. If Existing Licensees remain in the band after December 9, 2013, they must cease operations within six

months of receiving a written demand from either an MSS licensee or an AWS licensee.

(ii) An AWS licensee in this band is required conform to the technical criteria specified in TIA Bulletin TSB 10–F, or procedures other than TSB 10–F that follow generally acceptable good engineering practices pursuant to § 101.105(c) of this chapter, to determine whether its operations in the 1995–2000 MHz band would cause interference to the operations of Existing Licensees in the 1990–2025 MHz band. To the extent that the TSB 10–F demonstrates that an AWS licensee may cause interference to Existing Licensees in an adjacent DMA, the AWS licensee must either relocate the Existing Licensees or revise its proposed operations to ensure, in accordance with the technical criteria in the TSB 10–F, that its revised operations will not cause interference to Existing Licensees in adjacent DMAs.

(2) If a specific DMA has not yet been cleared and an AWS licensee seeks to begin operations in the specific DMA, an AWS licensee may negotiate with an Existing Licensee for the purpose of agreeing to terms under which the Existing Licensees would relocate their operations to one of the channel plans specified in § 74.602(a)(3) to other authorized bands, or to other media; or, alternatively, would discontinue use of the 1990–2025 MHz band. An AWS licensee may negotiate individually or collectively for relocation of Existing Licensees, but the AWS licensee is required to coordinate its anticipated clearance schedule with other New Entrants. New entrants are expected to work cooperatively with all interested parties to avoid duplicative efforts and undue delay in the negotiation and transition process. Parties may not decline to negotiate, though Existing Licensees may decline to be relocated. The good faith provisions set-forth in § 101.73 of this chapter apply throughout the negotiation and relocation process.

(3) If a mandatory negotiation period for or an involuntary relocation of Existing Licensees in a particular DMA has already been triggered pursuant to paragraph (e) of this section or pursuant to provisions set-forth elsewhere in this chapter or by order in WT Docket 02–55, ET Docket 00–258, or ET Docket 95–18, an AWS licensee seeking to operate in that particular DMA will not trigger a new negotiation or involuntary relocation schedule pursuant to this section. If such has not occurred with respect to a specific DMA, the following shall apply to AWS licensees at 1995–2000 MHz:

(i) Existing Licensees in DMAs 1–30, as such DMAs existed on September 6, 2000, are subject to involuntary relocation. Under involuntary relocation, the Existing Licensees are required to relocate providing that the New Entrant complies with the requirements set forth in paragraph (c) of this section and furnishes Existing Licensees with comparable facilities, as defined in § 101.75 (b) of this chapter.

(ii) For the remaining DMAs, as such DMAs existed on September 6, 2000, a one-year mandatory negotiation period will commence between Existing Licensees and New Entrants (if such has not already occurred or been triggered) when an AWS licensee approaches any Existing Licensee operating in the specific DMA. Mandatory negotiations shall be conducted in accordance with the good faith provisions set forth in § 101.73 of this chapter with the goal of providing the Existing Licensees with comparable facilities, as defined in § 101.73(d)(1) through (3) of this chapter. After the end of the mandatory negotiation period, an AWS licensee may involuntarily relocate any Existing Licensees with which they have been unable to reach a negotiated agreement.

(iii) To the extent the Commission adopts an earlier transition date to relocate Existing Licensees in a specific DMA in WT Docket 02–55, ET Docket 00–258, or ET Docket 95–18, AWS licensees and Existing Licensees shall comply with the requirements set forth and adopted in those proceedings.

PART 78—CABLE TELEVISION RELAY SERVICE

18. The authority citation for part 78 continues to read as follows:

Authority: 47 U.S.C. Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309.

19. Section 78.40 is revised as follows:

§ 78.40 Transition of the 1990–2025 MHz band from the Cable Television Relay Service to Emerging Technologies.

(a) New Entrants are collectively defined as those licensees proposing to use emerging technologies to implement Mobile Satellite Services in the 2000–2020 MHz band (MSS licensees), those licensees authorized after July 1, 2004 to implement new Fixed and Mobile services in the 1990–1995 MHz band, and those licensees authorized after September 9, 2004 in the 1995–2000 MHz and 2020–2025 MHz bands. New entrants may negotiate with Cable Television Relay Service licensees operating on a primary basis and fixed

service licensees operating on a primary basis in the 1990–2025 MHz band (Existing Licensees) for the purpose of agreeing to terms under which the Existing Licensees would relocate their operations to the 2025–2110 MHz band, to other authorized bands, or to other media; or, alternatively, would accept a sharing arrangement with the New Entrants that may result in an otherwise impermissible level of interference to the Existing Licensee's operations. New Entrants in the 2020–2025 MHz band are subject to the specific relocation procedures adopted in WT Docket 04–356.

(b) Existing Licensees in the 1990–2025 MHz band allocated for licensed emerging technology services will maintain primary status in the band until a New Entrant completes relocation of the Existing Licensee's operations. Existing Licensee indicates to a New Entrant that it declines to be relocated, become secondary under the terms of paragraphs (f)(6) or (g)(1)(i) of this section.

(c) The Commission will amend the operating license of the Existing Licensee to secondary status only if the following requirements are met:

(1) The service applicant, provider, licensee, or representative using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable additional costs that the relocated Existing Licensee might incur as a result of operation in another authorized band or migration to another medium;

(2) The New Entrant completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new microwave or Cable Television Relay Service frequencies and frequency coordination.

(3) The New Entrant builds the replacement system and tests it for comparability with the existing system.

(d) The Existing Licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff.

(e) If, within one year after the relocation to new facilities the Existing Licensee demonstrates that the new facilities are not comparable to the former facilities, the New Entrant must remedy the defect.

(f) Subject to the terms paragraph (f) of this section, the relocation of Existing

Licensees will be carried out by MSS licensees in the following manner:

(1) Existing Licensees and MSS licensees may negotiate individually or collectively for relocation of Existing Licensees to one of the channel plans specified in § 74.602(a)(3). Parties may not decline to negotiate, though Existing Licensees may decline to be relocated.

(i) MSS licensees must relocate all Existing Licensees in Nielsen Designated Market Areas (DMAs) 1–30, as such DMAs existed on September 6, 2000, prior to beginning operations, except those Existing Licensees that decline relocation. Such relocation negotiations shall be conducted as “mandatory negotiations,” as that term is used in § 101.73 of this chapter. If these parties are unable to reach a negotiated agreement, MSS Licensees may involuntarily relocate such Existing Licensees after December 8, 2004.

(ii) [Reserved]

(iii) On the date that the first MSS licensee begins operations in the 2000–2020 MHz band, a one-year mandatory negotiation period begins between MSS licensees and Existing Licensees in DMAs 31–210, as such DMAs existed on September 6, 2000. After the end of the mandatory negotiation period, MSS licensees may involuntarily relocate any Existing Licensees with which they have been unable to reach a negotiated agreement. As described elsewhere in this paragraph (f), MSS Licensees are obligated to relocate these Existing Licensees within the specified three- and five-year time periods.

(2) Before negotiating with MSS licensees, Existing Licensees in Nielsen Designated Market Areas where there is a BAS frequency coordinator must coordinate and select a band plan for the market area. If an Existing Licensee wishes to operate in the 2025–2110 MHz band using the channel plan specified in § 78.18(a)(6)(i), then all licensees within that Existing Licensee's market must agree to such operation and all must operate on a secondary basis to any licensee operating on the channel plan specified in § 78.18(a)(6)(ii). All negotiations must produce solutions that adhere to the market area's band plan.

(3) [Reserved]

(4) [Reserved]

(5) As of the date the first MSS Licensee begins operations in the 1990–2025 MHz band, MSS Licensees must relocate Existing Licensees in DMAs 31–100, as they existed as of September 6, 2000, within three years, and in the remaining DMAs, as they existed as of September 6, 2000, within five years.

(6) On December 9, 2013, all Existing Licensees will become secondary in the

1990–2025 MHz band. Upon written demand by any MSS Licensee, Existing Licensees must cease operations in the 1990–2025 MHz band within six months.

(g) The 1995–2000 MHz band is allocated for Advanced Wireless Services (AWS). AWS licensees in this band are New Entrants as defined in paragraph (a) of this section and therefore must comply with sections (a), (b), (c), (d), (e) and (g) of this section to the extent AWS entrants seek to relocate Broadcast Auxiliary Service licensees operating on a primary basis and fixed service licensees operating on a primary basis in the 1990–2025 MHz band (Existing Licensees).

(1) AWS licensees are required to protect previously Existing Licensees in this band from interference.

(i) An AWS licensee may not begin operations in a specific Nielsen Designated Market Area (DMA) until all incumbent operations in that DMA have been either relocated by an MSS licensee, an AWS entrant, or another licensee; or discontinued pursuant to the terms of paragraph (a) of this section. If Existing Licensees remain in the band after December 9, 2013, they must cease operations within six months of receiving a written demand from either an MSS licensee or an AWS licensee.

(ii) An AWS licensee in this band is required to conform to the technical criteria specified in TIA Bulletin TSB 10–F, or procedures other than TSB 10–F that follow generally acceptable good engineering practices pursuant to § 101.105(c) of this chapter, to determine whether its operations in the 1995–2000 MHz band would cause interference to the operations of Existing Licensees in the 1990–2025 MHz band. To the extent that the TSB 10–F demonstrates that an AWS licensee may cause interference to Existing Licensees in an adjacent DMA, the AWS licensee must either relocate the Existing Licensees or revise its proposed operations to ensure, in accordance with the technical criteria in the TSB 10–F, that its revised operations will not cause interference to Existing Licensees in adjacent DMAs.

(2) If a specific DMA has not yet been cleared and an AWS licensee seeks to begin operations in the specific DMA, an AWS licensee may negotiate with an Existing Licensee for the purpose of agreeing to terms under which the Existing Licensees would relocate their operations to one of the channel plans specified in § 74.602(a)(3) of this chapter, to other authorized bands, or to other media; or, alternatively, would discontinue use of the 1990–2025 MHz

band. An AWS licensee may negotiate individually or collectively for relocation of Existing Licensees, but the AWS licensee is required to coordinate its anticipated clearance schedule with other New Entrants. New entrants are expected to work cooperatively with all interested parties to avoid duplicative efforts and undue delay in the negotiation and transition process. Parties may not decline to negotiate, though Existing Licensees may decline to be relocated. The good faith provisions set-forth in § 101.73 of this chapter apply throughout the negotiation and relocation process.

(3) If a mandatory negotiation period for or an involuntary relocation of Existing Licensees in a particular DMA has already been triggered pursuant to paragraph (e) of this section or pursuant to provisions set-forth elsewhere in this chapter or by order in WT Docket 02–55, ET Docket 00–258, or ET Docket 95–18, an AWS licensee seeking to operate in that particular DMA will not trigger a new negotiation or involuntary relocation schedule pursuant to this section. If such has not occurred with respect to a specific DMA, the following shall apply to AWS licensees at 1995–2000 MHz:

(i) Existing Licensees in DMAs 1–30, as such DMAs existed on September 6, 2000, are subject to involuntary relocation. Under involuntary relocation, the Existing Licensees are required to relocate providing that the New Entrant complies with the requirements set-forth in paragraph (c) of this section and furnishes Existing Licensees with comparable facilities, as defined in § 101.75(b) of this chapter.

(ii) For the remaining DMAs, as such DMAs existed on September 6, 2000, a one-year mandatory negotiation period will commence between Existing Licensees and New Entrants (if such has not already occurred or been triggered) when an AWS licensee approaches any Existing Licensee operating in the specific DMA. Mandatory negotiations shall be conducted in accordance with the good faith provisions set-forth in § 101.73 of this chapter with the goal of providing the Existing Licensees with comparable facilities, as defined in § 101.73(d)(1)–(3) of this chapter. After the end of the mandatory negotiation period, an AWS licensee may involuntary relocate any Existing Licensees with which they have been unable to reach a negotiated agreement.

(iii) To the extent the Commission adopts an earlier transition date to relocate Existing Licensees in a specific DMA in WT Docket 02–55, ET Docket 00–258, or ET Docket 95–18, AWS licensees and Existing Licensees shall

comply with the requirements set-forth and adopted in those proceedings.

PART 101—FIXED MICROWAVE SERVICES

20. The authority citation for part 101 continues to read as follows:

Authority: 47 U.S.C. Secs. 154, 303.

21. Revise § 101.69 to read as follows: Policies Governing Microwave Relocation From the 1850–1990 and 2110–2200 MHz Bands

§ 101.69 Transition of the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands from the fixed microwave services to personal communications services and emerging technologies.

Fixed Microwave Services (FMS) in the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands have been allocated for use by emerging technology (ET) services, including Personal Communications Services (PCS), Advanced Wireless Services (AWS), and Mobile Satellite Services (MSS). The rules in this section provide for a transition period during which ET licensees may relocate existing FMS licensees using these frequencies to other media or other fixed channels, including those in other microwave bands.

(a) ET licensees may negotiate with FMS licensees authorized to use frequencies in the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands, for the purpose of agreeing to terms under which the FMS licensees would:

(1) Relocate their operations to other fixed microwave bands or other media; or alternatively

(2) Accept a sharing arrangement with the ET licensee that may result in an otherwise impermissible level of interference to the FMS operations.

(b)–(c) [Reserved]

(d) Relocation of FMS licensees in the 2110–2150 and 2160–2200 MHz band will be subject to mandatory negotiations only. Except as provided in paragraph (e) of this section, mandatory negotiation periods are defined as follows:

(1) Non-public safety incumbents will have a two-year mandatory negotiation period; and

(2) Public safety incumbents will have a three-year mandatory negotiation period.

(e) Relocation of FMS licensees by Mobile-Satellite Service (MSS) licensees, including MSS licensees providing Ancillary Terrestrial Component (ATC) service, will be subject to mandatory negotiations only. Mandatory negotiation periods that are

triggered in the first instance by MSS/ATC licensees are defined as follows:

(1) The mandatory negotiation period for non-public safety incumbents will end December 8, 2004.

(2) The mandatory negotiation period for public safety incumbents will end December 8, 2005.

(f) AWS licensees operating in the 1915–1920 MHz band will follow the requirements and procedures set forth in ET Docket No. 00–258 and WT Docket No. 04–356.

(g) If no agreement is reached during the mandatory negotiation period, an ET licensee may initiate involuntary relocation procedures. Under involuntary relocation, the incumbent is required to relocate, provided that the ET licensee meets the conditions of § 101.75.

22. Section 101.79 is amended by revising paragraph (a) to read as follows:

§ 101.79 Sunset provisions for licensees in the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands.

(a) FMS licensees will maintain primary status in the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands unless and until an ET licensee (including MSS/ATC operator) requires use of the spectrum. ET licensees are not required to pay relocation costs after the relocation rules sunset. Once the relocation rules sunset, an ET licensee may require the incumbent to cease operations, provided that the ET licensee intends to turn on a system within interference range of the incumbent, as determined by TIA TSB 10–F (for terrestrial-to-terrestrial situations) or TIA TSB 86 (for MSS satellite-to-terrestrial situations) or any standard successor. ET licensee notification to the affected FMS licensee must be in writing and must provide the incumbent with no less than six months to vacate the spectrum. After the six-month notice period has expired, the FMS licensee must turn its license back into the Commission, unless the parties have entered into an agreement which allows the FMS licensee to continue to operate on a mutually agreed upon basis. The date that the relocation rules sunset is determined as follows:

(1) For the 2110–2150 MHz and 2160–2180 MHz bands, ten years after the first ET license is issued in the respective band; and

(2) For the 2180–2200 MHz band, December 8, 2013 (*i.e.*, ten years after the mandatory negotiation period begins for MSS/ATC operators in the service).

* * * * *

[FR Doc. E8–14423 Filed 6–24–08; 8:45 am]

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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 509 and 552

[GSAR Case 2006–G512; Docket 2008–0007; Sequence 9]

RIN 3090–AI57

General Services Acquisition Regulation; GSAR Case 2006–G512; Rewrite of GSAR Part 509, Contractor Qualifications

AGENCY: Office of the Chief Acquisition Officer, General Services Administration (GSA).

ACTION: Proposed rule with request for comments.

SUMMARY: The General Services Administration (GSA) is proposing to amend the General Services Acquisition Regulation (GSAR) to update language addressing contractor qualifications. This rule is a result of the General Services Administration Acquisition Manual (GSAM) Rewrite initiative undertaken by GSA to revise the GSAM to maintain consistency with the FAR, and to implement streamlined and innovative acquisition procedures that contractors, offerors and GSA contracting personnel can utilize when entering into and administering contractual relationships. The GSAM incorporates the General Services Administration Acquisition Regulation (GSAR) as well as internal agency acquisition policy.

GSA will rewrite each part of the GSAR and GSAM, and as each GSAR part is rewritten, will publish it in the **Federal Register**.

This is one of a series of revisions. It covers the rewrite of GSAR Part 509, Contractor Qualifications.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before August 25, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by GSAR Case 2006–G512 by any of the following methods:

• Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “GSAR Case 2006–G512” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with GSAR Case 2006–G512. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “GSAR Case 2006–G512” on your attached document.

• Fax: 202–501–4067.

• Mail: General Services

Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2006–G512 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925, or by e-mail at meredith.murphy@gsa.gov for clarification of content. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC 20405, (202) 501–4755. Please cite GSAR Case 2006–G512.

SUPPLEMENTARY INFORMATION:

A. Background

The GSAR Rewrite Project

On February 15, 2006, GSA published an Advance Notice of Proposed Rulemaking (ANPR) with request for comments because GSA is beginning the review and update of the General Services Administration Acquisition Regulation (GSAR).

The GSAR rewrite will—

• Consider comments received from the ANPR, published in the **Federal Register** at 71 FR 7910, February 15, 2006.

• Change “you” to “contracting officer.”

• Maintain consistency with the FAR but eliminate duplication.

• Revise GSAR sections that are out of date, or impose inappropriate burdens on the Government or contractors, especially small businesses.

• Streamline and simplify.

In addition, GSA has recently reorganized into two, rather than three services. Therefore, the reorganization of the Federal Supply Service (FSS) and the Federal Technology Service (FTS) into the Federal Acquisition Service (FAS) will be considered in the rewrite initiative.

The Rewrite of Part 509

This proposed rule contains the revisions made to Part 509, Contractor Qualifications. There are no major substantive changes to the policies. GSA Form 353, Performance Evaluation and Facilities Report, is proposed for deletion so that FAR forms would be used instead. Subsection 509.405–1(b) and clauses 552.209–70 through

552.209–73 are proposed for deletion as unnecessary. The explanation of “auditor” in 509.105–1 is removed as unnecessary - it is partly duplicative (credit and finance) and too restrictive (does not allow use of DCAA). Subsection 509.406–3(b)(7) is deleted as duplicative of 509.406–3(b)(5). The debarment legal authorities in 509.401 are updated. The term “Suspension and Debarment Official” is used throughout the Part.

Discussion of Comments

As a result of the ANPR, GSA received two comments pertaining to GSAR Part 509.

One commenter suggested revising the Assignment of Claims clause, GSAR 552.232–23, to facilitate contractor teaming arrangements. The proposed revision applies to GSAM Part 532, not Part 509; it has therefore been referred to the Part 532 Rewrite Team, which has not yet begun work. Any changes proposed to the Assignment of Claims clause by the Part 532 Rewrite Team will, of course, be published for public comment. The other commenter suggested GSA consider placing guidance on teaming arrangements that is on GSA’s website in the GSAR. There is no guidance on teaming arrangements on a GSA-wide website. One purchasing office within GSA does have such guidance on a website, but that guidance is unique to Federal Supply Schedules. Therefore, the team that is revising GSAM Part 508, Required Sources of Supplies and Services, will incorporate the regulatory and procedural material on Schedules teaming arrangements in GSAM Part 508, ensure that it is published for public comment, and oversee the removal of the regulatory and procedural teaming arrangement material from the Federal Acquisition Service (FAS) website.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The General Services Administration does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the only substantive change is a minor one, deleting a GSA-unique form in favor of using the FAR forms. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from

small businesses and other interested parties. GSA will consider comments from small entities concerning the affected GSAR Parts 509 and 552 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (GSAR case 2006–G512), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the GSAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 3090–0007.

List of Subjects in 48 CFR Parts 509 and 552

Government procurement.

Dated: June 12, 2008.

Al Matera,

Director, Office of Acquisition Policy, General Services Administration.

Therefore, GSA proposes to amend 48 CFR parts 509 and 552 as set forth below:

1. The authority citation for 48 CFR parts 509 and 552 is revised to read as follows:

Authority: 40 U.S.C. 121(c).

PART 509—CONTRACTOR QUALIFICATIONS

2. Revise section 509.105 to read as follows:

509.105 Procedures.

509.105–1 Obtaining information.

(a) *From a prospective contractor.* FAR 9.105–1 lists a number of sources of information that a contracting officer may utilize before making a determination of responsibility. The contracting officer may request information directly from a prospective contractor using GSA Form 527, Contractor’s Qualifications and Financial Information, but only after exhausting other available sources of information.

(b) *From Government personnel.* The contracting officer may solicit and consider information from any appropriate activities, *e.g.*, legal counsel, quality control, contract management, credit and finance, and auditors before determining that an offeror is responsible.

509.105–2 Determinations and documentation.

(a) The contracting officer shall provide written notification to a prospective contractor determined not responsible. Include the basis for the

determination. Notification provides the prospective contractor with the opportunity to correct any problem for future solicitations.

(b) Due to the potential for de facto debarment, the contracting officer shall avoid making repeated determinations of nonresponsibility based on the same past performance information.

(c) To provide for timely consideration of the need to institute action to debar a contractor, the contracting officer shall submit a copy of each nonresponsibility determination, other than those based on capacity or financial capability, to the Suspension and Debarment Official in the Office of the Chief Acquisition Officer.

509.106 [Removed]

3. Section 509.106 is removed.

Subpart 509.2 [Removed]

4. Subpart 509.2 is removed.

5. Revise section 509.306 to read as follows:

509.306 Solicitation requirements.

The clauses at FAR 52.209–3 and 52.209–4 do not cover all the solicitation requirements described in FAR 9.306. If a solicitation contains a testing and approval requirement, the contracting officer must address the requirements in FAR 9.306(d) and (f) through (j) in the solicitation’s Section H, special contract requirements.

509.308 [Removed]

6. Section 509.308 is removed.

7. Revise section 509.401 to read as follows:

509.401 Applicability.

This subpart applies to all the following:

(a) Acquisitions of personal property, nonpersonal services, construction, and space in buildings.

(b) Acquisition of transportation services (Federal Management Regulation (FMR) Parts 102–117 and 102–118 (41 CFR Parts 102–117 and 102–118)).

(c) Contracts for disposal of personal property (FMR Parts 102–36 through 102–38 (41 CFR Parts 102–36 through 102–38)).

(d) Covered transactions as defined by 41 CFR Part 105–68.

8. Amend section 509.403 by adding, in alphabetical order, the definitions “Debarred official” and “Suspending official”; and, in the definition “Fact-finding official” by removing the word “GSA” and adding the word “Civilian” in its place. The added text reads as follows:

509.403 Definitions.

Debarring official means the Suspension and Debarment Official within the Office of the Chief Acquisition Officer.

* * * * *

Suspending official means the Suspension and Debarment Official within the Office of the Chief Acquisition Officer.

9. Revise section 509.405 to read as follows:

509.405 Effect of listing.**509.405-1 Continuation of current contracts.**

(a) When a contractor appears on the current EPLS, consider terminating a contract under any of the following circumstances:

(1) Any circumstances giving rise to the debarment or suspension also constitute a default in the contractor's performance of the contract.

(2) The contractor presents a significant risk to the Government in completing the contract.

(3) The conduct that provides the cause of the suspension, proposed debarment, or debarment involved a GSA contract.

(b) Before terminating a contract when a contractor appears on the current EPLS, consider the following factors:

(1) Seriousness of the cause for debarment or suspension.

(2) Extent of contract performance.

(3) Potential costs of termination and procurement.

(4) Need for or urgency of the requirement, contract coverage, and the impact of delay for procurement.

(5) Availability of other safeguards to protect the Government's interest until completion of the contract.

(6) Availability of alternate competitive sources to meet the requirement (e.g., other multiple award contracts, readily available commercial items).

(c) The responsibilities of the agency head under FAR 9.405-1 are delegated to the GSA Suspension and Debarment Official.

509.405-2 Restrictions on subcontracting.

The responsibilities of the agency head under FAR 9.405-2(a) are delegated to the GSA Suspension and Debarment Official.

10. Revise section 509.406-1 to read as follows:

509.406-1 General.

The Suspension and Debarment Official is the designee under FAR 9.406-1(c).

11. Amend section 509.406-3 by—

a. Removing from paragraphs (a) and (b), the words “debarment official” and adding the words “Suspension and Debarment Official” in its place each time it appears;

b. Removing from paragraph (b)(2), the word “Number” and adding the word “Numbers” in its place;

c. Removing paragraph (b)(7);

d. Revising paragraph (c); and

e. Removing from paragraph (d), the words “debarment official” and adding the words “Suspension and Debarment Official” in its place each time it appears.

The revised text reads as follows:

509.406-3 Procedures.

* * * * *

(c) *Review.* The Suspension and Debarment Official will review the report, and after coordinating with assigned legal counsel—

(1) Initiate debarment action;

(2) Decline debarment action;

(3) Request additional information; or

(4) Refer the matter to the OIG for further investigation and development of a case file.

* * * * *

509.407-1 [Amended]

12. Amend section 509.407-1 by removing the words “suspending official” and adding “Suspension and Debarment Official” in its place.

509.407-3 [Amended]

13. Amend section 509.407-3 by removing the words “suspending official” and adding “Suspension and Debarment Official” in its place each time it appears.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**552.209-70 through 552.209-73**

[Removed]

14. Sections 552.209-70 through 552.209-73 are removed.

[FR Doc. E8-14392 Filed 6-24-08; 8:45 am]

BILLING CODE 6820-61-S

DEPARTMENT OF TRANSPORTATION**Pipeline and Hazardous Materials Safety Administration****49 CFR Part 192**

[Docket No. PHMSA-RSPA-2004-19854]

RIN 2137-AE15

Pipeline Safety: Integrity Management Program for Gas Distribution Pipelines

AGENCY: Pipeline and Hazardous Materials Safety Administration

(PHMSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking.

SUMMARY: PHMSA proposes to amend the Federal Pipeline Safety Regulations to require operators of gas distribution pipelines to develop and implement integrity management (IM) programs. The purpose of these programs is to enhance safety by identifying and reducing pipeline integrity risks. The IM programs required by the proposed rule would be similar to those currently required for gas transmission pipelines, but tailored to reflect the differences in and among distribution systems. In accordance with Federal law, the proposed rule would require operators to install excess flow valves on certain new and replaced residential service lines, subject to feasibility criteria outlined in the rule. Based on the required risk assessments and enhanced controls, the proposed rule also would establish procedures and standards permitting risk-based adjustment of prescribed intervals for leak detection surveys and other fixed-interval requirements in the agency's existing regulations for gas distribution pipelines. To further minimize regulatory burdens, the proposed rule would establish simpler requirements for master meter and liquefied petroleum gas (LPG) operators, reflecting the relatively lower risk of these small pipeline systems.

This proposal also addresses statutory mandates and recommendations from the DOT's Office of the Inspector General (OIG) and stakeholder groups.

DATES: Anyone may submit written comments on proposed regulatory changes by September 23, 2008. PHMSA will consider late-filed comments to the extent possible.

ADDRESSES: Comments should reference Docket No. PHMSA-RSPA-2004-19854 and may be submitted in the following ways:

- *E-Gov Web Site:* <http://www.regulations.gov>. This site allows the public to enter comments on any Federal Register notice issued by any agency.

- *Fax:* 1-202-493-2251.
- *Mail:* DOT Docket Operations Facility (M-30), U.S. Department of Transportation, West Building, 1200 New Jersey Avenue SE., Washington, DC 20590.

- *Hand Delivery:* DOT Docket Operations Facility, U.S. Department of Transportation, West Building, 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.

Instructions: In the E-Gov Web site: <http://www.regulations.gov>, under "Search Documents" select "Pipeline and Hazardous Materials Safety Administration." Next, select "Notices," and then click "Submit." Select this rulemaking by clicking on the docket number listed above. Submit your comment by clicking the yellow bubble in the right column then following the instructions.

Identify docket number PHMSA-RSPA-2004-19854 at the beginning of your comments. For comments by mail, please provide two copies. To receive PHMSA's confirmation receipt, include a self-addressed stamped postcard. Internet users may access all comments at <http://www.regulations.gov>, by following the steps above.

Note: PHMSA will post all comments without changes or edits to <http://www.regulations.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).

FOR FURTHER INFORMATION CONTACT: Mike Israni at (202) 366-4571 or by e-mail at mike.israni@dot.gov.

SUPPLEMENTARY INFORMATION: The following subjects are addressed in this preamble:

- I. Background
 - A. Integrity Management (IM)
 - B. Nature of U.S. Distribution Pipeline Systems
 - C. Safety of Distribution Pipeline Systems
 - D. Distribution Pipeline Safety Regulation
 - E. Applicability of Integrity Management Plans (IMP) to Distribution Pipeline Systems
- Distribution Systems Are Located in Highly Populated Areas
- Challenges of Assessment or Testing
- II. American Gas Foundation Study
- III. Recommendations or Mandates of Oversight Bodies
 - A. DOT Inspector General
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- IV. Stakeholder Groups
 - A. Stakeholder Groups' Involvement
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 - D. Findings Relevant To Leak Management
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- V. Public Meetings
 - A. Public Meetings Concerning Distribution Integrity Management

- B. EFV Public Meeting
- VI. Guidance for Integrity Management
- VII. Applicability to Small and Simple Distribution Systems; Request for Comments
 - A. Master Meter and LPG Operators
 - B. Very Small Distribution Systems
- VIII. Plastic Pipe Issues
 - A. Plastic Pipeline Database and Availability of Failure Information
 - B. Plastic Pipe Marking
- IX. Monitoring the Effectiveness of Actions
- X. Deviating From Required Intervals Based on Operator's Distribution Integrity Management Plan (DIMP)
- XI. Prevention Through People
- XII. Summary Description of Proposed Rule
- XIII. Section-by-Section Analysis
- XIV. Regulatory Analyses and Notices

I. Background

A. Integrity Management

PHMSA is initiating this rulemaking proceeding in order to extend its integrity management approach to the largest segment of the Nation's pipeline network—the distribution systems that directly serve homes, schools, businesses, and other natural gas consumers. Beginning in 2000, the agency has promulgated regulations requiring operators of hazardous liquid pipelines (49 CFR 195.452, published at 65 FR 75378 and 67 FR 2136) and gas transmission pipelines (49 CFR 192, Subpart O, published at 68 FR 69778) to develop and follow individualized integrity management (IM) programs, in addition to PHMSA's core pipeline safety regulations. The IM approach was designed to promote continuous improvement in pipeline safety by requiring operators to identify and invest in risk control measures beyond core regulatory requirements.

The IM regulations for hazardous liquid and gas transmission pipelines are similar. Fundamentally, both require that operators analyze their pipelines to identify and manage factors that affect risks to the pipeline and risks posed by the pipeline. Operators must integrate the best available information about their pipelines to inform their risk decisions. Both rules require that operators identify segments of their pipelines where an incident could cause serious consequences and focus priority attention in those areas. Both rules also require that operators implement a program to provide greater assurance of the integrity of these pipeline segments. Actions required in these segments include assessments utilizing in-line inspection tools, pressure testing, direct assessment, or other technology that provides an equivalent understanding of the pipe condition. While existing regulations required prompt repair of safety-significant problems, the IM

regulations require operators to inspect their lines and perform repairs within a period of time commensurate with the safety significance of the problems found. The rules also require that operators implement measures that will help prevent accidents from occurring on their high-consequence segments and that will mitigate the consequences if an accident does occur.

Although it is too early to draw statistically-significant conclusions about the effectiveness of the IM programs for transmission pipelines, early indications are very favorable. The initial inspections under IM have identified tens of thousands of locations where the pipelines were damaged (including damage by external force/excavation and by conditions like corrosion) and repairs were made before accidents could occur. Operators have implemented additional safety measures to address higher-risk situations, many of which are unique to their individual circumstances. These early successes have fueled interest in extending the IM approach to gas distribution pipeline systems.

B. Nature of U.S. Distribution Pipeline Systems

As of 2006, more than 1.2 million miles of gas mains are in service in the U.S. "Mains" are the pipelines providing a common supply to a certain number (often hundreds) of homes and businesses. These pipelines are often located under city streets and range in size from less than 2 inches in diameter to more than 8 inches in diameter. These mains feed over 63 million "services." A "service" is the pipe that connects to a main and delivers gas to an individual customer, at the meter. Service lines are usually very small, less than 1-inch in diameter except for those serving larger industrial and commercial customers. The length of service lines varies widely. In dense urban areas where townhouses are built right up to the sidewalk, a service line may be only a few feet long. In rural areas, service lines may be several hundred feet long, perhaps as long as a mile. PHMSA uses 65 feet as its estimate of the average length of a service line. Applying that value, the 63 million services represent nearly another 800,000 miles of pipeline, meaning that the total amount of pipeline in U.S. distribution pipeline systems is approximately two million miles. Use of natural gas continues to grow in the U.S., and the amount of distribution pipeline in service increases accordingly. Since 2001, an additional 5.1 million customers have been added, representing an increase of

over 173,000 miles of distribution pipeline.

Natural gas has been distributed by pipeline in some areas for over a hundred years. Pipeline systems in these areas were originally small, serving a few customers. These systems often merged as larger distribution companies were formed. The materials in use in some of these systems reflect older (e.g., cast iron, copper, bare steel) as well as newer (e.g., polyethylene plastic and cathodically-protected coated steel) technologies. Two-thirds of States have programs that require distribution pipeline operators to replace older pipe,¹ but much of the pipe in service is still many decades old.

In other areas, distribution of natural gas by pipeline is a relatively new phenomenon. In some rural areas, for example, gas may not have been available until a transmission pipeline was routed into the vicinity. Then, municipalities or distribution companies may have created a distribution system to bring natural gas service to customers for whom it was previously unavailable. Systems of this nature tend to be relatively uniform in age and type of materials, but the threats to integrity (such as electrical interference from other buried substructures and localized flooding or vehicular traffic patterns) may still vary from one location to another. Diversity of the gas pipeline system will likely increase as systems age, new customers are added, and portions of the original systems are replaced. The bulk of newer gas distribution pipeline systems, and replacements for older pipe, are comprised of plastic pipe. More than half of the pipelines in U.S. gas distribution systems are non-metallic.

C. Safety of Distribution Pipeline Systems

By operation of the Federal Pipeline Safety Laws, 49 U.S.C. 60102, the Federal government has assumed ultimate responsibility for the safety oversight of distribution pipeline operators. PHMSA's regulations in 49 CFR Part 192 establish a minimum set of safety requirements that all States must implement, although States may impose more stringent requirements on intrastate systems. PHMSA also collects data concerning distribution system mileage, incidents that occur on distribution systems, their leak repair experience and other information about the size, age and material(s) of construction of their distribution piping.

¹ Some of these programs involve a limited number of operators, as described further below.

PHMSA considered this information, its historical trends, and projected patterns in proposing IM regulations for distribution pipelines.

Incidents on distribution pipelines kill and injure more people than incidents on gas transmission pipelines. As noted above, nearly two million miles of distribution pipelines are in operation in the U.S., compared with approximately 300,000 miles of gas transmission pipelines. In addition, distribution pipelines are almost all located in populated areas. Large portions of gas transmission pipelines traverse rural areas where there are few people. Largely because of these differences, incidents on distribution pipelines in 2006 resulted in five times as many fatalities (16 vs. 3) and six times as many serious injuries (25 vs. 4) as those on gas transmission pipelines, even though the total number of incidents on each type of pipeline was about the same (141 vs. 134). Because of the much larger number of miles of distribution pipeline, the normalized rate of fatalities and injuries (i.e., the number per 100,000 miles) is similar for the two types of lines, with a slightly lower rate for distribution lines. As described further below, the trend in gas distribution incidents involving fatalities and serious injuries (those requiring hospitalization) was downward from 1990–2002. In the years since, however, the number has again started to increase.

D. Distribution Pipeline Safety Regulation

Pursuant to Federal law, most oversight of gas distribution pipeline systems is performed directly by States. Under 49 U.S.C. 60105 and 60106, a State may exercise jurisdiction over intrastate gas distribution operations within the State if its pipeline safety program is certified by PHMSA or if it enters into an agency agreement with DOT. Under these provisions, 48 States (excluding only Alaska and Hawaii) and the District of Columbia currently exercise safety jurisdiction over some or all gas distribution operations within their boundaries. States must implement the minimum standards established by PHMSA but have a variety of ways in which they can oversee distribution pipeline safety. They can simply mirror the Federal pipeline safety program; they can impose additional requirements, beyond the Federal minimum; they can engage in special oversight programs with individual operators or groups of operators; or finally, they can provide incentives for safety improvements, often through their rate-setting authority.

It is appropriate that the principal actions for regulating distribution pipeline safety rest with the States. States need to balance safety and affordability. They need to ensure that the particular needs of their citizenry are fulfilled. They also need to ensure that the applied safety standards are appropriate for the unique environment in which gas distribution occurs. Distribution pipeline systems are limited in geographic scope, although some systems serve many thousands of customers. The environment in which they operate significantly affects the safety issues that they face. Factors such as weather (dry/wet, hot/subject to freezing), soil conditions (corrosivity), and the local economy (significant construction and excavation activity) can significantly shape the threats affecting individual distribution operators and the actions necessary to address those threats. Proximity to gas-producing regions also can be important, as natural gas that is distributed near production areas may be subject to less processing and may contain more contaminants, with greater potential to affect system integrity, than gas that is processed for long-distance transportation.

States must have flexibility to deal with their local circumstances. It would be both ineffective and inefficient, for example, to impose frost heave damage requirements in the desert southwest. States address these differences by imposing some requirements that exceed those in the Federal safety code.

The National Association of Pipeline Safety Representatives (NAPSR)² surveyed its members to determine the extent to which they impose requirements or programs that exceed the Federal minimum.³ The survey, addressed to each State pipeline safety program manager, asked whether the State imposes additional requirements or has infrastructure safety improvement programs implemented that exceed the federal minimum requirements. NAPSR asked its members to provide a brief description of any positive responses.

Forty-eight State agencies and the District of Columbia responded to the NAPSR survey. All but six reported some requirements or programs exceeding the Federal minimum standards. The results were as follows:

- 20 States have additional reporting requirements;

² NAPSR's members are the managers of the pipeline safety regulatory staff from each state (and the District of Columbia) that is certified by, or a designated agent of, DOT for regulatory oversight.

³ NAPSR conducted the survey in 2004–2005.

- 11 States provide enhanced oversight and observation of work/testing on the pipelines;
- 11 States have additional damage prevention requirements;
- 13 States require additional leak testing;
- 11 States impose leak response requirements (including eight of the 13 that require additional leak testing);
- Eight States impose either additional odorant requirements or more frequent testing;
- Six States impose additional design and installation requirements;
- Six States impose additional training and qualification of operator personnel requirements.
- Six States impose additional requirements related to cathodic protection systems used to protect steel pipe from corrosion;
- Six States require their State regulators to approve operators' operating and maintenance plans;
- Five States impose operating pressure requirements;
- Five States impose additional customer meter requirements;
- Three States require that operators cap off abandoned service lines after specified periods;
- Four States extend operator responsibility for maintenance of service/customer lines;
- Four States encourage safety enhancement through rate cases, and approve the operation of distribution pipeline systems by specific companies;
- One State requires its operators to conduct an annual evaluation of all cast iron and unprotected steel pipe in their distribution systems; and
- One State requires its operators to remediate any evidence found of corrosion within 90 days.

The most significant area in which States reported actions beyond Federal standards was replacement of aging and inferior infrastructure. Thirty-three States, or two-thirds of those responding, reported they have some kind of program for replacing infrastructure, including cast-iron pipe, uncoated steel pipe, copper pipe, and some types of plastic pipe. These programs varied in scope and schedule, often reflecting the relative amount of targeted infrastructure present in each State. NAPSR collected the following data on pipe replacement programs:

- Twelve States reported their programs involved all (or nearly all) operators;
- Sixteen States reported their programs involved one or a limited number of operators, often in response to past accidents or rate cases;

- Four States provided no information from which to estimate the scope of their programs;
- Eight States reported that their programs are complete (*i.e.*, all targeted infrastructure has been replaced) or will be completed by 2010;
- Eight States reported that their programs will be complete by about 2020;
- Four States reported that their programs would not be complete until after 2020; and
- Twelve States did not report an expected completion date. These results indicate States can and do exercise authority beyond minimum Federal requirements. Additional requirements are focused in scope, and vary from State to State, based on local needs and issues. Programs to replace older, inferior infrastructure are the most widespread practice beyond Federal requirements. Such programs are in progress in two-thirds of the States, although some of these programs are of limited scope (*i.e.*, affecting a single operator).

Still, despite these State efforts, serious incidents continue to occur on distribution pipeline systems. As discussed above, the number of serious incidents per mile is similar to that for gas transmission pipelines, but there are many more miles of distribution pipelines. As a result, serious incidents on gas distribution pipelines kill or injure more people annually than do incidents on gas transmission pipelines. Even if the number of serious incidents on transmission pipelines is significantly reduced, major improvement in overall safety will not be achieved unless the number of incidents on distribution pipelines is also reduced. PHMSA's approach to achieving improvement for gas transmission pipelines was to require that each operator analyze its own pipeline's risks, through an integrity management program, and address them as necessary. PHMSA concludes that the same approach is appropriate for distribution pipelines.

Although the additional State requirements provide protection beyond the minimum Federal standards to help assure the integrity of distribution pipeline systems, the requirements vary by State. No State requires a comprehensive systematic evaluation and management of the risks associated with operating gas distribution pipelines similar to PHMSA's existing IM requirements or to the requirements we are proposing in this Notice. Nevertheless, some State imposed requirements likely encompass individual actions operators would be

required to take under an IM program, offsetting the costs for those operators to comply with this rule.

The National Association of Regulatory Utility Commissioners (NARUC) has also considered the need for additional safety regulation. NARUC members represent Public Service/Safety Commissions under whose auspices States usually conduct pipeline safety regulatory programs. As such, NARUC represents executive management of State pipeline safety programs. In February 2005, the NARUC Board of Directors adopted a resolution encouraging development of an approach to distribution IM using risk-based, technically-sound, and cost-effective performance-based measures. NARUC recommended an approach based on the notion that operators are knowledgeable about their infrastructure and can identify and respond to threats against their systems in order to reduce the risk of system failures while balancing the need to ensure continued safe, reliable service at a minimal financial cost.

NARUC based its resolution on the long-standing commitment of industry and government to operate the United States' gas pipeline system reliably and safely. They acknowledged recent examinations by regulators, legislators, and gas distribution pipeline operators to determine the most effective approach to maintaining and enhancing distribution system integrity and safety. NARUC commented that States must take into account varying circumstances including: geography, energy customer base, local economy, system age and construction materials, size of distribution operations and consumption patterns of gas customers (ranging from large-volume manufacturers to mid-size businesses to single-family residences), as well as a State's overall executive policies and goals.

NARUC noted that due to significant structural, geographical, and functional differences among gas transmission and distribution companies, it would be infeasible to apply many transmission integrity requirements to distribution systems. NARUC further noted any adjustment to an operator's distribution IM program should be responsive to the operator's safety performance, existing regulations, and current practices affecting such performance.

E. Applicability of Integrity Management Plans (IMP) to Distribution Pipeline Systems

The basic premise of the integrity management programs for gas transmission and hazardous liquid

pipelines—that safety is improved by identifying risks and taking actions to address them—is applicable to distribution pipeline systems. However, because of the differences between distribution pipeline systems and pipeline systems covered by current IM regulations, the physical inspections (e.g. In-Line Inspection tools and Direct Assessment methods) of pipeline segments required by the current IM regulations cannot be required on distribution pipelines. Because the same IM regulations will not work, a different type of integrity management approach is necessary.

Distribution Systems Are Located in Highly Populated Areas

The first element of existing IM program requirements for transmission pipelines is to identify so-called “high consequence areas”—those segments of the pipeline where an incident/break could produce serious harm to people or the environment. This is important for hazardous liquid and gas transmission pipelines because both traverse large distances, including areas that are sparsely populated or where risk of serious environmental damage would be small. Identifying high consequence areas improves the effectiveness of integrity management requirements by focusing inspection and assessment efforts on the pipe where significant consequences could occur.

As described above, gas distribution pipeline systems are different. Unlike transmission pipelines, they do not traverse long distances and generally do not include significant areas of limited population. They operate almost entirely in populated areas, because their purpose is to provide gas service to the residences and businesses of those populations. Thus, by contrast to a transmission pipeline, identifying areas where the gas distribution pipeline is near concentrations of people would not tend to identify a limited portion of the pipeline on which integrity management attention should be focused. Some other means of prioritizing operator attention, based on risk, is needed for distribution pipelines.

Challenges of Assessment or Testing

As described above, distribution pipeline systems consist of a complex network of mains and services. They include considerable lengths of pipeline of very small diameter and many non-metallic materials. They also include extensive branching, with a typical city main being connected to a new service roughly every one hundred feet. These differences make it impossible to use

many of the techniques required by the existing IMP regulations to assess the physical condition of the pipeline. One technique (in-line inspection) involves passing through the inside of a pipeline inspection tools that use magnetic detection techniques to identify areas where the wall of a steel pipe has been thinned by corrosion or damage. Another (direct assessment) involves using indirect inspection tools to identify areas where the electrical current imposed on steel pipes to prevent corrosion is interrupted or is experiencing interference. Distribution pipelines are too small and have too many connections to allow in-line inspection tools to pass through the lines, and approximately half of the distribution pipeline system is non-metallic (e.g., plastic), meaning that neither the internal tools nor the indirect inspections used for direct assessment can be used. Pressure testing (isolating a pipe and filling it with water or air at high pressure to see if it leaks) can be used, but would require that service be cut off to all customers served by the portion of the system being tested. A continuing program of such testing would essentially constitute the natural gas equivalent of “rolling blackouts” and would be unacceptable to the American public. Distribution pipelines can be inspected by digging to expose the pipeline, and operators are required to do such inspections when pipe must be excavated for other reasons. Digging up all distribution pipelines on a periodic basis, however, is clearly impractical.

For these reasons, the inspection requirements of current IMP regulations cannot be used for distribution pipelines.

Some other approach is needed. As described below, PHMSA worked with stakeholder groups and held two public meetings to help determine how best to apply IMP principles in the gas distribution pipeline environment.⁴ These public meetings are discussed further below.

II. American Gas Foundation Study

The gas distribution industry recognized the need to consider its safety record and to determine if additional actions are needed. In late 2003, the American Gas Foundation (AGF) launched a study of the safety performance and integrity of gas distribution pipeline systems. Currently,

operators must report an incident to PHMSA if it meets the reporting criteria in 49 CFR Part 191. The AGF study examined the record of incidents reported to PHMSA on gas distribution pipeline systems from 1990 through 2002 (the latest year for which data were complete at the time the study began) and compared that record to incidents reported for transmission pipelines over the same period.

The AGF study analyzed trends in reported incidents and focused specifically on incidents involving deaths or injuries requiring hospitalization (called “serious incidents” in the study). A joint team, the Distribution Infrastructure Government-Industry Team (DIGIT), was established to oversee the AGF study. This team consisted of representatives of the AGF, the American Public Gas Association, and State pipeline safety regulators. PHMSA took part in DIGIT as an observer.

The AGF published its findings in January 2005.⁵ The AGF study found a downward trend in serious incidents over the 13-year period analyzed at a 95 percent statistical confidence level. (No statistically significant trend was found when considering all reported incidents.) The number of serious incidents per 100,000 miles of distribution pipeline was essentially the same as that for gas transmission pipelines over the analyzed period. There are many more miles of distribution pipelines, however. Historically, distribution pipeline incidents result in more deaths and injuries than incidents on gas transmission or hazardous liquid pipelines, largely because distribution lines are located in populated areas and constitute a much larger share of the mileage of working pipelines.

AGF found the primary cause of serious incidents was outside force damage, principally third-party excavation. Outside force damage represented 47 percent of serious incidents over the analyzed period. Corrosion caused 6.5 percent of serious incidents, and all other causes contributed less than 10 percent each.

AGF also examined practices gas distribution operators use to address threats to their systems, both those required by regulation and those performed voluntarily. The study found no obvious gaps and that industry practices exist to address known threats. Further, the study concluded (as for

⁴ The public meetings concerning integrity management requirements were held on December 16, 2004 and September 21, 2005. A third meeting, on June 17, 2005, focused exclusively on appropriate requirements for excess flow valves. Summaries of all meetings are in the docket.

⁵ American Gas Foundation, “Safety Performance and Integrity of the Natural Gas Distribution Infrastructure,” January 2005, available at http://www.aga.org/Template.cfm?Section=Non-AGA_Studies_Forecasts_Stats&template.

hazardous liquid pipelines and gas transmission pipelines) serious incidents continue to occur (albeit rarely) despite compliance with existing regulations.

III Recommendations or Mandates of Oversight Bodies

A. DOT Inspector General

In a report published June 14, 2004,⁶ the DOT's Inspector General (IG) found that recent accident trends for gas distribution pipelines are not favorable. The IG noted that nearly all of the natural gas distribution pipelines are located in highly-populated areas, such as business districts and residential communities, where a rupture could have the most significant consequences. As a result, the audit pointed out for the 10-year period from 1994 through 2003, accidents on natural gas distribution pipelines have resulted in more fatalities and injuries than accidents on hazardous liquid and natural gas transmission lines combined.

The IG also recognized that applying risk management principles to distribution pipelines could help reverse these trends. In testimony before Congress in July 2004,⁷ the IG recommended that PHMSA should define an approach for requiring operators of distribution pipeline systems to implement some form of integrity management or enhanced safety program with elements similar to those required in hazardous liquid and gas transmission pipeline integrity management programs.

B. National Transportation Safety Board

The National Transportation Safety Board (NTSB) investigates serious pipeline accidents, including those that occur on gas distribution pipeline systems. Over the years, the NTSB has made several recommendations to improve safety regulation of gas distribution pipelines. In particular, the NTSB has recommended the use of excess flow valves (EFVs) in all new construction and replaced service pipelines.

EFVs have received significant attention as a mitigation option for gas distribution systems. Current Federal regulations require that operators notify service line customers for new and replaced service lines of the availability and potential safety benefits of installing EFVs.⁸ In lieu of this notification, operators may elect to install the valves voluntarily when

certain conditions apply. The valves are generally applicable for new installations or complete service piping replacement for single-family residential homes, where the operating pressure is greater than 10 pounds per square inch (psi). Operators must install the valve if the customer agrees to pay for the cost of such installation. Discussions with operators indicate that approximately 30% of distribution system operators are installing the valves as a routine part of new and replaced service installations in situations in which they apply. Many of these are larger distribution operators, so the percentage of new and replaced service line installations voluntarily including EFVs is higher.

PHMSA conducted additional studies on the effectiveness of the valves and on the experience that has been gained as a result of their use. NAPSRS assisted in these studies. PHMSA concluded that EFVs, if specified and installed correctly, operate reliably to cut off the supply of gas in the event of major damage to the downstream service line (e.g., excavation damage). While performance problems had occurred with early installation of EFVs, the data also show that the valves seldom now suffer false activations, cutting off the supply of gas when no damage has occurred.

EFVs installed in new construction or replaced service lines would mitigate an incident occurring on service lines in which the line was severed. The valves are designed to operate in the event of line ruptures that result in major flow of gas. At the same time, they are an inexpensive option for mitigating such incidents. The valves themselves cost less than \$20 and the cost to install them, when a service line is being installed or replaced is nominal. They will not operate in the event of small leaks. They will not operate in the event of leaks or problems within a customer's residence or business, downstream of their pressure regulator, including situations in which a fire in a residence results in a breach of a gas appliance line in the residence.

PHMSA asked Allegro Energy Consulting to review incident report records to estimate how many incidents might have been mitigated by the presence of an excess flow valve had one been installed at construction or during repair. Allegro reviewed 634 incident reports submitted between 1999 and 2003. They screened out those that did not involve service lines, that were obviously slow leaks, or which otherwise did not appear to meet the criteria as incidents for which an excess flow valve would be beneficial. As a result, Allegro identified 101 incidents

in which the presence of an EFV might have mitigated consequences over this five-year period. To be clear, this is an estimate. The incident reports do not include some information (e.g., gas flow rate) that is necessary to ascertain definitively whether an excess flow valve would have been effective. They do not include information on whether the 25% of fatalities or injuries in which automobiles struck gas meter set assemblies at the side of homes could have been prevented by an EFV shutting off gas flow.

PHMSA also conducted a public meeting concerning EFVs, which is described in Section VI below.

C. Congressional Mandate

Subsequent to the stakeholder groups' recommendations discussed below and the public meeting, Congress passed the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (PIPES Act), which the President signed into law in December 2006. The Act included a mandate that PHMSA require gas distribution operators to implement integrity management programs and to install EFVs in all new or replaced residential gas service lines where operating conditions are suitable for available valves, beginning June 1, 2008. This proposed rule includes requirements addressing this mandate, which will no longer require the customer notification requirements of § 192.383. Thus, we are proposing to repeal this requirement.

IV. Stakeholder Groups

A. Stakeholder Groups' Involvement

In 2004, as described above, the IG recommended that PHMSA establish IM requirements for distribution pipelines, including elements similar to those in the IM regulations for hazardous liquid and gas transmission pipelines (except for those related to physical inspection (i.e., assessment, of the pipeline)). The IG highlighted this recommendation in testimony before Congress in 2004, and a report of the fiscal year (FY) 2005 Conference Committee on Appropriations required DOT to report its plans to establish such regulations. PHMSA filed its report in June 2005. A copy of the report is in the docket.

PHMSA's report to Congress described the work of four stakeholder groups to investigate opportunities to enhance the safety of distribution pipelines. The four multi-stakeholder groups (viz. Excavation Damage Group, Data Group, Risk Control Practices Group and Strategic Operations Group), representing State regulators, the public, and the gas distribution industry,

⁶ Audit report SC-2004-064, issued June 14, 2004.

⁷ *Id.*

⁸ 49 CFR 192.383.

collected and analyzed available information and issued a report of their investigations in December 2005. A copy of the report is in the docket. The groups agreed IM requirements for transmission pipelines could not be applied directly to distribution systems because gas distribution pipeline systems differ significantly from transmission pipelines in their design. The groups also found that diversity among gas distribution pipeline operators and systems was so great that prescriptive requirements suitable for all circumstances could not be established. Instead, the groups found it would be more appropriate to require all distribution pipeline operators, regardless of size, to implement an IM program, including seven key elements. These seven elements are described below under "Stakeholder Group Findings."

The groups concluded that distribution IM requirements should apply to all distribution pipeline systems, rather than just to portions of systems in high-consequence areas. Distribution pipeline systems are located in populated areas, where incidents are likely to produce serious consequences. Because distribution pipelines operate at very low pressures, failures typically appear as leaks. Experience shows gas released through leaks can migrate underground and collect in nearby buildings or other locations. These leaks can result in fires and explosions in locations not directly on the pipeline. Thus, the method used to identify high consequence areas along transmission pipelines—predicated on the likelihood that a fire or explosion would occur at the rupture location—would be irrelevant to gas distribution systems.

The stakeholder groups generally concluded IM requirements for distribution pipelines should be established by a regulation that sets high-level performance objectives with implementation guidelines. This approach would allow States flexibility in implementing IM programs suited to their particular circumstances; operators flexibility in better identifying the sources of risk to their pipelines; and more focused actions aimed at addressing those risks.

B. Stakeholder Groups' Findings

The stakeholder groups made the following findings and conclusions about the current state of gas distribution pipeline safety and integrity:

1. Distribution pipeline safety and excavation damage prevention are intrinsically linked. Excavation damage

poses, by far, the most significant threat to the safety and integrity of gas distribution pipeline systems. Therefore, excavation damage prevention presents the greatest opportunity for gas distribution system safety improvements. Any effort to improve distribution pipeline safety is flawed if it does not seriously address excavation damage prevention.

2. The dominant cause of reportable distribution pipeline incidents is "excavation damage," while "other outside force" and "natural force" are the second and third leading causes.

3. Corrosion is the principal cause of distribution pipeline leaks removed for both mains and service lines, but it causes relatively few incidents.

4. "Excavation damage" is nearly as significant as "corrosion damage" in causing service line leaks.

5. Excavation damage and material/weld failures, respectively, are the second and third leading causes of leaks for both mains and service lines.

6. Corrosion causes approximately four percent of incidents, indicating operators are managing corrosion to prevent it from becoming one of the major contributors to reportable incidents.

7. The rate of reportable distribution incidents resulting in deaths and injuries has decreased from 1990 to 2002. (Note that the Inspector General's analysis and AGF study were conducted for different periods.)

8. No statistically significant trend could be determined for total reportable distribution incidents for the same period.

9. There is a downward trend for reportable incidents resulting in deaths or injuries caused by damage from outside force.

10. Although not statistically analyzed, the data suggest a slight downward trend in corrosion-caused leaks, and a decreasing trend in leaks caused by third-party damage.

C. Stakeholder Conclusions

Based on their findings, the groups concluded:

1. The most useful option for imposing distribution IM requirements would be a high-level, flexible Federal regulation, with implementation guidance.

2. Seven elements could describe the basic structure of a high-level, flexible Federal regulation addressing distribution IM. Each operator would have to do the following regarding its pipeline system:

• Develop a written program describing management of the integrity of the distribution system;

• Have an understanding of the system, including the conditions and factors important to assessing risks;

• Identify threats applicable to the system, including potential future threats;

• Assess risks and characterize the relative significance of applicable threats to the system;

• Identify and put in place appropriate risk-control practices (or modify current risk-control practices) to prevent and mitigate risks from applicable threats consistent with the significance of these threats;

• Develop and monitor performance measures to evaluate effectiveness of programs, periodically evaluate program effectiveness, and adjust programs as needed to assure effectiveness; and

• Periodically report a select set of performance measures to jurisdictional regulatory authorities.

3. Because a distribution IM program would cover the entire distribution system, there is no need to identify high-consequence areas.

4. A distribution IM program should consider threats identified in the PHMSA Annual Distribution Report, PHMSA Form 7100.1-1, as "Cause of Leaks" in Part C:

- Corrosion;
- Natural Forces;
- Excavation Damage;
- Other Outside Force;
- Material or Welds (Construction);
- Equipment;
- Operations; and
- Other

5. Distribution IM requirements should not exclude any class or group of local distribution companies.

6. Operators may need guidance materials to comply with a high-level, risk-based, flexible federal rule. Small operators may need more precise compliance guidance.

7. Implementation of elements of distribution IM regulations should be based on information reasonably accessible to an operator and on information an operator can collect on a going-forward basis. Regulations should not require extensive research.

8. The most useful performance measures at the national level could be incidents (per mile or per service), number of excavation damages per "ticket,"⁹ the status of implementing elements of the rule, the amount of pipe that is not state-of-the-art, and a redefined measure or measures related to leaks.

9. Operator-specific performance measures are unique and must match

⁹A ticket is the information the underground facility operator receives from the one-call notification center.

the specific risk-control practices of its distribution IM program.

10. The operator should periodically evaluate the effectiveness of its distribution IM program. Programs should specify the period for evaluating program effectiveness, which should be as frequently as needed to assure distribution system integrity.

11. Operators should review and implement Common Ground Alliance (CGA) Best Practices, and other industry practices as appropriate, to reduce damages to their facilities. Similarly, other affected stakeholders should review and implement applicable CGA Best Practices.

12. A joint stakeholder group formed to conduct an annual review of safety performance metrics data, to resolve issues, and to produce a national performance metrics report would be of considerable value.

D. Findings Relevant to Leak Management

As described above, the stakeholder groups found that although corrosion is the dominant cause of leaks repaired on gas distribution pipeline systems, corrosion accounts for only four percent of gas distribution incidents. This reflects the importance and effectiveness of leak management practices operators currently use. The stakeholder groups agreed leak management is an important risk control practice and should be a part of a gas distribution IM program, along with excavation damage prevention.

According to the stakeholder groups, the essential elements of an effective leak management program are as follows:

- Locate the leak;
- Evaluate its severity;
- Act appropriately to mitigate the leak;
- Keep records; and
- Self-assess to determine if additional actions are necessary to keep the system safe.

These elements are collectively referred to by the acronym LEAKS, representing the first letter of each element.

E. Stakeholder Considerations Regarding Excess Flow Valves

The stakeholder groups devoted considerable attention to excess flow valves (EFVs) in the context of potential IM program requirements. As described above, an EFV is designed to stop the flow of gas in a service line experiencing major leakage, generally caused by excavation damage. The device prevents consequences associated with a significant escape of gas and its ignition. An EFV in a service

line provides no protection for breaks downstream of the meter (in homes). Since pressure is reduced at the meter and the flow through, even a completely severed line in the home poses much less risk than if the same break were to occur on the higher-pressure service line upstream of the meter.

The stakeholder groups considered the use of EFVs for IM and reached the following conclusions:

1. Information drawn from surveys of State practices and operational experience for currently installed EFVs indicated:

- Over 6.3 million EFVs have been installed in the United States (i.e., protecting approximately 10% of all services).
- If correctly specified and installed, EFVs work as designed.
- EFVs will not work in all applications—for example, EFVs will not work in up to 60 percent of new services in Connecticut, a State favoring their use, because the service lines operate at pressures below that required for EFVs to function.

2. Regulations should not require installation of EFVs on all new and replaced service lines. EFVs are one risk-control practice operators should consider along with others.

3. Operators, as part of their distribution IM program, should consider the mitigative value of installing EFVs.

In their findings, the stakeholder groups considered the NTSB's recommendation that DOT require installation of EFVs on all new and replaced gas service lines where operating pressure exceeds 10 psig.¹⁰ This recommendation resulted from the NTSB's investigation of a 1998 accident in South Riding, Virginia, which destroyed a new home and killed one of its occupants.¹¹ The NTSB concluded the accident was caused by gas escaping from a hole in the gas service line and the flow through that hole was of sufficient magnitude that an EFV would have prevented the accident.

Comments From Fire Service Organizations

The stakeholders also considered comments from representatives of the fire service organizations. The International Association of Fire Chiefs and the International Association of Fire Fighters wrote to the Secretary of Transportation in early 2004 urging DOT to require installation of EFVs. The

organizations commented that fire fighters are often first to respond to incidents involving fires fueled by escaping gas and their lives were at risk in doing so. The same organizations, along with the National Volunteer Fire Council and the Congressional Fire Services Institute, wrote to PHMSA again in 2005 after reviewing draft reports of the Risk Control Practices stakeholder group. The fire service organizations reiterated their recommendation about mandatory EFV installation and disagreed with the group's conclusion that EFVs should be treated under distribution IM requirements as one of the available mitigation options.

(Note that the conclusions of the stakeholder groups are reported here for completeness, but that many have been rendered moot by the statutory mandate, enacted after the stakeholder group deliberations, that installation of EFVs be made mandatory)

Surveys

In conjunction with stakeholder group findings, PHMSA considered the results of several surveys evaluating the prevalence and efficacy of EFVs in gas distribution systems. One survey, conducted by the National Regulatory Research Institute (NRRI), a university-based research arm of the National Association of Regulatory Utility Commissioners (NARUC), surveyed State regulatory commissioners, partly in response to PHMSA's interest in the subject. A second survey conducted by the National Association of Pipeline Safety Representatives (NAPSR)¹² obtained results from pipeline safety program managers in all States (and the District of Columbia) with regulatory jurisdiction over distribution pipeline safety. A third survey, sponsored by PHMSA and conducted by Oak Ridge National Laboratory, examined in more detail the experience of nine gas distribution operators, some of whom install EFVs voluntarily and others who install in conformance with the requirements of 49 CFR 192.383. Results of all three surveys are available in the docket for this rulemaking.

The surveys indicate EFVs, if correctly sized and installed, operate reliably. Instances of false closure, where gas flow stops even though the service line is undamaged, rarely occur. Likewise, the valves function reliably when service lines are damaged. In fact, one potential problem with EFVs—the increased risk that excavation-related

¹⁰ NTSB, "Natural Gas Explosion and Fire at South Riding Virginia, July 7, 1998," Pipeline Accident Report PAR-01/01, June 12, 2001.

¹¹ Ibid.

¹² NAPSR is an organization consisting of the state pipeline safety program manager from each state that exercises jurisdiction over pipeline safety.

damage will go unreported—is directly related to their effectiveness in stopping the flow of gas from a severed gas line. In some cases, particularly where directional boring¹³ is used, excavators may not even be aware they have damaged a gas service line. When an excavator damages a service line not protected by an EFV, gas is released and the excavator must stop work and notify the gas distributor to protect the safety of its own personnel and the house at which they are working. If an EFV is installed, the EFV functions to stop the flow of gas, and an irresponsible excavator can finish its work, re-fill the hole, and leave the site. Only later, when the residents discover they have no gas service, is the damage reported. The gas distribution operator must then re-excavate to locate and repair the damage, increasing the expense of the repair. Although anecdotal evidence shows excavators do not always notify operators of damage to service lines, PHMSA does not have the data to determine if this is a prevalent problem.

V. Public Meetings

A. Public Meetings Concerning Distribution Integrity Management

PHMSA conducted two public meetings to collect and evaluate public comments on the potential for adding IMP requirements for distribution pipelines. During the first meeting, held December 16, 2004, presentations were made concerning the then-draft AGF study discussed above and the DOT IG's recommendation. Comments made at this meeting resulted in the stakeholder group investigations, which are discussed in section VI.

The second public meeting, held on September 21, 2005, included presentations describing the stakeholder group investigations, which were then in progress. Participants included representatives of industry, State regulators, PHMSA, and the public, including persons involved in the stakeholder investigations. Key points made by meeting participants included the following:

- There must be a balance among improved safety, reliability, and costs. For municipal operators, cost trade-off involves potential effects on other

community services, including public safety.

- The primary cause of incidents on distribution systems is outside force damage, and any action must address this threat. Operators have limited ability to prevent excavation damage, and excavators are not typically under the jurisdiction of pipeline safety authorities. Comprehensive damage prevention programs can reduce incidence of excavation damage.

- Leak management is an important element in assuring the integrity of gas distribution pipelines.

- The majority of companies affected by any new distribution IM requirements are small companies, and the needs of those operators differ from larger companies. Smaller companies will likely require more detailed guidance for implementing new rules.

Summaries of both public meetings are in the docket.

B. EFV Public Meeting

On June 17, 2005, PHMSA conducted a public meeting to discuss EFV performance, notification, and installation issues. The meeting included panel discussions involving members of industry, State governments, fire service organizations, the National Association of Fire Protection, advocacy groups, the NTSB, and researchers who analyzed EFV performance.

Industry participants included representatives of companies voluntarily installing EFVs and those installing only when a customer requested. These company representatives said they analyzed the costs and benefits of installing EFVs under local conditions in deciding whether to install EFVs. Factors in these analyses include the size and growth rate of company service areas, costs of maintaining records related to notifications, experience with load growth after initial installation (which can result in a need to replace EFVs), and the relative effectiveness of alternative actions to reduce the threat of excavation damage. Operators also noted they have experienced instances in which excavators damaged a line equipped with an EFV, but the damage was not reported to the operator, increasing operator costs to repair the damage.

PHMSA and Allegro Energy described PHMSA-sponsored research on EFV performance (discussed above). The research examined incidents reported on gas distribution systems over a five-year period (634 events)—the Allegro Energy analysis described above. The PHMSA study examined these

narratives and concluded EFVs could have been a factor in mitigating 101 (approximately 16 percent) of the analyzed incidents.

The NTSB reported that serious accidents on gas distribution systems prompted its recommendation that PHMSA require EFV installation. Recognizing that States conduct most regulatory oversight of distribution operators, the NTSB contacted all State governors in 1996, recommending they establish requirements for mandatory installation. The responses to those recommendations—indicating States look to PHMSA for safety standards—reinforced the NTSB's support for a Federal requirement.

Representatives of State pipeline safety authorities, utility commissioners, and regulatory program managers described the factors considered by States in evaluating EFVs. They said local conditions could affect decisions on whether to use the valves. Initial installation costs are small, but life-cycle costs must be considered. They reported that EFVs provide protection from a limited scope of incidents involving significant damage to, or severance of, a service line. Many operators reported their belief that their resources are better spent attempting to reduce the frequency of those events rather than on installing EFVs. While all agree damage reduction activities can improve safety for existing gas services, they believe retrofit installation of EFVs, where the service line is not being replaced for other reasons, is impractical.

Public safety advocates expressed significant concern with the manner in which operators are implementing the notification requirements in 49 CFR § 192.383. Often the “customer” notified about the availability of EFVs for newly installed services is a builder/developer rather than the resident of a home. Experience indicates few builders/developers elect to have EFVs installed. When homes are then occupied shortly after the gas service is installed, the customer neither enjoys the protection of an EFV nor has the opportunity to decide to pay for the added protection.

Comments From Fire Service Representatives

Fire fighters participated in the stakeholder groups and public meetings. Because the consequences of accidents on gas distribution pipelines generally result from fires fed by escaping gas, fire fighters have a significant interest in reducing the frequency and consequences of such events.

As described above, the International Association of Fire Chiefs, the

¹³ Underground utilities are usually installed by digging a trench, laying the pipe or cable in the trench and refilling it. In such installations, damage to other utilities would be obvious. Directional boring is a technique used when trenching is impractical, often when utilities must be installed below paved surfaces. When directional boring is used, a service line could be damaged or severed. If an installed EFV operates properly to shut off the flow of gas, the installer may not even be aware that a gas service line has been damaged.

International Association of Fire Fighters, the National Volunteer Fire Council, and the Congressional Fire Services Institute support a requirement to install EFVs in all new and replaced service lines where installation is suitable. Additionally, these organizations support IM programs for gas distribution operators to identify and evaluate specific risks associated with their systems and to implement measures to minimize those risks. The organizations agreed most operators will need guidance to implement these requirements and small operators are likely to need guidance that is more precise. These organizations also believe it is vital for operators to implement strategies to reduce the frequency of outside force damage. The comments of these organizations are in the report of the stakeholder group investigations and are in the docket.

Representatives of the National Association of State Fire Marshals (NASFM) and the National Fire Protection Association (NFPA) participated in stakeholder groups. State Fire Marshals are responsible for overseeing compliance with State fire codes and related building standards, training fire fighters, and other duties based on State agency assignments. NFPA is a professional association responsible for developing American National Standards Institute approved consensus standards related to fire safety.

NASFM also supports mandatory installation of EFVs. In comments made at the June 2005 public meeting on EFVs and the September 2005 public meeting on distribution IM, NASFM also supported a comprehensive approach to IM. This approach would address all threats, prioritize them for action, and deal with them based on importance.

NFPA also supports IM requirements for gas distribution pipelines and agrees new requirements for distribution systems will primarily affect smaller operators who will need detailed guidance to implement them. NFPA acknowledges EFVs will reliably stop gas flow if the flow exceeds their trip point, but cautions that the valves are not a panacea because damage to a service line may not always result in sufficient flow to trip an EFV.

A complete summary of this meeting is available in the docket.

VI. Guidance for IM

As described above, the stakeholder groups concluded operators would need guidance to implement a regulation requiring operators to meet high-level performance objectives to improve IM. The diversity among distribution

systems and the size/capabilities of distribution operators make it impractical to require specific, detailed actions in the regulation. In particular, the stakeholder groups described above reported to PHMSA that operators need guidance to describe the following:

1. Information they should gather through routine activities to improve their understanding of the distribution system infrastructure.
2. How best to assemble detailed information on pipe characteristics (including material, manufacturer, batch, etc.) to strengthen their understanding of the system and to support current and future risk-management activities.
3. Threat evaluation processes and data needed to support this evaluation.
4. Options for evaluating the relative importance of threats.
5. How to perform risk analysis, encompassing situations from small, simple distribution systems to large and complicated ones, and how to use the results of these analyses.
6. Decision processes and criteria for choosing among prevention, detection, and mitigation measures.
7. Options for measuring safety program effectiveness and determining the situations under which different measures would be meaningful.
8. How to evaluate the overall effectiveness of the program such as how to determine if the program is being implemented as described and how to determine if the program is producing improvements.
9. How to structure a comprehensive leak management program, which is fundamental to successful management of distribution risk. At a minimum, operators need guidance to implement the LEAKS program or the following:

- Determine how local conditions and system knowledge should affect the frequency and type of leak surveys.
- Identify methods/criteria for evaluating the severity of leaks and need for action.
- Describe records an operator should maintain to permit trending and identification of underlying problems.
- Identify performance metrics and the types of analyses in which the operator should consider them.

On March 2, 2006, PHMSA asked the Gas Piping Technology Committee (GPTC), a standards-developing body, to prepare guidance. GPTC is accredited by the American National Standards Institute (ANSI), the governing body for consensus standards development in the U.S. GPTC has historically prepared guidance to assist operators in implementing various parts of natural

gas pipeline safety regulations in 49 CFR Part 192. GPTC agreed and formed a Distribution Integrity Guidance Task Force to develop guidance. The GPTC guidance will provide suggestions for operators concerning options they could use to implement the high-level requirements in a final rule. The GPTC will describe the scope and content of the guidance at a public meeting during the comment period.

The GPTC guidance is designed to assist operators in developing their distribution integrity management programs. PHMSA expects the guidance will provide options that operators can use to implement the DIMP requirements and that inspectors, primarily from State pipeline safety agencies, also will use the guidance as examples of actions an operator could take to comply with the rule. It will be up to each operator to develop its plan implementing the DIMP requirements. The GPTC guidance is only intended to assist operators; operators may use other approaches. Whatever approach and guidance an operator uses to develop its plan, it will be up to the operator to demonstrate how its approach satisfies the DIMP requirements. When inspectors identify deficiencies in operator plans and procedures intended to satisfy the requirements, they will use existing enforcement tools, based on non-compliance with the rule (not with the guidance) to cause operators to comply. PHMSA is not proposing to incorporate by reference the GPTC guidance.

PHMSA understands the GPTC guidance will be published for public comment, as part of the ANSI approval process, after this NPRM is published.

PHMSA also is supporting work by the American Public Gas Association (APGA) Security and Integrity Foundation (SIF) to develop more specific guidance for use by the smallest operators. These are usually municipalities that have limited resources to develop IM programs. SIF is a non-profit 501(c)(3) corporation, which was established by the APGA in 2004. The SIF is dedicated to promoting the security and operational integrity and safety of small natural gas distribution and utilization facilities. The SIF will focus its resources on enhancing the abilities of gas utility operators to prevent, mitigate and repair damage to the nation's small gas distribution infrastructure. In this work, SIF is using the GPTC guidance to develop a computer program that will assist small operators in developing their IM programs.

PHMSA and NAPSRS have formed a joint workgroup to develop a framework

for oversight of the Federal requirements for the distribution integrity management program. This joint workgroup is charged with developing an oversight program that provides consistency in the States' oversight of operator plans. The guidance developed by GPTC will be key to this process. States have the responsibility for designing and implementing their oversight programs, but PHMSA needs certain information from these programs to evaluate the effectiveness of the new Federal requirements, report results to Congress and organizations that oversee us, and determine if future changes are needed. PHMSA's goal in this workgroup is to provide regular reporting on progress and results of inspections of distribution operators' compliance with the final DIMP rule.

VII. Applicability to Small and Simple Distribution Systems; Request for Comments

A. Master Meter and Liquefied Petroleum Gas (LPG) Operators

We believe IM regulations for master meter and LPG operators should be limited because these systems are simple and seem to pose relatively little risk.

By contrast to other local distribution systems, master meter system operators receive gas at a single meter (the master meter) and operate small pipeline systems to deliver the gas from the meter to a small number of users. A typical example of a master meter operator is a trailer park where the trailer park owner/operator receives gas from a local distribution company and distributes it, via underground piping, to individual trailer pads. Master meter pipeline systems tend to cover limited geographical areas. They are simple systems, often including only one type of pipe, operating at a single pressure, and having no equipment other than pipe, meters, service pressure regulators, and valves.

Master meter operators are subject to the requirements of Parts 191 and 192, but some requirements are modified to better suit these simpler systems. For example, master meter operators must have damage prevention plans under § 192.614, but their plans do not have to be written. Similarly, these operators must provide notification of incidents by telephone (§ 191.5) but do not have to submit written incident reports (§ 191.9) or annual reports (§ 191.11). These modifications recognize these systems are generally simple and represent less risk.

LPG systems are small systems, mostly in rural areas, that use liquefied petroleum gas to serve a number of customers, usually in areas not served by natural gas transmission lines. Like master meter pipeline systems, LPG systems are simple and tend to cover limited geographical areas. Further, we estimate each master meter and LPG system operator has, on average, 100 services at low pressure. Very small operators with less than ten services and no portion of their systems in public areas will not be subject to the requirements of this proposed rule because these small operators are generally exempt from Part 192.¹⁴

PHMSA's review of reported incidents shows few incidents occur in master meter and LPG systems. Because of the relative simplicity of these pipeline systems, a risk analysis would provide much less useful information than an analysis of a more complicated distribution system. Master meter operators often exercise more positive control over excavations near their pipelines, thereby providing enhanced protection from third-party damage, the leading cause of distribution system incidents.

Based on this analysis and the distinctions that already exist in the regulations, the proposed rule would limit the scope of the IM requirements for master meter operators and LPG operators. Under the proposal, these operators would not have to perform risk analyses as part of their IM program because the relative simplicity of their systems makes the effort to perform the analysis more burdensome than beneficial. Additionally, these operators will not have to report performance measures, although they will need to maintain internal records of performance for inspection purposes.

PHMSA invites public comment on the following:

- Whether these IM limitations are appropriate for master meter and LPG system operators;
- Whether we should further limit the IM requirements for these operators; or
- Whether we should exempt these operators from IM requirements.

B. Very Small Distribution Systems

PHMSA notes there may be some local distribution systems of limited area and simple design for which similar limited IM requirements may be appropriate. There is currently no

regulatory precedent for differentiating among local distribution systems to identify a class of operators to exempt from certain requirements. PHMSA would consider limiting IM requirements for other operators of small, simple systems if we can establish reasonable criteria to identify operators for which such limitations are appropriate.

PHMSA does not consider the number of customers an appropriate selection criterion. Size, as measured by number of customers, is not directly correlated to risk. For example, a system serving several thousand customers that was installed over a brief period (e.g., after a transmission line was installed nearby providing a source of gas) could be quite uniform in design and materials. On the other hand, a system serving a few hundred customers that has been installed piecemeal over many years could have multiple types of material, including older materials subjected to age-related degradation, etc. In this example, the larger system would be expected to pose considerably less risk than the smaller. Rather than the system's size, PHMSA considers that appropriate criteria would identify systems with characteristics similar to those of master meter systems and representative of low risk. PHMSA proposes the following basis for making this distinction:

1. The system operates at a single pressure;
2. The system may include valves, meters, and service pressure regulators, but no other equipment;
3. The physical environment (i.e., potential for corrosion) is similar throughout the entire system;
4. Most of the system was installed at one time, consisting of one material. Additions may have been made later of another material, but those additions are limited and their location is known; and
5. The system location allows the operator to exercise control over most third-party excavation.

PHMSA invites comment on whether limited IM requirements should also apply to operators of simple distribution pipeline systems and on whether the above criteria would be appropriate for identifying systems to which to apply this limitation.

VIII. Plastic Pipe Issues

A. Plastic Pipeline Database and Availability of Failure Information

A significant amount of gas distribution pipeline is made of plastic. Very little plastic pipe is used in other pipeline systems. The Plastic Pipe Data Committee (PPDC), a voluntary group

¹⁴ Section 192.1(b)(6) states the requirements of Part 192 do not apply to operators of "any pipeline system that transports only petroleum gas or petroleum gas/air mixtures to—(i) Fewer than 10 customers, if no portion of the system is located in a public place."

consisting of representatives of industry, the NTSB, State pipeline safety regulators and PHMSA, and administered by the American Gas Association (AGA), monitors in-service performance of plastic pipe. Participating operators send information on problems occurring with plastic pipe and related fittings in their pipeline systems. PPDC periodically analyzes this information to identify adverse performance trends and problems potentially requiring action by plastic pipe users. PPDC information has limited distribution and is generally not available to operators who do not participate in the program. Gas distribution pipeline operators whose systems include significant amounts of plastic pipe would be better able to carry out an IM program with knowledge of plastic pipe performance issues.

PHMSA believes changes to the PPDC process could significantly improve operator insight into the risks associated with plastic distribution pipelines. In particular, more data of better quality and improved availability of results from PPDC data analysis could help inform operators of potential integrity issues related to their plastic pipe. Changes PHMSA would consider valuable include the following:

- Changing the current system of data collection, analysis, and communication to allow all operators better access to information on “suspect” materials in their systems (once analysis identifies a potential generic problem);
- Adding new requirements to facilitate operator use of PPDC information; and
- Adding requirements for information gathering on existing installed piping and equipment when normal operation and maintenance exposes the pipe.

PHMSA intends to discuss with AGA how to strengthen the PPDC process and improve availability of results and to encourage AGA to continue related discussions with PPDC members. PHMSA also invites public comment as to whether the PPDC, administered by AGA, is adequately objective to evaluate and report to the industry information concerning plastic pipe failures, or whether PHMSA should seek a new independent third party to perform this function.

PPDC is an independent entity. PHMSA cannot dictate the actions that PPDC takes. PPDC may not agree to changes that would provide information to operators who do not participate, and who cannot now include in their analyses failures that occur at non-participating operators. Further, it is

uncertain whether a different independent third party can be identified that would be willing and able to assume the task of analyzing failure information. Given the importance of plastic pipe integrity to distribution pipeline system safety, PHMSA has included in this proposed rule requirements for all operators to report data on failures that occur in plastic pipe/fittings. We are proposing that reports be made within 90 days of the occurrence of a failure. PHMSA will collect the data and ensure that the data are analyzed and that appropriate insights are communicated to all distribution pipeline operators for their consideration as part of their integrity management programs. PHMSA may take additional actions if analysis of reported failures indicates additional regulatory action is appropriate. PHMSA is proposing that a report be submitted within 90 days because we consider 90 days to be reasonable time for conducting detailed failure cause analysis. PHMSA invites public comment on whether some other reporting frequency is preferable and adequate to identify trends (e.g., quarterly reporting, annual reporting).

The proposed requirements to collect and report data on plastic pipe failures from the final rule may not be necessary if another group agrees to perform these functions. PHMSA invites comments on the appropriateness of the proposed reporting requirements.

B. Plastic Pipe Marking

Having better information on pipe type and its history would improve operators' ability to manage their risk. In many cases, records are inadequate to determine exactly what type of pipe is installed in particular locations in distribution systems. It would be convenient if pipe was marked so that operators could collect this information by examining the pipe when it is excavated for other reasons. Unfortunately, plastic pipe has not historically included any permanent markings that would allow operators to determine the particular type of plastic, its age, or other key parameters.

PHMSA recognizes there are many technical issues associated with pipe marking, and developing solutions requires discussion with all affected organizations. Technical issues include the label contents, durability, size, visibility, and spacing. PHMSA plans to discuss these issues further with pipeline manufacturers, operators, AGA, and State pipeline safety regulators. Thereafter, PHMSA plans to ask the American Society of Testing and Materials (ASTM) to revise its current

standard for plastic pipe marking (i.e., ASTM D2513). PHMSA could then consider incorporating the standards into federal regulations.

PHMSA invites comments on the desirability of requiring permanent markings on plastic pipe, on the related technical and logistical issues, and on its proposed approach to rely on ASTM to establish appropriate standards.

IX. Monitoring the Effectiveness of Actions

It is important that any program intended to improve safety include measurable attributes that can demonstrate whether the program is being effective. The existing IMP requirements for hazardous liquid and gas transmission pipelines both require operators to monitor performance and to review their programs periodically to determine if there is a need to change. This proposed rule contains similar requirements for distribution pipeline system operators. Similarly, it is important for PHMSA to be able to measure whether its actions are having the desired effect—improved safety.

The ultimate measure of distribution pipeline system safety is the number of deaths and injuries and the amount of property damage caused by incidents on distribution pipeline systems. Fortunately, however, incidents occur relatively infrequently. The number of deaths and injuries and the amount of damage are thus lagging indicators of performance that cannot reliably capture safety trends other than over long periods of time. Other interim measures are needed to provide information in a shorter period to evaluate the effectiveness of any new integrity management requirements implemented for distribution pipeline systems. This proposed rule requires that distribution pipeline operators submit to PHMSA annually the number of leaks repaired (by cause), the number of excavation damages and the number of “tickets” (representative of the amount of excavation activity), and the number of EFVs installed. PHMSA will use these data to evaluate the effectiveness of new distribution integrity management requirements until sufficient time has passed that trends in the overall number of incidents, deaths, serious injuries, and property damage should be apparent. PHMSA solicits comments on whether the paperwork burdens associated with the collection of this data is justified by the usefulness of this information. PHMSA also invites comment on other measures that might be used to monitor effectiveness in this interim period.

X. Deviating From Required Intervals Based on Operator's DIMP

The underlying purpose of all of PHMSA's integrity management requirements is to improve knowledge of the condition of each operator's pipeline and to use that information to identify new risk control solutions and to better focus risk reduction efforts. PHMSA concludes, based on our experience with hazardous liquid and gas transmission integrity management, that this process is working and is producing a more efficient and effective approach to controlling pipeline risk. PHMSA considers that implementing integrity management for distribution pipelines should offer additional opportunities to improve efficiency in assuring safety. Improving efficiency in assuring safety requires, however, that it be possible to reduce efforts that have marginal effect on controlling risk in order to shift resources to more effective actions.

As part of our continuing effort to improve efficiency and to make the approach to pipeline safety more risk-based, we are proposing an approach that would allow operators and the States to have more of a role in setting compliance intervals for distribution operators within a state. Rather than continue to require distribution operators to comply with intervals set by existing federal regulation in Part 192, this approach would let an operator use its distribution integrity plan, and the risk assessment on which it is based, to propose alternative intervals for Part 192 requirements that they must now implement periodically.¹⁵ Operators could propose extended intervals for threats and areas (e.g., portions of pipeline systems) where risk is low, making the application of these requirements more risk-based.

¹⁵ Operators are currently required to take the following periodic actions:

1. Cathodic Protection (CP) must be tested once per year. Rectifiers and moving/active components must be inspected six times per year (192.465)
2. Operators must reevaluate pipelines without CP every 3 years and provide CP if active corrosion is found (192.465)
3. Pipe exposed to the atmosphere must be inspected for corrosion every 3 years (§ 192.481)
4. Leak surveys must be conducted annually in business districts and at least every 5 years (3 if cathodically unprotected and electrical surveys are impractical) outside of business districts (§ 192.723)
5. Pressure limiting devices must be tested at least annually (§ 192.739)
6. Each valve necessary for safe system operation must be tested annually (§ 192.747)
7. Vaults housing pressure regulating equipment must be inspected annually (§ 192.749)
8. Mains must be patrolled 4 times a year in business districts and twice per year outside business districts (§ 192.721)

Operators would be required to submit their proposed intervals to the jurisdictional regulatory authority (usually the State) for review and determination that the proposal will provide an adequate level of pipeline safety. States would base their decisions on their review of the operator's risk analysis and on their own knowledge of the safety performance of, and issues affecting, each operator. While operators would likely propose only longer intervals, States could exercise their existing authority to impose requirements more restrictive than Federal minimums to require shorter intervals where necessary based on risk. PHMSA intends to work with NAPSRS to develop guidance States can use in making decisions concerning changes to the intervals for periodic requirements.

As an example, operators are now required to inspect pipelines potentially subject to atmospheric corrosion, including service lines entering customer gas meters, at least every three years. Many meters are located inside homes where, in many cases, no one is available during the day to provide access, and where the environment is unlikely to be particularly corrosive. Operators must arrange with residents for access, and must sometimes make multiple visits in order to complete their inspections. The industry is seeking regulatory changes based on these difficulties to reduce the frequency of required inspections of inside meters. An alternative approach might be for operators to establish that corrosion of pipelines in residences is low-risk, and to propose an alternate interval for conducting these inspections. States would have the flexibility to accept or modify operator adjustments to these inspection intervals based on their local circumstances and their understanding of operators' risk.

We seek comment on the following issues:

- What are the advantages and disadvantages of allowing operators and States to set intervals for each distribution operator on required activities using a risk-based approach driven by thorough analysis of individual operator performance data?
- Should there be some limit on the amount by which an operator can deviate from currently-prescribed intervals (e.g., no more than twice the interval in the Federal regulation)?
- How would a State establish guidance for implementing such a process?
- What additional performance data and analysis would be required?

- What costs to the States would be associated with such a process?
- What cost savings to operators could result from such changes?
- On what basis should a State judge the operators' engineering basis adequate?

XI. Prevention Through People

Historically, PHMSA's pipeline integrity management programs have focused on assuring the physical and structural soundness of the pipe. This is a key element to the safe transportation of hazardous materials, including transportation by pipeline. However, it is only part of the safety picture. The role of people, including control center operators, in preventing and reducing risk is another critical component in managing the integrity of pipeline systems, including distribution piping.

The proposed IM program regulations include requirements for operators to understand the threats affecting the integrity of their systems and to implement appropriate actions to mitigate risks associated with these threats. These include a first step towards instituting a "Prevention through People" (PTP) program to address human impacts on pipeline system integrity. Human impacts include both errors contributing to events and intervention to prevent or mitigate events. As part of considering the threat of inappropriate operation (*i.e.*, inappropriate actions by people), this proposed rule would have operators evaluate the potential for human error, considering existing regulatory programs (e.g. Operator Qualification, Drug and Alcohol Testing, Damage Prevention, Public Education), and any voluntary supplemental programs the operator now implements, in preventing and mitigating risk. An operator would be required to include in its written IM program a separate section on "Assuring Individual Performance," in which they would identify risk management measures to evaluate and manage the contribution of human error and intervention to risk (e.g., changes to the role or expertise of people).

Several existing regulations strengthen the effectiveness of the role of people in managing safety. These include Damage Prevention Program in § 192.614, Public Awareness in § 192.616, Qualification of Pipeline Personnel in subpart N under Part 192, and drug and alcohol testing in Part 199. The evaluation required by this proposed rule would consider the effects of these programs, and a PTP program would integrate these existing efforts and would address the risks associated with human factors as

enumerated in Section 12 of the PIPES Act, as well as the opportunities for people to mitigate risks. PHMSA is separately developing proposed requirements for control room management, which would also become a part of the PTP program and a consideration for integrity management of distribution pipeline systems.

A PTP program could include regulations and a system to identify and communicate noteworthy best practices. Because human interaction with gas distribution systems contributes to the risk these systems pose, PHMSA believes a PTP effort has strong potential to reduce distribution system risk. PHMSA invites public comment on the PTP concept and on any other requirements that should be included in this or a future IM program rulemaking.

PHMSA also requests public comment on how operators are currently addressing human factors, including fatigue, in their ongoing efforts to manage the integrity of their distribution pipelines.

XII. Summary Description of Proposed Rule

Over the past eight years, more than 1,000 incidents on distribution pipelines have resulted in fatalities, serious injuries, or major property damage. Excavation damage and other outside forces caused most of these incidents. This proposal reduces system operating risks and the probability of failure by requiring operators to establish a documented, systematic approach to evaluating and managing risks associated with their pipeline systems. In this NPRM, PHMSA proposes to add a new subpart to the Federal pipeline safety regulations to require gas distribution pipeline operators to develop and implement IM programs covering the seven IM program elements identified by PHMSA and representatives of States, industry, and the public who participated in the stakeholder groups. The proposed rule also implements the legislative direction that PHMSA prescribe minimum standards for IM programs for distribution pipelines. As discussed above, PHMSA requested GPTC to develop more detailed guidance to assist distribution operators in implementing a new rule and States in overseeing these requirements.

The proposed regulation would require operators to develop and implement written IM programs addressing the following elements:

- Knowledge of infrastructure;
- Identification of threats;
- Evaluation and prioritization of risks;

- Mitigation of risks;
- Measurement and monitoring of performance;
- Periodic evaluation and improvement; and
- Reporting of results.

The proposed rule implements the legislative direction that PHMSA require distribution pipeline operators to install an EFV in each newly-installed or replaced service line serving a single-family residence for which a suitable valve is commercially-available and where conditions are suitable. Suitable conditions include:

- Operation continuously throughout the year at a pressure not less than 10 psig;
- No history of liquids or contaminants in the gas flow which would interfere with operation of the valve; and
- Where installation is not likely to cause a loss of service to the residence; or
- Interfere with required operation and maintenance activities.

Any installation will have to comply with the performance standards in § 192.381. The proposed requirement to install EFVs will make it unnecessary for operators to notify customers of EFV availability as currently required by § 192.383. Thus, this proposal would repeal the customer notification requirement.

Because of the significant diversity among distribution pipeline operators and systems, the IM requirements in the proposed rule are high-level and performance-based. The proposal specifies the required program elements, but does not prescribe specific methods of implementation. Prescriptive, how-to requirements would likely not fit the circumstances of all operators. Still, PHMSA recognizes many operators will want additional detail about actions they may take to implement the performance-based regulatory requirements. This is the reason PHMSA asked GPTC to develop guidance providing examples of methods that satisfy the requirements. Also, as discussed earlier, the APGA SIF intends to use the GPTC guidance to develop model IM programs for its small municipal members.

XIII. Section-by-Section Analysis

Section 192.383 Excess flow valve customer notification. This section currently requires operators to notify customers about EFV availability for installation and install an EFV if the customer so requests and agrees to bear all associated costs. The proposed requirements in this NPRM would require operators to install EFVs in new

or replaced service lines unless certain conditions preclude installation. We are repealing this existing requirement because the proposed new requirements render the notification requirements in this section unnecessary.

Section 192.1001 What do the regulations in this subpart cover? These proposed rules will apply to all operators of gas distribution systems subject to Part 192. The proposed rules would require each operator of a distribution pipeline system to implement an IM program with prescribed minimum requirements. Under the proposal, IM requirements applicable to master meter operators and operators of liquid propane gas (LPG) distribution systems will be much more limited than those applicable to larger operators. For example, the proposal would not require these operators to install EFVs and would not have them evaluate and prioritize risks and report results.

Section 192.1003 What definitions apply to this subpart? PHMSA proposes to add a definition for the term “damage” as used in § 192.1005.

Section 192.1005 What must a gas distribution operator (other than a master meter or LPG operator) do to implement this subpart? The proposed rule would require gas distribution operators, other than master meter or LPG distribution system operators (see § 192.1015), to develop a formal IM program with certain prescribed elements and to implement their programs no later than 18 months after the final rule becomes effective. The IM program is to manage and reduce the risks associated with the operator’s pipeline system.

Section 192.1007 What are the required IM program elements? The proposed rule defines the minimum elements each operator’s IM program must include. Master meter and LPG operators will include only some elements in their programs. For gas distribution operators other than master meter or LPG operators, the required program elements are as follows:

a. Knowledge of the system’s infrastructure. To develop an IM program, an operator must identify threats applicable to its pipeline system and analyze the risks its pipeline system poses. Operators cannot do this without understanding their pipeline systems. Generally, the operator should know information such as location, material composition, piping sizes, construction methods, date of installation, soil conditions, pressure (operating and design), operating experience, performance data, condition of the system, and any other characteristics

that help identify the applicable threats and risks.

An operator may not know some necessary information about its infrastructure. In some cases, distribution systems include pipe installed several decades ago, and reliable records may not exist to provide complete information. In other cases, distribution systems have grown by acquisition and merger, as multiple pipeline systems came under common ownership. Complete records may not have been transferred during these changes in ownership, again leading to gaps in the knowledge an operator has about its pipeline system. This proposed rule does not require operators to engage in extensive investigative programs to uncover information, nor does it require operators to conduct excavations for the sole purpose of revealing information about buried pipe.

An operator must assemble as complete an understanding of its infrastructure as possible using information the operator has on hand from ongoing design, operations, and maintenance activities. An operator's IM program must identify what additional information the operator needs to know about its infrastructure, and must provide for gaining that additional knowledge over time through normal activities. For example, situations in which buried pipe must be exposed for maintenance or other purposes present an opportunity to collect data about the pipe and its environment at very little or no additional cost. An operator's IM program must provide for identification and use of such opportunities to improve knowledge of the distribution system infrastructure.

b. Identify threats (existing and potential). Operators need to evaluate their pipeline systems and the environments in which the pipelines operate to identify specific threats the pipelines face and to determine what are appropriate actions to manage the threats and minimize the risk. Threats affecting pipeline systems are generally grouped into broad categories. This proposed rule uses the same categories as does the form operators use to report incidents occurring on their distribution pipeline systems (Form PHMSA F 7100.1). Not all threat categories are applicable to all pipelines. For example, corrosion does not affect plastic pipe. Additionally, the categories often represent a grouping of similar threats, not all of which may affect a given pipeline. Although all buried metal pipe is generally considered subject to potential external corrosion, not all pipeline systems are subject to internal corrosion. Outside force may be an

applicable threat, but outside force from earthquake movement may or may not be an issue. The proposed rule would require operators to identify both existing threats and potential threats. For example, outside force from landslide or earth movement may be a potential threat to a distribution pipeline system servicing an expanding community, even though currently, the pipeline system is not affected by such problems.

In considering the threat of inappropriate operation, operators would be required to evaluate the effects that actions of its personnel can have on pipeline safety.

c. Evaluate and prioritize risk. Simply knowing what threats exist is not sufficient to understand and manage risk posed to distribution pipeline systems. Operators must determine the likelihood that a system failure would be caused by any given threat. Therefore, the proposed rule would require operators to evaluate each applicable threat and estimate the risk to the pipeline. An operator may subdivide the system into regions (areas within a distribution system consisting of mains, services and other appurtenances) with similar characteristics and reasonably consistent risk, and for which similar actions would be effective in reducing risk.

d. Identify and implement measures to address risks. Once the relative risks are known, operators can take action to mitigate those risks and thus improve safety. The specific actions appropriate for an operator to take will vary depending on the applicable threats, their prevalence, and the risks posed by a leak or failure on the operator's pipeline.

The proposed rule would require operators to identify and implement appropriate risk reduction strategies. Under the proposal, operators would be required to implement at least two risk reduction strategies—an effective leak management program and an enhanced damage prevention program. Since excavation damage is the leading cause of incidents on gas distribution pipeline systems, having effective measures to minimize the likelihood of such damage would be a valuable risk reduction method. Low-pressure distribution pipelines tend to fail by leaking, except in some cases of excavation damage. Leaking gas tends to migrate and can accumulate in buildings and other confined areas where fires and explosion can result. Leaks can be identified and corrected before injury to people and property occurs. Distribution pipeline operators typically

have established leak management programs. This is the reason, for example, why leaks resulting from corrosion represent 36 percent of leaks repaired on distribution mains and 25 percent on service lines, while corrosion is the cause of less than five percent of distribution pipeline incidents.¹⁶ An effective leak management program is thus a valuable risk reduction strategy for all distribution pipeline operators.

Each operator would be required to develop an IM program with a separate section on "Assuring Individual Performance" to improve the safety performance of its personnel. This is a first step towards implementing an integrated approach to assuring PTP.

e. Measure performance, monitor results, and evaluate effectiveness. The proposed rule would require each operator to measure its performance and report certain measures periodically to PHMSA and State regulatory authorities. Only by measuring results can an operator know if its risk reduction efforts are effective. As proposed, operators would have to make changes to their programs to improve effectiveness if performance measurement indicates improvement is needed. Regulators will use the reported performance measures to evaluate overall effectiveness in reducing risk from gas distribution pipeline systems. Further changes to regulations or to oversight (e.g., frequency of inspections) may be appropriate depending on the data analysis findings.

f. Periodic Evaluation and Improvement. Operators would use measured performance to determine whether further improvements are needed and to make necessary changes in their IM programs. Operators would have to evaluate their programs periodically. Operators should determine how often these reviews are appropriate. For large, complex systems, sufficient data and experience may be available to make annual reviews meaningful. For small, simple systems, there may not be sufficient information to make an annual review meaningful. Whatever the size of the system, all operators will have to conduct a complete program evaluation at least once every five years.

g. Report results. The proposed rule would require each operator to measure its performance and report certain measures periodically to PHMSA and State regulatory authorities. The proposal would require operators to

¹⁶ Integrity Management for Gas Distribution, Report of Phase 1 Investigations, December 2005, Attachment 4, page 18. Based on data reported to PHMSA by distribution pipeline operators for 2004.

report four of the required performance measures each March to PHMSA as part of the annual report required by § 191.11. Combining this reporting with the annual report already required will minimize the additional burden on operators to provide this information. Operators would also be required to report these four measures to the State pipeline safety authority where the gas distribution pipeline is located. Operators also would be required to retain records of the remaining listed performance measures for ten years.

Section 192.1009 What must an operator report when plastic pipeline fails? Plastic pipe (including fittings, couplings, valves and joints) forms a significant portion of many distribution pipeline systems. Plastic pipe is used very little in other pipeline systems. Knowledge of potential weaknesses in its plastic pipe is thus particularly important for a distribution pipeline operator analyzing the risk from its system. This section would require that operators report all plastic pipe failures to PHMSA within 90 days after a failure. PHMSA will collect this information and will assure that it is analyzed to identify and communicate significant information about potential vulnerabilities associated with plastic pipe. Distribution pipeline operators will then be able to take this information into consideration in their risk analyses.

Section 192.1011 When must an Excess Flow Valve (EFV) be installed? Gas distribution operators, except for master meter and LPG operators, would be required to install an EFV in each new or replaced service line installed for a single-family residence if a suitable valve is commercially available and certain operating conditions are present for the EFV to function. The required operating conditions are: the operating pressure in the service line must be 10 psig or greater; the gas stream must be free of contaminants and liquids potentially interfering with valve operation; installation must not result in loss of service to the residence; the presence of an EFV must not interfere with required operation and maintenance activities; and the EFV must meet the performance criteria listed in 49 CFR § 192.381.

Section 192.1013 How does an operator file a report with PHMSA? This section describes where an operator is to send required reports. PHMSA prefers electronic submissions.

Section 192.1015 What records must an operator keep? The proposed rule requires an operator to make a number of decisions and to perform a number of analyses to determine and implement

risk reduction methods most appropriate to its distribution pipeline system. It is critical that an operator retain knowledge of the basis for its decisions for the operator to effectively implement and modify its IM program. The proposed rule specifies the records an operator would have to keep to serve this purpose. These records also will allow PHMSA (or the applicable State oversight agency) to review the operator's analyses, decisions, and actions to determine through inspections if they are reasonable and comply with the proposed requirements.

Section 192.1017 When may an operator deviate from required periodic inspections of this part? Various provisions of Part 192 require all distribution pipeline operators to perform actions at prescribed intervals. 49 CFR 192.481, for example, requires all operators to perform atmospheric corrosion inspection at fixed three-year intervals, without regard to system-specific risk factors. It is likely that some of these actions could be performed at less frequent intervals (based on lower risk) with no difference in safety outcomes. The resources made available by reducing action intervals, where appropriate, could be used to address more risk-significant problems. Thus, deviating from intervals now specified in other sections of Part 192 could allow operators to be more risk-based in application of their resources.

This section would allow operators to use their risk analyses to propose changes to the intervals for periodic requirements included in other sections of Part 192. Operators would be required to submit their proposals to jurisdictional safety regulators (usually States) for review and determination that the proposal will assure an adequate level of pipeline safety.

Section 192.1019 What must a master meter or liquefied petroleum gas (LPG) operator do to implement this subpart? This section specifies the requirements master meter and LPG operators must meet. Gas distribution systems operated by master meter and LPG operators are subject to the requirements of Part 192, but these systems are generally smaller and pose less risk than systems operated by other gas distribution operators. Master meter and LPG systems cover a smaller geographic area, over which the operator usually has more control. In particular, the operator usually has more control over excavation activity, which is the leading cause of damage to gas distribution pipeline systems. To reflect these differences, we are proposing a more limited and simpler

set of IM program requirements for these operators. They must develop and implement written IM programs containing the elements required of other gas distribution operators, except an IM program for a master meter or LPG operation need not include the elements for evaluating and prioritizing risks and reporting results. There will be no EFV installation requirements. Also, the level of detail in these IM programs should be much less to reflect the relative simplicity of these pipeline systems. In a separate guidance document, we will provide a model IM program these operators may use. A draft of this guidance is available in the docket to this rulemaking. We request comment on this draft guidance.

Guidance. To carry out the proposed requirements, operators will have to make a number of reasonably complex decisions and analyses to understand their systems, evaluate threats and risks, and implement risk reduction methods. While it is impractical to specify a single method for how operators should make these decisions/analyses, it is possible to provide guidance concerning factors operators should consider. This document will provide guidance in carrying out several requirements. PHMSA expects GPTC to develop more detailed guidance to assist operators in implementing a final rule. Once the GPTC guidance is available, PHMSA may modify the proposed guidance. This draft guidance document is available in the docket to this rulemaking.

XIV. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This notice of proposed rulemaking is published under the authority of the Federal Pipeline Safety Law (49 U.S.C. 60101 *et seq.*). Section 60102 authorizes the Secretary of Transportation to issue regulations governing design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. The proposed integrity management program regulations are issued under this authority and address the NTSB's and DOT Inspector General's recommendations. This rulemaking also carries out the mandates regarding distribution integrity management and excess flows valves under section 9 of the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (Pub. L. 109-468, Dec. 29, 2006).

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

DOT considers this an “economically significant” regulatory action under section 3(f)(1) of Executive Order 12866 (58 FR 51735; October 4, 1993). This NPRM is also significant under DOT’s regulatory policies and procedures (44 FR 11034; February 26, 1979). PHMSA prepared a Draft Regulatory Evaluation for this NPRM and placed it in the public docket.

The proposed requirements would affect an estimated 9,291 natural gas operators with a combined total of 1,138,000 miles of mains and 60,970,000 services. Of these operators, 201 are local gas utilities with more than 12 thousand services, 1,090 are local gas utilities with 12 thousand or fewer services, and 8,000 are master meter and LPG systems.

The monetized benefits resulting from the proposed rule are estimated to be \$214 million per year. Those benefits include:

- Reductions in the consequences of reportable incidents;
- Reductions in the consequences of non-reportable incidents;
- A reduction in the probability of a major catastrophic incident;
- Reductions in lost natural gas;
- Reductions in emergency response costs;
- Reductions in evacuations;
- Reductions in dig-ins impacting non-gas underground facilities; and
- Elimination of the existing EFV notification requirement.

The costs of the proposed rule are estimated to be \$155.1 million in the first year and \$104.1 million in each subsequent year. Those costs cover:

- Development of an IMP;
- Implementation of the IMP;
- Mitigation of risks;
- Reporting to PHMSA and State Regulators;
- Recordkeeping; and
- Management of the IMP.

The analysis finds that, for those costs and benefits that can be quantified, the present value of net benefits are expected to be between \$1.5 billion and \$2.8 billion over a fifty year period after all of the requirements are implemented. Also significant is that the proposed rule is expected to be cost-effective if it results in eliminating only approximately 14.5 percent of the societal costs associated with gas distribution systems.

C. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) PHMSA must consider whether a rulemaking would

have a significant effect on a substantial number of small entities. The proposed IM program requirements apply to gas distribution pipeline operators and require operators of gas distribution pipelines to develop and implement IMPs that will better assure the integrity of their pipeline systems.

Natural gas distribution pipeline operators meet the Small Business Administration’s small business definition of 500 or fewer employees for natural gas distribution operators under North American Industry Classification System (NAICS) 221210. PHMSA estimates that the proposed rule will affect 9,007 small operators. These small operators can be separated into two categories: (1) Local gas distribution utilities with 12,000 or fewer services and (2) master meter and LPG systems. PHMSA estimates there are 1,007 small operators among the local gas distribution utilities with 12,000 or fewer services and 8,000 master meter and LPG systems, all of which are small.

Furthermore, PHMSA estimates the proposed rule will cost each local gas utility with 12,000 or fewer services on average approximately \$40,000 in the first year and \$17,000 in each subsequent year. PHMSA also estimates that the proposed rule will cost master meter and LPG systems on average approximately \$3,000 in the first year and \$1,000 in each subsequent year. PHMSA does not have information on the operators’ revenues and cannot estimate the economic impact the costs will have. The costs associated with the proposed rule may be significant for at least some of the small entities. Therefore, PHMSA believes that the proposed rule could result in a significant adverse economic impact for some of the smallest affected entities. PHMSA invites comments on these assumptions.

PHMSA has tried to minimize costs for these small operators. As mentioned earlier, small operators’ IM programs will not have to include the elements for evaluating and prioritizing risks and for reporting results and there will be no EFV installation requirements. PHMSA is also providing a manual for small operators to guide their compliance with the proposed rule and PHMSA will continue to evaluate alternative methods of compliance that reduce the burden on small businesses while retaining an appropriate level of pipeline safety. Additionally, industry is undertaking a number of initiatives that will help small entities comply with the proposed rule, including the preparation of guidance materials and a model IM program for distribution pipeline operators.

D. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) addresses the collection of information by the Federal government from individuals, small businesses and State and local governments and seeks to minimize the burdens such information collection requirements might impose. A collection of information includes providing answers to identical questions posed to, or identical reporting or record-keeping requirements imposed on ten or more persons, other than agencies, instrumentalities, or employees of the United States. In accordance with the requirements of the Paperwork Reduction Act, agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. PHMSA is requesting comment on a proposed information collection. PHMSA is also giving notice that the proposed collection of information has been submitted to OMB for review and approval.

This NPRM proposes additional information collection requirements. Those requirements result from affected natural gas distribution system operators having to (1) prepare a distribution integrity management program (DIMP); (2) document their DIMP procedures and processes; (3) prepare periodic revisions to their IM programs; (4) keep records, and (5) report periodically to PHMSA and the States. PHMSA evaluated the NPRM, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and believes the burden hours to industry resulting from the NPRM will be 681,379 in the first year and 85,597 hours in each subsequent year. Large and small operators will bear the largest share of the information collection burden. Master meter and Liquid Petroleum Gas system operators are estimated to require 20 hours each to comply in the first year and to make brief (less than ¼ hour) updates to the initial information in subsequent years.

Pursuant to 44 U.S.C. 3506(c)(2)(B), PHMSA solicits comments concerning: whether these information collection requirements are necessary for PHMSA to properly perform its functions, including whether the information has practical utility; the accuracy of PHMSA’s estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collecting information on those who are to

respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

E. Executive Order 13084

This NPRM has been analyzed under principles and criteria contained in Executive Order 13084 (“Consultation and Coordination with Indian Tribal Governments”). Because this NPRM does not significantly or uniquely affect communities of Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13084 do not apply.

F. Executive Order 13132

PHMSA analyzed this NPRM under the principles and criteria contained in Executive Order 13132 (Federalism). PHMSA issues pipeline safety regulations applicable to interstate and intrastate pipelines. The requirements in this proposed rule apply to operators of distribution pipeline systems, primarily intrastate pipeline systems. Under 49 U.S.C. 60105, PHMSA cedes authority to enforce safety standards on intrastate pipeline facilities to a certified State authority. Thus, State pipeline safety regulatory agencies will be the primary enforcer of these safety requirements. Although some States have additional requirements that address IM issues, no State requires its distribution operators to have comprehensive IM programs similar to what we are proposing. Under 49 U.S.C. 60107, PHMSA gives participating States grant money to carry out their pipeline safety enforcement programs. Although some States choose not to participate in the pipeline safety grant program, every State has the option to participate. This grant money is used to defray added safety program costs incurred by enforcing the proposed requirements. We expect to increase money available to help States.

PHMSA has concluded this proposed rule does not propose any regulation that: (1) Has substantial direct effects on States, relationships between the national government and the States, or distribution of power and responsibilities among various levels of government; (2) imposes substantial direct compliance costs on States and local governments; or (3) preempts State law. Therefore, the consultation and funding requirements of Executive Order 13132 (64 FR 43255; August 10, 1999) do not apply.

This proposed rule would serve to preempt any currently established State requirements in this area. States would have the ability to augment pipeline

safety requirements for pipelines, but would not be able to approve safety requirements less stringent than those contained within this proposed rule.

Although the consultation requirements do not apply, the States have played an integral role in helping develop the proposed requirements. State pipeline safety regulatory agencies participated in the stakeholder groups that helped develop the findings on which this proposal is based and provided guidance through NARUC in the form of a resolution. PHMSA action is consistent with this resolution.

G. Executive Order 13211

This NPRM is not a “significant energy action” under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). It is not likely to have a significant adverse effect on supply, distribution, or energy use. Further, the Office of Information and Regulatory Affairs has not designated this NPRM as a significant energy action.

H. Unfunded Mandates

PHMSA estimates that this NPRM does impose an unfunded mandate under the 1995 Unfunded Mandates Reform Act (UMRA). PHMSA estimates the rule to cost operators \$155.1 million in the first year of the regulations, which is higher than the \$100 million threshold (adjusted for inflation, currently estimated to be \$132 million) in any one year. The Regulatory Impact Analysis performed under EO 12866 requirements also meets the analytical requirements under UMRA, and PHMSA has concluded the approach taken in this regulation is the least burdensome alternative for achieving the NPRM’s objectives.

I. National Environmental Policy Act

PHMSA analyzed this NPRM in accordance with section 102(2)(c) of the National Environmental Policy Act (42 U.S.C. 4332), the Council on Environmental Quality regulations (40 CFR 1500–1508), and DOT Order 5610.1C, and has preliminarily determined this action will not significantly affect the quality of the human environment. The Environmental Assessment is in the Docket.

List of Subjects in 49 CFR Part 192

Integrity management, Pipeline safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, PHMSA proposes to amend part 192 of

title 49 of the Code of Federal Regulations as follows:

PART 192—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

1. The authority citation for part 192 continues to read as follows:

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60110, 60113, and 60118; and 49 CFR 1.53.

§ 192.383 [Removed]

2. Section 192.383 is removed.
3. In part 192, a new subpart P is added to read as follows:

Subpart P—Gas Distribution Pipeline Integrity Management (IM)

Sec.

- 192.1001 What do the regulations in this subpart cover?
- 192.1003 What definitions apply to this subpart?
- 192.1005 What must a gas distribution operator (other than a master meter or LPG operator) do to implement this subpart?
- 192.1007 What are the required integrity management (IM) program elements?
- 192.1009 What must an operator report when plastic pipe fails?
- 192.1011 When must an Excess Flow Valve (EFV) be installed?
- 192.1013 How does an operator file a report with PHMSA?
- 192.1015 What records must an operator keep?
- 192.1017 When may an operator deviate from required periodic inspections under this part?
- 192.1019 What must a master meter or liquefied petroleum gas (LPG) operator do to implement this subpart?

Subpart P—Gas Distribution Pipeline Integrity Management (IM)

§ 192.1001 What do the regulations in this subpart cover?

General. This subpart prescribes minimum requirements for an IM program for any gas distribution pipeline covered under this part. A gas distribution operator, other than a master meter or liquefied petroleum (LPG) operator, must follow the requirements in §§ 192.1005 through 192.1017 of this subpart. A master meter operator or LPG operator of a gas distribution pipeline must follow the requirements in § 192.1019 of this subpart.

§ 192.1003 What definitions apply to this subpart?

The following definitions apply to this subpart:

Damage means any impact or exposure resulting in the repair or replacement of an underground facility,

related appurtenance, or materials supporting the pipeline.

§ 192.1005 What must a gas distribution operator (other than a master meter or LPG operator) do to implement this subpart?

(a) *Dates.* No later than [INSERT DATE 18 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] an operator of a gas distribution pipeline must develop and fully implement a written IM program. The IM program must contain the elements described in § 192.1007.

(b) *Procedures.* An operator's program must have written procedures describing the processes for developing, implementing and periodically improving each of the required elements.

§ 192.1007 What are the required integrity management (IM) program elements?

(a) *Knowledge.* An operator must demonstrate an understanding of the gas distribution system.

(1) Identify the characteristics of the system and the environmental factors that are necessary to assess the applicable threats and risks to the gas distribution system.

(2) Understand the information gained from past design and operations.

(3) Identify additional information needed and provide a plan for gaining that information over time through normal activities.

(4) Develop a process by which the program will be continually refined and improved.

(5) Provide for the capture and retention of data on any piping system installed after the operator's IM program becomes effective. The data must include, at a minimum, the location where the new piping and appurtenances are installed and the material of which they are constructed.

(b) *Identify threats.* The operator must consider the following categories of threats to each gas distribution pipeline: corrosion, natural forces, excavation damage, other outside force damage, material or weld failure, equipment malfunction, inappropriate operation, and any other concerns that could threaten the integrity of the pipeline. An operator must gather data from the following sources to identify existing and potential threats: incident and leak history, corrosion control records, continuing surveillance records, patrolling records, maintenance history, and "one call" and excavation damage experience. In considering the threat of inappropriate operation, the operator must evaluate the contribution of human error to risk and the potential role of people in preventing and

mitigating the impact of events contributing to risk. This evaluation must also consider the contribution of existing DOT requirements applicable to the operator's system (e.g., Operator Qualification, Drug and Alcohol Testing) in mitigating risk.

(c) *Evaluate and prioritize risk.* An operator must evaluate the risks associated with its distribution pipeline system. In this evaluation, the operator must determine the relative probability of each threat and estimate and prioritize the risks posed to the pipeline system. This evaluation must consider each applicable current and potential threat, the likelihood of failure associated with each threat, and the potential consequences of such a failure. An operator may subdivide the system into regions (areas within a distribution system consisting of mains, services and other appurtenances) with similar characteristics and reasonably consistent risk, and for which similar actions would be effective in reducing risk.

(d) *Identify and implement measures to address risks.* Determine and implement measures designed to reduce the risks from failure of its gas distribution pipeline system. These measures must include implementing an effective leak management program and enhancing the operator's damage prevention program required under § 192.614 of this part. To address risks posed by inappropriate operation, an operator's written IM program must contain a separate section with a heading 'Assuring Individual Performance'. In that section, an operator must list risk management measures to evaluate and manage the contribution of human error and intervention to risk (e.g., changes to the role or expertise of people), and implement measures appropriate to address the risk. In addition, this section of the written IM program must consider existing programs the operator has implemented to comply with § 192.614 (damage prevention programs); § 192.616 (public awareness); Subpart N of this Part (qualification of pipeline personnel), and 49 CFR Part 199 (drug and alcohol testing).

(e) *Measure performance, monitor results, and evaluate effectiveness.*

(1) Develop and monitor performance measures from an established baseline to evaluate the effectiveness of its IM program. An operator must consider the results of its performance monitoring in periodically re-evaluating the threats and risks. These performance measures must include the following:

(i) Number of hazardous leaks either eliminated or repaired, per § 192.703(c), categorized by cause;

(ii) Number of excavation damages;

(iii) Number of excavation tickets (receipt of information by the underground facility operator from the notification center);

(iv) Number of EFVs installed;

(v) Total number of leaks either eliminated or repaired, categorized by cause;

(vi) Number of hazardous leaks either eliminated or repaired per § 192.703(c), categorized by material; and

(vii) Any additional measures to evaluate the effectiveness of the operator's program in controlling each identified threat.

(f) *Periodic Evaluation and Improvement.* An operator must continually re-evaluate threats and risks on its entire system and consider the relevance of threats in one location to other areas. In addition, each operator must periodically evaluate the effectiveness of its program for assuring individual performance to reassess the contribution of human error to risk and to identify opportunities to intervene to reduce further the human contribution to risk (e.g., improve targeting of damage prevention efforts). Each operator must determine the appropriate period for conducting complete program evaluations based on the complexity of its system and changes in factors affecting the risk of failure. An operator must conduct a complete program re-evaluation at least every five years. The operator must consider the results of the performance monitoring in these evaluations.

(g) *Report results.* Report the four measures listed in paragraphs (e)(1)(i) through (e)(1)(iv) of this section, annually by March 15, to PHMSA as part of the annual report required by § 191.11 of this chapter. An operator also must report these four measures to the State pipeline safety authority in the State where the gas distribution pipeline is located.

§ 192.1009 What must an operator report when plastic pipe fails?

Each operator must report information relating to each material failure of plastic pipe (including fittings, couplings, valves and joints) no later than 90 days after failure. This information must include, at a minimum, location of the failure in the system, nominal pipe size, material type, nature of failure including any contribution of local pipeline environment, pipe manufacturer, lot number and date of manufacture, and other information that can be found in

markings on the failed pipe. An operator must send the information report as indicated in § 192.1013. An operator must also report this information to the State pipeline safety authority in the State where the gas distribution pipeline is located.

§ 192.1011 When must an Excess Flow Valve (EFV) be installed?

(a) *General requirements.* This section only applies to new or replaced service lines serving single-family residences. An EFV installation must comply with the requirements in § 192.381.

(b) *Installation required.* The operator must install an EFV on the service line installed or entirely replaced after [INSERT DATE 90 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**], unless one or more of the following conditions is present:

(1) The service line does not operate at a pressure of 10 psig or greater throughout the year;

(2) The operator has prior experience with contaminants in the gas stream that could interfere with the EFV's operation or cause loss of service to a residence;

(3) An EFV could interfere with necessary operation or maintenance activities, such as blowing liquids from the line; or

(4) An EFV meeting performance requirements in § 192.381 is not commercially available to the operator.

§ 192.1013 How does an operator file a report with PHMSA?

An operator must send any performance report required by this subpart to the Information Resource Manager as follows:

(a) Through the online electronic reporting system available at PHMSA's home page at <http://phmsa.dot.gov>;

(b) Via facsimile to (202) 493-2311; or

(c) Mail: PHMSA—Information Resource Manager, U.S. Department of Transportation-East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590.

§ 192.1015 What records must an operator keep?

Except for the performance measures records required in § 192.1007, an operator must maintain, for the useful life of the pipeline, records demonstrating compliance with the requirements of this subpart. At a minimum, an operator must maintain

the following records for review during an inspection:

(a) A written IM program in accordance with § 192.1005;

(b) Documents supporting threat identification;

(c) A written procedure for ranking the threats;

(d) Documents to support any decision, analysis, or process developed and used to implement and evaluate each element of the IM program;

(e) Records identifying changes made to the IM program, or its elements, including a description of the change and the reason it was made; and

(f) Records on performance measures. However, an operator must only retain records of performance measures for ten years.

§ 192.1017 When may an operator deviate from required periodic inspections under this part?

(a) An operator may propose to reduce the frequency of periodic inspections and tests required in this part on the basis of the engineering analysis and risk assessment required by this subpart. Operators may propose reductions only where they can demonstrate that the reduced frequency will not significantly increase risk.

(b) An operator must submit its proposal to the PHMSA Associate Administrator for Pipeline Safety or the State agency responsible for oversight of the operator's system. PHMSA, or the applicable State oversight agency, may accept the proposal, with or without conditions and limitations, on a showing that the adjusted interval provides a satisfactory level of pipeline safety.

§ 192.1019 What must a master meter or liquefied petroleum gas (LPG) operator do to implement this subpart?

(a) *General.* No later than [INSERT DATE 18 MONTHS AFTER PUBLICATION OF THE FINAL RULE IN THE **Federal Register**] the operator of a master meter or a liquefied petroleum gas (LPG) gas distribution pipeline must develop and fully implement a written IM program. The IM program must contain, at a minimum, elements in paragraphs (a)(1) through (a)(5) of this section. The IM program for these pipelines should reflect the relative simplicity of these types of systems.

(1) *Infrastructure knowledge.* The operator must demonstrate knowledge

of the system's infrastructure, which, to the extent known, should include the approximate location and material of its distribution system. The operator must identify additional information needed and provide a plan for gaining knowledge over time through normal activities.

(2) *Identify threats.* The operator must consider, at minimum, the following categories of threats (existing and potential): corrosion, natural forces, excavation damage, other outside force damage, material or weld failure, equipment malfunction and inappropriate operation.

(3) *Identify and implement measures to mitigate risks.* The operator must determine and implement measures designed to reduce the risks from failure of its pipeline system.

(4) *Measure performance, monitor results, and evaluate effectiveness.* The operator must develop and monitor performance measures on the number of leaks eliminated or repaired on its pipeline system and their causes.

(5) *Periodic evaluation and improvement.* The operator must determine the appropriate period for conducting IM program evaluations based on the complexity of its system and changes in factors affecting the risk of failure. An operator must re-evaluate its entire program at least every five years. The operator must consider the results of the performance monitoring in these evaluations.

(b) *Records.* The operator must maintain, for the useful life of the pipeline, the following records:

(1) A written IM program in accordance with this section;

(2) Documents supporting threat identification; and

(3) Documents showing the location and material of all piping and appurtenances that are installed after the effective date of the operator's IM program and, to the extent known, the location and material of all pipe and appurtenances that were existing on the effective date of the operator's program.

Issued in Washington, DC on June 20, 2008.

William H. Gute,

Deputy Associate Administrator for Pipeline Safety.

[FR Doc. 08-1387 Filed 6-20-08; 3:31 pm]

BILLING CODE 4910-60-P

Notices

Federal Register

Vol. 73, No. 123

Wednesday, June 25, 2008

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

Food Safety and Inspection Service

[Docket No. FSIS-2008-0018]

Notice of Funding Opportunity With the Food Safety and Inspection Service for Food Safety and Defense Training for Spanish-Speaking Plant Owners and Operators

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of funding opportunity.

SUMMARY: The Food Safety and Inspection Service (FSIS) is soliciting applications for one or more cooperative agreements for a collaborative outreach program on food safety and defense. The program will target Spanish-speaking owners and operators of small and very small establishments producing meat and poultry products. The goal is to increase knowledge of and compliance with FSIS requirements regarding meat and poultry products sold in the U.S. by this segment of the regulated industry. FSIS will allocate between \$50,000 and \$100,000 to one or more cooperative agreements this fiscal year 2008, with agreements being renewable for up to five years.

DATES: Applications must be received by August 11, 2008.

FOR FURTHER INFORMATION CONTACT:

Mildred Rivera-Betancourt, Training Operations Branch, telephone (515)727-8987; facsimile (515)727-8992; e-mail mildred.rivera-betancourt@fsis.usda.gov.

Application materials can be downloaded from the Government grants Web site at <http://www.grants.gov>. Click on "Find Grant Opportunities," then select "Basic Search;" type in "10.479" in the Search by Catalog of Federal Domestic Assistance (CFDA) Number field and select "Search"; click on "Food Safety Cooperation Agreements" and select

"Application" to access the application for this announcement.

SUPPLEMENTARY INFORMATION:

Background

FSIS relies on partner agencies, organizations and institutions to help it in many aspects of its public health mission. These partners share FSIS's public health and food safety goals and through their activities make important contributions to national food safety and food defense.

On occasion, FSIS supports such partnerships with state or local agencies, educational institutions or other non-profit organizations by funding projects to address specific areas of mutual concern. This is done under FSIS's authority to enter into cooperative agreements for educational programs or special studies to improve the safety of the nation's food supply (Pub. L. 108-7, sec. 713, 117 Stat. 39).

Cooperative agreements are federal grants where the granting Federal agency is substantially involved with the cooperator that receives the funding during both project development and project execution.

The nature and the number of cooperative projects funded each year are determined by the Agency's current priorities, the availability of discretionary funds, the number of proposals received, and the Agency's assessment of how well proposals will address its stated priority goals and objectives.

Outreach is an essential component of FSIS's regulatory program. Improving outreach is one of FSIS's six priorities in its Strategic Plan for 2008 to 2013. The Web site for the Strategic Plan is: http://search.usda.gov/search?sort=date%3AD%3AL%3Ad1&output=xml_no_dtd&site=FSIS&ie=UTF-8&oe=UTF-8&client=FSIS&proxystylesheet=default_frontend&q=Strategic+Plan.

Outreach is essential because the agency's implementation of its Pathogen Reduction/Hazard Analysis and Critical Control Point (HACCP) regulation requires that regulated establishments develop and implement their own controls to ensure production of safe products. It is a public health imperative that all producers of meat, poultry and egg products for American consumers employ effective systems for food safety and food defense.

Program Description

FSIS wants to improve its outreach to underserved and non-English speaking persons engaged in meat and poultry processing. The initial focus is on Spanish-speaking operators of small plants (fewer than 500 employees) and very small plants (fewer than 10 employees, or less than \$2.5 million in sales.) Operators of small and very small plants generally have fewer technical and financial resources by which to ensure compliance with Federal inspection requirements than do large plants. This disadvantage is exacerbated if English is not the predominant language spoken because difficulties may arise in understanding and complying with applicable inspection laws and guidance generally available only in English.

In addition to U.S. plants affected, the ability of plant operators in countries exporting to the U.S. to meet equivalency requirements directly relates to their ability to understand our requirements and establish systems that are as effective as our own.

Therefore, FSIS intends to fund one or more cooperative projects to provide training and education to Spanish-speaking owners and operators of establishments producing meat and poultry products subject to FSIS's regulations. This includes establishments in the U.S., including the Commonwealth of Puerto Rico, and establishments in other countries producing imports to the U.S. in the Caribbean, Mexico, Central and South America. The goal is for those trained to be able to enhance their own food safety programs, better demonstrate compliance with applicable regulations, and communicate more effectively with FSIS and other Agencies regarding the production and export of their meat, poultry, and egg products.

The cooperator that receives the funding will design, develop, and deliver training for Spanish-speaking operators of meat and poultry facilities that addresses the effective use of HACCP systems, appropriate responses to emerging food safety and food defense concerns, understanding of the latest information on foodborne illness and hazards, and the availability of new procedures and technologies for hazard avoidance and mitigation. HACCP training should encompass products

entering plants as well as products produced.

Training will address U.S. meat, poultry, and egg products regulations, policies, and procedures. It will also provide guidance on how small and very small plant owners and operators can manage their operations to better ensure compliance with applicable FSIS regulations.

The training program will be designed to reach a large proportion of the targeted operators, directly or indirectly. Training will be delivered through workshops and other kinds of group instruction but will also be delivered through alternative methods such as electronic self-teaching materials and distance learning programs.

Materials developed will have educational value independent of the cooperative project and will be made available by FSIS or the cooperator for reproduction and public use.

Available Funding

Fiscal year 2008 funding will total between \$50,000 and \$100,000.

Project Period

Projects are funded for a period of up to one year from the project starting date. Awarded cooperative agreement(s) may be renewed yearly for up to four additional years.

Eligible Applicants

Educational institutions, state, local and tribal government agencies, and other non-profit organizations with demonstrable capabilities to provide outreach and education to Spanish-speaking owners and operators of meat and poultry establishments are invited to submit applications.

Content and Form of Application

1. *Application for Federal Assistance*, OMB Standard Form 424. Please complete this form in its entirety. The original copy of the application must contain a pen-and-ink signature of the authorized organizational representative—an individual with the authority to commit the organization's time and other relevant resources to the project. The CFDA (block 10) is "10.479—Food Safety Cooperative Agreements." The Web site for OMB Standard Form 424 is: http://www.grants.gov/agencies/aforms_repository_information.jsp.

2. *Project Description*. The description should provide reviewers sufficient information to effectively evaluate the merits of the application under the review criteria listed below. It should include a statement of the objectives; the steps necessary to implement the

objectives of the outreach program; an evaluation plan for the activities; a program delivery plan; and a statement of work describing how the activities will be implemented and managed by the applicant. It should be no longer than eight pages.

The statement of work should be in a table format that identifies each objective, the key tasks to achieve it, the entity responsible for the task, the completion date, the task location, and FSIS' role.

3. *Budget*. Applicants must complete OMB Standard Form 424-A, "Budget Information, Non-Construction Program", and a budget narrative itemizing costs for each line item on the SF-424-A. The Web site for OMB Standard Form 424-A is: http://www.grants.gov/agencies/aforms_repository_information.jsp.

4. *Key Personnel and Collaborative Arrangements*. Applicants should provide information on the roles and responsibilities of each person working on the project, specifying the project leader and including collaborators from other organizations.

Address to Submit Applications

Applications may be submitted through <http://www.grants.gov>, or directly to FSIS, electronically or by mail. Applications sent directly should be e-mailed to mildred.rivera-betancourt@fsis.usda.gov, or mailed to Mildred Rivera-Betancourt, U.S. Department of Agriculture, FSIS, OEET/CFL/TOB, 210 Walnut Street, Room 985, Des Moines, IA 50320.

All applications must be submitted by the deadline. Applications meet the deadline if they are received in the mailroom at the above address on or before the date applications are due.

Date Applications Are Due

Applications are due August 11, 2008.

Acknowledgment of Applications

FSIS will acknowledge receipt of applications by e-mail. If receipt of application is not acknowledged by FSIS within 15 days of the submission deadline, the applicant should contact Mildred Rivera-Betancourt at (515) 727-8987, e-mail: mildred.rivera-betancourt@fsis.usda.gov, or Ralph Stafko at (202) 690-6592, e-mail: ralph.stafko@fsis.usda.gov.

Application Review Process

Applications will be reviewed on their merits by a panel of at least three reviewers from the U.S. Department of Agriculture and other agencies or disinterested organizations as needed. The panel will examine and score

applications based on each of the five criteria listed below. Reviewers will assign a point value up to the maximum for each criterion. After all reviewers have evaluated and scored each of the applications, the scores for the entire panel will be averaged to determine a final score for the application.

After assigning points for each criterion, applications will be listed in order of their final score and presented, along with funding level recommendations, to the FSIS Assistant Administrator for Outreach, Employee Education and Training, who will make the final decision on awarding of the cooperative agreement(s). Decisions may be tentative, pending additional information subject to negotiation between FSIS and the applicant.

FSIS will review and critique applications, and select those to be made cooperative projects, by September 23, 2008.

Evaluation Criteria and Weights

Proposals for funding will be reviewed and ranked in accord with the following factors:

- *Project Design*. The project description demonstrates understanding of the needs of Spanish-speaking operators of small and very small meat and poultry plants. It shows how the project will assist small and very small plants to maintain effective HACCP systems, produce safe products, and otherwise comply with federal regulations. The project provides for effective outreach, including development of work products that can be used to expand coverage through independent use of materials subsequent to the cooperative agreement. The project includes well-constructed plans for assessing needs, targeting those needs, and measuring the program's effectiveness. Maximum 40 points.

- *Delivery Plan*. The plan specifies applicant's responsibilities for each part of the program delivery. The plan demonstrates ability to identify specific tasks required and time lines to accomplish them. Higher scores will be given to the extent tasks are specific, measurable, and reasonable, have specific periods for completion, relate to required activities, and reflect program objectives. Maximum 20 points.

- *Project Management*. The applicant demonstrates an ability to implement sound and effective project management. Organizational skills, leadership, and experience in delivering services or programs are indicative of ability to execute project plans. Maximum 20 points.

- *Investment in Project.* The cooperator agrees to contribute significant resources to the project. Maximum 10 points.

- *Collaborative Partnering.* The plan reflects intent to work collaboratively with other partners, and demonstrated experience and capacity to partner with other agencies, organizations or institutions, to enhance the effectiveness of the program. Maximum 10 points.

Award Administration

Notification of Award. FSIS will notify project leaders whose applications have been selected for funding. The FSIS awarding official will enter into cooperative agreements with applicants whose applications have been judged most meritorious under the procedures set forth in this announcement. Cooperative agreements will provide the amount of Federal funds for use in the project period, the terms and conditions of the award, and the time-period for the project. The effective date of the award is the date the agreement is executed by both parties. All funds provided must be expended solely for the purposes for which they are obligated under the approved agreement and budget, the regulations, and applicable Federal cost principles. Awarded agreements are subject to applicable Federal regulations and OMB circulars. No commitment of Federal assistance beyond the project period is made or implied for any award resulting from this notice.

Applicants that are not funded will be notified within 120 days after the submission deadline.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it online through the FSIS Web page located at http://www.fsis.usda.gov/regulations/2008_Notices_Index/. FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also

available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at http://www.fsis.usda.gov/news_and_events/email_subscription/. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and they have the option to password protect their accounts.

Done at Washington, DC, on: June 19, 2008.

Alfred V. Almanza,

Administrator.

[FR Doc. E8-14287 Filed 6-24-08; 8:45 am]

BILLING CODE 3410-DM-P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Economic Development Administration (EDA).

Title: Compliance with Government Performance and Results Act.

OMB Approval Number: 0610-0098.

Form Number(s): ED-915, ED-916, ED-917, and ED-918.

Type of Review: Regular submission.

Burden Hours: 11,131.

Number of Respondents: 1,530.

Average Hours Per Response: 7 hours and 20 minutes.

Needs and Uses: EDA must comply with the Government Performance and Results Act of 1993 which requires Federal agencies to develop performance measures, and report to Congress and stakeholders the results of the agency's performance. EDA needs to collect specific data from grant recipients to report on its performance in meeting its stated goals and objectives.

Affected Public: State, local, or tribal government; not-for-profit institutions; business or other for-profit organizations.

Frequency: Annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395-3897.

Copies of the above information collection proposal can be obtained by

calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482-0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395-7285, or David_Rostker@omb.eop.gov.

Dated: June 19, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8-14281 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-34-P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Economic Development Administration (EDA).

Title: Award for Excellence in Economic Development.

OMB Control Number: 0610-0101.

Form Number(s): None.

Type of Request: Regular submission.

Burden Hours: 300.

Number of Respondents: 100.

Average Hours Per Response: 3.

Needs and Uses: EDA provides a broad range of economic development assistance to help distressed communities design and implement effective economic development strategies. A part of this assistance includes disseminating information about best practices and encouraging collegial learning among economic development practitioners. EDA has created the Award for Excellence in Economic Development to recognize outstanding economic development activities of national importance.

Affected Public: State, local or tribal government; and not-for-profit institutions.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395-3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance

Officer, (202) 482-0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395-7285, or David_Rostker@omb.eop.gov.

Dated: June 19, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8-14282 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-34-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1564]

Approval for Manufacturing Authority, Imperium Renewables, Inc., (Biodiesel), Aberdeen and Hoquiam, WA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

WHEREAS, the Port of Grays Harbor, grantee of FTZ 173, has requested manufacturing authority on behalf of Imperium Renewables, Inc. (IRI), within FTZ 173 in Aberdeen and Hoquiam, Washington (FTZ Docket 13-2007, filed 4/4/2007);

WHEREAS, notice inviting public comment has been given in the **Federal Register** (72 FR 18203, 4/11/2007);

WHEREAS, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations would be satisfied, and that approval of the application would be in the public interest if subject to the restriction listed below;

NOW, THEREFORE, the Board hereby grants authority for manufacturing authority within FTZ 173 on behalf of IRI, as described in the application and **Federal Register** notice, subject to the FTZ Act and the Board's regulations, including § 400.28, and further limited

to an initial time period for approval, until March 31, 2013, subject to extension upon review.

Signed at Washington, DC, this 12th day of June 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8-14418 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

Order No. 1562

Approval of Manufacturing Authority, Within Foreign-Trade Zone 38, Spartanburg County, SC, Kittel Supplier USA, Inc., (Automotive Door Trim Components)

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u) (the Act), the Foreign-Trade Zones Board (the Board) adopts the following Order:

WHEREAS, the South Carolina State Ports Authority, grantee of FTZ 38, has requested authority under Section 400.28 (a)(2) of the Board's regulations on behalf of Kittel Supplier USA, Inc., to assemble automotive door trim components under FTZ procedures within FTZ 38 Site 3, Duncan, South Carolina (FTZ Docket 32-2007, filed 8-3-2007);

WHEREAS, notice inviting public comment has been given in the **Federal Register** (72 FR 45219, 8-13-2007);

WHEREAS, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application is in the public interest;

NOW, THEREFORE, the Board hereby grants authority for the assembly of automotive door trim components within FTZ 38 for Kittel Supplier USA, Inc., as described in the application and **Federal Register** notice, subject to the Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 12th day of June 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8-14389 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

Order No. 1565

Expansion of Foreign-Trade Zone 155, Calhoun and Victoria Counties, Texas, Area

Pursuant to its authority under the Foreign-Trade Zones Act of June, 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

WHEREAS, the Calhoun-Victoria FTZ, Inc., grantee of Foreign-Trade Zone 155, submitted an application to the Board for authority to expand its zone to include an additional site located at the Markham salt dome caverns in Markham, Texas (Site 7 - 11 acres), adjacent to the Port Lavaca-Point Comfort Customs and Border Protection port of entry (FTZ Docket 50-2007, filed 12/14/07);

WHEREAS, notice inviting public comment was given in the **Federal Register** (72 FR 73314, 12/27/07), and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

WHEREAS, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

NOW, THEREFORE, the Board hereby orders:

The application to expand FTZ 155 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 18th day of June 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8-14419 Filed 6-25-08; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

Order No. 1563

Grant of Authority for Subzone Status, Sony Electronics Inc., (Audio, Video, Communications and Information Technology Products and Accessories), Romeoville, Illinois

Pursuant to its authority under the Foreign-Trade Zones Act, of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

WHEREAS, the Foreign-Trade Zones Act provides for "...the establishment... of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

WHEREAS, the Board's regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

WHEREAS, the Illinois International Port District, grantee of Foreign-Trade Zone 22, has made application to the Board for authority to establish a special-purpose subzone at the warehouse, distribution and kitting facility of Sony Electronics Inc., located in Romeoville, Illinois (FTZ Docket 49-2007, filed 12/4/07);

WHEREAS, notice inviting public comment was given in the **Federal Register** (72 FR 70819-70820, 12/13/07); and,

WHEREAS, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application is in the public interest;

NOW, THEREFORE, the Board hereby grants authority for subzone status for activity related to audio, video, communications and information-technology products and accessories warehousing, distribution and kitting at the facility of Sony Electronics Inc., located in Romeoville, Illinois (Subzone 22P), as described in the application and **Federal Register** notice, and subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 12th day of June 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8-14391 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-846]

Brake Rotors From the People's Republic of China: Revocation of Antidumping Duty Order Pursuant to Second Five-Year (Sunset) Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determination by the United States International Trade Commission ("ITC") that revocation of the existing antidumping duty ("AD") order on brake rotors from the People's Republic of China ("PRC") would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, the Department of Commerce (the "Department") is publishing this notice of revocation of the AD order.

DATES: *Effective Date:* June 25, 2008.

FOR FURTHER INFORMATION CONTACT: Frances Veith or Juanita Chen, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* 202-482-4295 and 202-482-1904, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 17, 1997, the Department published the AD order on brake rotors

from the PRC.¹ On July 2, 2007, the Department published the notice of initiation of the sunset review of the AD duty order on brake rotors from the PRC pursuant to section 751(c) of the Tariff Act of 1930, as amended ("the Act"). See *Initiation of Five-Year ("Sunset") Reviews*, 72 FR 35968 (July 2, 2007) ("*Initiation Notice*"). As a result of its review, the Department found that revocation of the AD order would be likely to lead to continuation or recurrence of dumping and notified the ITC of the margins likely to prevail were the order revoked. See *Brake Rotors from the People's Republic of China: Notice of Final Results of Expedited Second Sunset Review of Antidumping Duty Order*, 73 FR 1319 (January 8, 2008) ("*Brake Rotors Final*").

On May 29, 2008, the ITC determined, pursuant to section 751(c) of the Act, that revocation of the AD order on brake rotors from the PRC would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The ITC notified the Department on June 12, 2008, and published its decision on June 18, 2008. See *Brake Rotors From China: Investigation No. 731-TA-744 (Second Review)*, 73 FR 34790 (June 18, 2008) and ITC Publication 4009 Inv. No. 731-TA-744 (Second Review) (June 2008).

Scope of the Order

The products covered by this order are brake rotors made of gray cast iron, whether finished, semifinished, or unfinished, ranging in diameter from 8 to 16 inches (20.32 to 40.64 centimeters) and in weight from 8 to 45 pounds (3.63 to 20.41 kilograms). The size parameters (weight and dimension) of the brake rotors limit their use to the following types of motor vehicles: automobiles, all-terrain vehicles, vans and recreational vehicles under "one ton and a half," and light trucks designated as "one ton and a half."

Finished brake rotors are those that are ready for sale and installation without any further operations. Semifinished rotors are those on which the surface is not entirely smooth, and have undergone some drilling. Unfinished rotors are those which have undergone some grinding or turning.

These brake rotors are for motor vehicles, and do not contain in the casting a logo of an original equipment manufacturer ("OEM") which produces vehicles sold in the United States (e.g., General Motors, Ford, Chrysler, Honda,

¹ See *Notice of Antidumping Duty Order: Brake Rotors from the People's Republic of China*, 62 FR 18740 (April 17, 1997).

Toyota, Volvo). Brake rotors covered in this order are not certified by OEM producers of vehicles sold in the United States. The scope also includes composite brake rotors that are made of gray cast iron, which contain a steel plate, but otherwise meet the above criteria. Excluded from the scope of this order are brake rotors made of gray cast iron, whether finished, semifinished, or unfinished, with a diameter less than 8 inches or greater than 16 inches (less than 20.32 centimeters or greater than 40.64 centimeters) and a weight less than 8 pounds or greater than 45 pounds (less than 3.63 kilograms or greater than 20.41 kilograms).²

Brake rotors are currently classifiable under subheadings 8708.39.5010, 8708.39.5030, and 8708.30.5030 of the *Harmonized Tariff Schedule of the United States* ("HTSUS").³ Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Revocation of Order

As a result of the determination by the ITC that revocation of this AD order would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, pursuant to section 751(d) of the Act, the Department is revoking the AD order on brake rotors from the PRC. Pursuant to section 751(d)(3) of the Act and 19 CFR 351.222(i)(2)(i), the effective date of revocation is August 14, 2007 (*i.e.*, the fifth anniversary of the date of publication in the **Federal Register** of the notice of continuation of this AD order).⁴ The Department will notify U.S. Customs and Border Protection to terminate suspension of liquidation and collection of cash deposits on entries of the subject merchandise entered or withdrawn from warehouse on or after August 14, 2007, the effective date of revocation of the AD order. The Department will complete any pending

² In a 2007 scope ruling, the Department determined that brake rotors produced by Federal-Mogul and certified by Ford Motor Company are excluded from the scope of the order. See the January 17, 2007, Department memorandum entitled "Scope Ruling of the Antidumping Duty Order on Brake Rotors from the People's Republic of China: Federal-Mogul Corporation." *Notice of Scope Rulings*, 72 FR 23802 (May 1, 2007).

³ As of January 1, 2005, the HTSUS classification for brake rotors (discs) changed from 8708.39.5010 to 8708.39.5030. As of January 1, 2007, the HTSUS classification for brake rotors (discs) changed from 8708.39.5030 to 8708.30.5030. See *Harmonized Tariff Schedule of the United States (2007)* (Rev. 2), available at <http://www.usitc.gov>.

⁴ See *Continuation of Antidumping Duty Order: Brake Rotors from the People's Republic of China*, 67 FR 52933 (August 14, 2002).

administrative reviews of this order and will conduct administrative reviews of subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

This five-year or "sunset" review and notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: June 20, 2008.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

[FR Doc. E8-14421 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-863]

Sixth Administrative Review of Honey From the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* June 25, 2008.

FOR FURTHER INFORMATION CONTACT: Catherine Bertrand, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone-(202) 482-3207.

Background

On January 28, 2008 the Department of Commerce (the "Department") published a notice of initiation of an administrative review of the antidumping duty order on honey from the People's Republic of China ("PRC") covering the period December 1, 2006–November 30, 2007. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 FR 4829 (January 28, 2008) ("*Initiation*").

On June 10, 2007 the American Honey Producers Association and the Sioux Honey Association (the "Petitioners") withdrew their request for an administrative review for the following twenty-one companies: Anhui Honghui Foodstuff (Group) Co., Ltd., Chengdu Stone Dynasty Art Stone, Eurasia Bee's Products Co., Ltd., Golden Tadco Int'l, Hangzhou Golden Harvest Health Industry Co., Ltd., Hanseatische Nahrungsmittel Fabrik R Import-Export

GMBH, Inner Mongolia Altin Bee-Keeping, Jiangsu Kanghong Natural Healthfoods Co., Ltd., Jiangsu Light Industry Products Imp & Exp (Group) Corp., OEI International Inc., Qingdao Aolan Trade Co., Ltd., QHD Sanhai Honey Co., Ltd., Shanghai Bloom International Trading Co., Ltd., Shanghai Foreign Trade Co., Ltd., Shanghai Hui Ai Mal Tose Co., Ltd., Shanghai Taiside Trading Co., Ltd., Sichuan-Dujiangyan Dubao Bee Industrial Co., Ltd., Tianjin Eulia Honey Co., Ltd., Wuhan Bee Healthy Co., Ltd., Wuhan Shino-Food Trade Co., Ltd. and Xinjiang Jinhui Food Co., Ltd. The Petitioners were the only party to request a review of the entries of subject merchandise exported by these companies.

Partial Rescission

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within ninety days of the date of publication of notice of initiation of the requested review.

On April 22, 2008 the Department extended the deadline for withdrawal of request for review. The current deadline is thirty days after the receipt of the last response to the Department's initial antidumping duty questionnaire. The last questionnaire response was received on June 2, 2008; thus, the deadline for withdrawal of request for review is July 1, 2008. Because the Petitioners' withdrawal of requests for review was timely and no other party requested a review of the aforementioned companies, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review with respect to Anhui Honghui Foodstuff (Group) Co., Ltd., Chengdu Stone Dynasty Art Stone, Eurasia Bee's Products Co., Ltd., Golden Tadco Int'l, Hangzhou Golden Harvest Health Industry Co., Ltd., Hanseatische Nahrungsmittel Fabrik R Import-Export GMBH, Inner Mongolia Altin Bee-Keeping, Jiangsu Kanghong Natural Healthfoods Co., Ltd., Jiangsu Light Industry Products Imp & Exp (Group) Corp., OEI International Inc., Qingdao Aolan Trade Co., Ltd., QHD Sanhai Honey Co., Ltd., Shanghai Bloom International Trading Co., Ltd., Shanghai Foreign Trade Co., Ltd., Shanghai Hui Ai Mal Tose Co., Ltd., Shanghai Taiside Trading Co., Ltd., Sichuan-Dujiangyan Dubao Bee Industrial Co., Ltd., Tianjin Eulia Honey Co., Ltd., Wuhan Bee Healthy Co., Ltd., Wuhan Shino-Food Trade Co., Ltd. and Xinjiang Jinhui Food Co., Ltd.

Assessment Rates

The Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries. For those companies for which this review has been rescinded and which have a separate rate, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2). The Department will issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Notification to Importers

This notice serves as a final reminder to importers for whom this review is being rescinded, as of the publication date of this notice, of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative protective orders ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This notice is issued and published in accordance with section 777(i)(1) of the Act and 19 CFR 351.213(d)(4).

Dated: June 18, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8-14409 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 08-00003]

Export Trade Certificate of Review

ACTION: Notice of Issuance of an Export Trade Certificate of Review to AGLA Trade Link International (Application No. 08-00003).

SUMMARY: On June 18, 2008, the U.S. Department of Commerce issued an Export Trade Certificate of Review to AGLA Trade Link International ("ATLI"). This notice summarizes the conduct for which certification has been granted.

FOR FURTHER INFORMATION CONTACT: Jeffrey Anspacher, Director, Export Trading Company Affairs, International Trade Administration, by telephone at (202) 482-5131 (this is not a toll-free number), or by e-mail at oetca@ita.doc.gov.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. Sections 4001-21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing Title III are found at 15 CFR Part 325 (2006).

Export Trading Company Affairs ("ETCA") is issuing this notice pursuant to 15 CFR section 325.6(b), which requires the Secretary of Commerce to publish a summary of the certification in the **Federal Register**. Under Section 305(a) of the Act and 15 CFR section 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Certified Conduct: ATLI is certified to engage in the Export Trade Activities and Methods of Operation described below in the following Export Trade and Export Markets.

I. Export Trade

1. *Products:* All Products.
2. *Services:* All Services.
3. *Technology Rights:* Technology rights that relate to Products and Services, including, but not limited to, patents, trademarks, copyrights, and trade secrets.
4. *Export Trade Facilitation Services (as they Relate to the Export of Products, Services, and Technology Rights):* Export Trade Facilitation Services, including, but not limited to,

professional services in the areas of government relations and assistance with state and federal programs; foreign trade and business protocol; consulting; market research and analysis; collection of information on trade opportunities; marketing; negotiations; joint ventures; shipping; export management; export licensing; advertising; documentation and services related to compliance with customs requirements; insurance and financing; trade show exhibitions; organizational development; management and labor strategies; transfer of technology; transportation services; and facilitating the formation of shippers' associations.

II. Export Markets

The Export Markets include all parts of the world except the United States (the fifty states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands).

III. Export Trade Activities and Methods of Operation

1. With respect to the sale of Products and Services, licensing of Technology Rights, and the provision of Export Trade Facilitation Services, ATLI, may:
 - a. Provide and/or arrange for the provision of Export Trade Facilitation Services;
 - b. Engage in promotional and marketing activities and collect information on trade opportunities in the Export Markets and distribute such information to clients;
 - c. Enter into exclusive and/or non-exclusive licensing and/or sales agreements with Suppliers for the export of Products, Services, and/or Technology Rights to Export Markets;
 - d. Enter into exclusive and/or non-exclusive arrangements with distributors and/or sales representatives in Export Markets;
 - e. Allocate export sales or divide Export Markets among Suppliers for the sale and/or licensing of Products, Services, and/or Technology Rights;
 - f. Allocate export orders among Suppliers;
 - g. Establish the price of Products, Services, and/or Technology Rights for sales and/or licensing in Export Markets;
 - h. Negotiate, enter into, and/or manage licensing agreements for the export of Technology Rights; and
 - i. Enter into contracts for shipping Products to Export Markets.
2. ATLI may exchange information on a one-to-one basis with its individual

Suppliers regarding that Supplier's inventories and near-term production schedules in order that the availability of Products for export can be determined and effectively coordinated by ATLI with its distributors in Export Markets.

V. Definition

"Supplier" means a person who produces, provides, or sells Products, Services and/or Technology Rights.

VI. Protection Provided by Certificate

The Certificate protects ATLI and its directors, officers, and employees acting on its behalf, from private treble damage actions and government criminal and civil suits under U.S. federal and state antitrust laws for the export conduct specified in the Certificate and carried out during its effective period in compliance with its terms and conditions.

VII. Effective Period of Certificate

This Certificate continues in effect from June 18, 2008, until it is relinquished, modified, or revoked as provided in the Act and the Regulations.

VIII. Other Conduct

Nothing in the Certificate prohibits ATLI from engaging in conduct not specified in the Certificate, but such conduct is subject to the normal application of the antitrust laws.

IX. Disclaimers

1. The issuance of the Certificate of Review to ATLI by the Secretary of Commerce with the concurrence of the Attorney General under the provisions of the Act does not constitute, explicitly or implicitly, an endorsement or opinion of the Secretary of Commerce or the Attorney General concerning either (a) the viability or quality of the business plans of ATLI or (b) the legality of such business plans of ATLI under the laws of the United States (other than as provided in the Act) or under the laws of any foreign country.

2. The application of the Certificate to conduct in Export Trade where the U.S. Government is the buyer or where the U.S. Government bears more than half the cost of the transaction is subject to the limitations set forth in Section V.(D.) of the "Guidelines for the Issuance of Export Trade Certificates of Review (Second Edition)," 50 FR 1786 (January 11, 1985).

A copy of the Certificate will be kept in the International Trade Administration's Freedom of Information Records Inspection Facility, Room 4100, U.S. Department of

Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Dated: June 19, 2008.

Jeffrey Anspacher,

Director, Export Trading Company Affairs.

[FR Doc. E8-14371 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-DR-P

DEPARTMENT OF COMMERCE

International Trade Administration

A-570-849

Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China: Extension of Time Limits for Preliminary Results of New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: June 25, 2008.

FOR FURTHER INFORMATION CONTACT:

Dimitrios Kalogeropoulos, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482-2623.

Background

On January 11, 2008, the Department of Commerce ("Department") initiated the new shipper review of the antidumping duty order on cut-to-length carbon steel plate from the People's Republic of China with respect to Hunan Valin Xiangtan Iron & Steel Co., Ltd., covering the period November 1, 2006, through October 31, 2007. *See Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China; Initiation of New Shipper Review*, 73 FR 3236 (January 17, 2008). The preliminary results of this new shipper review are currently due no later than July 9, 2008.

Extension of Time Limit of Preliminary Results

Section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended ("the Act"), requires that the Department issue preliminary results of a new shipper review of an antidumping duty order within 180 days after the day on which the review was initiated. *See also* 19 CFR 351.214(i)(1). The Act further provides that the Department may extend that 180-day period to 300 days if it determines that the case is extraordinarily complicated. *See* 19 CFR 351.214(i)(2).

The Department determines that this new shipper review involves

complicated methodological issues and the examination of importer information. Therefore, in accordance with section 751(a)(2)(B)(iv) of the Act and 19 CFR 351.214(i)(2), the Department is extending the time period for these preliminary results to 300 days, until no later than November 6, 2008. The final results continue to be due 90 days after the publication of the preliminary results.

This notice is issued and published pursuant to section 751(a)(2)(B)(iv) and 777(i) of the Act.

Dated: June 18, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8-14407 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-X132

Marine Mammals; File Nos. 1127-1921 and 10018

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

ACTION: Notice; issuance of permits.

SUMMARY: Notice is hereby given that the Hawaii Marine Mammal Consortium, P.O. Box 6107, Kamuela, HI 96743 [File No. 1127-1921] and Dr. Rachel Cartwright, 5277 West Wooley Rd., Oxnard, CA 93035 [File No. 10018] have each been issued a permit to conduct scientific research on several species of cetaceans found in Hawaiian waters.

ADDRESSES: These permits and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713-2289; fax (301)427-2521; and Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Rm 1110, Honolulu, HI 96814-4700; phone (808)944-2200; fax (808)973-2941.

FOR FURTHER INFORMATION CONTACT:

Brandy Belmas or Carrie Hubard, (301)713-2289.

SUPPLEMENTARY INFORMATION: On July 11, 2007, notice was published in the **Federal Register** (72 FR 37731) that a request for a scientific research permit to take 24 species of cetaceans in

Hawaiian waters, including the following endangered species: blue whale (*Balaenoptera musculus*), fin whale (*B. physalus*), humpback whale (*Megaptera novaeangliae*), sei whale (*B. borealis*), and sperm whale (*Physeter macrocephalus*), had been submitted by the Hawaii Marine Mammal Consortium. In addition, on August 6, 2007, notice was published in the **Federal Register** (72 FR 43626) that a request for a scientific research permit to take humpback whales in Hawaiian waters, had been submitted by Dr. Cartwright. 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.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 1127–1921 authorizes a total of 6390 annual takes, of the species listed above, by means of close approach via vessel for photo-identification, behavioral observation, acoustic recording, underwater photography and video, photogrammetry, collection of sloughed skin and fecal samples, and incidental harassment. Up to 860 takes, of the total authorized, are allocated for biopsy sampling. With the exception of humpback whales, all age/sex classes, except calves less than one year and associated mothers, may be biopsy sampled. No humpback whale calves less than 6 months of age would be biopsy sampled. The objectives of this research are to study the status, numbers, distribution, and life histories of several cetacean species found in Hawaiian waters.

Permit No. 10018 authorizes up to 540 annual takes of humpback whales (420 juveniles/adults; 120 calves) by means of close approach via vessel for photo-identification, focal follows, underwater observations, collection of sloughed skin, and incidental harassment. Incidental harassment of bottlenose dolphins (*Tursiops truncatus*), spinner dolphins (*Stenella longirostris*), pantropical spotted dolphins (*Stenella attenuata*), false killer whales (*Pseudorca crassidens*), and short-finned pilot whales (*Globicephala macrorhynchus*) is also authorized. The purpose of this research is to test the hypotheses that behavior, dynamics, and distribution of female/calf pairs varies between different stocks and may be influenced by abiotic factors such as

aspects of bathymetry, water quality, and levels of vessel traffic.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an environmental assessment was prepared analyzing the effects of the permitted activities. After a Finding of No Significant Impact, the determination was made that it was not necessary to prepare an environmental impact statement.

Issuance of these permits, 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 19, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–14415 Filed 6–24–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XI60

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council's (Council) Groundfish Oversight Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Thursday, July 17, 2008 at 9 a.m.

ADDRESSES: *Meeting address:* The meeting will be held at the Holiday Inn, One Newbury Street, Route 1, Peabody, MA 01960.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978)465–0492.

SUPPLEMENTARY INFORMATION: The items of discussion in the committee's agenda are as follows:

1. The Groundfish Oversight Committee will continue to develop

Amendment 16 to the Northeast Multispecies Fishery Management Plan. Amendment 16 will adjust management measures as necessary to continue rebuilding of overfished groundfish stocks. The Committee will discuss measures for both the commercial and recreational components of the fishery at this meeting. The Committee will address questions raised by the Council concerning Committee proposals to develop specific allocations of six groundfish stocks to the recreational and commercial components of the fishery. The Committee will also discuss the implications of a recent Council proposal for managing Annual Catch Limits (ACLs) on these allocations. Other recreational issues that may be addressed include rationale for basing the allocation on different time periods, monitoring of recreational ACLs, and Accountability Measures (AMs) for the recreational fishery. The Committee will discuss several issues related to the commercial component of the fishery. These include monitoring requirements and a review of accountability measures for the commercial fishery. The Committee may also further discuss an effort control option raised at the June 2, 2008 Committee meeting an option that is based on a twenty-four hour clock and trip limits.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: June 19, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–14280 Filed 6–24–08; 8:45 am]

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DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

RIN 0648–XD76

Taking Marine Mammals Incidental to Specified Activities; Seismic Surveys in the Beaufort and Chukchi Seas

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

ACTION: Notice of receipt of application and proposed incidental take authorization; request for comments.

SUMMARY: NMFS has received an application from Shell Offshore, Inc. (SOI) and its contractor WesternGeco for an Incidental Harassment Authorization (IHA) to take small numbers of marine mammals, by harassment, incidental to conducting marine geophysical programs, including deep seismic surveys, on oil and gas lease blocks located on Outer Continental Shelf (OCS) waters in the Beaufort and Chukchi Seas. Under the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to SOI and WesternGeco to incidentally take, by Level B harassment, small numbers of several species of marine mammals during the Arctic Ocean open-water seasons between August 1, 2008 and July 31, 2009, incidental to conducting these seismic surveys.

DATES: Comments and information must be received no later than July 25, 2008.

ADDRESSES: Written comments on the application should be addressed to Mr. P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, or by telephoning the contact listed here. The mailbox address for providing email comments is PR1.XD76@noaa.gov. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

A copy of the application (containing a list of the references used in this document) may be obtained by writing to this address or by telephoning the contact listed here and are also available at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha>.

A copy of the Minerals Management Service (MMS) Final Programmatic Environmental Assessment (Final PEA) and the NMFS/MMS Draft Programmatic Environmental Impact Statement (Draft PEIS) are available at: <http://www.mms.gov/alaska/>.

Documents cited in this document that are not available through standard public library access methods, may be viewed, by appointment, during regular business hours at this address.

FOR FURTHER INFORMATION CONTACT:

Kenneth Hollingshead, Office of Protected Resources, NMFS, (301) 713–2289, or Brad Smith, NMFS, Alaska Regional Office 907–271–3023.

SUPPLEMENTARY INFORMATION:**Background**

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

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

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as:

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

Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public

notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Summary of Request

On October 16, 2007, NMFS received an application from SOI for the taking, by harassment, of several species of marine mammals incidental to conducting a marine seismic survey program during the open water season between August 1, 2008 and July 31, 2009 (referred to in this document as 2008/2009). SOI is planning a variety of programs in the Chukchi and Beaufort Seas during the 2008/2009 open water seasons, including a: (1) Chukchi Sea deep 3–D seismic survey; (2) Beaufort Sea deep 3–D seismic survey; and (3) Beaufort Sea marine surveys, which includes three activities: (a) site clearance and shallow hazards surveys; (b) an ice-gouge survey; and (c) a strudel scour survey.

The deep seismic survey components of the program will be conducted from WesternGeco’s vessel, *M/V Gilavar*. Detailed specifications on this seismic survey vessel are provided in Attachment A of SOI’s IHA application. These specifications include: (1) complete descriptions of the number and lengths of the streamers which form the hydrophone arrays; (2) airgun size and sound propagation properties; and (3) additional detailed data on the *M/V Gilavar*’s characteristics. In summary, the *M/V Gilavar* will tow two source arrays, comprising three identical subarrays each, which will be fired alternately as the ship progresses downline in the survey area. The *M/V Gilavar* will tow up to 6 streamer cables up to 5.4 kilometers (km)(3.4 mi) long. With this configuration each pass of the *M/V Gilavar* can record 12 subsurface lines spanning a swath of up to 360 meters (1181 ft). The seismic acquisition vessel will be supported by the *M/V Gulf Provider*, or a similar vessel. The *M/V Gulf Provider* will serve as a crew change, resupply, fueling support of acoustic and marine mammal monitoring, and seismic chase vessel. It will not deploy seismic acquisition gear.

As SOI’s 2007 IHA for open water seismic activities in the Chukchi and Beaufort Seas is valid until August 1, 2008, this IHA request is intended, therefore, for the open water seasons between August 2, 2008 through July 31, 2009.

As marine mammals may be affected by seismic and vessel noise, SOI has requested an authorization under section 101(a)(5)(D) of the MMPA to

take marine mammals by Level B harassment while conducting seismic surveys and related activities.

Plan for Seismic Operations

In its application, SOI notes that it plans for the *M/V Gilavar* to be in the Chukchi Sea to begin seismic acquisition data on or after July 20, 2008, move to the Beaufort Sea in mid-July through late October, and conclude work in the Chukchi Sea around November 15, 2008. For purposes of the MMPA, the Chukchi and Beaufort seas meet the definition of a "specific geographic region" as defined under the Act. As proposed, the 2008 seismic survey effort will last a maximum of 100 days of active data acquisition (excluding downtime due to weather and other unforeseen delays). When ice conditions permit or when SOI determines to do so (at present, SOI plans to work in the Chukchi Sea until around September 25), the seismic and associated vessels will transit to the Beaufort Sea to conduct seismic operation for part of the this 100-day period. The proposed commencement date of July 20th for starting seismic in the Chukchi Sea is designed to ensure that there will be no conflict with the spring bowhead whale migration and subsistence hunts conducted by Barrow, Pt. Hope, or Wainwright or the beluga subsistence hunt conducted by the village of Pt. Lay in early July. The approximate area of SOI's seismic survey operations are shown in Figure 1 in SOI's IHA application.

3-D Deep Seismic Surveys

Chukchi Sea 3-D Deep Seismic Surveys

SOI and its geophysical (seismic) contractor, WesternGeco, propose to conduct a marine geophysical (deep 3-D seismic) survey program during open water season on various MMS Outer Continental Shelf (OCS) lease blocks in the northern Chukchi Sea (see Figure 1 in SOI's IHA application). The Chukchi Sea 3-D Deep Seismic survey will be conducted on leases obtained under Lease Sale (LS) 193. The exact locations where operations will occur within that sale area were not known at the time of SOI's IHA application, but NMFS presumes they will take place on lease blocks obtained as a result of the sale. However, in general SOI notes that the seismic data acquisition will occur at least 25 mi (40 km) offshore of the coast and in waters with depths averaging about 40 m (131 ft).

The deep 3-D seismic survey is proposed to be conducted from WesternGeco's vessel *M/V Gilavar*, described previously. Two "chase

boats" will accompany the seismic vessel. These two chase boats will provide the following functions: (1) re-supply, (2) marine mammal monitoring, (3) ice scouting, and (4) general support for the *M/V Gilavar*. The chase boat vessels proposed for use in 2008 are the *M/V Theresa Marie* and the *M/V Torsvik*. These vessels will not deploy any seismic gear. In addition, a crew change vessel, the *M/V Gulf Provider* or similar vessel and a landing craft, such as the *M/V Maxime* or similar vessel, will support the *M/V Gilavar*, and the two chase boats in the Chukchi Sea. The crew change vessel will be used to move personnel and supplies from the seismic vessel, and two chase boats to the nearshore areas. In turn, the landing craft will move personnel and supplies from the crew change vessel, when it is located in nearshore areas, to the beach (most likely this will be at Barrow). Lastly, the Marine Mammal Monitoring and Mitigation Program (4MP) will have a separate vessel for the proposed 2008 Program. The landing craft also will be used to move personnel and equipment from the 4MP vessel to the near shore areas.

Beaufort Sea Deep 3-D Seismic Surveys

The same seismic vessel (*M/V Gilavar*), seismic equipment, and chase boats that are described for the Chukchi Sea Deep 3-D Seismic survey, will be used to conduct deep 3-D seismic surveys in the central and eastern Beaufort Sea (see Figure 2 in SOI's IHA application). The focus of this activity will be on SOI's existing leases, but some activity in the Beaufort Sea may occur outside of SOI's existing leases. The landing craft, which will be used to move personnel and supplies from vessels in the near shore to docking sites will most likely use West Dock, or Oliktok Dock. Smaller vessels such as the Alaska Clean Seas (ACS) bay boats, or similar vessels, may be used to assist in the movement of people and supplies and support of the 4MP in the Beaufort Sea. The specific geographic region for SOI's deep seismic program in the Beaufort Sea will be in OCS waters including SOI leases beginning east of the Colville River delta to west of the village of Kaktovik (see Figure 2 in SOI's application). According to SOI's IHA application, the Beaufort Sea program is planned to occur for a maximum of 60 days (excluding downtime due to weather and unforeseen delays) during open-water from mid-August to the end of October; however, recent communications with SOI indicates that the Beaufort Sea seismic program will not start until after September 25, 2008. This timing of activities in the fall will

avoid any significant conflict with the Beaufort Sea bowhead whale subsistence hunt conducted by the Beaufort Sea villages, because it is anticipated that the fall bowhead whale hunt will have ended by that time.

Description of Marine 3-D Seismic Data Acquisition

In the seismic method, reflected sound energy produces graphic images of seafloor and sub-seafloor features. The seismic system consists of sources and detectors, the positions of which must be accurately measured at all times. The sound signal comes from arrays of towed energy sources. These energy sources store compressed air which is released on command from the towing vessel. The released air forms a bubble which expands and contracts in a predictable fashion, emitting sound waves as it does so. Individual sources are configured into arrays. These arrays have an output signal, which is more desirable than that of a single bubble, and also serve to focus the sound output primarily in the downward direction, which is useful for the seismic method. This array effect also minimizes the sound emitted in the horizontal direction.

The downward propagating sound travels to the seafloor and into the geologic strata below the seafloor. Changes in the acoustic properties between the various rock layers result in a portion of the sound being reflected back toward the surface at each layer. This reflected energy is received by detectors called hydrophones, which are housed within submerged streamer cables which are towed behind the seismic vessel. Data from these hydrophones are recorded to produce seismic records or profiles. Seismic profiles often resemble geologic cross-sections along the course traveled by the survey vessel.

Description of WesternGeco's Air-Gun Array

SOI is proposing to use WesternGeco's 3147-in³ Bolt-Gun Array for its 3-D seismic survey operations in the Chukchi and Beaufort Seas. WesternGeco's source arrays are composed of 3 identically tuned Bolt-gun sub-arrays operating at an air pressure of 2,000 psi. In general, the signature produced by an array composed of multiple sub-arrays has the same shape as that produced by a single sub-array while the overall acoustic output of the array is determined by the number of sub-arrays employed.

The airgun arrangement for each of the three 1049-in³ sub-array is detailed in SOI's application. As indicated in the

application's diagram, each sub-array is composed of six tuning elements; two 2-airgun clusters and four single airguns. The standard configuration of a source array for 3-D surveys consists of one or more 1049-in³ sub-arrays. When more than one sub-array is used, as here, the strings are lined up parallel to each other with either 8 m or 10 m (26 or 33 ft) cross-line separation between them. This separation was chosen so as to minimize the areal dimensions of the array in order to approximate point source radiation characteristics for frequencies in the nominal seismic processing band. For the 3147-in³ array the overall dimensions of the array are 15 m (49 ft) long by 16-m (52.5-ft) wide.

Characteristics of Airgun Pulses

A discussion of the characteristics of airgun pulses was provided in several previous **Federal Register** documents (see 69 FR 31792 (June 7, 2004) or 69 FR 34996 (June 23, 2004)) and is not repeated here. Additional information can be found in the NMFS/MMS Draft PEIS (see **ADDRESSES**). Reviewers are encouraged to read these earlier documents for additional background information.

Marine Surveys

SOI proposes to conduct marine surveys (shallow hazards and other activities) in the Beaufort and Chukchi seas in 2008. Acoustic systems similar to the ones proposed for use by SOI during its planned marine surveys have been described by NMFS previously (see 66 FR 40996 (August 6, 2001), 70 FR 13466 (March 21, 2005)). NMFS encourages readers to refer to these documents for additional information on these systems. A summary of SOI's planned activities is described next.

Beaufort Sea Marine Surveys

SOI proposes to conduct three marine survey activities in 2008 in the U.S. Beaufort Sea: (1) Site Clearance and Shallow Hazards (2) Ice Gouge Surveys, and (3) Strudel Scour Surveys. Marine surveys for site clearance and shallow hazards, ice gouge, or strudel scour in the Beaufort Sea can be accomplished by the *M/V Henry Christofferson*. No other vessels, such as chase boats, are necessary to accomplish the proposed marine survey work. Any necessary crew changes or 4MP coordinated activities under this activity will utilize the same crew change, landing craft, or 4MP vessel mentioned under the Beaufort Sea Deep 3-D Seismic survey.

Site Clearance and Shallow Hazards

Marine surveys will include site clearance and shallow hazards surveys of potential exploratory drilling locations. These surveys gather data on: (1) bathymetry, (2) seabed topography and other seabed characteristics (e.g., boulder patches), (3) potential geohazards (e.g., shallow faults and shallow gas zones), and (4) the presence of any archeological features (e.g., shipwrecks).

The focus of this activity will be on SOI's existing leases in the central and eastern Beaufort Sea, but some activity may occur outside of SOI's existing leases. Actual locations of site clearance and shallow hazard surveys have not been definitively set as of the date of this publication, although they will occur within the area outlined in Figure 2 of SOI's IHA application.

The vessel that SOI expects to use for the site clearance and shallow hazards surveys is the *M/V Henry Christofferson*, which is a diesel-powered tug as described in Attachment A to SOI's IHA application. SOI proposes to use the following acoustic instrumentation, (or similar equipment) during this work. This is the same equipment as was used on the *M/V Henry Christofferson* during 2007:

- (1) Dual frequency subbottom profiler Datasonics CAP6000 Chirp II (2 to 7 kiloHertz [kHz] or 8 to 23 kHz) or similar;
- (2) Medium penetration subbottom profiler, Datasonics SPR-1200 Bubble Pulser (400 (hertz [Hz]) or similar;
- (3) High resolution multi-channel 2D system, 20 cubic inches (in³) (2 by 10) gun array (0 to 150 Hz) or similar;
- (4) Multi-beam bathymetric sonar, Seabat 8101 (240 Hz); or similar; and
- (5) Side-scan sonar system, Datasonics SIS-1500 (190 to 210 kHz) or similar.

Ice Gouge Survey

Ice gouge surveys are a type of marine survey to determine the depth and distribution of ice gouges in the sea bed. Ice gouge is created by ice keels which project from the bottom of moving ice that gouge into seafloor sediment. Remnant ice gouge features are mapped to aid in predicting the prospect of, orientation, depth, and frequency of future ice gouge. These surveys will focus on the potential, prospective pipeline corridor between the Sivulliq Prospect in Camden Bay and the nearshore Point Thomson area. The Sivulliq area will be surveyed to gather geotechnical and seafloor hazard information as well as data on ice gouges.

SOI proposes that the acoustic instrumentation described previously in

this document (or something similar) will be used, namely multi-beam bathymetric sonar, side scan sonar and subbottom profiling. Actual locations of the ice gouge surveys have not been definitively set as of the date of this publication, although these will occur within the area outlined in Figure 2 of SOI's IHA application. There are also some platform siting lines proposed, which would employ a high resolution multi-channel 2D system, 20 cubic inches (in³) (2 by 10) airgun array (0 to 150 Hz) or similar system.

Strudel Scour Survey

During the early melt on the North Slope, the rivers begin to flow and discharge water over the coastal sea ice near the river deltas. That water rushes down holes in the ice ("strudels") and scours the seafloor. These erosional areas are called "strudel scours". Information on these features is required for prospective pipeline planning. Two proposed activities are required to gather this information.

First, an aerial survey will be conducted via helicopter overflights during the melt to locate the strudels; and strudel scour marine surveys to gather bathymetric data. The overflights investigate possible sources of overflowed water and will survey local streams that discharge in the vicinity of Point Thomson including the Staines River, which discharges to the east into Flaxman Lagoon and the Canning River, which discharges to the east directly into the Beaufort Sea. These helicopter overflights were scheduled to occur during late May/early June 2008 and, weather permitting, should take no more than four days. There are no planned landings during these overflights other than at the Deadhorse or Kaktovik airports.

Second, areas that have strudel scour identified during the aerial survey will be verified and surveyed with a marine vessel after the breakup of nearshore ice. This proposed activity is not anticipated to take more than 5 days to conduct. The operation is conducted in the shallow water areas near the coast in the vicinity of Point Thomson. The vessel has not been contracted; however, it is anticipated that it will be the diesel-powered *R/V Annika Marie*. This vessel will use the following equipment:

- (1) Multi-beam bathymetric sonar, Seabat 8101 (240 Hz); or similar sonar; and
- (2) Side-scan sonar system, Datasonics SIS-1500 (190 to 210 kHz) or similar sonar.

The multi-beam bathymetric sonar and the side-scan sonar systems both operate at frequencies greater than 180

kHz, the highest frequency considered by knowledgeable marine mammal biologists to be of possible influence to marine mammals. Because no taking of marine mammals will occur from this equipment, no measurements of those two sources are planned by SOI, and no exclusion zones for seals or whales would be established during operation of those two sources. The acoustic instrumentation used on the seismic vessels are described in SOI's IHA application.

Chukchi Sea Marine Surveys

Marine surveys will include site clearance and shallow hazards surveys of potential exploratory drilling locations as required by MMS regulations. These surveys gather data on: (1) bathymetry, (2) seabed topography and other seabed characteristics (e.g., boulder patches), (3) potential geohazards (e.g., shallow faults and shallow gas zones), and (4) the presence of any archeological features (e.g., shipwrecks). Marine surveys for site clearance and shallow hazards can be accomplished by one vessel with acoustic sources. No other vessels, such as chase boats, are necessary to accomplish the proposed work. Any necessary crew changes or 4MP coordinated activities under this activity will utilize the same crew change, landing craft, or 4MP vessel mentioned under the Chukchi Sea deep 3D seismic surveys.

The Chukchi Sea marine surveys will be conducted by SOI on leases acquired in OCS LS 193. Site clearance surveys are confined to small specific areas within OCS blocks. Actual locations of site clearance and shallow hazard surveys have not been definitively set as of the date of SOI's IHA application, although these will occur within the general area outlined in Figure 1 in SOI's IHA application. Before the commencement of operations, survey location information will be supplied to NMFS, MMS, other agencies and affected members of the public as it becomes available. SOI has not contracted for a vessel at the time of publication of this document.

Additional Information

A detailed description of the work proposed by SOI for the open-water seasons of 2008/2009 is contained in SOI's application which is available for review (see **ADDRESSES**). Also, a description of SOI's data acquisition program proposed for the 2008/2009 season, and WesternGeco's air-gun array to be employed during 2008/2009 has been provided in previous IHA notices on SOI's seismic program (see 71 FR

26055, May 3, 2006; 71 FR 50027, August 24, 2006).

Description of Habitat and Marine Mammals Affected by the Activity

A detailed description of the Beaufort and Chukchi sea ecosystems and their associated marine mammal populations can be found in the NMFS/MMS Draft PEIS and the MMS Final Programmatic Environmental Assessment (Final PEA) on Seismic Surveys (see **ADDRESSES** for availability) and also in several other documents (e.g., MMS, 2007 Final EIS for Chukchi Sea Planning Area: Oil and Gas Lease Sale 193 and Seismic Surveying Activities in the Chukchi Sea, MMS 2007-026).

Marine Mammals

The Beaufort/Chukchi Seas support a diverse assemblage of marine mammals, including bowhead whales, gray whales, beluga whales, killer whales, harbor porpoise, ringed seals, spotted seals, bearded seals, walrus and polar bears. These latter two species are under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS) and are not discussed further in this document. Descriptions of the biology and distribution of the marine mammal species under NMFS' jurisdiction can be found in SOI's IHA application, the 2007 NMFS/MMS Draft PEIS on Arctic Seismic Surveys, and the MMS 2006 Final PEA on Arctic Seismic Surveys. Information on these marine mammal species can also be found in NMFS Stock Assessment Reports (SARS). The 2007 Alaska SARS document is available at: <http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2007.pdf>. Please refer to those documents for information on these species.

Potential Effects of Seismic Surveys on Marine Mammals

Disturbance by seismic noise is the principal means of taking by this activity. Support vessels and aircraft may provide a potential secondary source of noise. The physical presence of vessels and aircraft could also lead to non-acoustic effects on marine mammals involving visual or other cues.

As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can, in general, be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the animal (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

Effects of Seismic Survey Sounds on Marine Mammals

Behavioral Effects

In its IHA application, SOI states that the only anticipated impacts to marine mammals associated with noise propagation from vessel movement and seismic airgun operations would be the

temporary and short term displacement of whales and seals from within ensonified zones produced by such noise sources. Any impacts on the whale and seal populations of the Beaufort and Chukchi Seas activity areas are likely to be short-term and transitory arising from the temporary displacement of individuals or small groups from locations they may occupy at the times they are exposed to seismic sounds between the 160- to 190-dB received levels. In the case of bowhead whales however, that displacement might well take the form of a deflection of the swim paths of migrating bowheads away from (seaward of) received noise levels lower than 160 db (Richardson *et al.*, 1999). Moreover, it is not presently known at what distance after passing the seismic source that bowheads will return to their previous migration route. However, NMFS does not believe that this offshore deflection is biologically significant (although it might be significant for purposes of subsistence hunting, as discussed later) as the bowhead migration is believed to remain within the general bowhead whale migratory corridor in the U.S. Beaufort Sea, which varies annually based on environmental factors.

SOI cites Richardson and Thomson [eds]. (2002) to support its contention that there is no conclusive evidence that exposure to sounds exceeding 160 dB have displaced bowheads from feeding activity. NMFS notes that, in 2006, observations conducted onboard a seismic vessel operating in the Canadian Beaufort Sea found that feeding bowhead whales were not observed to respond to seismic sounds at levels of 160 dB or lower.

Results from the 1996–1998 BP and Western Geophysical seismic monitoring programs in the Beaufort Sea indicate that most fall migrating bowheads deflected seaward to avoid an area within about 20 km (12.4 mi) of an active nearshore seismic operation, with the exception of a few closer sightings when there was an island or very shallow water between the seismic operations and the whales (Miller *et al.*, 1998, 1999). The available data do not provide an unequivocal estimate of the distance (and received sound levels) at which approaching bowheads begin to deflect, but this may be on the order of 35 km (21.7 mi).

When the received levels of noise exceed some threshold, cetaceans will show behavioral disturbance reactions. The levels, frequencies, and types of noise that will elicit a response vary between and within species, individuals, locations, and seasons. Behavioral changes may be subtle

alterations in surface, respiration, and dive cycles. More conspicuous responses include changes in activity or aerial displays, movement away from the sound source, or complete avoidance of the area. The reaction threshold and degree of response also are related to the activity of the animal at the time of the disturbance. Whales engaged in active behaviors, such as feeding, socializing, or mating, appear less likely than resting animals to show overt behavioral reactions, unless the disturbance is perceived as directly threatening.

Masking

Although NMFS believes that some limited masking of low-frequency sounds (e.g., whale calls) is a possibility during seismic surveys, the intermittent nature of seismic source pulses (1 second in duration every 16 to 24 seconds (i.e., less than 7 percent duty cycle)) will limit the extent of masking. Bowhead whales are known to continue calling in the presence of seismic survey sounds, and their calls can be heard between seismic pulses (Greene *et al.*, 1999, Richardson *et al.*, 1986). Masking effects are expected to be absent in the case of belugas, given that sounds important to them are predominantly at much higher frequencies than are airgun sounds.

Injury and Mortality

NMFS and SOI believe that there is no evidence that bowheads or other marine mammals exposed to seismic sounds in the Arctic have incurred an injury to their auditory mechanisms. While it is not positively known whether the hearing systems of marine mammals very close to an airgun would be at risk of temporary or permanent hearing impairment, Richardson *et al.* (1995) notes that TTS is a theoretical possibility for animals within a few hundred meters of the source. More recently, scientists have determined that the received level of a single seismic pulse might need to be ~210 dB re 1 μ Pa rms (~221–226 dB pk-pk) in order to produce brief, mild TTS. Exposure to several seismic pulses at received levels near 200–205 dB (rms) might result in slight TTS in a small odontocete, assuming the TTS threshold is a function of the total received pulse energy. Seismic pulses with received levels of 200–205 dB or more are usually restricted to a radius of no more than 200 m (656 ft) around a seismic vessel operating a large array of airguns. For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. However, according to SOI, there

is a strong likelihood that baleen whales (i.e., bowheads, gray whales and humpback whales) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of onset of TTS.

For pinnipeds, information indicates that for single seismic impulses, sounds would need to be higher than 190 dB rms for TTS to occur while exposure to several seismic pulses indicates that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations. This indicates to NMFS that the 190-dB safety zone (see Mitigation and Monitoring later in this document) provides a sufficient buffer to prevent permanent threshold shift (PTS) in pinnipeds.

A marine mammal within a radius of ≤ 100 m (≤ 328 ft) around a typical large array of operating airguns may be exposed to a few seismic pulses at received levels of ≥ 205 dB, and possibly more pulses if the marine mammal moved with the seismic vessel. When PTS occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges. However, as scientists are reluctant to cause injury to a marine mammals, there is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns. Given the possibility that mammals close to an airgun array might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, but are assumed to be similar to those in humans and other terrestrial mammals. Acousticians are in general agreement that a temporary shift in hearing threshold of up to 40 dB due to moderate exposure times is fully recoverable and does not involve tissue damage or cell loss. Liberman and Dodds (1987) state, "... acute threshold shifts as large as 60 dB are routinely seen in ears in which the surface morphology of the stereocilia is perfectly normal." (Stereocilia are the sensory cells responsible for the sensation of hearing.) In the chinchilla, no cases of TTS involve the loss of stereocilia, but all cases of PTS do (Ahroon *et al.*, 1996). Cell death clearly qualifies as Level A harassment (injury)

under the MMPA. Because there is no cell death with modest (up to 40 dB) TTS, such losses of sensitivity constitute a temporary impairment but not an injury, further supporting NMFS' precautionary approach that establishment of seismic airgun shutdown at 180 dB for cetaceans and 190 dB for pinnipeds, will prevent auditory injury to marine mammals by seismic airgun sounds.

NMFS notes that planned monitoring and mitigation measures (described later in this document) have been designed to avoid sudden onsets of seismic pulses at full power, to detect marine mammals occurring near the array, and to avoid exposing them to sound pulses that have any possibility of causing hearing impairment. Moreover, NMFS does not expect that any marine mammals will be seriously injured or killed during SOI's seismic survey activities, even if some animals are not detected prior to entering the 180-dB and 190-dB isopleths (safety zones) for cetaceans and pinnipeds, respectively. These criteria were set to approximate a level below where Level A harassment (i.e., defined as "any act of pursuit, torment or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild") from acoustic sources was believed to begin. Because, a decade or so ago, scientists did not have information on where PTS might occur in marine mammals, the High Energy Seismic Survey (HESS) workshop (HESS, 1997, 1999) set the level to prevent injury to marine mammals at 180 dB. NMFS concurred and determined that TTS, which is the mildest form of hearing impairment that can occur during exposure to a strong sound, may occur at these levels (180 dB for cetaceans, 190 dB for pinnipeds). When a marine mammal experiences TTS, the hearing threshold rises and a sound must be stronger in order to be heard. TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound.

Strandings

In numerous past IHA notices for seismic surveys, commenters have referenced two stranding events allegedly associated with seismic activities, one off Baja California and a second off Brazil. NMFS has addressed this concern several times and without

new information, does not believe that this issue warrants further discussion. For information relevant to strandings of marine mammals, readers are encouraged to review NMFS' response to comments on this matter found in 69 FR 74905 (December 14, 2004), 71 FR 43112 (July 31, 2006), 71 FR 50027 (August 24, 2006), and 71 FR 49418 (August 23, 2006). In addition, a June, 2008 stranding of 30–40 melon-headed whales (*Peponocephala spp*), off Madagascar that appears to be associated with seismic surveys is currently under investigation. One report indicates that the stranding began prior to seismic surveys starting.

It should be noted that marine mammal strandings recorded in the Beaufort and Chukchi seas do not appear to be related to seismic surveys. Finally, if bowhead and gray whales react to sounds at very low levels by making minor course corrections to avoid seismic noise and mitigation measures require SOI to ramp-up the seismic array to avoid a startle effect, strandings are unlikely to occur in the Arctic Ocean. As a result, NMFS does not expect any marine mammals will incur serious injury, mortality or strandings in the Arctic Ocean.

Potential Impacts on Affected Species and Stocks of Marine Mammals

According to SOI, the only anticipated impacts to marine mammals associated with SOI's seismic activities with respect to noise propagation are from vessel movements and seismic air gun operations. SOI states that these impacts would be temporary and short term displacement of seals and whales from within ensonified zones produced by such noise sources. Any impacts on the whale and seal populations of the Beaufort and Chukchi Sea activity areas are likely to be short term and transitory arising from the temporary displacement of individuals or small groups from locations they may occupy at the times they are exposed to seismic sounds at the 160–190 dB (or higher) received levels. As noted elsewhere, it is highly unlikely that animals will be exposed to sounds of such intensity and duration as to physically damage their auditory mechanisms. In the case of bowhead whales that displacement might well take the form of a deflection of the swim paths of migrating bowheads away from (seaward of) received noise levels greater than 160 db (Richardson *et al.*, 1999). There is no evidence that bowheads so exposed have incurred injury to their auditory mechanisms. Also, there is no evidence that seals are more than temporarily displaced from ensonified zones and no

evidence that seals have experienced physical damage to their auditory mechanisms even within ensonified zones.

During the period of seismic acquisition in the Chukchi and Beaufort seas, most marine mammals are expected to be dispersed throughout the area. Bowhead whales are expected to be concentrated in the Canadian Beaufort Sea during much of this time, where they are not expected to be affected by SOI's seismic program. The peak of the bowhead whale migration through the Beaufort and Chukchi seas typically occurs in late August through October, and efforts to reduce potential impacts during this time will be addressed with the actual start of the migration and through discussions with the affected whaling communities. In the Chukchi Sea, the timing of seismic activities will take place while the whales are widely distributed and would be expected to occur in very low numbers within the seismic activity area. If SOI conducts seismic surveys in late September or October in the Beaufort or Chukchi Sea, bowheads may travel in proximity to the seismic survey activity areas and hear sounds from vessel traffic and seismic activities, of which some might be displaced by the planned activities.

The reduction of potential impacts during the fall bowhead whale migratory period will be addressed through discussions with the whaling communities. Starting in late August bowheads may travel in proximity to SOI's planned Beaufort Sea seismic activity areas and may hear sounds from vessel traffic and seismic activities, of which some might be displaced seaward by the planned activities. However, at the present time, SOI expects to significantly reduce its period of seismic operations in the Beaufort Sea by remaining in the Chukchi Sea until mid-September, entering the Beaufort Sea only after the fall subsistence hunt has concluded and after a significant portion of the bowhead whales would have left the Canadian Beaufort Sea on their westward migration to the Chukchi Sea.

In addition, although there was apparently a period of concentrated feeding in the central Beaufort Sea in September 2007, feeding does not normally appear to be an important activity by bowheads migrating through the eastern and central part of the Alaskan Beaufort Sea or the Chukchi Sea in most years. Sightings of bowhead whales occur in the summer near Barrow (Moore and DeMaster, 2000), and there are suggestions that certain areas near Barrow are important feeding

grounds. In addition, a few bowheads can be found in the Chukchi and Bering Seas during the summer and Rugh *et al.* (2003) suggests that this may be an expansion of the western Arctic stock, although more research is needed. In the absence of important feeding areas, the potential diversion of a small number of bowheads away from seismic activities is not expected to have any significant or long-term consequences for individual bowheads or their population.

Effects on Individual Arctic Ocean Marine Mammal Species

In order to facilitate the reader's understanding of the knowledge of impacts of impulsive noise on the principal marine mammal species that are expected to be affected by SOI's proposed seismic survey program, NMFS has previously provided a summary of potential impacts on the bowhead, gray, and beluga whales and the ringed, largha and bearded seals. This information can be found in the **Federal Register** (72 FR 31553, June 7, 2007). Information on impacts on marine mammals by seismic activities can also be found in SOI's IHA application.

Numbers of Marine Mammals Expected to Be Harassed by Seismic Survey Activities

The methodology used by SOI to estimate incidental take by harassment by seismic and the numbers of marine mammals that might be affected in the proposed seismic acquisition activity area in the Chukchi and Beaufort seas has been presented in SOI's 2008 IHA application.

In its application, SOI provides estimates of the number of potential "exposures" to sound levels equal to or greater than 160 dB re 1 μ Pa (rms). NMFS clarifies here that, except possibly for bowhead whales, calculations of the number of exposures by SOI, does not necessarily indicate that this is the number of Level B harassments that SOI's seismic activity will take. First, exposure estimates do not take into account variability between species or within a species by activity, age or sex. What this means is that not all animals are expected to react at the same level as its conspecifics, and all species are not expected to react at the same level, as some species in the Arctic will respond to sounds differently, if at all, depending upon whether or not they have good hearing in the same frequency range as seismic. Second, NMFS believes that SOI's use of the maximum density estimates for its requested take authorization (see IHA

application and references for details) is overly cautious as it tends to inflate harassment take estimates to an unreasonably high number and is not based on good empirical science. NMFS believes that these inflated numbers have been provided and used by SOI for its Level B harassment take request in an abundance of caution because they present a worst-case estimate. NMFS, on the other hand prefers to use the average density estimate numbers provided in Tables 6-1 through 6-5 in SOI's IHA application as these are the more realistic and scientifically supportable estimates. NMFS notes, for example, that the most comprehensive survey data set on ringed and bearded seals from the central and eastern Beaufort Sea was conducted on offshore pack ice in late spring. Density estimates of ringed and bearded seals were based on counts of seals on the ice during this survey, not in open water where seismic surveys are conducted. Consequently, the density and potential take (exposure) numbers for seals in the Beaufort and Chukchi seas will likely overestimate the number of seals that could be encountered and/or exposed to seismic airguns because only animals in the water near the survey area would be exposed to seismic and site clearance activity sound sources. Because seals would be more widely dispersed while in open water, NMFS presumes that animal densities would be less than when seals are concentrated on and near the ice. Compounding that error, SOI calculated the maximum density for seals as 4 times the average density, which NMFS does not believe is supported by the best available science.

The estimates for marine mammal "exposure" are based on a consideration of the number of marine mammals that might be appreciably disturbed during approximately 7974 km (4955 mi) of full 3D seismic surveys and approximately 4294 km (2668 mi) of mitigation gun activity in the Chukchi Sea and by approximately 4784 km (2973 mi) of full 3D seismic surveys and approximately 2576 km (1600 mi) of mitigation gun (a single small airgun used when the airgun array is not active to alert marine mammals to the presence of the survey vessel) activity in the Beaufort Sea. In addition to the 3D seismic program, the shallow hazards surveys using a 2 10 in³ airgun array will be performed along approximately 1237 km (769 mi) in the Beaufort Sea and approximately 432 km (268 mi) in the Chukchi Sea.

NMFS further notes that the close spacing of neighboring tracklines within the planned 3D seismic survey areas results in a limited amount of total area of the Chukchi and Beaufort seas being

exposed to sounds \geq 160 dB while much of the survey area is exposed repeatedly. This means that the number of non-migratory cetaceans and pinnipeds exposed to seismic sounds would be less than if the seismic vessel conducted straight line transects of the sea without turning and returning on a nearby, parallel track. However, these animals may be exposed several times before the seismic vessel moves to a new site. In that regard, NMFS notes that the methodology used by SOI in its "exposure" calculations is more valid for seismic surveys that transect long distances, for those surveys that "mow the lawn" (that is, remain within a relatively small area, transiting back and forth while shooting seismic). In such situations, the Level B harassment numbers tend to be highly inflated, if each "exposure" is calculated to be a different animal and not, as here, a relatively small number of animals residing in the area and being "exposed" to seismic sounds several times during the season. As a result, NMFS believes that SOI's estimated number of individual exposures does not account for multiple exposures of the same animal (principally non-migratory pinnipeds) instead of single animal exposures as the survey conducts a number of parallel transects of the same area (sometimes called bostrophodontical surveys) and the fact that the mitigation procedures would serve to reduce exposures to affected marine mammals.

As mentioned previously, 3D seismic airgun arrays are composed of identically tuned Bolt-gun sub-arrays operating at 2,000 psi. In general, the signature produced by an array composed of multiple sub-arrays has the same shape as that produced by a single sub-array while the overall acoustic output of the array is determined by the number of sub-arrays employed. The gun arrangement for the 1,049 square inches (in²) sub-array is detailed below and is comprised of three subarrays comprising a total 3,147 in² sound source. The anticipated radii of influence of the bathymetric sonars and pinger are less than those for the air gun configurations described in Attachment A in SOI's IHA application. It is assumed that, during simultaneous operations of those additional sound sources and the air gun(s), any marine mammals close enough to be affected by the sonars or pinger would already be affected by the air gun(s). In this event, SOI believes that marine mammals are not expected to exhibit more than short-term and inconsequential responses, and such responses have not been

considered to constitute “taking” therefore, potential taking estimates only include noise disturbance from the use of air guns. The specifications of the equipment, including site clearance activities, to be used and areas of ensonification are described more fully in SOI’s IHA application (see Attachment B in SOI’s IHA application).

Cetaceans

For belugas and gray whales, in both the Beaufort and Chukchi Seas and bowhead whales in the Chukchi Sea, Moore *et al.* (2000b and c) offer the most current data to estimate densities during summer. Density estimates for bowhead whales in the Beaufort Sea were updated by information provided by Miller *et al.* (2002).

Tables 6–1 and 6–2 (Chukchi Sea) and Tables 6–3 and 6–4 (beluga and bowhead: Beaufort Sea) provide density estimates for the summer and fall, respectively. Table 6–5 provides a summary of the expected densities for cetaceans (other than bowheads and belugas) and pinnipeds during all seasons in the Beaufort Sea. The number of different individuals of each species potentially exposed to received levels ≥ 160 dB re 1 μ Pa (rms) within each survey region, time period, and habitat zone was estimated by multiplying the expected species density, by the anticipated area to be ensonified to the 160–dB level in the survey region, time period, and habitat zone to which that density applies.

The numbers of “exposures” were then summed by SOI for each species across the survey regions, seasons, and habitat zones. Some of the animals estimated to be exposed, particularly migrating bowhead whales, might show avoidance reactions before being exposed to ≥ 160 dB re 1 μ Pa (rms). Thus, these calculations actually estimate the number of individuals potentially exposed to ≥ 160 dB that would occur if there were no avoidance of the area ensonified to that level.

For the full–3D airgun array, the cross track distance is 2 the 160–dB radius which was measured in 2007 as 8.1 km (5.0 mi) in the Chukchi Sea and 13.4 km (8.3 mi) in the Beaufort Sea. The mitigation gun’s 160–dB radius was measured at 1370 m (4495 ft) in the Chukchi Sea and Beaufort seas. For shallow hazards surveys to be

performed by the *Henry Christofferson*, the 160–dB radius measured in 2007 was equal to 621 m (2037 ft). Using these distances, SOI estimates that the area ensonified in the Chukchi Sea is approximately 15,000 km² and approximately 10,100 km² in the Beaufort Sea.

The estimated numbers of potential marine mammal “exposures” by SOI’s surveys are presented in Tables 6–6 for the summer/fall period in the Chukchi Sea, Table 6–7 for bowhead and beluga whales in the U.S. Beaufort Sea and in Table 6–8 for marine mammals (other than bowheads and belugas) in the Beaufort Sea. Table 1 in this document (Table 6–9 in the IHA application) summarizes these exposure estimates based on the 160–dB re 1 μ Pa (rms) criteria for cetaceans exposed to impulse sounds (such as seismic).

SOI’s estimates show that the bowhead whale is the only endangered marine mammal expected to be exposed to noise levels ≥ 160 dB unless, as expected during the fall migratory period, bowheads avoid the approaching survey vessel before the received levels reach 160 dB. Migrating bowheads are likely to take avoidance measures, though many of the bowheads engaged in other activities, particularly feeding and socializing, probably will not. SOI’s estimate of the number of bowhead whales potentially exposed to ≥ 160 dB is 1540 animals (9 in the Chukchi Sea and 1531 in the Beaufort Sea (see Table 1)). Two other endangered cetacean species that may be encountered in the northern Chukchi/western Beaufort Sea area, the fin whale and humpback whale, are estimated by SOI to have two exposures each in the Chukchi Sea. However, NMFS believes that at least for the fin whale, no animals would be so exposed given their low “average” estimates of densities in the area.

Most of the cetaceans exposed to seismic sounds with received levels ≥ 160 dB would involve bowhead, gray, and beluga whales, and the harbor porpoise. Average estimates of the number of exposures of cetaceans by 3D seismic surveys (other than bowheads), in descending order, are beluga (298), gray whale (183), and harbor porpoise (58). The regional breakdown of these numbers is shown in Tables 6–6 to 6–8. Estimates for other species are lower

(Table 6–9). These estimates are also provided in Table 1 in this **Federal Register** notice.

Pinnipeds

Ringed, spotted, and bearded seals are all associated with sea ice, and most census methods used to determine density estimates for pinnipeds are associated with counting the number of seals hauled out on ice. Correction factors have been developed for most pinniped species that address biases associated with detectability and availability of a particular species. Although extensive surveys of ringed and bearded seals have been conducted in the Beaufort Sea, the majority of the surveys have been conducted over the landfast ice and few seal surveys have been in open water. The most comprehensive survey data set on ringed seals (and bearded seal) from the central and eastern Beaufort Sea was conducted on offshore pack ice in late spring (Kingsley, 1986). It is important to note that all proposed activities will be conducted during the open-water season and density estimates used here were based on counts of seals on ice. Therefore, densities and potential take numbers will overestimate the numbers of seals that would likely be encountered and/or exposed because only the animals in the water would be exposed to the seismic and clearance activity sound sources.

The ringed seal is the most widespread and abundant pinniped in ice-covered arctic waters and ringed seals are expected to account for the vast majority of marine mammals expected to be encountered, and hence exposed to airgun sounds with received levels ≥ 160 dB re 1 μ Pa (rms) during SOI’s seismic survey. The average estimate is that 13,256 ringed seals might be exposed to seismic sounds with received levels ≥ 160 dB. Two additional pinniped species (other than the Pacific walrus) are expected to be encountered. They are the bearded seal (592 exposures), and the spotted seal (422 exposures) (see Table 1 in this document or Table 6–9 in the IHA application). The spotted seal and ribbon seal are unlikely to be encountered during SOI’s seismic surveys.

TABLE 1. SUMMARY OF THE NUMBER OF POTENTIAL EXPOSURES OF MARINE MAMMALS TO RECEIVED SOUND LEVELS IN THE WATER OF ≥ 160 dB DURING SOI'S PROPOSED SEISMIC PROGRAM IN THE CHUKCHI SEA AND BEAUFORT SEA, ALASKA, JULY - NOVEMBER, 2008. NOT ALL MARINE MAMMALS WILL CHANGE THEIR BEHAVIOR WHEN EXPOSED TO THESE SOUND LEVELS, ALTHOUGH SOME MIGHT ALTER THEIR BEHAVIOR SOMEWHAT WHEN LEVELS ARE LOWER (SEE TEXT).

Species	Number of Individuals Exposed to Sound Levels ≥ 160 dB					
	Chukchi Sea		Beaufort Sea		Total	
	Avg.	Max.	Avg.	Max.	Avg.	Max.
Odontocetes						
<i>Monodontidae</i>						
Beluga	63	254	234	938	298	1192
Narwhal	0	0	0	0	0	0
<i>Delphinidae</i>						
Killer whale	2	6	0	0	2	6
<i>Phocoenidae</i>						
Harbor porpoise	57	227	2	6	58	234
Mysticetes						
<i>Bowhead Whale</i> ^a	9	46	1531	1536	1540	1582
<i>Fin whale</i>	2	6	0	0	2	6
Gray whale	182	727	2	6	183	734
<i>Humpback whale</i>	2	6	0	0	2	6
Minke whale	2	6	0	0	2	6
Total Cetaceans	70	281	1533	1543	1603	1824
Pinnipeds						
Bearded seal	270	405	322	1286	592	1691
Ribbon seal	2	6	0	0	2	6
Ringed seal	6951	10827	6305	25221	13256	36047
Spotted seal	361	562	61	243	422	804
Total Pinnipeds	5678	8836	6687	26750	12366	35586

^a See text for description of bowhead whale estimate for the Beaufort Sea

Potential Marine Mammal Disturbance At Less Than 160 dB Received Levels

During autumn seismic surveys in the Beaufort Sea, migrating bowhead whales displayed avoidance (i.e., deflection) at distances out to 20–30 km (12–19 mi) and received sound levels of ~130 dB (rms) (Miller *et al.*, 1999; Richardson *et al.*, 1999). Therefore, it is possible that a larger number of bowhead whales than estimated above may be disturbed to some extent if reactions occur at ≥ 130 dB (rms).

However, these references note that bowhead whales below the water surface at a distance of 20 km (12.4 mi) from an airgun array received pulses of about 117–135 dB re 1 μ Pa rms, depending upon propagation. Corresponding levels at 30 km (18.6 mi) were about 107–126 dB re 1 μ Pa rms. Miller *et al.* (1999) surmise that deflection may have begun about 35 km (21.7 mi) to the east of the seismic operations, but did not provide SPL measurements to that distance, and noted that sound propagation has not been studied as extensively eastward in the alongshore direction, as it has northward, in the offshore direction. Therefore, while this single year of data analysis indicates that bowhead whales may make minor deflections in

swimming direction at a distance of 30–35 km (18.6–21.7 mi), there is no indication that the sound pressure level (SPL) where deflection first begins is at 120 dB- it could be at another SPL lower or higher than 120 dB. Miller *et al.* (1999) also note that the received levels at 20–30 km (12.4–18.6 mi) were considerably lower in 1998 than have previously been shown to elicit avoidance in bowheads exposed to seismic pulses. However, the seismic airgun array used in 1998 was larger than the ones used in 1996 and 1997. Therefore, NMFS believes that it cannot scientifically support adopting any single SPL value below 160 dB and apply it across the board for all species and in all circumstances.

Second, NMFS has noted in the past that minor course changes during migration are not considered a significant behavioral change and, as indicated in MMS' 2006 Final PEA, have not been seen at other times of the year and during other activities. To show the contextual nature of this minor behavioral modification, recent monitoring studies of Canadian seismic operations indicate that when not migrating but involved in feeding, bowhead whales do not move away from a noise source at an SPL of 160 dB.

Therefore, while bowheads may avoid an area of 20 km (12.4 mi) around a noise source, when such a determination requires a post-survey computer analysis to find that bowheads have made slight course change, NMFS believes that this does not rise to a level considered to be a significant behavioral response on the part of the marine mammals or under the MMPA, a "take." NMFS therefore continues to estimate "takings" under the MMPA from impulse noises, such as seismic, as being at a distance of 160 dB (re 1 μ Pa). NMFS needs to point out however, that while this might not be a "taking" in the sense that there is not a significant behavioral response by bowhead whales, a minor course deflection by bowheads can have a significant impact on the subsistence uses of bowheads. As a result, NMFS still requires mitigation measures to ensure that the activity does not have an unmitigable adverse impact on subsistence uses of bowheads.

Finally, it is likely that SOI will not conduct seismic operations in the Beaufort Sea during that part of the fall bowhead migration that occurs at the same time as the fall bowhead subsistence hunt. As a result, a large proportion of the bowhead population would migrate past the Beaufort Sea

seismic survey area without being exposed to any seismic sounds. Limiting operations during the fall bowhead whale migration is also meant to reduce any chance of conflicting with subsistence hunting and will continue at least until hunting quotas have been filled by the coastal communities.

Potential Impact on Habitat

SOI states that the proposed seismic activities will not result in any permanent impact on habitats used by marine mammals, or to their prey sources. Seismic activities will mostly occur during the time of year when bowhead whales are widely distributed and would be expected to occur in very low numbers within the seismic activity area (mid- to late-July through September). Any effects would be temporary and of short duration at any one place. The primary potential impacts to marine mammals is associated with elevated sound levels from the proposed airguns were discussed previously in this document.

A broad discussion on the various types of potential effects of exposure to seismic on fish and invertebrates can be found in the NMFS/MMS Draft PEIS for Arctic Seismic Surveys (see **ADDRESSES**).

Mortality to fish, fish eggs and larvae from seismic energy sources would be expected within a few meters (0.5 to 3 m (1.6 to 9.8 ft)) from the seismic source. Direct mortality has been observed in cod and plaice within 48 hours that were subjected to seismic pulses two meters from the source (Matishov, 1992), however other studies did not report any fish kills from seismic source exposure (La Bella *et al.*, 1996; IMG, 2002; Hassel *et al.*, 2003). To date, fish mortalities associated with normal seismic operations are thought to be slight. Saetre and Ona (1996) modeled a worst-case mathematical approach on the effects of seismic energy on fish eggs and larvae, and concluded that mortality rates caused by exposure to seismic are so low compared to natural mortality that issues relating to stock recruitment should be regarded as insignificant.

Limited studies on physiological effects on marine fish and invertebrates to acoustic stress have been conducted. No significant increases in physiological stress from seismic energy were detected for various fish, squid, and cuttlefish (McCauley *et al.*, 2000) or in male snow crabs (Christian *et al.*, 2003). Behavioral changes in fish associated with seismic exposures are expected to be minor at best. Because only a small portion of the available foraging habitat would be subjected to seismic pulses at a given time, fish would be expected to

return to the area of disturbance anywhere from 15–30 minutes (McCauley *et al.*, 2000) to several days (Engas *et al.*, 1996).

Available data indicates that mortality and behavioral changes do occur within very close range to the seismic source, however, the proposed seismic acquisition activities in the Chukchi and Beaufort seas are predicted by SOI to have a negligible effect to the prey resource of the various life stages of fish and invertebrates available to marine mammals occurring during the project's duration. In addition, it is unlikely that bowheads, gray, or beluga whales will be excluded from any habitat.

Effects of Seismic Noise and Other Related Activities on Subsistence

The disturbance and potential displacement of marine mammals by sounds from seismic activities are the principal concerns related to subsistence use within the Beaufort and Chukchi seas. The harvest of marine mammals (mainly bowhead whales, but also ringed and bearded seals) is central to the culture and subsistence economies of the coastal North Slope and Western Alaskan communities. In particular, if fall-migrating bowhead whales are displaced farther offshore by elevated noise levels, the harvest of these whales could be more difficult and dangerous for hunters. The impact would be that whaling crews would necessarily be forced to travel greater distances to intercept westward migrating whales thereby creating a safety hazard for whaling crews and/or limiting chances of successfully striking and landing bowheads. The harvest could also be affected if bowheads become more skittish when exposed to seismic noise. Hunters relate how bowhead whales also appear "angry" due to seismic noise, making whaling more dangerous.

This potential impact on subsistence uses of marine mammals is proposed by SOI to be mitigated by application of the procedures established in a Conflict Avoidance Agreement (CAA) between the seismic operators and the AEWC and the Whaling Captains' Associations of Kaktovik, Nuiqsut, Barrow, Pt. Hope and Wainwright. SOI notes that the times and locations of seismic and other noise producing sources are likely to be curtailed during times of active bowhead whale scouting and actual whaling activities within the traditional subsistence hunting areas of the potentially affected communities. (See Mitigation for Subsistence). SOI states that seismic survey activities will also be scheduled to avoid the traditional subsistence beluga hunt which annually

occurs in July in the community of Pt. Lay. As a result, SOI believes that there should be no adverse impacts on the availability of whale species for subsistence uses. In the event that a CAA is not signed by either party, then NMFS will implement mitigation measures it determines are necessary to ensure that the taking of marine mammals by SOI's seismic and related activities do not have an unmitigable adverse impact on the subsistence uses of marine mammals.

In the Chukchi Sea, SOI's seismic work should not have unmitigable adverse impacts on the availability of the whale species for subsistence uses. The whale species normally taken by Inupiat hunters are the bowhead and belugas. SOI's Chukchi Sea seismic operations will not begin until after July 20, 2008 by which time the majority of bowheads will have migrated to their summer feeding areas in Canada. Even if any bowheads remain in the northeastern Chukchi Sea after July 20, they are not normally hunted after this date until the return migration occurs around late September when a fall hunt by Barrow whalers takes place. In recent years, bowhead whales have occasionally been taken in the fall by coastal villages along the Chukchi coast, but the total number of these animals has been small. Seismic operations for the Chukchi Sea seismic program will be timed and located so as to avoid any possible conflict with the Barrow fall whaling, and specific provisions governing the timing and location are expected to be incorporated, if signed, into a CAA established between SOI and WesternGeco, the AEWC, and the Whaling Captains Associations.

Beluga whales may also be taken sporadically for subsistence needs by coastal villages, but traditionally are taken in small numbers very near the coast. However, SOI will establish "communication stations" in the villages to monitor impacts. Gray whales, which will be abundant in the northern Chukchi Sea from spring through autumn, are not taken by subsistence hunters.

Plan of Cooperation (POC)

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. SOI has summarized concerns received during 2006 and 2007 into the 2007 POC, which was submitted during June 2007 to federal agencies as well as to

subsistence stakeholders, and updated in July 2007 and earlier this year. SOI has developed the POC to mitigate and avoid any unreasonable interference by SOI's planned activities on North Slope subsistence uses and resources. The POC is the result of numerous meetings and consultations between SOI, affected subsistence communities and stakeholders, and federal agencies beginning in October 2006 (see Table 12-1 in SOI's IHA application for a list of meetings). The POC identifies and documents potential conflicts and associated measures that will be taken to minimize any adverse effects on the availability of marine mammals for subsistence use. To be effective, SOI believes the POC must be a dynamic document which will expand to incorporate the communications and consultation that will continue to occur throughout 2008. Outcomes of POC meetings are included in quarterly updates attached to the POC and distributed to federal, state, and local agencies as well as local stakeholder groups.

SOI hopes that a CAA will result from the POC meetings. In that regard, the AEWC submitted a draft CAA to the industry earlier this spring. If signed, the CAA will incorporate all appropriate measures and procedures regarding the timing and areas of the operator's planned activities (e.g., times and places where seismic operations will be curtailed or moved in order to avoid potential conflicts with active subsistence whaling and sealing); a communications system between operator's vessels and whaling and hunting crews (i.e., the communications center will be located in strategic areas); provision for marine mammal observers/Inupiat communicators aboard all project vessels; conflict resolution procedures; and provisions for rendering emergency assistance to subsistence hunting crews. If requested, post-season meetings will also be held to assess the effectiveness of a 2008 CAA between SOI, the AEWC, and the Whaling Captains Associations, to address how well conflicts (if any) were resolved; and to receive recommendations on any changes (if any) might be needed in the implementation of future CAAs.

It should be noted that NMFS is required by the MMPA to make a determination that an activity would not have an unmitigable adverse impact on the subsistence needs for marine mammals. While this includes usage of both cetaceans and pinnipeds, the primary impact from seismic activities is expected to be impacts from noise on bowhead whales during its westward

fall migration and feeding period in the Beaufort Sea. NMFS has defined unmitigable adverse impact as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) causing the marine mammals to abandon or avoid hunting areas; (ii) directly displacing subsistence users; or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met (50 CFR 216.103).

Therefore, while a signed CAA allows NMFS to make a determination that the activity will not have an unmitigable adverse impact on the subsistence use of marine mammals, if one or both parties fail to sign the CAA, then NMFS will make the determination that the activity will or will not have an unmitigable adverse impact on subsistence use of marine mammals. This determination may require that the IHA contain additional mitigation measures in order for this decision to be made.

Mitigation and Monitoring

As part of its application, SOI has proposed implementing a marine mammal mitigation and monitoring program (4MP) that will consist of monitoring and mitigation during SOI's seismic and shallow-hazard survey activities. In conjunction with monitoring during SOI's exploratory drilling program (subject to a separate notice and review), monitoring will provide information on the numbers of marine mammals potentially affected by these activities and permit real time mitigation to prevent injury of marine mammals by industrial sounds or activities. These goals will be accomplished by conducting vessel-, aerial-, and acoustic-monitoring programs to characterize the sounds produced by the seismic airgun arrays and related equipment and to document the potential reactions of marine mammals in the area to those sounds and activities. Acoustic modeling will be used to predict the sound levels produced by the seismic, shallow hazards and drilling equipment in the U.S. Beaufort and Chukchi seas. For the seismic program, acoustic measurements will also be made to establish zones of influence (ZOIs) around the activities that will be monitored by observers. Aerial monitoring and reconnaissance of marine mammals and recordings of ambient sound levels, vocalizations of

marine mammals, and received levels should they be detectable using bottom-founded acoustic recorders along the Beaufort Sea coast will be used to interpret the reactions of marine mammals exposed to the activities. The components of SOI's mitigation and monitoring programs are briefly described next. Additional information can be found in SOI's application.

Proposed Mitigation Measures

As part of its IHA application, SOI submitted its proposed mitigation and monitoring program for SOI's seismic programs in the Chukchi and Beaufort seas for 2008/2009. SOI notes that the proposed seismic exploration program incorporates both design features and operational procedures for minimizing potential impacts on cetaceans and pinnipeds and on subsistence hunts. Seismic survey design features include: (1) Timing and locating seismic activities to avoid interference with the annual fall bowhead whale hunts; (2) configuring the airgun arrays to maximize the proportion of energy that propagates downward and minimizes horizontal propagation; (3) limiting the size of the seismic energy source to only that required to meet the technical objectives of the seismic survey; and (4) conducting pre-season modeling and early season field assessments to establish and refine (as necessary) the appropriate 180 dB and 190 dB safety zones, and other radii relevant to behavioral disturbance.

The potential disturbance of cetaceans and pinnipeds during seismic operations will be minimized further through the implementation of the following several ship-based mitigation measures.

Safety and Disturbance Zones

Safety radii for marine mammals around airgun arrays are customarily defined as the distances within which received pulse levels are greater than or equal to 180 dB re 1 μ Pa (rms) for cetaceans and greater than or equal to 190 dB re 1 μ Pa (rms) for pinnipeds. These safety criteria are based on an assumption that seismic pulses at lower received levels will not injure these animals or impair their hearing abilities, but that higher received levels might result in such effects. It should be understood that marine mammals inside these safety zones will not necessarily be seriously injured or killed as these zones were established prior to the current understanding that significantly higher levels of impulse sounds would be required before injury or mortality would occur. This has been described previously in this document.

SOI anticipates that monitoring similar to that conducted in the Chukchi Sea in 2007 will also be required in the Chukchi and the Beaufort seas in 2008. SOI plans to use marine mammal observers (MMOs) onboard the seismic vessel to monitor the 190- and 180-dB (rms) safety radii for pinnipeds and cetaceans, respectively and to implement appropriate mitigation as discussed in the proceeding sections. SOI also plans to monitor the 160-dB (rms) disturbance zone with MMOs onboard the chase vessels in 2008 as was done in 2006 and 2007. There has also been concern that received pulse levels as low as 120 dB (rms) may have the potential to disturb some whales. In 2006 and 2007, there was a requirement in the IHAs issued to SOI by NMFS to implement special mitigation measures if specified numbers of bowhead cow/calf pairs might be exposed to seismic sounds greater than 120 dB rms or if large groups (greater than 12 individuals) of bowhead or gray whales might be exposed to sounds greater than or equal to 160 dB rms. In 2007, monitoring of the 120-dB (rms) zone was required in the Beaufort Sea after 25 September. For 2008, SOI anticipates that it will not operate in the Chukchi Sea between September 25th and the time ice prevents additional work in the Beaufort Sea, by which time NMFS believes the bowhead whale cow/calf migration period to have been completed. As a result, it is unlikely that SOI will not need to monitor the 120 dB (rms) zone in the Chukchi Sea in 2008.

During the 2006 and 2007 seismic programs in the Chukchi and Beaufort Seas, SOI utilized a combination of pre-season modeling and early season sound source verification to establish safety zones for these sound level criteria. As the equipment being utilized in 2008 is the same as that used in the 2006 and 2007 field seasons, and the majority of locations where seismic data is to be acquired were modeled prior to the 2006 and 2007 seasons, SOI will initially utilize the derived (measured) sound criterion distances from 2006. Any locations not modeled previously will be modeled prior to 2008 survey initiation and mitigation distances and safety zones adjusted up, if necessary following sound measurements at the new locations. Modeling of the sound propagation is based on the size and configuration of the airgun array and on available oceanographic data. An acoustics contractor will perform the direct measurements of the received levels of underwater sound versus distance and direction from the airgun

arrays using calibrated hydrophones. The acoustic data will be analyzed as quickly as reasonably practicable in the field and used to verify (and if necessary adjust) the safety distances. The mitigation measures to be implemented will include ramp ups, power downs, and shut downs as described next.

Ramp-Up

A ramp up of an airgun array provides a gradual increase in sound levels, and involves a step-wise increase in the number and total volume of airguns firing until the full volume is achieved. The purpose of a ramp up (or "soft start") is to "warn" cetaceans and pinnipeds in the vicinity of the airguns and to provide the time for them to leave the area and thus avoid any potential injury or impairment of their hearing abilities. During the proposed seismic program, the seismic operator will ramp up the airgun arrays slowly, at a rate no greater than 6 dB/5 minute period. Full ramp ups (i.e., from a cold start after a shut down, when no airguns have been firing) will begin by firing a small airgun in the arrays. The minimum duration of a shut-down period, i.e., without air guns firing, which must be followed by a ramp up typically is the amount of time it would take the source vessel to cover the 180-dB safety radius. That depends on ship speed and the size of the 180-dB safety radius, which are not known at this time.

A full ramp up, after a shut down, will not begin until there has been a minimum of a 30-minute period of observation by MMOs of the safety zone to assure that no marine mammals are present. The entire safety zone must be visible during the 30-minute leading up to a full ramp up. If the entire safety zone is not visible, then ramp up from a cold start cannot begin. If a marine mammal(s) is sighted within the safety zone during the 30-minute watch prior to ramp up, ramp up will be delayed until the marine mammal(s) is sighted outside of the safety zone or the animal(s) is not sighted for at least 15–30 minutes: 15 minutes for small odontocetes and pinnipeds, or 30 minutes for baleen whales and large odontocetes.

During periods of turn around and transit between seismic transects, at least one airgun will remain operational to alert marine mammals in the area of the vessel's location. The ramp-up procedure still will be followed when increasing the source levels from one air gun to the full arrays. Moreover, keeping one air gun firing will avoid the prohibition of a cold start during darkness or other periods of poor

visibility. Through use of this approach, seismic operations can resume upon entry to a new transect without a full ramp up and the associated 30-minute lead-in observations. MMOs will be on duty whenever the airguns are firing during daylight, and during the 30-min periods prior to ramp-ups as well as during ramp-ups. Daylight will occur for 24 hr/day until mid-August, so until that date MMOs will automatically be observing during the 30-minute period preceding a ramp up. Later in the season, MMOs will be called out at night to observe prior to and during any ramp up. The seismic operator and MMOs will maintain records of the times when ramp-ups start, and when the airgun arrays reach full power.

Power Downs and Shut Downs

A power down is the immediate reduction in the number of operating airguns from all guns firing to some smaller number. A shut down is the immediate cessation of firing of all airguns. The airgun arrays will be immediately powered down whenever a marine mammal is sighted approaching close to or within the applicable safety zone of the full airgun arrays (i.e., 180 dB rms for cetaceans, 190 dB rms for pinnipeds), but is outside the applicable safety zone of the single airgun. If a marine mammal is sighted within the applicable safety zone of the single airgun, the airgun array will be shut down (i.e., no airguns firing). Although observers will be located on the bridge ahead of the center of the airgun array, the shutdown criterion for animals ahead of the vessel will be based on the distance from the bridge (vantage point for MMOs) rather than from the airgun array - a precautionary approach. For marine mammals sighted alongside or behind the airgun array, the distance is measured from the array.

Operations at Night and in Poor Visibility

When operating under conditions of reduced visibility attributable to darkness or to adverse weather conditions, infra-red or night-vision binoculars will be available for use. However, it is recognized that their effectiveness is limited. For that reason, MMOs will not routinely be on watch at night, except in periods before and during ramp-ups. It should be noted that if one small airgun remains firing, the rest of the array can be ramped up during darkness or in periods of low visibility. Seismic operations may continue under conditions of darkness or reduced visibility.

Preliminary Mitigation Determination

As NMFS believes that the combination of use of the mitigation gun, ramp-up of the seismic airgun array and the slow vessel speed (to allow marine mammals sufficient time to take necessary avoidance measures), the use of trained marine mammal observers and shut-down procedures (to avoid potential injury if the animal is close to the vessel), and the behavioral response of marine mammals (especially bowhead whales) to avoid areas of high anthropogenic noise all provide protection to marine mammals from serious injury or mortality. As a result, NMFS believes that it is not necessary to require termination of survey activities during darkness or reduced visibility and that the current level of mitigation will result in the lowest level of impact on marine mammals practicable.

Proposed Marine Mammal Monitoring

SOI has proposed to implement a marine mammal monitoring program (4MP) to collect data to address the following specific objectives: (1) improve the understanding of the distribution and abundance of marine mammals in the Chukchi and Beaufort sea project areas; (2) understand the propagation and attenuation of anthropogenic sounds in the waters of the project areas; (3) determine the ambient sound levels in the waters of the project areas; and (4) assess the effects of sound on marine mammals inhabiting the project areas and their distribution relative to the local people that depend on them for subsistence hunting.

These objectives and the monitoring and mitigation goals will be addressed by: (1) vessel-based MMOs on the seismic source and other support vessels; (2) an acoustic program to predict and then measure the sounds produced by the seismic operations and the possible responses of marine mammals to those sounds; (3) an aerial monitoring and reconnaissance of marine mammals available for subsistence harvest along the Chukchi Sea coast; and (4) bottom-founded autonomous acoustic recorder arrays along the Alaskan coast and offshore in the Chukchi and Beaufort seas to record ambient sound levels, vocalizations of marine mammals, and received levels of seismic operations should they be detectable.

Seismic Source Vessel-based Visual Monitoring

A sufficient number of MMOs will be required to be onboard the seismic

source vessel to meet the following criteria: (1) 100 percent monitoring coverage during all periods of seismic operations in daylight and for the 30 minutes prior to starting ramp-up and for the number of minutes required to reach full ramp-up; (2) coverage during darkness for 30-minutes before and during ramp-ups (provided MMOs verify that they can clearly see the entire safety zone); (3) maximum of 4 consecutive hours on watch per MMO; (4) maximum of approximately 12 hours on watch per day per MMO with no other shipboard duties; and (5) two-MMO coverage during ramp-up and the 30 minutes prior to full ramp-ups and for as large a fraction of the other operating hours as possible.

To accomplish these tasks SOI proposes to have from three to five MMOs (including one Inupiat observer/communicator) based aboard the seismic vessel. However, NMFS does not consider Inupiat observers to be included in the required minimum number of MMOs unless they have undergone MMO training at a facility approved in advance by NMFS. MMOs will search for and observe marine mammals whenever seismic operations are in progress and for at least 30 minutes before the planned start of seismic transmissions or whenever the seismic array's operations have been suspended for more than 10 minutes. The MMOs will scan the area immediately around the vessels with reticle binoculars during the daytime. Laser rangefinding equipment will be available to assist with distance estimation. After mid-August, when the duration of darkness increases, image intensifiers will be used by observers and additional light sources may be used to illuminate the safety zone.

The seismic vessel-based work will provide the basis for real-time mitigation (airgun power downs and, as necessary, shut downs), as called for by the IHAs; information needed to estimate the "take" of marine mammals by harassment, which must be reported to NMFS; data on the occurrence, distribution, and activities of marine mammals in the areas where the seismic program is conducted; information to compare the distances, distributions, behavior; movements of marine mammals relative to the source vessels at times with and without seismic activity; a communication channel to Inupiat whalers through the Communications Coordination Center in coastal villages; and continued employment and capacity building for local residents, with one objective being to develop a larger pool of experienced Inupiat MMOs.

The use of four or more MMOs allows two observers to be on duty simultaneously for up to 50 percent of the active airgun hours. The use of two observers increases the probability of detecting marine mammals, and two observers will be on duty for the entire duration of time whenever the seismic array is ramped up. As mentioned previously, individual watches will be limited to no more than 4 consecutive hours to avoid observer fatigue (and no more than 12 hours on watch per 24 hour day). When mammals are detected within or about to enter the safety zone designated to prevent injury to the animals (see Mitigation), the geophysical crew leader will be notified so that shutdown procedures can be implemented immediately. Details of the vessel-based marine mammal monitoring program are described in SOI's IHA application (see Appendix B).

Chase Boat Monitoring

MMOs will also be present on smaller support vessels that travel with the seismic source vessel. These support vessels are commonly known as "guard boats" or "chase boats." During seismic operations, a chase boat remains very near to the stern of the source vessel anytime that a member of the source vessel crew is on the back deck deploying or retrieving equipment related to the seismic array. Once the seismic array is deployed the chase boat then serves to keep other vessels away from the seismic source vessel and the seismic array itself (including hydrophone streamer) during production of seismic data and provide additional emergency response capabilities.

In the Chukchi and Beaufort seas in 2008, SOI's seismic source vessel will have one associated chase boat and possibly an additional supply vessel. The chase boat and supply vessel (if present) will have three MMOs onboard to collect marine mammal observations and to monitor the 160 dB (rms) disturbance zone from the seismic airgun array. MMOs on the chase boats will be able to contact the seismic ship if marine mammals are sighted. To maximize the amount of time during the day that an observer is on duty, two observers aboard the chase boat or supply vessel will rarely work at the same time. As on the source vessels, shifts will be limited to 4 hrs in length and 12 hrs total in a 24 hr period.

SOI plans to monitor the 160-dB (rms) disturbance radius in 2008 using MMOs onboard the chase vessel. The 160-dB radius in the Chukchi Sea in 2007 was determined by JASCO (2007) to extend ~8.1 km from the airgun

source on the *M/V Gilavar*. In the Beaufort Sea, the 160-dB radius was measured at 13.45 km (8.4 mi) (JASCO, 2007). This area around the seismic vessel was monitored by MMOs onboard the *M/V Gulf Provider* (the chase boat used in 2006 and 2007 operations). As in 2007 during monitoring of the 160-dB zone the *M/V Gulf Provider* will travel ~8 km (5 mi) ahead and to the side of the *M/V Gilavar*. MMOs onboard the *M/V Gulf Provider* will search the area ahead of the *M/V Gilavar* within the 160-dB zone for marine mammals. Every 8 km (5 mi) or so, the *M/V Gulf Provider* will move to the other side of the *M/V Gilavar* continuing in a stair-step type pattern. The distance at which the *M/V Gulf Provider* (or other equivalent vessel) travels ahead of the *M/V Gilavar* will be determined by the measured 160-dB radius. Mitigation (i.e., power down or shut down of the airgun array) will be implemented if a group of 12 or more bowhead or gray whales enter the 160-dB zone. SOI will use this same protocol in the Beaufort Sea after the 160-dB radius has been determined. Depending upon the size of the measured 160-dB zone around the airgun array SOI may decide to use a vessel equipped with a Passive Acoustic Monitoring (PAM) system (if it has been independently field tested and certified to NMFS as being capable of detecting marine mammals that inhabit the Arctic Ocean) or may use a second chase boat to ensure effective monitoring of the area.

In 2007 the measured distance to the 180-dB isopleth ranged from about 2.45 km (1.5 mi) in the Chukchi Sea to about 2.2 km (1.4 mi) in the Beaufort Sea near the Sivulliq prospect. SOI decided to use an additional vessel to monitor this zone given its importance in protecting marine mammals from potential injury associated with exposure to seismic pulses. Depending upon the measured radius for the 180-dB zone in 2008/2009 SOI may elect to use a PAM system to help monitor this area around the *M/V Gilavar* as well.

Aerial Survey Program

SOI proposes to conduct an aerial survey program in support of the seismic exploration program in the Beaufort Sea during summer and fall of 2008. The objectives of the aerial survey will be: (1) to advise operating vessels as to the presence of marine mammals in the general area of operation; (2) to provide mitigation monitoring (120 dB zones) as may be required under the conditions of the IHA; (3) to collect and report data on the distribution, numbers, movement and behavior of marine mammals near the seismic

operations with special emphasis on migrating bowhead whales; (4) to support regulatory reporting and Inupiat communications related to the estimation of impacts of seismic operations on marine mammals; (5) to monitor the accessibility of bowhead whales to Inupiat hunters and (6) to document how far west of seismic activities bowhead whales travel before they return to their normal migration paths, and if possible, to document how far east of seismic operations the deflection begins.

The same aerial survey design will be implemented during the summer (August) and fall (late August-October) period, but during the summer, the survey grid will be flown twice a week, and during the fall, flights will be conducted daily. During the early summer, few cetaceans are expected to be encountered in the nearshore Alaskan Beaufort Sea where seismic surveys will be conducted. Those cetaceans that are encountered are expected to be either along the coast (gray whales: (Maher, 1960; Rugh and Fraker, 1981; Miller *et al.*, 1999; Treacy, 2000) or seaward of the continental shelf among the pack ice (bowheads: Moore *et al.*, 1989b; Miller *et al.*, 2002; and belugas: Moore *et al.*, 1993; Clark *et al.*, 1993; Miller *et al.*, 1999) north of the area where seismic surveys and drilling activities are to be conducted. During some years a few gray whales are found feeding in shallow nearshore waters from Barrow to Kaktovik but most sightings are in the western part of that area.

During the late summer and fall, the bowhead whale is the primary species of concern, but belugas and gray whales are also present. Bowheads and belugas migrate through the Alaskan Beaufort Sea from summering areas in the central and eastern Beaufort Sea and Amundsen Gulf to their wintering areas in the Bering Sea (Clarke *et al.*, 1993; Moore *et al.*, 1993; Miller *et al.*, 2002). Some bowheads are sighted in the eastern Alaskan Beaufort Sea starting mid-August and near Barrow starting late August but the main migration does not start until early September.

The aerial survey procedures will be generally consistent with those during earlier industry studies (Miller *et al.*, 1997, 1998, 1999; Patterson *et al.*, 2007). This will facilitate comparison and pooling of data where appropriate. However, SOI notes that the specific survey grids will be tailored to SOI's operations and the time of year. Information on survey procedures can be found in SOI's IHA application.

Survey Design in the Beaufort Sea in Summer

The main species of concern in the Beaufort Sea is the bowhead whale but small numbers of belugas, and in some years, gray whales, are present in the Beaufort Sea during summer (see above). Few bowhead whales are expected to be found in the Beaufort Sea during early August; however, a reduced aerial survey program is proposed during the summer prior to seismic operations to confirm the distribution and numbers of bowheads, gray whales and belugas, because no recent surveys have been conducted at this time of year. The few bowheads that were present in the Beaufort Sea during summer in the late 1980s were generally found among the pack ice in deep offshore waters of the central Beaufort Sea (Moore and DeMaster, 1998; Moore *et al.*, 2000). Although gray whales were rarely sighted in the Beaufort Sea prior to the 1980's (Rugh and Fraker, 1981), sightings appear to have become more common along the coast of the Beaufort Sea in summer and early fall (Miller *et al.*, 1999; Treacy 1998, 2000, 2002; Patterson *et al.*, 2007) possibly because of increases in the gray whale population and/or reductions in ice cover in recent years. Because no summer surveys have been conducted in the Beaufort Sea since the 1980s, the information on summer distribution of cetaceans will be valuable for planning future seismic or drilling operations. The grid that will be flown in the summer will be the same grid flown later in the year, but it will be flown twice a week instead of daily. If cetaceans are encountered in the vicinity of planned seismic operations, then SOI would consider flying the survey grid proposed for later in the season, rather than the early-season survey plan. Surveys will be conducted 2 days/week until the period one week prior to the start of seismic operations in the Beaufort Sea. Beginning approximately one week prior to the start of seismic operations, daily surveys would be initiated and they would be conducted using the grid shown in Figure 3 in Appendix B of SOI's IHA application.

Survey Design in the Beaufort Sea in Fall

Aerial surveys during the late August-October period will be designed to provide mitigation monitoring as required by the IHA. SOI notes that, if, as in 2006 and 2007, mitigation monitoring is required to ensure that large aggregations of mother-calf bowheads do not approach to within the

120 dB re 1 μ Pa (rms) radius from the active seismic operation, priority will be given to mitigation monitoring to the east of the seismic operation (see Appendix B, Figure 2). SOI suggests, that, if permitted by the IHA, it is prepared to conduct some surveys to collect data on the extent of westward deflection while still monitoring the 120-dB radius to the east of the seismic operation. These surveys will obtain detailed data (weather permitting) on the occurrence, distribution, and movements of marine mammals, particularly bowhead whales, within an area that extends about 100 km (62 mi) to the east of the primary seismic vessel to a few km west of it, and north to about 65 km (40 mi) offshore. A westward emphasis would obtain the same data for an area about 100 km (62 mi) to the west of the primary seismic vessel and about 20 km (12 mi) east of it; again about 65 km (40 mi) offshore. This site-specific survey coverage will complement the simultaneous MMS/NMFS National Marine Mammal Laboratory Bowhead Whales Aerial Survey Program (BWASP) survey coverage of the broader Beaufort Sea area.

The proposed survey grid will provide data both within and beyond the anticipated immediate zone of influence of the seismic program, as identified by Miller *et al.* (1999). Miller *et al.* (1999) were not able to determine how far upstream and downstream (i.e., east and west) of the seismic operations bowheads began deflecting and then returned to their "normal" migration corridor. That is an important concern for the Inupiat whalers. SOI notes that the proposed survey grid is not able to address that concern because of the need to extend flights well to the east to detect mother-calf pairs before they are exposed to seismic sounds greater than 120 dB re 1 μ Pa.

It is possible that the east-west extent of seismic surveys will change during the season due to ice or other operational restrictions. If so, SOI may need to modify the aerial survey grid to maintain observations to 100 km (62 mi) east (or west) of the seismic survey area, but the total km/mi of survey that can be conducted each day are limited by the fuel capacity of the aircraft. The only alternative to ensure adequate aerial survey coverage over the entire area where seismic activities might influence bowhead whale distribution is to space the individual transects farther apart. For each 15–20 km (9.3–12.4 mi) increase in the east-west size of the seismic survey area, the spacing between lines will need to be increased by 1 km (0.62 mi) to maintain survey

coverage from 100 km (62 mi) east to 20 km (12.4 mi) west of the seismic activities (or vice versa). Data from the easternmost transects of the proposed survey grid will document the main bowhead whale migration corridor east of the seismic exploration area and will provide the baseline data on the location of the migration corridor relative to the coast.

SOI does not propose to fly a smaller "intensive" survey grid in 2008/2009. In previous years, a separate grid of 4–6 shorter transects was flown, whenever possible, to provide additional survey coverage within about 20 km (12.4 mi) of the seismic operations. This coverage was designed to provide additional data on marine mammal utilization of the actual area of seismic exploration and immediately adjacent waters. The 1996–98 studies showed that bowhead whales were almost entirely absent from the area within 20 km (12.4 mi) of the active seismic operation (Miller *et al.* 1997, 1998, 1999). Thus, the flying-time that (in the past) would have been expended on flying the intensive grid will be used to extend the coverage farther to the east and west of the seismic activity.

Depending on the distance offshore where seismic is being conducted, the survey grid may not extend far enough offshore to document whales which could potentially deflect north of the operation. In this case, SOI plans to extend the north ends of the transects farther north so that they extend 30–35 km (19–22 mi) north of the seismic operation and the two most westerly (or easterly depending upon the survey design) lines will not be surveyed. This will mean that the survey lines will only extend as far west as the seismic operation or start as far east as the seismic operations. SOI states that it is not possible to move the grid north without surveying areas south of the seismic operation because some whales may deflect south of the seismic operation and that deflection must be monitored.

If seismic surveys of the Beaufort Sea end while substantial numbers of bowhead whales are still migrating west, aerial survey coverage of the area of most recent seismic operations will continue for several days after seismic surveys have ended. This will provide "post-seismic" data on whale distribution during seismic periods. These data will be used in analyses to estimate the extent of deflection during seismic activities and the duration of any potential deflection after surveys end. Post seismic coverage will not be conducted if the bowhead migration has ended by that time, but it is expected

that due to freeze-up, seismic operations will move out of the Beaufort Sea before the end of the bowhead whale migration.

The survey grid patterns for summer and fall time periods being proposed by SOI are described in SOI's IHA application.

Joint Industry Studies Program

Chukchi Sea Coastal Aerial Survey

The only recent aerial surveys of marine mammals in the Chukchi Sea were conducted along coastal areas of the Chukchi Sea to approximately 20 nmi (37 km) offshore in 2006 and 2007 in support of SOI's summer seismic exploration. These surveys provided data on the distribution and abundance of marine mammals in nearshore waters of the Chukchi Sea. Population sizes of several species found they may have changed considerably since earlier surveys were conducted and their distributions may have changed because of changes in ice conditions. SOI plans to conduct an aerial survey program in the Chukchi Sea in 2008 that will be similar to the 2006 and 2007 programs.

Alaskan Natives from several villages along the east coast of the Chukchi Sea hunt marine mammals during the summer and Native communities are concerned that offshore oil and gas development activities such as seismic exploration may negatively impact their ability to harvest marine mammals. Of particular concern is the potential impact on the beluga harvest at Point Lay and on future bowhead harvests at Point Hope, Wainwright and Barrow. Other species of concern in the Chukchi Sea include the gray whale, bearded, ringed, and spotted seals, and walrus. The gray whale is expected to be the most numerous cetacean species encountered during the proposed summer seismic activities, although beluga whales also occur in the area. The ringed seal is likely to be the most abundant pinniped species. The current aerial survey program has been designed to collect distribution data on cetaceans but will be limited in its ability to collect similar data on pinnipeds because of aircraft altitude.

The aerial survey program will be conducted in support of the SOI seismic program in the Chukchi Sea during summer and fall of 2008/2009. The objectives of the aerial survey will be (1) to address data deficiencies in the distribution and abundance of marine mammals in coastal areas of the eastern Chukchi Sea; and (2) to collect and report data on the distribution, numbers, orientation and behavior of marine mammals, particularly beluga

whales, near traditional hunting areas in the eastern Chukchi Sea.

With agreement from hunters in the coastal villages, aerial surveys of coastal areas to approximately 20 mi (37 km) offshore between Point Hope and Point Barrow will begin in early- to mid-July and will continue until mid-November or until seismic operations in the Chukchi Sea are completed. Weather and equipment permitting, surveys will be conducted twice per week during this time period. In addition, during the 2008/2009 field season, SOI will coordinate and cooperate with the aerial surveys conducted by NMML for MMS and any other groups conducting surveys in the same region. For a description of the aerial survey procedures, please see SOI's IHA application.

Acoustic "Net" Array: Chukchi Sea

The acoustic "net" array used during the 2007 field season in the Chukchi Sea was designed to accomplish two main objectives. The first was to collect information on the occurrence and distribution of beluga whales that may be available to subsistence hunters near villages located on the Chukchi Sea coast. The second objective was to measure the ambient noise levels near these villages and record received levels of sounds from seismic survey activities further offshore in the Chukchi Sea.

The net array configuration used in 2007 is again proposed for 2008/2009. The basic components are 30 ocean bottom hydrophones (OBH) systems. Two separate deployments with different placement configurations are planned. The first deployment will occur in mid-July immediately following the beluga hunt and will be adjusted to avoid any interference with the hunt. The initial net array configuration will include and extend the 2006 configuration (see Figures 8 and 9 in Appendix B of SOI's application for number of OBHs and locations for the two deployments). These offshore systems will capture seismic exploration sounds over large distances to help characterize the sound transmission properties of larger areas of the Chukchi Sea.

The second deployment will occur in late August at the same time that all currently deployed systems will be recovered for battery replacement and data extraction. The second deployment emphasizes the offshore coverage out to 72 degrees North (80 nm north of Wainwright, 150 nm (172 mi; 278 km) north of Point Lay, and 180 nm (207 mi; 333 km) north of Cape Lizbourne. The primary goal of extending the arrays further offshore later in the season is to

obtain greater coverage of the central Chukchi Sea to detect vocalization from migrating bowheads starting in September. The specific geometries and placements of the arrays are primarily driven by the objectives of (a) detecting the occurrence and approximate offshore distributions of belugas and possibly bowhead whales during the July to mid-August period and primarily by bowhead whales during the mid-August to late-October period, (b) measuring ambient noise, and (c) measuring received levels of seismic survey activities. Timing of deployment and final positions will be subject to weather and ice conditions, based on consultation with local villages, and carried out to minimize any interference with subsistence hunting or fishing activities.

Additionally, a set of 4 to 6 OBH systems will be deployed near the end of the season to collect data throughout the winter.

Acoustic Array: Beaufort Sea

In addition to the continuation of the acoustic net array program in the Chukchi Sea in 2008/2009, SOI proposes to also continue a program that deployed directional acoustic recording systems in the Beaufort Sea. The purpose of the array will be to further understand, define, and document sound characteristics and propagation resulting from offshore seismic and other industry operations that may have the potential to cause deflections of bowhead whales from anticipated migratory pathways. Of particular interest will be the east-west extent of deflection (i.e. how far east of a sound source do bowheads begin to deflect and how far to the west beyond the sound source does deflection persist). Of additional interest will be the extent of offshore deflection that occurs.

In previous work around seismic and drill-ship operations in the Alaskan Beaufort Sea, the primary method for studying this question has been aerial surveys. Acoustic localization methods provide a supplementary methods for addressing these questions. As compared with aerial surveys, acoustic methods have the advantage of providing a vastly larger number of whale detections, and can operate day or night, independent of visibility, and to some degree independent of ice conditions and sea state—all of which prevent or impair aerial surveys. However, acoustic methods depend on the animals to call, and to some extent assume that calling rate is unaffected by exposure to industrial noise. Bowheads do call frequently in the fall, but there is some evidence that their calling rate

may be reduced upon exposure to industrial sounds, complicating interpretation. The combined use of acoustic and aerial survey methods will provide information about these issues.

SOI has contracted with Greeneridge to conduct the whale acoustic monitoring program using the passive acoustics techniques developed and used successfully since 2001 for monitoring the bowhead migration past BP's Northstar oil production facility northwest of Prudhoe Bay. Those techniques involve using directional autonomous seafloor acoustic recorders (DASARs) to measure the arrival angles of bowhead calls at known locations, then triangulating to locate the calling whale. Thousands, in some years tens of thousands, of whale calls have been located each year since 2001. The 2008/2009 study will use a new model of the DASAR similar to those deployed in 2007. Figure 11 in Appendix B of SOI's IHA application shows potential locations of the DASARs. The results of these data will be used to determine the extent of deflection of migrating bowhead whales from the sound sources. More information on DASARs and this part of SOI's monitoring program can be found in SOI's IHA application.

Additional Mitigation and Monitoring Measures

In addition to the standard mitigation and monitoring measures mentioned previously, NMFS is proposing to incorporate additional mitigation/monitoring measures (such as expanded monitoring-safety zones for bowhead and gray whales, and having those zones monitored effectively) into the 2008/2009 IHA to ensure that impacts on marine mammals are at the lowest level practicable. The additional mitigation measures are specific for the SOI seismic project, in part because SOI incorporated monitoring measures in the 4MP document that makes this monitoring practicable. It should be recognized that these mitigation/monitoring measures do not establish NMFS policy applicable to other projects or other locations under NMFS' jurisdiction, as each application for an IHA is context-specific. These measures have been developed based upon available data specific to the project areas. NMFS and MMS intend to collect additional information from all sources, including industry, non-governmental organizations, Alaska Natives and other federal and state agencies regarding measures necessary for effectively monitoring marine mammal populations, assessing impacts from seismic on marine mammals, and

determining practicable measures for mitigating those impacts. MMS and NMFS anticipate that mitigation measures applicable to future seismic and other activities may change and evolve based on newly-acquired data.

Reporting

Daily Reporting

In its IHA application, SOI proposes to collect, via the aerial flights, unanalyzed bowhead sighting and flightline data which will be exchanged between MMS and SOI on a daily basis during the field season. NMFS is proposing that each team will also submit its sighting information to NMFS in Anchorage each day. After the SOI and MMS data files have been reviewed and finalized, they will be shared in digital form.

Interim Report

The results of the 2008 SOI vessel-based monitoring, including estimates of take by harassment, will be presented in the "90 day" and final Technical Report as required by NMFS under IHAs. SOI proposes that the Technical Report will include: (1) summaries of monitoring effort: total hours, total distances, and distribution through study period, sea state, and other factors affecting visibility and detectability of marine mammals; (2) analyses of the effects of various factors influencing detectability of marine mammals: sea state, number of observers, and fog/glare; (3) species composition, occurrence, and distribution of marine mammal sightings including date, water depth, numbers, age/size/gender categories, group sizes, and ice cover; (4) sighting rates of marine mammals versus operational state (and other variables that could affect detectability); (5) initial sighting distances versus operational state; (6) closest point of approach versus seismic state; (7) observed behaviors and types of movements versus operational state; (8) numbers of sightings/individuals seen versus operational state; (9) distribution around the drilling vessel and support vessels versus operational state; and (10) estimates of take based on (a) numbers of marine mammals directly seen within the relevant zones of influence (160 dB, 180 dB, 190 dB (if SPLs of that level are measured)), and (b) numbers of marine mammals estimated to be there based on sighting density during daytime hours with acceptable sightability conditions. This report will be due 90 days after termination of the 2008 open water season and will include the results from any seismic work conducted in the

Chukchi/Beaufort Seas in 2008 under the previous IHA.

Comprehensive Monitoring Reports

In November, 2007, SOI (in coordination and cooperation with other Arctic seismic IHA holders) released a final, peer-reviewed edition of the 2006 Joint Monitoring Program in the Chukchi and Beaufort Seas, July–November 2006 (LGL, 2007). This report is available for downloading on the NMFS website (see **ADDRESSES**). A draft comprehensive report for 2007 was provided to NMFS and those attending the NMFS/MMS Arctic Ocean open water meeting in Anchorage, AK on April 14–16, 2008. Based on reviewer comments made at that meeting, SOI is currently revising this report and plans to make it available to the public shortly.

Following the 2008 open water season, a comprehensive report describing the proposed acoustic, vessel-based, and aerial monitoring programs will be prepared. The 2008 comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the studies into a broad based assessment of industry activities and their impacts on marine mammals in the Beaufort Sea during 2008 (work conducted in 2009 under the proposed 2008/2009 IHA will be analyzed in a 2009 comprehensive report). The 2008 report will form the basis for future monitoring efforts and will establish long term data sets to help evaluate changes in the Beaufort/Chukchi Sea ecosystems. The report will also incorporate studies being conducted in the Chukchi Sea and will attempt to provide a regional synthesis of available data on industry activity in offshore areas of northern Alaska that may influence marine mammal density, distribution and behavior.

This comprehensive report will consider data from many different sources including two relatively different types of aerial surveys; several types of acoustic systems for data collection (net array, passive acoustic monitoring, vertical array, and other acoustical monitoring systems that might be deployed), and vessel based observations. Collection of comparable data across the wide array of programs will help with the synthesis of information. However, interpretation of broad patterns in data from a single year is inherently limited. Much of the 2008 data will be used to assess the efficacy of the various data collection methods and to establish protocols that will

provide a basis for integration of the data sets over a period of years.

Endangered Species Act (ESA)

Under section 7 of the ESA, the NMFS has begun consultation with MMS on the proposed seismic survey activities in the Beaufort and Chukchi seas during 2008/2009. NMFS will also consult on the issuance of the IHA under section 101(a)(5)(D) of the MMPA to SOI for this activity. Consultation will be concluded prior to NMFS making a determination on the issuance of an IHA.

National Environmental Policy Act (NEPA)

In 2006, the MMS prepared Draft and Final Programmatic Environmental Assessments (PEAs) for seismic surveys in the Beaufort and Chukchi Seas. Availability of the Draft and Final PEA was noticed by NMFS in several Federal Register notices regarding issuance of IHAs to SOI and others. NMFS was a cooperating agency in the preparation of the MMS PEA. On November 17, 2006, NMFS and MMS announced that they were jointly preparing a Draft Programmatic Environmental Impact Statement (PEIS) to assess the impacts of MMS' annual authorizations under the Outer Continental Shelf (OCS) Lands Act to the U.S. oil and gas industry to conduct offshore geophysical seismic surveys in the Chukchi and Beaufort seas off Alaska, and NMFS' authorizations under the MMPA to incidentally harass marine mammals while conducting those surveys. On March 30, 2007, the Environmental Protection Agency (EPA) noticed the availability for comment of the NMFS/MMS Draft PEIS. A Final PEIS has not been completed. In order to meet NMFS' NEPA requirements for the proposed IHA to SOI, NMFS is preparing a supplement to the 2006 Final PEA which incorporates by reference the 2006 Final PEA and other related documents. Upon completion, a copy of this Supplemental EA will be available upon request.

Preliminary Determinations

Based on the information provided in SOI's application, this document, the MMS 2006 Final PEA for Arctic Seismic Surveys, the 2006 and 2007 Comprehensive Monitoring Reports by SOI and others, and NMFS' 2008 Final Supplemental EA, NMFS has preliminarily determined that the impact of SOI conducting seismic surveys in the northern Chukchi Sea and eastern and central Beaufort Sea in 2008/2009 will have no more than a negligible impact on marine mammals and that there will not be any

unmitigable adverse impacts to subsistence communities, provided the mitigation measures described in this document are implemented (see Mitigation).

For reasons explained previously in this document, NMFS has preliminarily determined that no take by serious injury, death or stranding is anticipated by, or authorized to, SOI's 2008/2009 seismic survey activities, and the potential for temporary or permanent hearing impairment is low and will be avoided through the incorporation of the mitigation measures mentioned in this document. The best scientific information indicates that an auditory injury is unlikely to occur as apparently sounds need to be significantly greater than 180 dB for injury to occur. NMFS has preliminarily determined that exposure to several seismic pulses at received levels near 200-205 dB (rms) might result in slight TTS in hearing in a small odontocete. Seismic pulses with received levels of 200-205 dB or more are usually restricted to a radius of no more than 200 m (656 ft) around a seismic vessel operating a large array of airguns. For baleen whales, while there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS, there is a strong likelihood that baleen whales (bowheads, gray whales and humpback whales) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of onset of TTS. For pinnipeds, information indicates that for single seismic impulses, sounds would need to be higher than 190 dB rms for TTS to occur while exposure to several seismic pulses indicates that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations. Therefore, the requirement for MMOs to monitor safety zones (180 dB for cetaceans, 190 dB for pinnipeds) and power-down or shutdown arrays even at this distance and the increasing effectiveness of an MMO seeing a marine mammal prior to entering a close-in zone where auditory injury could occur indicates to NMFS that the 180 dB and 190-dB safety zones for cetaceans and pinnipeds respectively, provides a sufficient buffer to prevent PTS in marine mammals.

NMFS has also preliminarily determined that only small numbers of marine mammals will be harassed by SOI's 2008 seismic and shallow hazard programs. As discussed previously, the species most likely to be harassed during seismic surveys in the Arctic Ocean area is the ringed seal, with a total "best estimate" of 13,256 animals

being "exposed" to sound levels of 160 dB or greater (6,951 animals in the Chukchi Sea and 6,305 animals in the Beaufort Sea) (see Table 1). As explained previously, this does not mean that this is the number of ringed seals that will actually have a behavioral reaction to the noise, rather it is simply the best estimate of the number of animals that potentially could have a behavioral modification due to the noise. For example Moulton and Lawson (2002) indicate that most pinnipeds exposed to seismic sounds lower than 170 dB do not visibly react to that sound; pinnipeds are not likely to react to seismic sounds unless they are greater than 170 dB re 1 microPa (rms). In addition as discussed previously, these estimates are calculated based upon line miles of survey effort (also animal density and the calculated zone of influence), the resulting take estimate numbers tend to be highly inflated, because animals that might have been affected (taken) are likely to have moved out of the area to avoid additional annoyance from the seismic sounds (assuming they were taken in the first place). As a result, NMFS believes that these "exposure" estimates for pinnipeds are conservative and seismic and shallow hazard surveys will actually affect significantly less than 5 percent of the Beaufort and Chukchi Sea ringed seal populations. This preliminary finding also applies to other pinniped species in the Arctic.

Even if the estimate of 13,256 ringed seals being behaviorally harassed is not a small number in absolute terms, it is relatively small, representing only about 5.3 percent of the regional stock size of that species (249,000), if each "exposure" at 160 dB represents an individual ringed seal that has reacted to that sound and less if a higher SPL is required for a behavioral reaction (as is expected) or animals moved out of the seismic area. As a result, we believe that these "exposure" estimates are conservative and seismic and shallow hazard surveys will actually affect significantly less than 5 percent of the Beaufort and Chukchi Sea ringed seal populations. This finding also applies to other pinniped species in the Arctic.

The estimated number of Level B harassment takes represented as "exposures" during SOI's seismic and shallow hazard surveys in the Beaufort and Chukchi seas is 297 beluga (63 in the Chukchi Sea, 234 in the Beaufort Sea) and 1,540 bowheads (9 in the Chukchi Sea and 1,531 in the Beaufort Sea). The Level B harassment "take" estimate represents less than 1 percent of the combined Beaufort and Chukchi Seas beluga stock size of 42,968 (39,258

in the Beaufort Sea; 3,710 in the Chukchi Sea), a relatively small number. For bowhead whales, this Level B harassment "take" estimate represents between 12 percent (based on 13,326 bowheads which assumes a 3.4 percent annual population growth rate from the 2001 estimate) and 14 percent of the Bering-Chukchi-Beaufort Seas bowhead population (based on the 2001 population estimate of 10,545 animals). However, NMFS currently estimates that this population percentage estimate will be lower because SOI has significantly reduced its planned days of seismic surveys in the Beaufort Sea to only 20 days (September 25 to about October 15th or when surveys are curtailed by ice).

While these exposure numbers may represent a somewhat sizable portion of the population size of bowhead whales (12-14 percent), NMFS believes that the estimated number of bowhead exposures overestimate actual takings for the following reasons: (1) SOI plans to concentrate its 3D seismic survey program in 2008 in the Lease Sale 193 area of the Chukchi Sea and only move into the Beaufort Sea after the bowhead subsistence hunt is completed (and a sizeable portion of the bowhead population will have migrated past SOI's planned seismic location by that time), and (2) the proposed shallow hazard survey activities would occur in the Chukchi and Beaufort seas at a time when bowheads are mostly concentrated in the Canadian Beaufort Sea. As a result, NMFS has preliminarily determined that relatively few bowhead whales will be taken and that only small numbers of marine mammals will be harassed by SOI's 2008 seismic and shallow hazard programs.

Therefore, NMFS has preliminarily determined that the short-term impact of conducting seismic surveys in the U.S. Chukchi and Beaufort seas may result, at worst, in a temporary modification in behavior by certain species of marine mammals. While behavioral and avoidance reactions may be made by these species in response to the resultant noise, this behavioral change is expected to have a negligible impact on the animals. While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals (which vary annually due to variable ice conditions and other factors) in the area of seismic operations, the number of potential harassment takings is estimated to be small (see Estimated Takes for NMFS' analysis). In addition, for reasons described previously, injury (temporary

or permanent hearing impairment) and/or mortality is unlikely and will be avoided through the incorporation of the mitigation measures mentioned in this document and required by the authorization. No rookeries, mating grounds, areas of concentrated feeding, or other areas of special significance for marine mammals occur within or near the planned area of operations during the season of operations.

Finally, NMFS has preliminarily determined that the proposed seismic activity by SOI in the northern Chukchi Sea and central and eastern Beaufort Sea in 2008/2009 will not have an unmitigable adverse impact on the subsistence uses of bowhead whales and other marine mammals. This preliminary determination is supported by the information in this Federal Register Notice, including: (1) Seismic activities in the Chukchi Sea will not begin until after July 20 by which time the spring bowhead hunt is expected to have ended; (2) that the fall bowhead whale hunt in the Beaufort Sea will either be governed by a CAA between SOI and the AEW and village whaling captains or by mitigation measures to protect subsistence hunting of marine mammals contained in the IHA; (3) the CAA or IHA conditions will significantly reduce impacts on subsistence hunters to ensure that there will not be an unmitigable adverse impact on subsistence uses of marine mammals; (4) while it is possible that accessibility to belugas during the spring subsistence beluga hunt could be impaired by the survey, it is unlikely because very little of the proposed survey is within 25 km (15.5 mi) of the Chukchi Sea coast, meaning the vessel will usually be well offshore and away from areas where seismic surveys would influence beluga hunting by communities; and (5) because seals (ringed, spotted, bearded) are hunted in nearshore waters and the seismic survey will remain offshore of the coastal and nearshore areas of these seals where natives would harvest these seals, it should not conflict with harvest activities.

As a result of these preliminary determinations, NMFS proposes to issue an IHA to SOI for conducting a seismic survey in the northern Chukchi Sea and central and eastern Beaufort Sea in 2008/2009, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: June 20, 2008.

P. Michael Payne,

*Acting Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. E8-14393 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-22-S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Request for Public Comment on Commercial Availability Request under the North American Free Trade Agreement (NAFTA)

June 19, 2008.

AGENCY: The Committee for the Implementation of Textile Agreements (CITA).

ACTION: Request for Public Comments concerning a request for modification of the NAFTA rules of origin for thread and yarn of acrylic staple fiber.

SUMMARY: On June 10, 2008, the Government of the United States received a request from the Government of Canada alleging that acrylic staple fiber, classified in subheading 5503.30 of the Harmonized Tariff Schedule of the United States (HTSUS), cannot be supplied by the domestic industry in commercial quantities in a timely manner and requesting that the governments of Mexico and the United States consult to consider whether the North American Free Trade Agreement (NAFTA) rule of origin for thread and yarns classified under HTSUS subheadings 55.08 through 55.11 should be modified to allow the use of non-North American acrylic staple fiber.

The President may proclaim a modification to the NAFTA rules of origin only after reaching an agreement with the other NAFTA countries on the modification. CITA hereby solicits public comments on this request, in particular with regard to whether acrylic staple fiber of HTSUS subheading 5503.30 can be supplied by the domestic industry in commercial quantities in a timely manner. Comments must be submitted by July 25, 2008 to the Chairman, Committee for the Implementation of Textile Agreements, Room 3001, United States Department of Commerce, Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Martin J. Walsh or Maria K. Dybczak, International Trade Specialists, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-2818 and (202) 482-3651, respectively.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 USC 1854); Section 202(q) of the North American Free Trade Agreement Implementation Act (19 USC 3332(q)); Executive Order 11651 of March 3, 1972, as amended.

Background

Under the NAFTA, NAFTA countries are required to eliminate customs duties on textile and apparel goods that qualify as originating goods under the NAFTA rules of origin, which are set out in Annex 401 to the NAFTA. The NAFTA provides that the rules of origin for textile and apparel products may be amended through a subsequent agreement by the NAFTA countries. See Section 202(q) of the NAFTA Implementation Act. In consultations regarding such a change, the NAFTA countries are to consider issues of availability of supply of fibers, yarns, or fabrics in the free trade area and whether domestic producers are capable of supplying commercial quantities of the good in a timely manner. The NAFTA Implementation Act provides the President with the authority to proclaim modifications to the NAFTA rules of origin as are necessary to implement an agreement with one or more NAFTA country on such a modification. See section 202(q) of the NAFTA Implementation Act.

On June 10, 2008, the Government of the United States received a request from the Government of Canada alleging that acrylic staple fiber, classified in subheading 5503.30 of the HTSUS, cannot be supplied by the domestic industry in commercial quantities in a timely manner and requesting that the governments of Mexico and the United States consult to consider whether the NAFTA rule of origin for thread and yarns classified under HTSUS subheadings 55.08 through 55.11 should be modified to allow the use of non-North American acrylic staple fiber.

CITA is soliciting public comments regarding this request, particularly with respect to whether acrylic staple fiber can be supplied by the domestic industry in commercial quantities in a timely manner. Comments must be received no later than July 25, 2008. Interested persons are invited to submit six copies of such comments or information to the Chairman, Committee for the Implementation of Textile Agreements, room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, DC 20230.

If a comment alleges that acrylic staple fiber can be supplied by the domestic industry in commercial quantities in a timely manner, CITA will

closely review any supporting documentation, such as a signed statement by a manufacturer stating that it produces the acrylic staple fiber that is the subject of the request, including the quantities that can be supplied and the time necessary to fill an order, as well as any relevant information regarding past production.

CITA will protect any business confidential information that is marked "business confidential" from disclosure to the full extent permitted by law. CITA will make available to the public non-confidential versions of the request and non-confidential versions of any public comments received with respect to a request in room 3100 in the Herbert Hoover Building, 14th and Constitution Avenue, N.W., Washington, DC 20230. Persons submitting comments on a request are encouraged to include a non-confidential version and a non-confidential summary.

R. Matthew Priest,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. E8-14408 Filed 6-24-08; 8:45 am]

BILLING CODE 3510-DS-S

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 25, 2008.

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 20, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Planning, Evaluation and Policy Development

Type of Review: New.

Title: Study of the Effects of the Section 1003(e) Hold Harmless Provision on Title I Allocations.

Frequency: One time.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 49.

Burden Hours: 196.

Abstract: This study will examine the impact of the 100 percent hold-harmless provision under Section 1003(e) on states' Title I Part A allocations to school districts. Findings from this study will inform the upcoming reauthorization of Elementary and Secondary Education Act (ESEA) and will help to guide policymakers who may consider potential changes to Section 1003 and the hold-harmless provision.

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 3745. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202-4537.

Requests may also be electronically mailed to ICDocketMgr@ed.gov or faxed to 202-401-0920. Please specify the complete title of the information collection 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. E8-14399 Filed 6-24-08; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

Notice of Waivers for the Rehabilitation Training—Rehabilitation Continuing Education Program (RCEP)

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of waivers for the Rehabilitation Training—Rehabilitation Continuing Education Program (RCEP).

SUMMARY: The Secretary waives the requirements in 34 CFR 75.250 and 75.261(a) and (c)(2) of the Education Department General Administrative Regulations (EDGAR), respectively, that generally prohibit project periods exceeding five years and project period extensions involving the obligation of additional Federal funds. These waivers will enable seven current RCEP grantees to provide continuing education to employees of vocational rehabilitation (VR) agencies and their partners and to continue to receive some additional Federal funding from July 1 through September 30, 2008.

DATES: *Effective Date:* These waivers are effective June 25, 2008.

FOR FURTHER INFORMATION CONTACT:

Christine Marschall, U.S. Department of Education, 400 Maryland Ave, SW., room 5053, Potomac Center Plaza, Washington, DC 20202-2800. Telephone: (202) 245-7429 or via Internet: Christine.Marschall@ed.gov.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS) at 1-800-877-8339.

Individuals with disabilities can obtain this document in an alternative format (e.g., Braille, large print, audiotope, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: On May 12, 2008, we published a notice in the

Federal Register (73 FR 26974), proposing waivers of 34 CFR 75.250 and 75.261(a) and (c)(2) of EDGAR in order to give early notice of the possibility that the Department will continue to fund seven current RCEP grantees from July 1 through September 30, 2008.

The RCEPs provide continuing education to employees of State VR agencies and their partners, as well as other rehabilitation services agencies. The Rehabilitation Services Administration (RSA) in the Department's Office of Special Education and Rehabilitative Services is in the process of redesigning the RCEPs to create and support 10 regional Technical Assistance and Continuing Education (TACE) centers. (For more information on the TACE centers, see the notice of final priority that the Department published in the **Federal Register** on June 5, 2008 (73 FR 32010). The Department intends to make awards for the TACE centers so that grant activities can begin by October 1, 2008.

The waivers announced in this notice ensure that services provided by the current RCEP grantees are provided to the extent possible through September 30, 2008, the anticipated date that the TACE centers will commence their project activities. The project periods for the following current RCEP grantees end on June 30, 2008: (1) State University of New York at Buffalo, (2) George Washington University, (3) the University of Arkansas, (4) the University of Missouri-Columbia, (5) the University of Northern Colorado, (6) San Diego State University, and (7) Western Washington University. Because it would be contrary to the public interest to have a lapse in continuing education activities before grants for RSA's new TACE projects are awarded and implemented, the Secretary will provide some additional funding to these seven RCEP grantees that are in the fifth year of their project periods to allow them to continue operating through September 30, 2008.

Note: RSA does not plan to continue funding any other RCEPs with the exception of three RCEP grantees currently in the fourth year of their grant (Assumption College, the University of Tennessee, and Georgia State University) with budget periods ending on June 30, 2008. For these three RCEP grantees, the Secretary plans to extend their current budget period and provide some additional funding to support continuing education activities through September 30, 2008.

Analysis of Comments and Changes

In response to our invitation to comment on the proposed waivers, we received 13 comments, all expressing support for the waivers. As a result,

there are no changes in the final waivers.

Waiver of Delayed Effective Date

The Administrative Procedure Act requires that a substantive rule be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). We provided the public with an opportunity to comment on the Secretary's intent to waive the requirements in 34 CFR 75.250 and 75.261(a) and (c)(2) of EDGAR for current RCEP grantees that have grants ending on June 30, 2008, to enable them to provide continuing education to employees of VR agencies and their partners and to continue to receive some additional Federal funding from July 1 through September 30, 2008. All of the comments that we received supported the proposed waivers. Given that the current RCEP grantees' project periods will expire on June 30, 2008, in order to ensure that there is no lapse in the services provided by these grantees, the Secretary has determined that a delayed effective date is impracticable and would be contrary to the public interest.

Final Waivers—Rehabilitation Continuing Education Program

The Secretary waives the requirements in 34 CFR 75.250 and 75.261(a) and (c)(2), which prohibit project periods exceeding five years and extensions of project periods that involve the obligation of additional Federal funds, for current RCEP grantees in the fifth year of their grants.

With these waivers, the seven RCEP grantees that have grants ending on June 30, 2008, are eligible for additional funding, as available, to allow them to continue their activities through September 30, 2008.

Regulatory Flexibility Act Certification

The Secretary certifies that the announced waivers will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act of 1995

This notice of waivers does not contain any information collection requirements.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents 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/index.html>.

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>.

(Catalog of Federal Domestic Assistance Number 84.264A, Rehabilitation Continuing Education Program)

Program Authority: 29 U.S.C. 772.

Dated: June 20, 2008.

Tracy R. Justesen,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E8-14413 Filed 6-24-08; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Basic Energy Sciences Advisory Committee; Notice of Open Meeting

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Basic Energy Sciences Advisory Committee (BESAC). Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, July 24, 2008, 8:30 a.m. to 5 p.m., and Friday, July 25, 2008, 8:30 a.m. to 12 p.m.

ADDRESSES: Bethesda North Marriott Hotel and Conference Center, 5701 Marinelli Road, North Bethesda, MD 20852.

FOR FURTHER INFORMATION CONTACT: Karen Talamini, Office of Basic Energy Sciences, U.S. Department of Energy, Germantown Building, Independence Avenue, Washington, DC 20585; *Telephone:* (301) 903-4563.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of this meeting is to provide advice and guidance with respect to the basic energy sciences research program.

Tentative Agenda: Agenda will include discussions of the following:

- News from DOE.
- News from the Office of Basic Energy Sciences.
- Report of the COV of the Chemical Sciences, Geosciences and Biosciences Division.
- Reports from the BES Nanoscience Centers.
- Report from the New Era Subcommittee.

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Karen Talamini at 301-903-6594 (fax) or karen.talamini@science.doe.gov (e-mail). You must make your request for an oral statement at least 5 business days prior to the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, between 9 a.m. and 4 p.m., Monday through Friday, except holidays.

Issued in Washington, DC on June 20, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8-14343 Filed 6-24-08; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY**DOE/NSF Nuclear Science Advisory Committee**

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the DOE/NSF Nuclear Science Advisory Committee (NSAC). Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, August 21, 2008, 8:30 a.m. to 5 p.m.

ADDRESSES: Marriott Crystal Gateway Hotel, 1700 Jefferson Davis Highway, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT:

Brenda L. May, U.S. Department of Energy; SC-26/Germantown Building, 1000 Independence Avenue, SW., Washington, DC 20585-1290; Telephone: 301-903-0536.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance on a continuing basis to the Department of Energy and the National Science Foundation on scientific priorities within the field of basic nuclear science research.

Tentative Agenda: Agenda will include discussions of the following:

Thursday, August 21, 2008

- Perspectives from Department of Energy and National Science Foundation.
- Presentation of the Performance Measures Subcommittee Report.
- Update on Deep Underground Science and Engineering Laboratory.
- User Facility Reports.
- Update on Fundamental Neutron Physics Beam.
- Public Comment (10-minute rule).

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact Brenda L. May, 301-903-0536 or Brenda.May@science.doe.gov (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available on the U.S. Department of Energy's *Office of Nuclear Physics* Web site for viewing.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8-14340 Filed 6-24-08; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY**Fusion Energy Sciences Advisory Committee**

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Fusion Energy Sciences Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Monday, August 4, 2008, 8:30 a.m. to 6:30 p.m. and Tuesday, August 5, 2008, 8:30 a.m. to noon.

ADDRESSES: The Gaithersburg Hilton, 620 Perry Parkway, Gaithersburg, Maryland, 20877.

FOR FURTHER INFORMATION CONTACT:

Albert L. Opdenaker, Office of Fusion Energy Sciences, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-1290; Telephone: 301-903-4927.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The Office of Fusion Energy Sciences (OFES) is developing a new strategic plan for the Fusion Energy Sciences (FES) program. The Fusion Energy Sciences Advisory Committee (FESAC) recently completed its report on scientific themes and issues facing the magnetic fusion portion of the FES program. At this meeting, FESAC will hear a status report from each of its two current panels, one that is identifying the scientific themes and issues facing the four major alternate confinement concepts, and the other identifying the scientific themes and issues facing the high energy density laboratory plasmas program. Once these panels complete their work, their output along with the previous FESAC report on the themes and issues facing the magnetic fusion program will inform the efforts of OFES to produce a new strategic plan. In addition, the committee will hear a scientific paper, the topic of which has yet to be determined.

Tentative Agenda

Monday, August 4, 2008

- OFES: Plan for developing a new strategic plan for FES
- ITER Project Status
- Status Report: Panel on High Energy Density Laboratory Plasmas
- Status Report: Panel on Alternate Confinement Concepts
- Public Comments

Tuesday, August 5, 2008

- Scientific Paper: TBD
- Discussion of Strategic Plan Development
- Adjourn

Public Participation: The meeting is open to the public. If you would like to file a written statement with the

Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Albert L. Opdenaker at 301-903-8584 (fax) or albert.opdenaker@science.doe.gov (e-mail). Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available on the U.S. Department of Energy's *Office of Fusion Energy Sciences* Web site (<http://www.science.doe.gov/ofes/>).

Issued at Washington, DC, on June 20, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8-14337 Filed 6-24-08; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP06-5-009]

Empire Pipeline Inc.; Notice of Application

June 17, 2008.

Take notice that on June 10, 2008, Empire Pipeline, Inc. (EPI), 6363 Main Street, Williamsville, New York 14221, filed in Docket No. CP06-5-009, an application under section 7 of the Natural Gas Act (NGA), to amend its certificate of public convenience and necessity issued by the Commission on December 21, 2006. EPI requests authorization to amend its certificate to make a minor route realignment in the Town of Farmington, Ontario County, New York, between mileposts 3.8 and 4.8, in the vicinity of the New York State Thruway. The application is on file with the Commission and open to public inspection. This filing may also be viewed on the Commission's Web site at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, call (202) 502-8659 or TTY, (202) 208-3676.

Any questions regarding this petition should be directed to David W. Reitz, Attorney for Empire Pipeline, Inc., 6363 Main Street, Williamsville, NY 14221, at (716) 857-7949, by fax at (716) 857-7206, or at reitzd@natfuel.com.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Comment Date: July 8, 2008.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-14286 Filed 6-24-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PT08-1-000]

Southern California Edison Company; Notice of Intent To Prepare An Environmental Impact Statement for the Proposed Devers-Palo Verde No. 2 Transmission Line Project, Request for Comments On Environmental Issues, and Notice of Public Scoping Meetings

June 17, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental impact statement (EIS) that will identify and address the environmental impacts that could result from the construction and operation of the Devers-Palo Verde No. 2 Transmission Line Project (DPV2 or Project). The DPV2 is proposed by Southern California Edison Company (SCE). The Commission will use the EIS in its decision-making process to determine whether or not to authorize the Project. This notice describes the

proposed Project facilities and explains the scoping process that will be used to gather input from the public and interested agencies on the project. Your input will help determine the issues that need to be evaluated in the EIS. Please note that the scoping period for the Project will close on August 1, 2008.

Comments on the Project may be submitted in written form or verbally. In lieu of or in addition to sending written comments, you are invited to attend the public scoping meetings that have been scheduled in the Project area. These meetings are scheduled for July 8, 2008 in Quartzsite, Arizona and July 9, 2008 in Phoenix, Arizona. Further instructions on how to submit comments and additional details of the public scoping meetings are provided in the Public Participation section of this notice.

The FERC will be the lead federal agency for the preparation of the EIS and will prepare the document to satisfy the requirements of the National Environmental Policy Act (NEPA). The document will be used by the FERC to consider the environmental impacts that could result from the Commission's use of its supplemental siting authority for interstate transmission lines under section 216 of the Federal Power Act.¹ The NEPA document will address the environmental impacts of proposed facilities for the entire project; however, the Commission's permit review process will be limited solely to the facilities located within the Arizona portion of the proposed project. The California Public Utilities Commission approved the California portion of the facilities on January 25, 2007.

It is the FERC's goal that other federal agencies will participate in the environmental review process as cooperating agencies to satisfy their respective NEPA responsibilities. With this notice, we² are asking federal, state, and local agencies with jurisdiction and/or special expertise with respect to environmental issues and tribal leaders to cooperate formally with us in the preparation of the EIS. These agencies may choose to participate once they have evaluated SCE's proposal relative to their responsibilities. Agencies that intend to request cooperating status should follow the instructions for filing comments described in the Public Participation section of this notice.

This notice is being sent to affected landowners; federal, state, and local

government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. We encourage government representatives to notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by an SCE representative about the acquisition of an easement to construct, operate, and maintain the proposed Project facilities. SCE would seek to negotiate a mutually acceptable agreement. However, if the Project is approved by the FERC, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement and only if the project is approved by FERC, the company could initiate condemnation proceedings in accordance with state law.

A fact sheet prepared by the FERC entitled "A Guide to the Electric Transmission Construction Permit Process" is available for viewing on the FERC Internet Web site (<http://www.ferc.gov/industries/electric.asp>). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the FERC's proceedings.

Summary of the Proposed Project

SCE proposes to construct a new high-voltage electric transmission line between Maricopa County, Arizona and Riverside County, California. The DPV2 Project consists of 267 miles of new transmission lines which include two primary route segments. The Devers-Harquahala Junction segment is approximately 225 miles long and would extend from SCE's existing Devers Substation, near Palm Springs, California to a new Harquahala Junction Switchyard, approximately 50 miles west of Phoenix, Arizona. The Devers-Valley No. 2 segment would extend approximately 42 miles southwesterly from Devers Substation to SCE's Valley Substation, near Romoland, California. The entire line would be constructed within or adjacent to existing SCE rights-of-way (ROW). Approximately 170 miles of the Project is located in California and 97 miles is located in Arizona.

In addition, SCE proposes to construct a new Harquahala Junction Switchyard in Arizona and an optional Midpoint Substation/Switchyard near Blythe, California; expand and/or modify the existing Devers and Valley Substations; and install two new 500 kilovolt (kV) series capacitor banks, one in Arizona and one in California. The majority of

the structures used for the Project would be single circuit lattice steel towers, typically spanning four structures per mile. The average height of these structures would be approximately 150 feet, with heights that would vary according to terrain, environmental conditions and site-specific mitigation requirements. The Midpoint Substation is considered an optional project component; SCE has received a large number of interconnection requests for new renewable and new conventional gas-fired generation in this area. Development of these projects would require construction of the Midpoint Substation. A general overview map of the Project area and facilities is provided in Appendix 1.³

Specifically, the facilities proposed by SCE include the following:

- *Devers-Harquahala Line*— construction of approximately 225 miles of new 500 kV, single-circuit alternating current transmission line from near Palm Springs, California to near Phoenix, Arizona.

- *Devers-Valley No. 2 Line*— construction of approximately 42 miles of new 500 kV, single-circuit alternating current transmission line from near Palm Springs, California, to near Romoland, California.

- *Devers Substation Expansion*— installation of new 135-foot-high by 90 foot-wide dead-end structures, circuit breakers, and disconnect switches; a 500 kV shunt line reactor and associated disconnect switches; a 500 kV static volt ampere reactive compensator; and two MVAR shunt capacitors.

- *Valley Substation Modification*— installation of dead-end structures, circuit breakers, and disconnect switches within the existing 500 kV switchrack.

- *Harquahala Junction Switchyard*— construction of a new 500 kV switchyard facility on a 40 acre site, near Phoenix, Arizona that would include installation of dead-end structures, circuit breakers and disconnect switches within a new 500 kV switchrack.

- *Optional Midpoint Substation/Switchyard*— construction of a new 500 kV switchyard facility on a 44 acre site, near Blythe, California including

³ The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices are available on the Commission's Internet Web site (<http://www.ferc.gov>) at the "eLibrary" link or from the Commission's Public Reference Room at (202) 502-8371. For instructions on connecting to eLibrary, refer to the Availability of Additional Information section of this notice. Copies of the appendices were sent to all those receiving this notice in the mail. Requests for detailed maps of the proposed facilities should be made directly to SCE by calling 1-866-602-3782.

¹ Section 1221 of the Energy Policy Act of 2005 amended the Federal Power Act by adding a new Section 216.

² "We," "us," and "our" refer to the environmental staff of the FERC's Office of Energy Projects.

installation of buses, circuit breakers and disconnect switches. Also, installation of a new communications facility that would include three new microwave paths and two fiber optic systems, a mechanical-electrical control room and a microwave tower.

- *Series Capacitors*—installation of two series capacitor banks, one in Arizona and one in California. Major components include series capacitors, dead-end structures, telecommunication equipment, outdoor lighting, grounding grid, and a mechanical-electrical equipment room.

SCE states that the purpose of the Project is to relieve transmission congestion between Arizona and California, provide regional economic benefits to California and Arizona, increase competition among energy suppliers by increasing the electricity market liquidity at the Palo Verde Hub, and provide access to renewable energy. SCE anticipates that construction of the DPV2 Project would begin in February 2010, with a projected in-service date of December 2011.

Land Requirements for Construction

Construction of the proposed electric transmission line and associated facilities would require approximately 4,400 acres of land, including the construction right-of-way, temporary work areas, access roads, storage and contractor yards and substation facilities. Following construction, the majority of the land would be retained as permanent ROW for the transmission line and operation of the substation facility sites.

SCE would construct 150 miles of the proposed Devers-Harquahala 500 kV transmission line within a 130-foot-wide ROW granted by the Bureau of Land Management (BLM). Of this total, 57.2 miles is in California and 92.7 miles is in Arizona. The Devers-Harquahala route on BLM land is entirely within the Utility Corridors designated in BLM's Resource Management Plans. The ROW also includes land managed by the United States Fish and Wildlife Service and the United States Department of Defense. The remainder of the Devers-Harquahala line would cross state, tribal, and private lands. All lands are vacant and undeveloped. The majority of the line would parallel the existing Devers-Palo Verde No. 1 500 kV transmission line.

The Devers-Valley No. 2 transmission line located in California would be constructed about 130 feet south of the existing Devers-Valley No. 1 line. The route would traverse a small portion of the San Bernardino National Forest and the Santa Rosa and San Jacinto

Mountains National Monument and is wholly within existing ROWs. The privately-owned lands that the line would cross are primarily unincorporated areas. Portions of the line would be located within undeveloped portions of the Cities of Palm Springs (2.1 miles), Banning (0.5 miles), and Beaumont (0.5 miles).

Construction of the California portion of the DPV2 transmission line would require the expansion of the Devers Substation to the northeast on unimproved land that is already owned by SCE. However, it would not be necessary to expand the Valley Substation in order to accommodate the DPV2 line. Construction of the optional Midpoint Substation would require 44 acres of land and an additional 5 acres for a temporary laydown area to be located at or near the existing roadway at the substation site.

Construction of the proposed new Harquahala Junction Switchyard in Arizona would be on a 40-acre site located in Section 25, Township 2 north, Range 8 West, near 451st Avenue and the Thomas Road alignment. The site is adjacent to the location where the existing DPV1 and Harquahala-Hassayampa 500 kV transmission lines intersect. Construction of the Harquahala Junction Switchyard would require an agreement among SCE, Arizona Public Service Company (APS), and the Harquahala Generating Company to allow APS to connect its planned TS-5 transmission line at the Harquahala Junction Switchyard. SCE does not yet have such an agreement, and as an alternative to the termination at the Harquahala Junction Switchyard, the Devers-Harquahala transmission line could terminate at the Harquahala Generating Station Switchyard, which is located approximately five miles west of the proposed Harquahala Junction Switchyard. Termination at the Harquahala Generating Station Switchyard would require an additional five miles of 500 kV transmission line and 23 new, single circuit tubular steel poles. A 500 kV shunt-line reactor and associated disconnect devices would be installed on generation station property on approximately two acres of property that would be acquired for this purpose.

Installation of the proposed two new 500 kV series capacitor banks would be on BLM land that is adjacent to DPV1 series capacitor banks. The proposed Arizona series capacitor site would be located approximately 55 miles west of the Harquahala Junction Switchyard and would be accessed from the nearby El Paso natural gas pipeline access road. The California series capacitor site would be located approximately 64

miles east of the Devers Substation in the Chuckwalla Valley. Both facilities would occupy approximately two acres inside the fenced site and temporarily use a one-acre fenced area for material laydown, storage, and staging.

The EIS Process

NEPA requires the FERC to take into account the environmental impacts that could result from an action whenever it considers the issuance of a permit to construct electric transmission facilities. The EIS we are preparing is intended to provide FERC and cooperating agencies with the necessary information for consideration during each respective agency's review of potential environmental impacts.

Although no formal application has been filed with the FERC, we have already initiated our NEPA review under the FERC's pre-filing process, which was established in Order No. 689.⁴ The purpose of the pre-filing process is to encourage the early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC. A diagram summarizing the permit review process and opportunities for public participation for the Project is attached to this notice as Appendix 2.

The FERC staff has already started to meet and communicate with SCE, jurisdictional agencies, and other interested stakeholders to discuss the Project and identify issues and concerns. We will continue the pre-filing process by conducting interagency and public scoping meetings in the Project area to solicit comments and concerns about the Project.

By this notice, we are formally announcing our intent to prepare an EIS and request additional agency and public comments to help us focus the analysis in the EIS on the potentially significant environmental issues related to the proposed action. If you provide comments at a scoping meeting, you do not need to resubmit the same comments in response to this notice.

Our independent analysis of the issues will be included in a draft EIS. The draft EIS will be mailed to federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; affected and potentially affected landowners; other interested parties; local libraries and newspapers; and the FERC's official service list for this proceeding. A 45-day comment period

⁴ *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Order No. 689, 71 **Federal Register** 69,440 (December 1, 2006), FERC Statutes & Regulations ¶31,234 (2006) (Final Rule).

will be allotted for review of the draft EIS. We will consider all timely comments on the draft EIS and revise the document, as necessary, before issuing a final EIS. The comment period on the draft EIS will be coordinated, to the extent possible, with other jurisdictional agencies.

Currently Identified Environmental Issues

The EIS will discuss impacts that could occur as a result of the construction and operation of the proposed Project. We have already identified a number of issues and alternatives that we think deserve attention based on a preliminary review of the proposed facilities, and the environmental information provided by SCE. This preliminary list of issues and alternatives may be changed based on your comments and our additional analysis.

- Geology and Soils:
 - Erosion and sedimentation control.
 - Assessment of invasive weed control plans.
 - Right-of-way restoration.
- Water Resources:
 - Effect of transmission line crossings on perennial and intermittent waterbodies, including the Colorado River.
 - Assessment of alternative waterbody crossing methods.
 - Fish, Wildlife, and Vegetation:
 - Effect on coldwater and sensitive fisheries.
 - Effect on wildlife resources and their habitat.
 - Effect on birds.
 - Special Status Species:
 - Potential effect on federally listed species.
 - Potential effect on state-listed sensitive species.
 - Potential effect on Big Horn sheep.
 - Cultural Resources:
 - Potential effect on historic and prehistoric sites.
 - Native American and tribal concerns.
 - Land Use, Recreation and Special Interest Areas, and Visual Resources:
 - Impacts on recreational and residential areas.
 - Visual impacts.
 - Socioeconomics:
 - Effects on transportation and traffic.
 - Effects of construction workforce demands on public services and temporary housing.
 - Air Quality and Noise:
 - Effects on the local air quality and noise environment from construction and operation of the proposed facilities.
 - Reliability and Safety:
 - Assessment of hazards associated with electric transmission lines.

- Alternatives:
 - Assessment of alternative configurations and alternative routes to reduce or avoid environmental impacts.
 - Assessment of alternative substation locations.
 - Cumulative Impact:
 - Assessment of the effect of the proposed Project when combined with other past, present, or future actions in the same region.

Public Participation

You can make a difference by providing us with your specific comments or concerns about SCE's proposal. By becoming a commenter, your concerns will be addressed in our EIS and considered during the NEPA review. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen the environmental impact. The more specific your comments, the more useful they will be.

To expedite our receipt and consideration of your comments, the Commission strongly encourages electronic submission of any comments on this Project. See Title 18 Code of Federal Regulations 385.2001(a)(1)(iii) and the instructions on the Commission's Internet Web site at <http://www.ferc.gov> under the link to "Documents and Filings" and "eFiling." eFiling is a file attachment process and requires that you prepare your submission in the same manner as you would if filing on paper, and save it to a file on your hard drive. New eFiling users must first create an account by clicking on "Sign up" or "eRegister." You will be asked to select the type of filing you are making. This filing is considered a "Comment on Filing." In addition, there is a "Quick Comment" option available, which is an easy method for interested persons to submit text-only comments on a project. The Quick-Comment User Guide can be viewed at <http://www.ferc.gov/docs-filing/efiling/quick-comment-guide.pdf>.

Quick Comment does not require a FERC eRegistration account; however, you will be asked to provide a valid e-mail address. All comments submitted under either eFiling or the Quick Comment option are placed in the public record for the specified docket or project number(s). The Docket Number for the DPV2 Project is PT08-1-000. Your comments must be submitted electronically by August 1, 2008.

If you wish to mail comments, please mail your comments so that they will be received in Washington, DC on or before August 1, 2008 and carefully follow these instructions:

Send an original and two copies of your letter to:

- Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St. NE.; Room 1A, Washington, DC 20426;
- Label one copy of your comments for the attention of OEP/EIPG; and
- Reference Docket No. PT08-1-000 on the original and both copies.

Once SCE formally files its application with the Commission, you may want to become an "intervenor," which is an official party to the proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in a Commission proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the "e-filing" link on the Commission's Web site. Please note that you may not request intervenor status at this time. You must wait until a formal application is filed with the Commission.

Two public scoping meetings have been scheduled in the Project area to provide another opportunity to offer comments on the proposed Project. Interested groups and individuals are encouraged to attend the meetings and to present comments on the environmental issues they believe should be addressed in the EIS. A transcript of the meetings will be generated so that your comments will be accurately recorded. Meetings will be held at the following locations:

Date	Location
July 8, 2008 (7-10 pm).	Quartzsite Elementary School, 930 W. Quail Trail, Quartzsite, AZ 85346, Tel: (928) 927-5500.
July 9, 2008 (7-10 pm).	Best Western Central Phoenix Inn, 1100 N. Central Ave- nue, Phoenix, AZ 85004, Tel: (602) 252-2100.

Environmental Mailing List

Everyone who responds to this notice or provides comments throughout the EIS process will be retained on the mailing list. If you do not want to send comments at this time but still want to stay informed and receive copies of the draft and final EISs, you must return the Mailing List Retention Form (Appendix 3). If you do not send comments or return the Mailing List Retention Form asking to remain on the mailing list, you will be taken off the mailing list.

Availability of Additional Information

Additional information about the Project is available from the Commission's Office of External Affairs at 1-866-208 FERC or on the FERC Internet Web site (<http://www.ferc.gov>) using the "eLibrary" link. Click on the eLibrary link, click on "General Search," and enter the docket number excluding the last three digits in the Docket Number field (*i.e.*, PT08-1). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnlineSupport@ferc.gov or toll free at 1-866-208-3676, or for TTY, contact (202) 502-8659. The eLibrary link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as Orders, notices, and rule makings.

In addition, the FERC offers a free service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. To register for this service, go to <http://www.ferc.gov/esubscribenow.htm>.

Public meetings or site visits will be posted on the Commission's calendar located at <http://www.ferc.gov/EventCalendar/EventsList.aspx> along with other related information.

To request additional information on the proposed Project or to provide comments directly to the Project sponsor, you can contact SCE by calling toll free at 1-866-602-3782. Also, SCE has established an Internet Web site at <http://www.sce.com/dpv2>. The Web site includes a description of the Project, an overview map of the proposed electric transmission route, and links to related documents. SCE will update the Web site as the environmental review of its Project proceeds.

Kimberly D. Bose,*Secretary.*

[FR Doc. E8-14284 Filed 6-24-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Project No. 11291-023-IN]****Star Mill, Inc.; Notice of Availability of Environmental Assessment**

June 17, 2008.

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 proposed termination of license by implied surrender for the Star Milling and Electric Minor Water Power Project, located on the Fawn River in La Grange County, Indiana, and has prepared an Environmental Assessment (EA).

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 (P-11291) 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 1-866-208-3372, or for TTY, (202) 502-8659.

Any comments should be filed by July 17, 2008, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1-A, Washington, DC 20426. Please reference the project name and project number (P-11291) on 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 Jon Cofrancesco at (202) 502-8951.

Kimberly D. Bose,*Secretary.*

[FR Doc. E8-14285 Filed 6-24-08; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY**[EPA-HQ-OPPT-2003-0004; FRL-8368-5]****Access to Confidential Business Information by Midwest Research Institute****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice.

SUMMARY: EPA has authorized its contractor, Midwest Research Institute (MRI) of Kansas City, MO, to access information which has been submitted to EPA under section 4 of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data will occur no sooner than July 2, 2008.

FOR FURTHER INFORMATION CONTACT: *For general information contact:* Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (202) 554-1404; e-mail address: TSCA-Hotline@epa.gov.

For technical information contact: Scott Sherlock, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (202) 564-8257; fax number: (202) 564-8251; e-mail address: sherlock.scott@epa.gov.

SUPPLEMENTARY INFORMATION:**I. General Information****A. Does this Notice Apply to Me?**

This action is directed to the public in general. This action may, however, be of interest to you if are or may be required to conduct testing of chemical substances under the Toxic Substances Control Act (TSCA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPPT-2003-0004. All documents in the docket are listed in the docket's index available at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly

available docket materials are available electronically at <http://www.regulations.gov>, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

2. **Electronic access.** You may access this **Federal Register** document electronically through the EPA Internet under the “**Federal Register**” listings at <http://www.epa.gov/fedrgstr>.

II. What Action is the Agency Taking?

Under Contract Number GS-10F-0127J, contractor MRI of 425 Volker Boulevard, Kansas City, MO will assist the Office of Pollution Prevention and Toxics (OPPT) in the review of test protocols, plans, reports and supporting data submitted under Dioxin/Furan test rule under 40 CFR part 766. The contractor will also assist in arranging expert panel teleconferences, handling minutes from those teleconferences, and distributing reviews and information.

In accordance with 40 CFR 2.306(j), EPA has determined that under Contract Number GS-10F-0127J, MRI will require access to CBI submitted to EPA under section 4 of TSCA to perform successfully the duties specified under the contract. MRI personnel will be given access to information submitted to EPA under section 4 of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under section 4 of TSCA that EPA may provide MRI access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Region VII Headquarters in Kansas City, Kansas.

MRI will be authorized access to TSCA CBI at EPA Region VII Headquarters under the EPA *TSCA CBI Protection Manual*.

Access to TSCA data, including CBI, will continue until April 30, 2010. If the contract is extended, this access will

also continue for the duration of the extended contract without further notice.

MRI personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

List of Subjects

Environmental Protection,
Confidential Business Information.

Dated: June 6, 2008.

Brion Cook,

Director, Information Management Division,
Office of Pollution Prevention and Toxics.

[FR Doc. E8-13878 Filed 6-24-08; 8:45 am]

BILLING CODE 6560-50-S

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2004-0027, FRL-8685-2]

Agency Information Collection Activities; Proposed Collection; Comment Request; Cooling Water Intake Structures New Facility Rule (Renewal); EPA ICR No. 1973.04, OMB Control No. 2040-0241

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. This ICR is scheduled to expire on June 30, 2008. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

DATES: Additional comments may be submitted on or before July 25, 2008.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA-HQ-

OW-2004-0027, to (1) EPA online using <http://www.regulations.gov> (our preferred method), by e-mail to ow-docket@epa.gov, or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT:

Amelia Letnes, State and Regional Branch, Water Permits Division, OWM Mail Code: 4203M, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564-5627; e-mail address: letnes.amelia@epa.gov.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On March 28, 2008 (73 FR 16,669), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA-HQ-OW-2004-0027, which is available for online viewing at <http://www.regulations.gov>, or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202-566-1744, and the telephone number for the Water Docket is 202-566-2426.

Use EPA's electronic docket and comment system at <http://www.regulations.gov>, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select “docket search,” then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at <http://www.regulations.gov> as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further

information about the electronic docket, go to <http://www.regulations.gov>.

Title: Cooling Water Intake Structures New Facility Rule (Renewal).

ICR numbers: EPA ICR Number: 1973.04, OMB Control No. 2040-0241.

ICR Status: This ICR is scheduled to expire on June 30, 2008. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The section 316(b) New Facility Rule requires the collection of information from new facilities that use a Cooling Water Intake Structure (CWIS). Section 316(b) of the Clean Water Act (CWA) requires that any standard established under section 301 or 306 of the CWA and applicable to a point source must require that the location, design, construction and capacity of CWISs at that facility reflect the best technology available (BTA) for minimizing adverse environmental impact. (See 66 FR 65256.) Such impact occurs as a result of impingement (where fish and other aquatic life are trapped on technologies at the entrance to cooling water intake structures) and entrainment (where aquatic organisms, eggs, and larvae are taken into the cooling system, passed through the heat exchanger, and then pumped back out with the discharge from the facility). The rule establishes standard requirements applicable to the location, design, construction, and capacity of cooling water intake structures at new facilities. These requirements seek to minimize the adverse environmental impact associated with the use of CWISs.

Burden Statement: The annual average reporting and recordkeeping burden for the collection of information by facilities responding to the section 316(b) New Facility Rule is estimated to be 1,885 hours per respondent (i.e., an annual average of 113,084 hours of burden divided among an anticipated annual average of 60 facilities). The Director reporting and recordkeeping burden for the review, oversight, and

administration of the rule is estimated to average 111 hours per respondent (i.e., an annual average of 5,125 hours of burden divided among an anticipated 46 States on average per year). Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 60 facilities and 46 States and Territories.

Frequency of response: Annual, every 5 years.

Estimated total average number of responses for each respondent: 5.3 for facilities and 6.1 for States and Territories.

Estimated total annual burden hours: 118,209 (113,084 for facilities and 5,125 for States and Territories).

Estimated total annual costs: \$8.5 million per year. This includes an estimated burden cost of \$6.7 million and an estimated cost of approximately \$1.8 million for capital investment or maintenance and operational costs.

Changes in the estimates: There is an increase of 41,941 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This increase is due to the addition of the newly built facilities, as well as the continued performance of annual activities by facilities that received their permit during the first ICR approval period. In addition, this ICR includes additional repermitting burdens and costs which were not in the first renewal ICR because not all of the new facilities required repermitting during the first renewal ICR.

Dated: June 19, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8-14417 Filed 6-24-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPPT-2007-0698; FRL-8352-3]

Hazard Education Before Renovation of Target Housing; State of Colorado Authorization Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for comments and opportunity for public hearing.

SUMMARY: On June 29, 2007, EPA received an application from the State of Colorado requesting authorization to administer a program in accordance with section 406(b) of the Toxic Substances Control Act (TSCA). This program ensures that owners and occupants of target housing are provided information concerning potential hazards of lead-based paint (LBP) exposure before certain renovations are begun on that housing. In addition to providing general information on the health hazards associated with exposure to lead, the lead hazard information pamphlet advises owners and occupants to take appropriate precautions to avoid exposure to lead-contaminated dust and LBP debris that are sometimes generated during renovations. EPA believes that distribution of the pamphlet will help to reduce the exposures that cause serious lead poisonings, especially in children under age 6, who are particularly susceptible to the hazards of lead.

DATES: Comments must be received on or before August 11, 2008. In addition, a public hearing request may be submitted on or before July 2, 2008.

ADDRESSES: Submit all written comments and/or requests for a public hearing identified by docket identification (ID) number EPA-HQ-OPPT-2007-0698, by one of the following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID number EPA-HQ-OPPT-2007-0698. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564-8930. Such deliveries

are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

- **Instructions:** Direct your comments to Docket ID number EPA-HQ-OPPT-2007-0689. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov>, or e-mail. The <http://www.regulations.gov> website 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 the 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 docket index available in [regulations.gov](http://www.regulations.gov). To access the electronic docket, go to <http://www.regulations.gov>, select "Advanced Search," then "Docket Search." Insert the docket ID number where indicated and select the "Submit" button. Follow the instructions on the [regulations.gov](http://www.regulations.gov) website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at <http://www.regulations.gov>, or, if only available in hard copy, at the OPPT

Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301, Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: Amanda Hasty, Pollution Prevention, Pesticides and Toxics Program (P3T), U.S. EPA, Region 8, 1595 Wynkoop St., Denver, CO 80202-1129; telephone number: (303) 312-6966; e-mail address: hasty.amanda@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may potentially be affected by this action if you perform renovations of target housing for compensation in the State of Colorado. Target housing is defined in the Code of Federal Regulations (see 40 CFR 745.103) as any housing constructed prior to 1978. Potentially affected entities may include, but are not limited to:

- Renovators (North American Industrial Classification System (NAICS) codes 236116, 236118), e.g., general building contractors/operative builders, renovation firms, individual contractors, and special trade contractors like carpenters, painters, drywall workers and lathers, "home improvement" contractors.
- Multi-family housing owners/managers (NAICS codes 531311, 531110), e.g., property management firms and some landlords.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The NAICS codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in 40 CFR 745.82. If you have any questions regarding the applicability of this action to a

particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. **Submitting CBI.** Do not submit this information to EPA through <http://www.regulations.gov>, or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the CD ROM or disk as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. **Tips for preparing your comments.** When submitting comments, remember to:

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

II. Background

A. What Action is the Agency Taking?

The State of Colorado has provided a self-certification letter stating that its pre-renovation notification program meets the requirements for authorization of a state program under section 404 of TSCA and has requested approval of the Colorado pre-renovation notification program. Therefore, pursuant to section 404 of TSCA, the

program is deemed authorized as of the date of submission, June 29, 2007. If EPA subsequently finds that the program does not meet all the requirements for approval of a state program, EPA will work with the state to correct any deficiencies in order to approve the program. If the deficiencies are not corrected, a notice of disapproval will be issued in the **Federal Register** and a Federal program will be implemented in the state.

Pursuant to section 404(b) of TSCA (15 U.S.C. 2684(b)), EPA provides notice and an opportunity for a public hearing on a state or tribal program application before approving the application. Therefore, by this notice EPA is soliciting public comment on whether the state of Colorado application meets the requirements for EPA approval. This notice also provides an opportunity to request a public hearing on the application. If a hearing is requested and granted, EPA will issue a **Federal Register** notice announcing the date, time, and place of the hearing. EPA's final decision on the application will be published in the **Federal Register**.

B. What is the Agency's Authority for Taking this Action?

On October 28, 1992, the Housing and Community Development Act of 1992, Public Law 102-550, became law. Title X of that statute was the Residential Lead-Based Paint Hazard Reduction Act of 1992. That Act amended TSCA (15 U.S.C. 2601 *et seq.*) by adding Title IV (15 U.S.C. 2681-2692), titled *Lead Exposure Reduction*.

Section 402 of TSCA (15 U.S.C. 2682) authorizes and directs EPA to promulgate final regulations governing Lead-Based Paint (LBP) activities in target housing, public and commercial buildings, bridges and other structures. Those regulations are to ensure that individuals engaged in such activities are properly trained, that training programs are accredited, and that individuals engaged in these activities are certified and follow documented work practice standards. Under section 404 of TSCA (15 U.S.C. 2684), a state may seek authorization from EPA to administer and enforce its own lead-based paint activities program.

In the **Federal Register** of August 29, 1996 (61 FR 45777) (FRL-5389-9), EPA promulgated final TSCA section 402/404 regulations governing LBP activities in target housing and child-occupied facilities (a subset of public buildings). Those regulations are codified at 40 CFR part 745, and allow both states and Indian tribes to apply for program authorization. Pursuant to section 404(h) of TSCA (15 U.S.C. 2684(h)), EPA

was authorized to establish the Federal program in any state or tribal nation without its own authorized program in place by August 31, 1998.

States and tribes that choose to apply for program authorization must submit a complete application to the appropriate regional EPA office for review. Those applications will be reviewed by EPA within 180 days of receipt of the complete application. To receive EPA approval, a state or tribe must demonstrate that its program is at least as protective of human health and the environment as the Federal program, and provides for adequate enforcement (section 404(b) of TSCA, 15 U.S.C. 2684(b)). EPA's regulations (40 CFR part 745, subpart Q) provide the detailed requirements a state or tribal program must meet in order to obtain EPA approval.

A state may choose to certify that its lead-based paint activities program (40 CFR part 745, subpart L) and/or pre-renovation notification program (40 CFR part 745, subpart E) meets the requirements for EPA approval, by submitting a letter signed by the Governor or Attorney General stating that the program meets the requirements of section 404(b) of TSCA. Upon submission of such certification letter, the program is deemed authorized (15 U.S.C. 2684(a)). This authorization becomes ineffective, however, if EPA disapproves the application or withdraws the program authorization.

III. State Program Description Summary

The following is a program description summary provided by the State of Colorado.

5.1.1

Pursuant to Colorado Revised Statute, section 25-7-1104(2), the Division may delegate the implementation or enforcement of standards under Title 25, Part 11, C.R.S., to local health or building departments, as appropriate, if requested by such a local department. If the Division approves such a delegation to a local health or building department, the Division shall be the primary agency responsible for overseeing and coordinating administration and enforcement of the program and Mr. Steven D. Fine shall serve as the primary contact with EPA (40 CFR 745.324(b)(1)(ii)).

5.1.2

At this time, there is no delegation to any local health or building department; therefore, the Division has not developed a description of the functions to be performed by each agency. If the Division ever performs such a delegation, it will submit to EPA the

required information as detailed in 40 CFR 745.324(b)(1)(iii).

5.2

Information necessary to demonstrate that the proposed regulation No. 19 is at least as protective as the Federal Program (40 CFR 745.324(b)(2)).

5.2.1

Description demonstrating program contains all elements specified in 40 CFR 745.326.

5.2.1.1

Procedures and requirements for the distribution of lead hazard information to owners and occupants of target housing before renovations for compensation (40 CFR 745.325(a)(1)).

Regulation No. 19, Part B, includes standards and procedures for the distribution of lead hazard information to owners and occupants of target housing before renovations for compensation. These standards and procedures include:

- Clear standards for identifying home improvement activities that trigger the pamphlet distribution requirements at Regulation No. 19, Part B, Section I, Scope and Applicability and Section II.E. (40 CFR 745.326(b)(1)).

- Procedures for distributing the lead hazard information to owners and occupants of the housing prior to renovation activities requirements at Regulation No. 19, Part B, Section III., Information Distribution Requirements (40 CFR 745.326(b)(2)).

5.2.1.2

An approved lead hazard information pamphlet meeting the requirements of section 406 of TSCA, as determined by EPA (40 CFR 745.325(a)(2)). For distribution of a lead hazard information pamphlet, Regulation No. 19, Part B, has a definition of pamphlet, like the EPA definition of pamphlet, which requires either:

- The lead hazard information pamphlet developed by EPA under section 406(a) of TSCA, titled *Protect Your Family from Lead in Your Home* at Regulation Number 19, Part B, Section II.D. (40 CFR 745.326(c)(1)); or

- An alternate pamphlet or package of lead hazard information that has been submitted by the State or Tribe, reviewed by EPA, and approved by EPA for use in that State or Tribe. Such information must meet the content requirements prescribed by section 406(a) of TSCA, and be in a format that is readable to the diverse audience of housing owners and occupants in that State or Tribe at Regulation No. 19, Sections II.D. (40 CFR 745.326(c)(2)).

5.3

Analysis of Regulation No. 19, Part B Compared to Federal Program in 40 CFR part 745, subpart E.

The following analysis demonstrates that the State of Colorado's program is at least as protective as the elements of the Federal program.

5.3.1

Purpose of the proposed regulation. The purpose of the Pre-Renovation Education in Target Housing Regulation Number 19, Part B, is to reduce exposure to lead hazards that may result from renovation activities conducted in "target housing," including dwelling units and common areas. Regulation Number 19, Part B, will not regulate activities in public or commercial buildings. Regulation Number 19, Part B, includes provisions to establish requirements for certain persons who perform renovations of target housing for compensation to provide a lead hazard information pamphlet to the owner and occupant of such housing prior to commencing the renovation.

5.3.2

Program elements. The Division has followed EPA's regulation at 40 CFR part 745 and the State Legislature's statutory requirements to develop Regulation Number 19, Part B, to be both consistent with the federal program and acceptable to EPA. Implementation of Regulation Number 19, Part B, is an appropriate step to continuing to prevent exposing children to lead hazards that may result from certain renovation activities in "target housing." The scope and applicability of Regulation Number 19, Part B, (Section I., Scope and Applicability) has the same meaning as the scope and applicability of EPA's program (40 CFR 745.82).

Regulation Number 19, Part B, includes or incorporates definitions (Section II, Definitions) that are nearly identical to EPA's program (40 CFR 745.83). This includes the clear requirement that the information must meet the requirements of TSCA 406(a) or be approved by EPA pursuant to 40 CFR 745.326.

The information distribution requirements provided by Regulation Number 19, Part B, (Section III., Information Distribution Requirements) are nearly identical to EPA's (40 CFR 745.85). The information distribution requirements of Regulation Number 19, Part B, include renovations in dwelling units (section III.A.), renovation in common areas (Section III.B.), and written acknowledgements (Section III.C.) which correspond almost word for word to EPA requirements (40 CFR 745.85(a), (b) and (c)). Regulation No. 19, Part B, includes recordkeeping requirements (Section IV., Recordkeeping Requirements) designed

to match those of the EPA (40 CFR 745.86).

Also included in Regulation Number 19, Part B, is sample language for acknowledgement and certification statements (Section V., Acknowledgement and Certification Statements). The sample language in this section was designed to match the clear intent and have the same meaning as EPA program's sample language (40 CFR 745.88).

5.3.3 Conclusion

This analysis of substantive program elements demonstrates that Colorado's Pre-Renovation Education in Target Housing Regulation Number 19, Part B, is at least as protective of human health and the environment as the Federal regulations developed pursuant to TSCA section 406.

IV. Federal Overfiling

Section 404(b) of TSCA makes it unlawful for any person to violate, or fail or refuse to comply with, any requirement of an approved State or Tribal program. Therefore, EPA reserves the right to exercise its enforcement authority under TSCA against a violation of, or a failure or refusal to comply with, any requirement of an authorized state or tribal program.

V. Submission to Congress and the Comptroller General

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 certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this document in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

Environmental protection, Hazardous substances, Lead, Renovation notification, Reporting and recordkeeping requirements.

Dated: May 27, 2008.

Robert E. Roberts,

Administrator, Region VIII.

[FR Doc. E8-14401 Filed 6-24-08; 8:45 am]

BILLING CODE 6560-50-S

ENVIRONMENTAL PROTECTION AGENCY

[FRL-8685-1]

Science Advisory Board Staff Office; Notification of a Public Teleconference of the Science Advisory Board Acrylamide Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public teleconference of the SAB Acrylamide Review Panel to finalize its draft report on its review of EPA's draft "Toxicological Review of Acrylamide".

DATES: A public teleconference of the SAB Acrylamide Review Panel will be held from 1 p.m. to 4 p.m. (Eastern Time) on July 16, 2008.

ADDRESSES: The public teleconference will take place via telephone only.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain the call-in number and access code to participate in the teleconference may contact Dr. Sue Shallal, EPA Science Advisory Board Staff (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone/voice mail: (202) 343-9977 or via e-mail at shallal.suhair@epa.gov.

SUPPLEMENTARY INFORMATION: The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice to the 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. Pursuant to the Federal Advisory Committee Act, Public Law 92-463, notice is hereby given that the EPA SAB Acrylamide Review Panel will hold a public teleconference to finalize their draft report.

Background: EPA's Office of Research and Development (ORD) has requested that the SAB peer review the Agency's draft Integrated Risk Information System (IRIS) assessment entitled "Toxicological Review of Acrylamide." Background on this SAB review, including the process for forming this review panel was provided in a **Federal Register** Notice published on March 29, 2007 (Volume 72 FR 60; 14804-14805). The SAB Panel met on March 11-12, 2008 to review the IRIS document [see **Federal Register** Notice dated February

1, 2008 [Volume 73, Number 22, Pages 6181–6182]). The purpose of this upcoming teleconference is for the SAB Panel to discuss and finalize its draft report. Additional information about this advisory activity can be found on the SAB Web site at <http://www.epa.gov/sab>. A meeting agenda and the draft SAB review report will be posted at the above noted SAB Web site prior to the meeting.

Availability of Meeting Materials: The meeting agendas and other materials including the SAB panel's draft report will be available on the SAB Web site at (<http://www.epa.gov/sab>) in advance of the meeting. For technical questions and information concerning the EPA's IRIS assessment, please contact Dr. Rob Dewoskin, at (919) 541-1089, or dewoskin.rob@epa.gov.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the SAB Panel to consider throughout the advisory process. **Oral Statements:** In general, individuals or groups requesting an oral presentation at a public SAB teleconference will be limited to three minutes per speaker, with no more than a total of one-half hour for all speakers. To be placed on the public speaker list, interested parties should contact Dr. Sue Shallal, DFO, in writing (preferably via e-mail), by July 9, 2008. **Written Statements:** Written statements should be received in the SAB Staff Office by July 9, 2008, so that the information may be made available to the SAB for their consideration prior to the teleconference. Written statements should be supplied to the DFO via e-mail to shallal.suhair@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).

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Sue Shallal at (202) 343-9977 or shallal.suhair@epa.gov. To request accommodation of a disability, please contact Dr. Shallal preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: June 18, 2008.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. E8-14402 Filed 6-24-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2008-0470; FRL-8368-3]

Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any currently registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Comments must be received on or before July 25, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2008-0470, by one of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- **Mail:** Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.
- **Delivery:** OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305-5805.

Instructions: Direct your comments to docket ID number EPA-HQ-OPP-2008-0470. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website 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 docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in www.regulations.gov. To access the electronic docket, go to <http://www.regulations.gov>, select "Advanced Search," then "Docket Search." Insert the docket ID number where indicated and select the "Submit" button. Follow the instructions on the www.regulations.gov website to view the docket index or access available documents. Although, listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at <http://www.regulations.gov>, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305-5805.

FOR FURTHER INFORMATION CONTACT: Driss Benmhend, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-9525; e-mail address: benmhend.driss@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).
- ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- iv. Describe any assumptions and provide any technical information and/or data that you used.
- v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications

EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

Application Form

File Symbols: 67702-EA and ET.
Applicant: Neudorff GmbH KG c/o Walter G. Talarek PC, 1008 Riva Ridge Drive, Great Falls, VA 22066-1620
Product names: NEU1173H Concentrate and NEU1173H RTU. *Type of product:* Herbicide. *Active ingredient:* Iron HEDTA (FeHEDTA) at and 26.52% and 1.5% respectively. *Proposal classification/Use:* Household and Commercial use. (D. Benmhend).

List of Subjects

Environmental protection, Pesticides and pest.

Dated: June 13, 2008.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8-13877 Filed 6-24-08; 8:45 a.m.]

BILLING CODE 6560-50-S

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2008-0170; FRL-8367-9]

Pesticide Registration Review; New Dockets Opened for Review and Comment; Closure of the Phosalone Registration Review Case

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has established registration review dockets for the pesticides listed in the table in Unit III.A. With this document, EPA is opening the public comment period for these registration reviews. The Agency is also announcing the closure of the phosalone registration review case (0027). Registration review is EPA's periodic review of pesticide registrations to ensure that each

pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the Agency may consider during the course of registration reviews. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

DATES: Comments must be received on or before September 23, 2008.

ADDRESSES: Submit your comments identified by the docket identification (ID) number for the specific pesticide of interest provided in the table in Unit III.A., by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305-5805.

Instructions: Direct your comments to the docket ID numbers listed in the table in Unit III.A. for the pesticides you are commenting on. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website 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 docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at [regulations.gov](http://www.regulations.gov). To access the electronic docket, go to <http://www.regulations.gov>, select "Advanced Search," then "Docket Search." Insert the docket ID number where indicated and select the "Submit" button. Follow the instructions on the [regulations.gov](http://www.regulations.gov) website to view the docket index or access available documents. 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 electronically at <http://www.regulations.gov>, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305-5805.

FOR FURTHER INFORMATION CONTACT: For information about the pesticides included in this document, contact the specific Chemical Review Managers for these pesticides as identified in the table in Unit III.A.

For general questions on the registration review program, contact Kevin Costello, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305-5026; fax number: (703) 305-7070; e-mail address: costello.kevin@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a

wide range of stakeholders including environmental, human health, farmworker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. **Submitting CBI.** Do not submit this information to EPA through [regulations.gov](http://www.regulations.gov) or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. **Tips for preparing your comments.** When submitting comments, remember to:

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

3. **Environmental Justice.** EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Authority

EPA is initiating its reviews of the pesticides identified in this document pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review published in the **Federal Register** of August 9, 2006, and effective on October 10, 2006 (71 FR 45719) (FRL-8080-4). You may also access the Procedural Regulations for Registration Review at 40 CFR part 155 or on the Agency's website at <http://www.epa.gov/fedrgstr/EPA-PEST/2006/August/Day-09/p12904.htm>. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA section 3(a), a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

III. Registration Reviews

A. What Action is the Agency Taking?

As directed by FIFRA section 3(g), EPA is reviewing the pesticide registrations identified in the Table of this unit to assure that they continue to satisfy the FIFRA standard for registration—that is, they can still be used without unreasonable adverse effects on human health or the environment. A pesticide's registration review begins when the Agency establishes a docket for the pesticide's registration review case and opens the

docket for public review and comment. review dockets for the cases identified
At present, EPA is opening registration in the following table.

TABLE—REGISTRATION REVIEW DOCKETS OPENING

Registration Review Case Name and Number	Docket ID Number	Chemical Review Manager, Telephone Number, E-mail Address
Bensulide Case #2035	EPA-HQ-OPP-2008-0022	Susan Bartow, (703) 603-0065, <i>bartow.susan@epa.gov</i>
Oxydemeton-methyl Case #0258	EPA-HQ-OPP-2008-0328	Dana L. Friedman, (703) 347-8827, <i>friedman.dana@epa.gov</i>
Temephos Case #0006	EPA-HQ-OPP-2008-0444	Katherine St. Clair, (703) 347-8778, <i>stclair.katherine@epa.gov</i>
Dicrotophos Case #0145	EPA-HQ-OPP-2008-0440	Rusty Wasem, (703) 305-6979, <i>wasem.russell@epa.gov</i>
Benzenemethanaminium Case #7625	EPA-HQ-OPP-2008-0441	Joy Schnackenberg, (703) 308-8072, <i>schnackenberg.joy@epa.gov</i>
Coumaphos Case #0018	EPA-HQ-OPP-2008-0023	Wilhelmena Livingston, (703) 308-8025, <i>livingston.wilhelmena@epa.gov</i>
Diazinon Case #0238	EPA-HQ-OPP-2008-0351	Jude Andreasen, (703) 308-9342, <i>andreasen.jude@epa.gov</i>
Profenofos Case #2540	EPA-HQ-OPP-2008-0345	Christina Scheltema, (703) 308-2201, <i>scheltema.christina@epa.gov</i>
Propetamphos Case #2550	EPA-HQ-OPP-2007-1195	Monica Wait, (703) 347-8019, <i>wait.monica@epa.gov</i>
Terbufos Case #0109	EPA-HQ-OPP-2008-0119	Tracy Perry, (703) 308-0128, <i>perry.tracy@epa.gov</i>
Tetrachlorvinphos Case #0321	EPA-HQ-OPP-2008-0316	James Parker, (703) 306-0469, <i>parker.james@epa.gov</i>

The Agency is also announcing the closure of the phosalone registration review case (0027). In October 2006, the Agency issued schedules for upcoming registration reviews and included phosalone as one of the pesticides scheduled for registration review. The Agency opened a docket for the phosalone registration review case on February 19, 2008. Since first identifying phosalone as a Registration Review pesticide, the Agency has determined that there are no current phosalone Section 3 or Section 24(c) registrations. Therefore, the Agency has determined that phosalone is no longer subject to registration review and has closed the phosalone registration review case pursuant to 40 CFR 155.42(c).

B. Docket Content

1. *Review dockets.* The registration review dockets contain information that the Agency may consider in the course of the registration review. The Agency may include information from its files including, but not limited to, the following information:

- An overview of the registration review case status.

- A list of current product registrations and registrants.
- **Federal Register** notices regarding any pending registration actions.
- **Federal Register** notices regarding current or pending tolerances.
 - Risk assessments.
 - Bibliographies concerning current registrations.
 - Summaries of incident data.
 - Any other pertinent data or information.

Each docket contains a document summarizing what the Agency currently knows about the pesticide case and a preliminary work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the Agency is asking that interested persons identify any additional information they believe the Agency should consider during the registration reviews of these pesticides. The Agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

2. *Other related information.* More information on these cases, including the active ingredients for each case, may

be located in the registration review schedule on the Agency's website at http://www.epa.gov/oppsrrd1/registration_review/schedule.htm. Information on the Agency's registration review program and its implementing regulation may be seen at http://www.epa.gov/oppsrrd1/registration_review.

3. *Information submission requirements.* Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.

- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record.

Written material may be submitted in paper or electronic form.

- Submitters must clearly identify the source of any submitted data or information.

- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

- As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

List of Subjects

Environmental protection, Pesticides and pests, Bensulide, Oxydemeton-methyl, Temephos, Dicrotophos, Benszenemethanaminium, Coumaphos, Diazinon, Profenofos, Propetamphos, Terbufos, Tetrachlorvinphos, Phosalone

Dated: May 29, 2008.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8-14238 Filed 6-24-08; 8:45 am]

BILLING CODE 6560-50-S

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2005-0258; FRL-8368-7]

Triadimefon; Product Cancellation Order

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellation, voluntarily requested by the registrant and accepted by the Agency, of a product containing the pesticide triadimefon, pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This cancellation order follows an April 16, 2008 **Federal Register** Notice of Receipt of Request from the triadimefon registrant to voluntarily cancel its triadimefon product registration 432-1294. This is not the last triadimefon product registered for use in the United States. In the April 16, 2008 notice, EPA indicated that it would issue an order implementing the cancellation, unless the Agency received substantive comments within the 30-day comment

period that would merit its further review of this request, or unless the registrant withdrew its request within this period. The Agency did not receive any comments on the notice. Further, the registrant did not withdraw its request. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellation. Any distribution, sale, or use of the triadimefon products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective June 25, 2008.

FOR FURTHER INFORMATION CONTACT: John W. Pates, Jr., Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-8195; fax number: (703) 305-5290; e-mail address: pates.john@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2005-0258. Publicly available docket materials are available either in the electronic docket at <http://www.regulations.gov>, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305-5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at <http://www.epa.gov/fedrgstr>.

II. What Action is the Agency Taking?

This notice announces the cancellation, as requested by the registrant, of a certain triadimefon product registered under section 3 of FIFRA. The product is listed by registration number in Table 1 of this unit.

TABLE 1.—TRIADIMEFON PRODUCT CANCELLATION

EPA Registration Number	Product Name
432-1294	Bayleton 50 Turf and Ornamental Fungicide in WSP and Bayleton 50 WP Fungicide

Table 2 of this unit includes the name and address of record for the registrant of the product in Table 1 of this unit by EPA company number.

TABLE 2.—REGISTRANT OF THE CANCELED TRIADIMEFON PRODUCT

EPA Company Number	Company Name and Address
432	Bayer Environmental Science 2 T.W. Alexander Drive Research Triangle Park, NC 27709

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the April 16, 2008 **Federal Register** notice announcing the Agency's receipt of the request for voluntary cancellation of triadimefon.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellation of the triadimefon registration identified in Table 1 of Unit II. Accordingly, the Agency orders that the triadimefon product registration identified in Table 1 of Unit II. is hereby canceled. Any distribution, sale, or use of existing stocks of the product identified in Table 1 of Unit II. in a manner inconsistent with any of the Provisions for Disposition of Existing Stocks set forth in Unit VI. will be considered a violation of FIFRA.

V. What is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Typically, the Agency will permit a registrant to sell and distribute existing stocks for one year after the date the cancellation request was received. Such policy is in accordance with the Agency's statement of policy as set forth in the **Federal Register** of June 26, 1991 (56 FR 29362) (FRL-3846-4). However, in this case, because Bayer Environmental Science has provided information to the Agency that it is not likely that any remaining existing stocks are out in the channels of trade, the Agency does not believe that there is a need to permit the registrant to sell or distribute existing stocks for a period of one year. In addition, the Agency does not believe that there is a need for persons other than the registrant to continue to sell and/or use existing stocks of canceled products. The Agency believes that end users have had sufficient time to exhaust those existing stocks. Therefore, the last date for end use of the product is effective on the date of publication of this cancellation order in the **Federal Register**. Pursuant to FIFRA section 6(f), the Agency hereby approves the requested cancellation of Bayleton 50 Turf and Ornamental Fungicide in WSP and Bayleton 50 WP Fungicide (EPA Registration # 432-1294).

List of Subjects

Environmental protection, Pesticides and pests.

Dated: June 17, 2008.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8-14113 Filed 6-24-08; 8:45 am]

BILLING CODE 6560-50-S

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

June 18, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before July 25, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at Nicholas_A_Fraser@omb.eop.gov or via fax at (202) 395-5167 and to Cathy Williams, Federal Communications Commission, Room 1-C823, 445 12th Street, SW., Washington, DC or via Internet at Cathy.Williams@fcc.gov or PRA@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the web page called "Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal

Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418-2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-1086.

Title: Section 74.786, Digital Channel Assignments; Section 74.787, Digital Licensing; Section 74.790, Permissible Service of Digital TV Translator and LPTV Stations; Section 74.794, Digital Emissions; Section 74.796, Modification of Digital Transmission Systems and Analog Transmission Systems for Digital Operation.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; State, local or tribal government.

Number of Respondents and Responses: 8,433 respondents; 34,660 responses.

Estimated Time per Response: 0.5-4 hours.

Frequency of Response: One-time reporting requirement; Third party disclosure requirement; Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained at 47 U.S.C. 301 of the Communications Act of 1934, as amended.

Total Annual Burden: 55,417 hours.

Total Annual Cost: \$95,734,200.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: 47 CFR Section 74.786(d) requires that digital LPTV and TV translator stations assigned to these channels as a companion digital channel demonstrate that a suitable in-core channel is not available. The demonstration will require that the licensee conduct a study to verify that an in-core channel is not available.

47 CFR Section 74.786(d) further requires that digital LPTV and TV translator stations proposing use of channels 52-59 notify all potentially affected 700 MHz wireless licensees of

their proposed operation not less than 30 days prior to the submission of their application. These applicants must notify wireless licensees of the 700 MHz bands comprising the same TV channel and the adjacent channel within who licensed geographic boundaries the digital LPTV or TV translator station is proposed to be located, and they must also notify licensees of co-channel and adjacent channel spectrum whose service boundaries lie within 75 miles and 50 miles, respectively, of their proposed station location.

47 CFR Section 74.786(e) allows assignment of UHF channels 60 to 69 to digital LPTV or TV translator stations for use as a digital conversion channel provided that stations proposing use of these channels notify all potentially affected 700 MHz wireless licensees of their proposed operation not later than 30 days prior to the submission of their application.

47 CFR Section 74.786(e) further provides that digital LPTV and TV translator stations proposing use of UHF channel 63, 64, 68, and 69 (public safety frequencies) as a digital conversion channel must secure a coordinated spectrum use agreement with the pertinent 700 MHz public safety regional planning committee and state administrator prior to the submission of their application.

47 CFR Section 74.786(e) Digital LPTV and TV translator stations proposing use of channels 62, 65, and 67 must notify the pertinent regional planning committee and state administrator of their proposed operation not later than 30 days prior to submission of their application.

47 CFR Section 74.787(a)(2)(iii) provides that mutually exclusive LPTV and TV translator applicants for companion digital stations will be afforded an opportunity to submit in writing to the Commission, settlements and engineering solutions to resolve their situation.

47 CFR Section 74.787(a)(3) provides that mutually exclusive applicants applying for construction permits for new digital stations and for major changes to existing stations in the LPTV service will similarly be allowed to *submit* in writing to the Commission, settlements and engineering solutions to rectify the problem.

47 CFR Section 74.787(a)(4) provides that mutually exclusive displacement relief applicants filing applications for digital LPTV and TV translator stations may be resolved by submitting settlements and engineering solutions in writing to the Commission.

47 CFR Section 74.790(f) permits digital TV translator stations to originate

emergency warnings over the air deemed necessary to protect and safeguard life and property, and to originate local public service announcements (PSAs) or messages seeking or acknowledging financial support necessary for its continued operation. These announcements or messages shall not exceed 30 seconds each, and be broadcast no more than once per hour.

47 CFR Section 74.790(e) requires that a digital TV translator station shall not retransmit the programs and signal of any TV broadcast or DTV broadcast station(s) without prior written consent of such station(s). A digital TV translator operator electing to multiplex signals must negotiate arrangements and obtain written consent of involved DTV station licensee(s).

47 CFR Section 74.790(g) requires a digital LPTV station who transmits the programming of a TV broadcast or DTV broadcast station received prior written consent of the station whose signal is being transmitted.

47 CFR Section 74.794 mandates that digital LPTV and TV translator stations operating on TV channels 22–24, 32–36, 38, and 65–69 with a digital transmitter not specifically FCC-certificated for the channel purchase and utilize a low pass filter or equivalent device rated by its manufacturer to have an attenuation of at least 85 dB in the GPS band. The licensees must retain with their station license a description of the low pass filter or equivalent device with the manufacturer's rating or a report of measurements by a qualified individual.

47 CFR Section 74.796(b)(5) requires digital LPTV or TV translator station licensees that modify their existing transmitter by use of a manufacturer-provided modification kit would need to purchase the kit and must notify the Commission upon completion of the transmitter modifications, in addition, a digital LPTV or TV translator station licensees that modify their existing transmitter and do not use a manufacturer-provided modification kit, but instead perform custom modification (those not related to installation of manufacturer-supplied and FCC-certified equipment) must notify the Commission upon completion of the transmitter modifications and shall certify compliance with all applicable transmission system requirements.

47 CFR Section 74.796(b)(6) provides that operators who modify their existing transmitter by use of a manufacturer-provided modification kit must maintain with the station's records for a period of not less than two years, and will make available to the Commission

upon request, a description of the nature of the modifications, installation and test instructions, and other material provided by the manufacturer, the results of performance-tests and measurements on the modified transmitter, and copies of related correspondence with the Commission. In addition, digital LPTV and TV translator operators who custom modify their transmitter must maintain with the station's records for a period of not less than two years, and will make available to the Commission upon request, a description of the modifications performed and performance tests, the results of performance-tests and measurements on the modified transmitter, and copies of related correspondence with the Commission.

In situations where protection of an existing analog LPTV or translator station without a frequency offset prevents acceptance of a proposed new or modified LPTV, TV translator, or Class A station, the Commission requires that the existing non-offset station install at its expense offset equipment and notify the Commission that it has done so, or, alternatively, negotiate an interference agreement with the new station and notify the Commission of that agreement.

The Commission requires that wireless licensees operating on channels 52–59 and 60–69 notify (by certified mail, return receipt requested) a digital LPTV or TV translator licensee operating on the same channel or first adjacent channel of its intention to initiate or change wireless operations and the likelihood of interference from the LPTV or translator station within its licensed geographic service area. This notification should describe the facilities, associated service area, and operation of the wireless licensee with sufficient detail to permit an evaluation of the likelihood of interference.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–14356 Filed 6–24–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 08–1183]

Notice of Suspension and Initiation of Debarment Proceedings; Schools and Libraries Universal Service Support Mechanism

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Enforcement Bureau gives notice of Mr. William Holman's suspension from the schools and libraries universal service support mechanism (or "E-Rate Program"). Additionally, the Bureau gives notice that debarment proceedings are commencing against him. Mr. Holman, or any person who has an existing contract with or intends to contract with him to provide or receive services in matters arising out of activities associated with or related to the schools and libraries support, may respond by filing an opposition request.

DATES: Opposition requests must be received by July 25, 2008. However, an opposition request by the party to be suspended must be received 30 days from the receipt of the suspension letter or July 25, 2008, whichever comes first. The Bureau will decide any opposition request for reversal or modification of suspension or debarment within 90 days of its receipt of such requests.

FOR FURTHER INFORMATION CONTACT: Diana Lee, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, Room 4-C330, 445 12th Street, SW., Washington, DC 20554. Diana Lee may be contacted by phone at (202) 418-0843 or e-mail at diana.lee@fcc.gov. If Ms. Lee is unavailable, you may contact Ms. Vickie Robinson, Assistant Chief, Investigations and Hearings Division, by telephone at (202) 418-1420 and by e-mail at vickie.robinson@fcc.gov.

SUPPLEMENTARY INFORMATION: The Enforcement Bureau has suspension and debarment authority pursuant to 47 CFR 54.8 and 47 CFR 0.111. Suspension will help to ensure that the party to be suspended cannot continue to benefit from the schools and libraries mechanism pending resolution of the debarment process. Attached is the suspension letter, DA 08-1183, which was mailed to Mr. Holman and released on May 19, 2008. The complete text of the notice of debarment is available for public inspection and copying center during regular business hours at the FCC Reference Information Center, Portal II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. In addition, the complete text is available on the FCC's Web site at <http://www.fcc.gov>. The text may also be purchased from the Commission's duplicating inspection and copying center during regular business hours at the contractor, Best Copy and Printing, Inc., Portal II, 445 12th Street, SW., Room CY-B420, Washington, DC 20554, telephone (202) 488-5300 or (800) 378-3160, facsimile (202) 488-5563, or via e-mail <http://www.bcpweb.com>.

Federal Communications Commission.

Hillary DeNigro,
Chief, Investigations and Hearings Division,
Enforcement Bureau.

The attached is the Suspension and Initiation of Debarment Letter to Mr. William Holman.

May 19, 2008.

DA 08-1183

Via certified mail. Return receipt requested and facsimile (415-773-5759).

Mr. William Holman, c/o Melinda Haag, Esq., Orrick, Herrington & Sutcliffe, LLP, The Orrick Building, 405 Howard Street, San Francisco, CA 94105-2669.

Re: Notice of Suspension and Initiation of Debarment Proceedings, File No. EB-08-IH-1142

Dear Mr. Holman: The Federal Communications Commission ("FCC" or "Commission") has received notice of your conviction of bid rigging, in violation of 15 U.S.C. 1, in connection with your participation in the schools and libraries universal service support mechanism ("E-Rate program").¹ Consequently, pursuant to 47 CFR 54.8, this letter constitutes official notice of your suspension from the E-Rate program. In addition, the Enforcement Bureau hereby notifies you that we are commencing debarment proceedings against you.²

I. Notice of Suspension

The Commission has established procedures to prevent persons who have "defrauded the government or engaged in

¹ Any further reference in this letter to "your conviction" refers to your guilty plea and subsequent conviction of bid rigging. See *United States v. William Holman*, Criminal Docket No. 3:05-CR-00208-CRB-012, Judgment (N.D.Cal. filed Apr. 9, 2008 and entered Apr. 9, 2008) ("Holman Judgment"), Substitute Information (N.D.Cal. filed and entered Apr. 5, 2007) ("Holman Substitute Information"). See also generally *United States v. Video Network Communications, Inc. et al.*, Criminal Docket No. 3:05-CR-00208-CRB, Superseding Indictment (N.D.Cal. filed Dec. 8, 2005 and entered Dec. 12, 2005), <http://www.usdoj.gov/atr/cases/f213600/213626.htm> (accessed May 1, 2008) ("VNCI Superseding Indictment").

² 47 CFR 54.8; 47 CFR 0.111 (delegating to the Enforcement Bureau authority to resolve universal service suspension and debarment proceedings). The Commission adopted debarment rules for the schools and libraries universal service support mechanism in 2003. See *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2003) ("Second Report and Order") (adopting section 54.521 to suspend and debar parties from the E-rate program). In 2007, the Commission extended the debarment rules to apply to all of the Federal universal service support mechanisms. *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Lifeline and Link Up; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, Report and Order, 22 FCC Rcd 16372, 16410-12 (2007) (*Program Management Order*) (renumbering section 54.521 of the universal service debarment rules as section 54.8 and amending subsections (a)(1), (5), (c), (d), (e)(2)(i), (3), (e)(4), and (g)).

similar acts through activities associated with or related to the schools and libraries support mechanism" from receiving the benefits associated with that program.³ You pled guilty to bid rigging in connection with your participation in the Ceria Travis Academy E-Rate project (the "Project").⁴ Specifically, you admitted that, as former vice president of sales for NEC Business Networks, Inc. ("NEC-BNS"), you entered into and engaged in a conspiracy with NEC-BNS and other co-conspirators to suppress and eliminate competition by submitting non-competitive bids for the Project and taking steps to ensure that the Project was awarded to NEC-BNS and co-conspirators.⁵

Pursuant to section 54.8(a)(4) of the Commission's rules,⁶ your conviction requires the Bureau to suspend you from participating in any activities associated with or related to the schools and libraries fund mechanism, including the receipt of funds or discounted services through the schools and libraries fund mechanism, or consulting with, assisting, or advising applicants or service providers regarding the schools and libraries support mechanism.⁷ Your suspension becomes effective upon the earlier of your receipt of this letter or publication of notice in the **Federal Register**.⁸

Suspension is immediate pending the Bureau's final debarment determination. In accordance with the Commission's debarment rules, you may contest this suspension or the scope of this suspension by filing arguments in opposition to the suspension, with any relevant documentation. Your request must be received within 30 days after you receive this letter or after notice is published in the **Federal Register**, whichever comes first.⁹ Such requests, however, will not ordinarily be granted.¹⁰ The Bureau may reverse or limit the scope of suspension only upon a finding of extraordinary circumstances.¹¹ Absent extraordinary circumstances, the

³ See *Second Report and Order*, 18 FCC Rcd at 9225, para. 66; *Program Management Order*, 22 FCC Rcd at 16387, para. 32. The Commission's debarment rules define a "person" as "[a]ny individual, group of individuals, corporation, partnership, association, unit of government or legal entity, however, organized." 47 CFR 54.8(a)(6).

⁴ See *Holman Judgment* at 1; *Holman Substitute Information* at 4.

⁵ See *id.* The Commission debarred NEC-BNS in 2006 for the company's wire fraud and bid rigging conviction. See *NEC Business Network Solutions, Inc.*, Notice of Debarment, 21 FCC Rcd 7491 (2006); 71 FR 42398 (2006). The following four individuals, who were also charged in the *VNCI Superseding Indictment*, have pled guilty or been found guilty, and subsequently sentenced: Judy Green, Earl Nelson, George Marchelos, and Allan Green. We are sending separate notices of suspension and initiation of debarment proceedings to these individuals. VNCI is now defunct and charges against the company have been dropped.

⁶ 47 CFR 54.8(a)(4). See *Second Report and Order*, 18 FCC Rcd at 9225-9227, paras. 67-74.

⁷ 47 CFR 54.8(a)(1), (d).

⁸ *Second Report and Order*, 18 FCC Rcd at 9226, para. 69; 47 CFR 54.8(e)(1).

⁹ 47 CFR 54.8(e)(4).

¹⁰ *Id.*

¹¹ 47 CFR 54.8(e)(5).

Bureau will decide any request for reversal or modification of suspension within 90 days of its receipt of such request.¹²

II. Initiation of Debarment Proceedings

Your guilty plea and conviction of criminal conduct in connection with the E-Rate program, in addition to serving as a basis for immediate suspension from the program, also serves as a basis for the initiation of debarment proceedings against you. Your conviction falls within the categories of causes for debarment defined in section 54.8(c) of the Commission's rules.¹³ Therefore, pursuant to section 54.8(a)(4) of the Commission's rules, your conviction requires the Bureau to commence debarment proceedings against you.

As with your suspension, you may contest debarment or the scope of the proposed debarment by filing arguments and any relevant documentation within 30 calendar days of the earlier of the receipt of this letter or of publication in the **Federal Register**.¹⁴ Absent extraordinary circumstances, the Bureau will debar you.¹⁵ Within 90 days of receipt of any opposition to your suspension and proposed debarment, the Bureau, in the absence of extraordinary circumstances, will provide you with notice of its decision to debar.¹⁶ If the Bureau decides to debar you, its decision will become effective upon the earlier of your receipt of a debarment notice or publication of the decision in the **Federal Register**.¹⁷

If and when your debarment becomes effective, you will be prohibited from participating in activities associated with or related to the schools and libraries support mechanism for three years from the date of debarment.¹⁸ The Bureau may, if necessary to protect the public interest, extend the debarment period.¹⁹

Please direct any response, if by messenger or hand delivery, to Marlene H. Dortch,

¹² See *Second Report and Order*, 18 FCC Rcd at 9226, para. 70; 47 CFR 54.8(e)(5), 54.8(f).

¹³ "Causes for suspension and debarment are the conviction of or civil judgment for attempt or commission of criminal fraud, theft, embezzlement, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice and other fraud or criminal offense arising out of activities associated with or related to the schools and libraries support mechanism, the high-cost support mechanism, the rural healthcare support mechanism, and the low-income support mechanism." 47 CFR 54.8(c). Such activities "include the receipt of funds or discounted services through [the Federal universal service] support mechanisms, or consulting with, assisting, or advising applicants or service providers regarding [the Federal universal service] support mechanisms." 47 CFR 54.8(a)(1).

¹⁴ See *Second Report and Order*, 18 FCC Rcd at 9226, para. 70; 47 CFR 54.8(e)(3).

¹⁵ *Second Report and Order*, 18 FCC Rcd at 9227, para. 74.

¹⁶ See *id.*, 18 FCC Rcd at 9226, para. 70; 47 CFR 54.8(e)(5).

¹⁷ *Id.* The Commission may reverse a debarment, or may limit the scope or period of debarment upon a finding of extraordinary circumstances, following the filing of a petition by you or an interested party or upon motion by the Commission. 47 CFR 54.8(f).

¹⁸ *Second Report and Order*, 18 FCC Rcd at 9225, para. 67; 47 CFR 54.8(d), 54.8(g).

¹⁹ *Id.*

Secretary, Federal Communications Commission, 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002, to the attention of Diana Lee, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Room 4-C330, with a copy to Vickie Robinson, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Room 4-C330, Federal Communications Commission. If sent by commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail), the response should be sent to the Federal Communications Commission, 9300 East Hampton Drive, Capitol Heights, Maryland 20743. If sent by first-class, Express, or Priority mail, the response should be sent to Diana Lee, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW., Room 4-C330, Washington, DC 20554, with a copy to Vickie Robinson, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW., Room 4-C330, Washington, DC 20554. You shall also transmit a copy of the response via e-mail to diana.lee@fcc.gov and to vickie.robinson@fcc.gov.

If you have any questions, please contact Ms. Lee via mail, by telephone at (202) 418-1420 or by e-mail at diana.lee@fcc.gov. If Ms. Lee is unavailable, you may contact Ms. Vickie Robinson, Assistant Chief, Investigations and Hearings Division, by telephone at (202) 418-1420 and by e-mail at vickie.robinson@fcc.gov.

Sincerely yours,

Hillary S. DeNigro,

Chief, Investigations and Hearings Division, Enforcement Bureau.

cc: Kristy Carroll, Esq., Universal Service Administrative Company (via e-mail), Michael Wood, Antitrust Division, United States Department of Justice.

[FR Doc. E8-14354 Filed 6-24-08; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[DA 08-1182]

Notice of Suspension and Initiation of Debarment Proceedings; Schools and Libraries Universal Service Support Mechanism

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Enforcement Bureau gives notice of Ms. Judy Green's suspension from the schools and libraries universal service support mechanism (or "E-Rate Program"). Additionally, the Bureau gives notice that debarment proceedings are commencing against her. Ms. Green, or any person who has an existing contract

with or intends to contract with her to provide or receive services in matters arising out of activities associated with or related to the schools and libraries support, may respond by filing an opposition request.

DATES: Opposition requests must be received by July 25, 2008. However, an opposition request by the party to be suspended must be received 30 days from the receipt of the suspension letter or July 25, 2008, whichever comes first. The Bureau will decide any opposition request for reversal or modification of suspension or debarment within 90 days of its receipt of such requests.

FOR FURTHER INFORMATION CONTACT: Diana Lee, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, Room 4-C330, 445 12th Street, SW., Washington, DC 20554. Diana Lee may be contacted by phone at (202) 418-0843 or e-mail at diana.lee@fcc.gov. If Ms. Lee is unavailable, you may contact Ms. Vickie Robinson, Assistant Chief, Investigations and Hearings Division, by telephone at (202) 418-1420 and by e-mail at vickie.robinson@fcc.gov.

SUPPLEMENTARY INFORMATION: The Enforcement Bureau has suspension and debarment authority pursuant to 47 CFR 54.8 and 47 CFR 0.111. Suspension will help to ensure that the party to be suspended cannot continue to benefit from the schools and libraries mechanism pending resolution of the debarment process. Attached is the suspension letter, DA 08-1182, which was mailed to Ms. Green and released on May 19, 2008. The complete text of the notice of debarment is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portal II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. In addition, the complete text is available on the FCC's Web site at <http://www.fcc.gov>. The text may also be purchased from the Commission's duplicating inspection and copying during regular business hours at the contractor, Best Copy and Printing, Inc., Portal II, 445 12th Street, SW., Room CY-B420, Washington, DC 20554, telephone (202) 488-5300 or (800) 378-3160, facsimile (202) 488-5563, or via e-mail <http://www.bcpweb.com>.

Federal Communications Commission.

Hillary DeNigro,

Chief, Investigations and Hearings Division, Enforcement Bureau.

The attached is the Suspension and Initiation of Debarment Letter to Ms. Judy Green.

May 19, 2008.

DA 08-1182

Via certified mail.

Return receipt requested and facsimile (510-452-8405).

Ms. Judy Green, c/o Erik G. Babcock, Law Offices of Erik Babcock, 1212 Broadway, Suite 726, Oakland, CA 94612.

Re: Notice of Suspension and Initiation of Debarment Proceedings, File No. EB-08-IH-1139

Dear Ms. Green: The Federal Communications Commission ("FCC" or "Commission") has received notice of your conviction on multiple counts of fraud, collusion, aiding and abetting, and conspiracy to commit wire and mail fraud, in violation of 15 U.S.C. 1 and 18 U.S.C. 2, 371, and 1343, in connection with your participation in the schools and libraries universal service support mechanism ("E-Rate program").¹ Consequently, pursuant to 47 CFR 54.8, this letter constitutes official notice of your suspension from the E-Rate program. In addition, the Enforcement Bureau hereby notifies you that we are commencing debarment proceedings against you.²

I. Notice of Suspension

The Commission has established procedures to prevent persons who have "defrauded the government or engaged in similar acts through activities associated with or related to the schools and libraries support mechanism" from receiving the benefits associated with that program.³ On March 19, 2008, the United States District Court in San Francisco sentenced you to serve seven and a half years in prison following your conviction of twenty-two counts of fraud,

¹ Any further reference in this letter to "your conviction" refers to your twenty-two count conviction. *United States v. Judy Green*, Criminal Docket No. 3:05-CR-00208-WHA-007, Judgment (N.D.Cal. filed and entered March 19, 2008) ("*Judy Green Judgment*").

² 47 CFR 54.8; 47 CFR 0.111 (delegating to the Enforcement Bureau authority to resolve universal service suspension and debarment proceedings). The Commission adopted debarment rules for the schools and libraries universal service support mechanism in 2003. See *Schools and Libraries Universal Service Support Mechanism*, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2003) ("*Second Report and Order*") (adopting section 54.521 to suspend and debar parties from the E-rate program). In 2007, the Commission extended the debarment rules to apply to all of the Federal universal service support mechanisms. *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Lifeline and Link Up; Changes to the Board of Directors for the National Exchange Carrier Association, Inc., Report and Order*, 22 FCC Rcd 16372, 16410-12 (2007) (*Program Management Order*) (renumbering section 54.521 of the universal service debarment rules as section 54.8 and amending subsections (a)(1), (5), (c), (d), (e)(2)(i), (3), (e)(4), and (g)).

³ See *Second Report and Order*, 18 FCC Rcd at 9225, 66; *Program Management Order*, 22 FCC Rcd at 16387, para. 32. The Commission's debarment rules define a "person" as "[a]ny individual, group of individuals, corporation, partnership, association, unit of government or legal entity, however, organized." 47 CFR 54.8(a)(6).

collusion, aiding and abetting, and conspiracy in connection with your leadership of multiple schemes to defraud the E-Rate program.⁴ As a former education consultant and sales representative for the companies Video Network Communications, Inc. ("VNCI") and ADJ Consultants, Inc. ("ADJ"), you orchestrated multiple fraudulent schemes and conspiracies involving more than twenty-five separate E-Rate projects in school districts throughout seven states from 1998 to 2003.⁵ The fraudulent schemes involved conspiring with various individuals and businesses for the purpose of engaging in conduct in restraint of competition by submitting collusive, noncompetitive, or rigged bids for telecommunications services eligible for E-Rate subsidies and ensuring telecommunications services contracts were awarded to conspirators and bids from non-conspirators were disqualified.⁶ The schemes also involved inflating the costs of eligible equipment and services in applications for funding submitted to Universal Service Administrative Company ("USAC") in order to pay for ineligible equipment and services and by misrepresenting schools' ability and willingness to pay for their portion of the school projects.⁷

Pursuant to section 54.8(a)(4) of the Commission's rules,⁸ your conviction requires the Bureau to suspend you from participating in any activities associated with or related to the schools and libraries fund mechanism, including the receipt of funds or discounted services through the schools and libraries fund mechanism, or consulting with, assisting, or advising applicants or service providers regarding the schools and libraries support mechanism.⁹ Your suspension becomes effective upon the earlier of your receipt of this letter or publication of notice in the **Federal Register**.¹⁰

Suspension is immediate pending the Bureau's final debarment determination. In

⁴ See http://www.usdoj.gov/opa/pr/2008/March/08_at_219.html (accessed Apr. 22, 2008) ("DOJ March 19, 2008 *Judy Green Press Release*"); *Judy Green Judgment* at 1.

⁵ See *United States v. Video Network Communications, Inc. et al.*, Criminal Docket No. 3:05-CR-00208-CRB, Superseding Indictment at 5, 15 (N.D.Cal. filed Dec. 8, 2005 and entered Dec. 12, 2005) also available at <http://www.usdoj.gov/atr/cases/f213600/213626.htm> (accessed May 1, 2008) ("*VNCI Superseding Indictment*"); see also DOJ March 19, 2008 *Judy Green Press Release*. The following four individuals, who were also charged in the *VNCI Superseding Indictment*, have pled guilty and subsequently have been sentenced: Earl Nelson, George Marchelos, William Holman and Allan Green. We are sending separate notices of suspension and initiation of debarment proceedings to these individuals. VNCI and ADJ are now defunct; charges against these companies have been dropped.

⁶ See *VNCI Superseding Indictment* at paras. 79-151; DOJ March 19, 2008 *Judy Green Press Release* at 1.

⁷ See *VNCI Superseding Indictment* at 12-78; DOJ March 19, 2008 *Judy Green Press Release* at 1.

⁸ 47 CFR 54.8(a)(4). See *Second Report and Order*, 18 FCC Rcd at 9225-9227, paras. 67-74.

⁹ 47 CFR 54.8(a)(1), (d).

¹⁰ *Second Report and Order*, 18 FCC Rcd at 9226, para. 69; 47 CFR 54.8(e)(1).

accordance with the Commission's debarment rules, you may contest this suspension or the scope of this suspension by filing arguments in opposition to the suspension, with any relevant documentation. Your request must be received within 30 days after you receive this letter or after notice is published in the **Federal Register**, whichever comes first.¹¹ Such requests, however, will not ordinarily be granted.¹² The Bureau may reverse or limit the scope of suspension only upon a finding of extraordinary circumstances.¹³ Absent extraordinary circumstances, the Bureau will decide any request for reversal or modification of suspension within 90 days of its receipt of such request.¹⁴

II. Initiation of Debarment Proceedings

Your conviction of criminal conduct in connection with the E-Rate program, in addition to serving as a basis for immediate suspension from the program, also serves as a basis for the initiation of debarment proceedings against you. Your conviction falls within the categories of causes for debarment defined in section 54.8(c) of the Commission's rules.¹⁵ Therefore, pursuant to section 54.8(a)(4) of the Commission's rules, your conviction requires the Bureau to commence debarment proceedings against you.

As with your suspension, you may contest debarment or the scope of the proposed debarment by filing arguments and any relevant documentation within 30 calendar days of the earlier of the receipt of this letter or of publication in the **Federal Register**.¹⁶ Absent extraordinary circumstances, the Bureau will debar you.¹⁷ Within 90 days of receipt of any opposition to your suspension and proposed debarment, the Bureau, in the absence of extraordinary circumstances, will provide you with notice of its decision to debar.¹⁸ If the Bureau decides to debar you, its decision will become effective upon the earlier of your receipt of a debarment notice

¹¹ 47 CFR 54.8(e)(4).

¹² *Id.*

¹³ 47 CFR 54.8(e)(5).

¹⁴ See *Second Report and Order*, 18 FCC Rcd at 9226, para. 70; 47 CFR 54.8(e)(5), 54.8(f).

¹⁵ Causes for suspension and debarment are the conviction of or civil judgment for attempt or commission of criminal fraud, theft, embezzlement, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice and other fraud or criminal offense arising out of activities associated with or related to the schools and libraries support mechanism, the high-cost support mechanism, the rural healthcare support mechanism, and the low-income support mechanism." 47 CFR 54.8(c). Such activities "include the receipt of funds or discounted services through [the Federal universal service] support mechanisms, or consulting with, assisting, or advising applicants or service providers regarding [the Federal universal service] support mechanisms." 47 CFR 54.8(a)(1).

¹⁶ See *Second Report and Order*, 18 FCC Rcd at 9226, paras. 70; 47 CFR 54.8(e)(3).

¹⁷ *Second Report and Order*, 18 FCC Rcd at 9227, para. 74.

¹⁸ See *id.*, 18 FCC Rcd at 9226, para. 70; 47 CFR 54.8(e)(5).

or publication of the decision in the **Federal Register**.¹⁹

If and when your debarment becomes effective, you will be prohibited from participating in activities associated with or related to the schools and libraries support mechanism for at least three years from the date of debarment.²⁰ The Bureau may, if necessary to protect the public interest, extend the debarment period.²¹

Please direct any response, if by messenger or hand delivery, to Marlene H. Dortch, Secretary, Federal Communications Commission, 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002, to the attention of Diana Lee, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Room 4-C330, with a copy to Vickie Robinson, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Room 4-C330, Federal Communications Commission. If sent by commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail), the response should be sent to the Federal Communications Commission, 9300 East Hampton Drive, Capitol Heights, Maryland 20743. If sent by first-class, Express, or Priority mail, the response should be sent to Diana Lee, Attorney Advisor, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW., Room 4-C330, Washington, DC 20554, with a copy to Vickie Robinson, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW., Room 4-C330, Washington, DC 20554. You shall also transmit a copy of the response via e-mail to diana.lee@fcc.gov and to vickie.robinson@fcc.gov.

If you have any questions, please contact Ms. Lee via mail, by telephone at (202) 418-1420 or by e-mail at diana.lee@fcc.gov. If Ms. Lee is unavailable, you may contact Ms. Vickie Robinson, Assistant Chief, Investigations and Hearings Division, by telephone at (202) 418-1420 and by e-mail at vickie.robinson@fcc.gov.

Sincerely yours,

Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau.

cc: Kristy Carroll, Esq., Universal Service Administrative Company (via e-mail).
Michael Wood, Antitrust Division, United States Department of Justice (via mail).

[FR Doc. E8-14360 Filed 6-24-08; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement

¹⁹ Id. The Commission may reverse a debarment, or may limit the scope or period of debarment upon a finding of extraordinary circumstances, following the filing of a petition by you or an interested party or upon motion by the Commission. 47 CFR 54.8(f).

²⁰ *Second Report and Order*, 18 FCC Rcd at 9225, para. 67; 47 CFR 54.8(d), 54.8(g).

²¹ Id.

under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Web site (<http://www.fmc.gov>) or contacting the Office of Agreements (202) 523-5793 or tradeanalysis@fmc.gov.

Agreement No.: 011741-012.

Title: U.S. Pacific Coast-Oceania Agreement.

Parties: A.P. Moller-Maersk A/S; Hamburg-Süd; and Hapag-Lloyd AG.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The amendment adds CMA CGM, S.A. and ANL Singapore PTE Ltd. as parties to the agreement. It also makes various other changes to accommodate the foregoing carriers' participation in the agreement.

Dated: June 20, 2008.

By Order of the Federal Maritime Commission.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8-14410 Filed 6-24-08; 8:45 am]

BILLING CODE 6730-01-P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants

Sea Lion Holdings, Ltd. dba Sea Lion Shipping, Ltd., 614 Progress Street, Elizabeth, NJ 07201, Officer: Richard Forte, President (Qualifying Individual),

LCL Logistix (India) Pvt. dba LCL Lines, Building B, Plaza Hill 215, Rte. 18 North, East Brunswick, NJ 08816, Officers: Unnikrishnan Nair,

President (Qualifying Individual),
Jaya Unnikrishnan Nair, Director.

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicant

World Express Shipping Transportation & Forwarding Services, Inc. dba Westainer, Lines dba West Forwarding Services, 17851 Jefferson Park Road, Ste. 101, Middleburg Hts., OH 44130, Officer: Brian C. Buckholz, President/CEO (Qualifying Individual).

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

Penbroke Marine Services Inc., 975 E. Linden Ave., Linden, NJ 07036, Officers: Brian J. Brennan, President, Gloria Murphy, Secretary (Qualifying Individuals).

Fredonia, Inc., 531 W. Roosevelt Road, Wheaton, IL 60187, Officer: Peter Terkildsen, President (Qualifying Individual).

Dated: June 20, 2008.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8-14390 Filed 6-24-08; 8:45 am]

BILLING CODE 6730-01-P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise

noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than July 18, 2008.

A. Federal Reserve Bank of Chicago (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. *Pinnacle Capital Corporation*, to become a bank holding company by acquiring 100 percent of the voting shares of Pinnacle Bank, both of Marshalltown, Iowa.

Board of Governors of the Federal Reserve System, June 19, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8-14308 Filed 6-24-08; 8:45 am]

BILLING CODE 6210-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Member Conflict Review and R03 Application Review Meeting, Program Announcement (PA) 07-318

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting.

Time and Date: 8 a.m.-5 p.m., July 17, 2008 (Closed).

Place: Marriott Waterfront Hotel, 700 Aliceanna Street, Baltimore, MD 21202.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92-463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of Member Conflict Review and R03 Application Review Meeting, PA 07-318.

Contact Person for More Information: Stephen Olenchock, PhD, Scientific Review Administrator, Office of Extramural Coordination and Special Projects, National Institute for Occupational Safety and Health, CDC, 1095 Willowdale Road, Morgantown, WV 26505, Telephone (304) 285-6271.

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.

Dated: June 18, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8-14313 Filed 6-24-08; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Application Requirements for the Low Income Home Energy Assistance Program (LIHEAP) Model Plan.

OMB No.: 0970-0075.

Description: States, including the District of Columbia, Tribes, tribal organizations and territories applying for LIHEAP block grant funds must submit an annual application (Model Plan) that meets the LIHEAP statutory and regulatory requirements prior to receiving Federal funds. A detailed application must be submitted every 3 years. Abbreviated applications may be submitted in alternate years. There have been no changes in the Model Plan.

Respondents: State Governments, Tribal Governments, Insular Areas, the District of Columbia, and the Commonwealth of Puerto Rico.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Detailed Model Plan	65	1	1	65
Abbreviated Model Plan	115	1	.33	38
Estimated Total Annual Burden Hours .....	.....	.....	.....	103

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: infocollection@acf.hhs.gov.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office

of Management and Budget, Paperwork Reduction Project, Fax: 202-395-6974, Attn: Desk Officer for the Administration for Children and Families.

Dated: June 18, 2008.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E8-14219 Filed 6-24-08; 8:45 am]

BILLING CODE 4184-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Hispanic Healthy Marriage Initiative Grantee Implementation Evaluation.

OMB No.: New Collection.

Description: The Administration for Children and Families (ACF), in partnership with the Office of the Assistant Secretary for Planning and

Evaluation (ASPE), U.S. Department of Health and Human Services, is proposing an information collection activity as part of the Hispanic Healthy Marriage Initiative (HHMI) Grantee Implementation Evaluation study. The proposed information collection consists of two components: (1) semistructured interviews with key respondents involved with selected marriage education programs serving Hispanic couples and individuals; and (2) focus groups with Hispanic individuals and couples participating in selected marriage education programs or declining to participate in such programs. Through this information collection and other study activities,

ACF and ASPE seek to identify the unique cultural needs of Hispanic couples and families that have implications for the design and delivery of healthy marriage education services to Hispanics, recognizing their diversity with respect to country of origin, language, and level of acculturation, among other factors.

Respondents: Marriage education program directors and managers; staff responsible for outreach, recruitment and intake activities in marriage education programs; marriage education instructors; key persons in partner organizations; and Hispanic individuals and couples.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Program Staff Discussion Guide	81	1	2	162
Partners/Community Leaders Discussion Guide	54	1	2	108
Participant Focus Group Discussion Guide	180	1	1	180

Estimated Total Annual Burden Hours: 450

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. E-mail address: OPREinfocollection@acf.hhs.gov. All requests should be identified by the title of the information collection.

The Department specifically requests comments 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)

the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: June 18, 2008.

Brendan C. Kelly,

OPRE Reports Clearance Officer.

[FR Doc. E8-14220 Filed 6-24-08; 8:45 am]

BILLING CODE 4184-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Project

Title: Evaluation of Pregnancy Prevention Approaches—Phase 1.

OMB No.: New Collection.

Description: The Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing a data collection activity as part of the Evaluation of Pregnancy Prevention Approaches study. This study will assess the effectiveness of a range of programs designed to prevent or reduce sexual risk behavior and pregnancy among older adolescents. Knowing what types of programs are effective will enhance programmatic decisions by policymakers and practitioners.

The proposed activity involves the collection of information from observations of program activities and interviews with a range of experts about various aspects of existing prevention programs and topics the experts view as important to address through evaluation. These data will be used to help enhance decisions about the types of programs to be evaluated in the study.

Respondents: Researchers and policy experts, program directors, program staff, or school administrators.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Estimated annual burden hours
Discussion Guide for Use with Researchers and Policy Experts	100	1	1	100
Discussion Guide for Use with Program Directors	50	1	1	50
Discussion Guide for Use with Program Staff	100	1	1	100
Discussion Guide for Use with School Administrators	50	1	1	50

ANNUAL BURDEN ESTIMATES—Continued

Instrument	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Estimated annual burden hours
Activity Observation Guide	50	1	.75	38

Estimated Total Annual Burden Hours: 338

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above.

Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. E-mail address: OPREinfocollection@acf.hhs.gov. All requests should be identified by the title of the information collection.

The Department specifically requests comments 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) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: June 18, 2008.
Brendan C. Kelly,
OPRE Reports Clearance Officer.
 [FR Doc. E8-14221 Filed 6-24-08; 8:45 am]
BILLING CODE 4184-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Proposed Projects

Title: Evaluation of the Community Healthy Marriage Initiative Implementation Study.
OMB No.: 0970-0283.
Description: The Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is conducting a demonstration and evaluation called the Community Healthy Marriage Initiative (CHMI).

Demonstration programs have been funded through Child Support Enforcement waivers authorized under section 1115 of the Social Security Act to support healthy marriage, improve child well-being and increase the financial security of children. The objective of the evaluation is to: (1) Assess the implementation of community interventions designed to provide marriage education by examining the way the projects operate and by examining child support outcomes among low-income families in the community; and (2) evaluate the community impacts of these interventions on marital stability and satisfaction, child well-being and child

support outcomes among low-income families.

The purpose of this information collection is to continue to collect implementation data under the protocols previously approved by the Office of Management and Budget (OMB), OMB Approval No. 0970-0283. Primary data for the implementation evaluation will come from observations, interviews, focus groups and records. One-on-one and small group interviews with project staff and marriage education service providers in the community will provide a detailed understanding of the administration and operation of the demonstrations. Focus group discussions will provide insights into participants' perspectives on marriage education and their experiences with the CHMI interventions.

In addition to the implementation information collected under this request, an impact evaluation will be integrated with the implementation study and will assess the effects of healthy marriage initiatives by comparing family and child well-being outcomes in the CHMI communities with similar outcomes in comparison communities that are well matched to the project sites. Data from the implementation studies will provide the basis for the instrumental variable models of CHMI impacts to help determine direct or indirect exposure to marriage-related services. Baseline data collected under the impact evaluation has been approved by OMB (See OMB Approval No. 0970-0322).

Respondents: Lead Project Staff, Service Provider Organization Staff, Key Community, Civic Stakeholders, and Program Participants.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Average number of responses per respondents	Average burden hours per response	Total burden hours
Administrative interviews	200	2	1	400
Small group interviews	25	1	1.6	40

Estimated Total Annual Burden Hours: 440

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for

Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington,

DC 20447, Attn: OPRE Reports Clearance Officer. E-mail address: OPREInfoCollection@acf.hhs.gov. All requests should be identified by the title of the information collection.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, FAX: 202-395-6974, Attn: Desk Officer for ACF.

Dated: June 18, 2008.

Brendan C. Kelly,

OPRE Reports Clearance Officer.

[FR Doc. E8-14222 Filed 6-24-08; 8:45 am]

BILLING CODE 4184-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2007-D-0207] (formerly Docket No. 2007D-0202)

Guidance for Industry: Microbiological Considerations for Antimicrobial Food Additive Submissions; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled "Guidance for Industry: Microbiological Considerations for Antimicrobial Food Additive Submissions." The guidance explains FDA's current thinking on a number of microbiological issues unique to the preparation of premarket submissions for antimicrobial food additives.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Office of Food Additive Safety (HFS-200), Center for Food Safety and Applied Nutrition, 5100 Paint Branch Pkwy., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your request, or fax your request to 301-436-2972. Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville,

MD 20852. Submit electronic comments to <http://www.regulations.gov>. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT:

Judith Kidwell, Center for Food Safety and Applied Nutrition (HFS-265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301-436-1071.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 25, 2007 (72 FR 54446), FDA announced the availability of a draft guidance entitled "Guidance for Industry: Microbiological Considerations for Antimicrobial Food Additive Submissions." FDA gave interested parties an opportunity to submit comments on the draft guidance by November 26, 2007. The agency considered the one received comment as it finalized the guidance. The guidance announced in this notice finalizes the draft guidance dated September 2007.

FDA is issuing this guidance document as level 1 guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance document represents FDA's current thinking on a number of microbiological issues unique to the preparation of premarket submissions for antimicrobial food additives. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The collection of information in 21 CFR 70.25, 71.1, 170.35, and 171.1 have been approved under OMB control number 0910-0016; the collection of information in 21 CFR 170.39 has been approved under OMB control number 0910-0298; and the collection of information in 21 CFR 170.101 and 170.106 have been approved under OMB control number 0910-0495.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document.

Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance document and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA through FDMS only.

IV. Electronic Access

Persons with access to the Internet may obtain the guidance at <http://www.cfsan.fda.gov/guidance.html>.

Dated: June 19, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8-14397 Filed 6-24-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of 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 a meeting of the Board of Scientific Counselors, NIEHS.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual other conducted by the National Institute of Environmental Health Sciences, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIEHS.

Date: July 20–22, 2008. July 20, 2008, 7 p.m. to 9:30 p.m.

Agenda: To review and evaluate programmatic and personnel issues.

Place: Doubletree Guest Suites, 2515 Meridian Parkway, Research Triangle Park, NC 27713.

Closed: July 21, 2008, 8:30 a.m. to 9:15 a.m.

Agenda: To review and evaluate programmatic and personnel issues.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Executive Conference Room, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Open: July 21, 2008, 9:15 a.m. to 11:35 a.m.

Agenda: An overview of the organization and research in the Laboratory of Structural Biology.

Place: Nat. Inst. of Environmental Health Sciences, South Campus, Conference Rooms 101A–C, Research Triangle Park, NC 27709.

Closed: July 21, 2008, 11:35 a.m. to 12:25 p.m.

Agenda: To review and evaluate programmatic and personnel issues.

Place: Nat. Inst. of Environmental Health Sciences, South Campus, Conference Rooms 101A–C, Research Triangle Park, NC 27709.

Open: July 21, 2008, 1 p.m. to 1:45 p.m.

Agenda: Poster Session.

Place: Nat. Inst. of Environmental Health Sciences South Campus, Conference Rooms 101A–C Research Triangle Park, NC 27709.

Closed: July 21, 2008, 1:45 p.m. to 5:15 p.m.

Agenda: To review and evaluate programmatic and personnel issues.

Place: Nat. Inst. of Environmental Health Sciences, South Campus, Conference Rooms 101A–C, Research Triangle Park, NC 27709.

Closed: July 21, 2008, 5:15 p.m. to Adjournment.

Agenda: To review and evaluate programmatic and personnel issues.

Place: Doubletree Guest Suites, 2515 Meridian Parkway, Research Triangle Park, NC 27713.

Closed: July 22, 2008, 9 a.m. to 10 a.m.

Agenda: To review and evaluate programmatic and personnel issues.

Place: Nat. Inst. of Environmental Health Sciences, South Campus, Conference Rooms 101A–C, Research Triangle Park, NC 27709.

Contact Person: Perry J. Blackshear, PhD, MD, Acting Scientific Director, Division of Intramural Research, National Inst. of Environmental Health Sciences, National Institutes of Health, PO Box 12233, Research Triangle Park, NC 27709, (919) 541-4899, black009@niehs.nih.gov.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety

Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: June 18, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–14261 Filed 6–24–08; 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(c4) 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: Topics in Development, Aging and Global Health.

Date: July 11, 2008.

Time: 1 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: Sherry L. Dupere, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5136, MSC 7843, Bethesda, MD 20892, (301) 435–1021, duperes@csr.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Skeletal Muscle and Exercise Physiology.

Date: July 16, 2008.

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: John P. Holden, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, 301–496–8551, holdenjo@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Reference Epigenome Mapping and Data Analysis and Coordination Centers.

Date: July 21, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, NW., Zenith, Washington, DC 20037.

Contact Person: Elena Smirnova, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5187, MSC 7840, Bethesda, MD 20892, 301–435–1236, smirnova@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project Grant in Cell Biology.

Date: August 13–14, 2008.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: David Balasundaram, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5189, MSC 7840, Bethesda, MD 20892, 301–435–1022, balasundaramd@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 18, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–14262 Filed 6–24–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. 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 on Aging Special Emphasis Panel; Aging Auditory System.

Date: July 16, 2008.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: William Cruce, PhD, Health Scientist Administrator, Scientific Review Office, National Institute on Aging, National Institutes of Health, Room 20212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301-402-7704, crucew@nia.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: National Institute on Aging Special Emphasis Panel; Proteinopathies in ALS-Dementia.

Date: July 23, 2008.

Time: 1:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: William Cruce, PhD, Health Scientist Administrator, Scientific Review Office, National Institute on Aging, National Institutes of Health, Room 2c212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301-402-7704, crucew@nia.nih.gov.

Name of Committee: National Institute on Aging Special Emphasis Panel; DNA Damage, Repair and Aging.

Date: July 25, 2008.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway, 7201 Wisconsin Avenue, 2C212, Bethesda, MD 20814, (Telephone Conference Call).

Contact Person: Elaine Lewis, PhD, Scientific Review Administrator, Scientific Review Office, National Institute on Aging, Gateway Building, Suite 20212, MSC-9205, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301-402-7707, elainelewis@nia.nih.gov.

Name of Committee: National Institute on Aging Special Emphasis Panel; Aging and Senile Dementia.

Date: August 7, 2008.

Time: 1 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue 2c212, Bethesda, MD 20814, (Telephone Conference Call).

Contact Person: William Cruce, PhD, Health Scientist Administrator, Scientific Review Office, National Institute on Aging,

National Institutes of Health, Room 2c212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301-402-7704, crucew@nia.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: June 18, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8-14264 Filed 6-24-08; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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 on Drug Abuse Special Emphasis Panel; Proteomics Center for HIV/AIDS and Addiction.

Date: July 21-22, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Mark Swieter, PhD, Chief, Training and Special Projects Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6101 Executive Boulevard, Suite 220, Bethesda, MD 20892-8401, (301) 435-1389, ms80x@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: June 18, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8-14277 Filed 6-24-08; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Disorders; 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 purpose of this meeting is to evaluate requests for preclinical development resources for potential new therapeutics for type 1 diabetes. The outcome of the evaluation will be a decision whether NIDDK should support the request and make available contract resources for development of the potential therapeutic to improve the treatment or prevent the development of type 1 diabetes and its complications. The research proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposed research projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Type 1 Diabetes—Rapid Access to Intervention Development Special Emphasis Panel; National Institute of Diabetes and Digestive and Kidney Diseases.

Date: July 2, 2008.

Time: 11 a.m.—12 p.m.

Agenda: To evaluate requests for preclinical development resources for potential new therapeutics for type 1 diabetes and its complications.

Place: 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Dr. Myrlelne Staten, Senior Advisor, Diabetes, Translation Research, Division of Diabetes, Endocrinology and Metabolic Diseases, NIDDK, NIH, 6707 Democracy Boulevard, Bethesda, MD 20892-5460, 301 402-7886.

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. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 98.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: June 18, 2008.

Jennifer Spaeth,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. E8-14278 Filed 6-24-08; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS-2008-0061]

Public Workshop: Implementing Privacy Protections in Government Data Mining

AGENCY: Privacy Office, DHS.

ACTION: Notice announcing public workshop.

SUMMARY: The Department of Homeland Security Privacy Office will host a public workshop, *Implementing Privacy Protections in Government Data Mining*.

DATES: The two-day workshop will be held on July 24, 2008, from 8:30 a.m. to 4:30 p.m., and on July 25th, 2008, from 8:30 a.m. to 12:30 p.m. Written comments should be received on or before July 17, 2008.

ADDRESSES: The workshop will be held in the International Ballroom East, Hilton Washington, 1919 Connecticut Avenue, NW., Washington, DC 20009. Send comments by e-mail to privacyworkshop@dhs.gov, by fax to (703)-235-0442, or by mail to Toby Milgrom Levin, Senior Advisor, Privacy Office, Department of Homeland Security, Washington, DC 20528. All comments must include the words "Data Mining Workshop" and the Docket Number (DHS-2008-0061). To register for the Workshop, please send an e-mail to privacyworkshop@dhs.gov with "Data Mining Workshop Registration" in the subject line, and your name and organizational affiliation in the body of the e-mail. Alternatively, you may call 703-235-0780 to register and provide this information.

FOR FURTHER INFORMATION CONTACT: Toby Milgrom Levin, DHS Privacy Office, Department of Homeland Security, Washington, DC 20528; by telephone 703-235-0780; by facsimile 703-235-0442; or by e-mail at privacyworkshop@dhs.gov.

SUPPLEMENTARY INFORMATION: The Department of Homeland Security (DHS) Privacy Office is holding a public workshop to bring together leading academic, policy, and technology experts to explore methods of validating the accuracy and effectiveness of data mining models and rules, and the role

of anonymization tools and automated audit controls in protecting privacy. The purpose of the workshop is to inform the Privacy Office as it prepares its 2008 report to Congress on DHS data mining activities.¹ The workshop will consist of a series of presentations and panel discussions that include the broad range of stakeholder perspectives. Workshop attendees will have an opportunity to ask questions after each panel.

The workshop is open to the public, and no fee is required for attendance.

Topics for Comment: To develop a comprehensive record regarding privacy protections in government data mining, the DHS Privacy Office also invites interested parties to submit written comments as described below. Comments should be received on or before July 17, 2008, and should be as specific as possible. The Privacy Office is particularly interested in receiving comments on the following topics:

1. How can government data mining activities be carried out in a manner that respects privacy?

2. How do the privacy issues posed by government data mining compare to those posed by other types of data analysis by the government? What are the similarities and differences? Are there privacy issues that are unique to government data mining?

3. What should be the elements of privacy best practices for government data mining? The Privacy Office requests that, where possible, comments include references to literature, technical standards and/or other resources that would support implementation of the best practices identified.

4. What should be the criteria for validating government data mining models and rules?

5. Are anonymization techniques or tools currently available that could be used in conjunction with government data mining? How effective are these techniques or tools? What are their costs and benefits? What degree of de-identification do they make possible?

6. What automated audit controls can be implemented in connection with

¹The Department has submitted three prior reports to the Congress on data mining: The 2008 *Letter Report Pursuant to Section 804 of the Implementing Recommendations of the 9/11 Commission Act of 2007*; the 2007 *Data Mining Report: DHS Privacy Office Response to House Report 109-699* (July 6, 2007) and the *Data Mining Report: DHS Privacy Office Response to House Report 108-774* (July 6, 2006). These reports are available on the DHS Privacy Office Web site at <http://www.dhs.gov/privacy>. The 2008 *Letter Report* provided a preliminary analysis of DHS data mining activities, with the understanding that a comprehensive report would follow. This workshop is intended to provide context for that comprehensive report.

government data mining? How effective are these controls? What are their costs and benefits?

7. Are there protections other than anonymization and automated audit controls that should be considered in connection with government data mining? How effective are any such protections? What are their costs and benefits?

8. Data quality plays an important role in the ability of government data mining techniques to produce accurate results. What data quality standards should DHS adopt for data mining?

9. What redress mechanisms should be implemented to protect privacy and also preserve the integrity and confidentiality of government investigative activities?

Written comments must include the words "Data Mining Workshop" and the Docket Number (DHS-2008-0061), and may be submitted by any one of the following methods:

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

- *E-mail:* privacyworkshop@dhs.gov. Include "Data Mining Workshop Comment" in the subject line of the message.

- *Fax:* 703-235-0442.

- *Mail:* Toby Milgrom Levin, Senior Advisor, Privacy Office, Department of Homeland Security, Washington, DC 20528.

All written comments received will be posted without alteration on the <http://www.dhs.gov/privacy> Web page for this workshop, including any personal contact information provided.

Registration: In order to assist us in planning for the workshop, we ask that attendees register in advance. To register, please send an e-mail to privacyworkshop@dhs.gov with "Data Mining Workshop Registration" in the subject line, and your name and organizational affiliation in the body of the e-mail. Alternatively, you may call 703-235-0780 to register and to provide the DHS Privacy Office with your name and organizational affiliation, if any. The Privacy Office will use this information only for purposes of planning this workshop and to contact you in the event of any logistical changes. An agenda and logistical information will be posted on the workshop Web page shortly before the event. A written transcript will be posted on the Web page following the event.

Special Assistance: Persons with disabilities who require special assistance should indicate this in their registration request and are encouraged

to identify anticipated special needs as early as possible.

Dated: June 20, 2008.

Hugo Teufel III,

Chief Privacy Officer.

[FR Doc. E8-14394 Filed 6-24-08; 8:45 am]

BILLING CODE 4410-10-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2008-0035]

Proposed Expansion of the Cove Point Facility, Cove Point, MD: Final Supplemental Environmental Assessment and Finding of No Significant Impact

AGENCY: Coast Guard, DHS.

ACTION: Notice of Availability of Final Supplemental Environmental Assessment and Finding of No Significant Impact.

SUMMARY: The Coast Guard announces the availability of the Final Supplemental Environmental Assessment (EA) and the Finding of No Significant Impact (FONSI) that evaluated the potential environmental impacts resulting from the proposed issuance of a Letter of Recommendation (LOR) on the suitability of the waterway for the expansion of the Cove Point LNG facility for Dominion Cove Point LNG, LP, in Cove Point, MD.

ADDRESSES: Comments and material received from the public as well as documents mentioned in this notice as being available in the docket, are part of the Coast Guard docket number USCG-2008-0035 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, room PL-401, 400 Seventh Street, SW., between 9 a.m. and 5 p.m., Monday through Friday, except for Federal Holidays. You may also find this docket on the internet at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call Lieutenant Commander Rogers Henderson, Coast Guard, telephone 202-372-1411 or Mr. Ken Smith, Coast Guard, telephone 202-372-1413. If you have any questions on viewing material on the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION: In accordance with the National Environmental Policy Act of 1969 (Section 102(2)(c)), as implemented by the Council of Environmental Quality

regulations (40 CFR parts 1500-1508), the applicant prepared a Final Supplemental EA and the Coast Guard prepared the FONSI for the Proposed Expansion of the Cove Point Facility, Cove Point, MD.

Response to Comments

The Coast Guard requested comments on the Draft Supplemental EA when the Notice of Availability for the Draft Supplemental EA was published on March 13, 2008 (73 FR 13551). The Coast Guard received nine comments on the draft Supplemental EA.

Two commenters agreed with the Coast Guard that the proposed action will not have a significant impact on the State of Maryland's environment or historic properties.

One commenter stated the current security measures for the facility and during tanker loading/unloading operations are insufficient. The Coast Guard disagrees because the facility is regulated under the Maritime Transportation Security Act (MTSA) of 2002 and as a result must comply with a Coast Guard approved Facility Security Plan. Foreign vessels which make LNG deliveries to the terminal must have a valid International Ship Security Certificate on board attesting to the vessel's compliance with the International Convention for Safety of Life at Sea and the Ship and Port Facility Security (ISPS) Code. The ISPS Code is the foreign equivalent to MTSA requirements. In addition, Cove Point has been receiving LNG shipments and operating in compliance with the safety and security provisions and operating restrictions of the Letter of Recommendation (LOR) issued by the Coast Guard to Cove Point in 2002.

One commenter discussed the applicability of the Sandia 2005 risk assessment to the proposed Expansion Project. The Coast Guard disagrees that this is applicable since the Sandia 2005 assessment referenced by the commenter is apparently the Sandia Report SAND2005-7339: "Review of the Independent Risk Assessment of the Proposed Cabrillo Liquefied Natural Gas Deepwater Port project." This report is not applicable to this proposed project because it addresses a deepwater project with a Floating Storage and Regasification Unit (FSRU), and not the waterway for an LNG terminal. Instead, the applicable Sandia report for Cove Point is the 2004 Sandia Report, SAND2004-6258: "Guidance on Risk Analysis and Safety Implications of a Large Liquefied Natural Gas Spill on Water." This report identifies three "Zones of Concerns". The Sandia 2004 report shows the conservative maximum

hazard distance is defined as Zone 3, which would occur in the unlikely event of a LNG vapor cloud release but would only create a hazard within a distance of about 2.2 miles from the point of the release.

One commenter suggested a major LNG spill would affect the cooling towers of the Calvert Cliffs Nuclear Power Plant. The Coast Guard disagrees with this comment since the plant is well outside the furthest potential impact zone, Zone 3, i.e. the distance of 2.2 miles, per the applicable Sandia report.

One commenter stated that the air pollutants from LNG tankers, marine escorts, and traffic specifically related to LNG were not addressed since the Maryland Department of the Environment covers only stationary equipment. The Coast Guard disagrees with this comment. These air pollutants were addressed in the April 2006 FERC FEIS, Appendix H, "General Conformity Determination for the Proposed Cove Point Expansion Project" which the Supplemental EA adopted. The General Conformity Rule, found in 40 CFR Part 51, Subpart W and 40 CFR Part 93, Subpart B, applies to proposed actions in a nonattainment or maintenance area that are not otherwise regulated under the New Source Review (NSR) programs or Operating Permit Program. Consequently, the General Conformity Rule applies to direct emissions, such as construction and vessel activity emissions, which are not long-term stationary source operations. As part of the General Conformity Determination, LNG ships and tugs emissions were estimated based on roundtrip operation in state waters.

One commenter declared that uncontrolled toxic air pollutants from the proposed project are expected to form toxic particulates matter hazardous to human health. The Coast Guard disagrees with this comment. As the Supplemental EA and FONSI discuss, we found that there will be no significant adverse impact from the toxic air pollutants and disagreed that these pollutants are uncontrolled. These pollutants are subject to the U.S. EPA Clean Air Act's National Emission Standards for Hazardous Air Pollutants (HAP). Under the HAP permitting process, it was established the proposed project's total potential HAP emission rate, 11 tons per year (tpy), was well below the threshold for facilities subject to HAP regulations which is 25 tpy.

One commenter expressed concern regarding the volume of ballast water intake from the increase of LNG tankers resulting in an increase of salinity of the Chesapeake Bay. The Coast Guard

disagrees with this comment. The volume of water removed by each LNG ship as a percentage of the total amount of the Bay is negligible and would not increase salinity in the Chesapeake Bay.

One commenter stated the impact of seawater intake for ballast from the increase in LNG tankers did not address the impact to aquatic organisms. The Coast Guard disagrees with this comment. The potential impacts to the aquatic organisms were addressed in Section 7 of the Supplemental EA. The calculated seawater intake on the LNG vessels is 0.6 feet per second. This velocity is similar to the 0.5 feet per second identified by the National Marine Fisheries Service as minimizing entrainment and impingement of aquatic organisms.

Supplemental Environmental Assessment

We prepared a Supplemental EA to identify and examine the reasonable alternatives and assess their potential environmental impacts. The Supplemental EA examined the potential effects associated with the incremental increase in LNG ship traffic within U.S. territorial waters on natural, cultural, and human resources.

Our preferred alternative is to issue a LOR with conditions. This action will assure that the waterway is suitable, safe, and environmentally sound for the increased LNG vessel traffic resulting from the Cove Point Expansion Project. This preferred alternative as well as other alternatives are further described in the supplemental EA.

The Coast Guard determined the Supplemental EA adequately discusses the environmental issues and impacts of the proposed action. It provides sufficient evidence and analysis for determining that an environmental impact statement is not required. Therefore, a Finding of No Significant Impact was issued for the preferred alternative of the proposed action.

Dated: June 17, 2008.

Capt. M.L. Blair,

Acting Director of Commercial Regulations and Standards.

[FR Doc. E8-14288 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-15-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2008-0499]

National Maritime Security Advisory Committee; Meeting

AGENCY: Coast Guard, DHS.

ACTION: Notice of meeting.

SUMMARY: The National Maritime Security Advisory Committee will have a web based meeting to discuss various issues relating to Maritime Security. This meeting will be open to the public.

DATES: The Committee will meet on Tuesday, July 22, 2008 from 2 p.m. until 5 p.m. EST. This meeting may close early if all business is finished. Written material and requests to make oral presentations should reach the Coast Guard on or before Monday, July 11, 2008. Requests to have a copy of your material distributed to each member of the committee or subcommittee should reach the Coast Guard on or before Monday, July 11, 2008.

ADDRESSES: The Committee will meet via a web enabled interactive online format. Send written material and requests to make oral presentations to Ryan Owens, Assistant to Designated Federal Officer of the National Maritime Security Advisory Committee, 2100 2nd Street, SW., Room 5302, Washington, DC 20593. You may also e-mail material to ryan.f.owens@uscg.mil. This notice is available in our online docket, Docket No. USCG-2008-0499, at <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: Ryan F. Owens, Assistant to DFO of the National Maritime Security Advisory Committee at (202) 372-1108 or ryan.f.owens@uscg.mil.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92-463).

Agenda of Meeting

The agenda for the July 22, 2008, Committee meeting is as follows:

- (1) Report and Discussion of the Transportation Worker Identification Credential (TWIC) Working Group.
- (2) Update and Discussion on the Maritime Government Coordination Council and the Maritime Sector Coordination Council.

Procedural

This meeting is open to the public and will be conducted via an online meeting format. If you would like to participate in this meeting, please log onto <https://fedgov.webex.com/fedgov/onstage/g.php?t=a&d=695573884> and follow the online instructions to register for this meeting. Please note that the meeting may close early if all business is finished. At the Chair's discretion, members of the public may make oral presentations during the meeting. If you would like to make an oral presentation at a meeting, please notify the Assistant

to DFO no later than Monday, July 11, 2008. Written material for distribution at a meeting should reach the Coast Guard no later than Monday, July 11, 2008. If you would like a copy of your material distributed to each member of the committee or subcommittee in advance of a meeting, please submit 25 copies to the Assistant to DFO no later than Monday, July 11, 2008.

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, contact the DFO as soon as possible.

Dated: June 18, 2008.

M.P. O'Malley,

Captain, U.S. Coast Guard, Chief, Office of Port and Facility Activities, Designated Federal Official, NMSAC.

[FR Doc. E8-14368 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-15-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA-1761-DR]

Georgia; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Georgia (FEMA-1761-DR), dated May 23, 2008, and related determinations.

EFFECTIVE DATE: June 16, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Georgia 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 23, 2008.

Douglas County for Public Assistance (already designated for Individual Assistance.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling;

97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–14324 Filed 6–24–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1766–DR]

Indiana; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Indiana (FEMA–1766–DR), dated June 8, 2008, and related determinations.

EFFECTIVE DATE: June 14, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Indiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 8, 2008.

Hamilton, Parke, and Putnam Counties for Individual Assistance.

Randolph County for Individual Assistance (already designated for emergency protective measures [Category B], limited to direct Federal assistance, under the Public Assistance program.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to

Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–14331 Filed 6–24–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1766–DR]

Indiana; 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 Indiana (FEMA–1766–DR), dated June 8, 2008, and related determinations.

EFFECTIVE DATE: June 13, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Indiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 8, 2008.

Adams and Knox Counties for Individual Assistance.

Brown, Clay, Daviess, Dearborn, Greene, Henry, Jackson, Jennings, Owen, Rush, Shelby, and Sullivan Counties for Individual Assistance (already designated for emergency protective measures [Category B], limited to direct Federal assistance, under the Public Assistance program.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential

Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–14332 Filed 6–24–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1766–DR]

Indiana; Amendment No. 7 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 Indiana (FEMA–1766–DR), dated June 8, 2008, and related determinations.

EFFECTIVE DATE: June 17, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Indiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 8, 2008.

Gibson and Posey Counties for Individual Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially

Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8-14361 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-10-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA-1766-DR]

Indiana; Amendment No. 6 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 Indiana (FEMA-1766-DR), dated June 8, 2008, and related determinations.

EFFECTIVE DATE: June 16, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Indiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 8, 2008.

Decatur and Wayne Counties for Individual Assistance (already designated for emergency protective measures [Category B], limited to direct Federal assistance, under the Public Assistance program.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially

Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8-14362 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-10-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA-1763-DR]

Iowa; Amendment No. 6 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 Iowa (FEMA-1763-DR), dated May 27, 2008, and related determinations.

EFFECTIVE DATE: June 18, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Iowa is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of May 27, 2008.

Jasper, Mahaska, Mills, and Monona Counties for Individual Assistance.

Chickasaw and Warren Counties for Individual Assistance and Public Assistance.

Crawford County for Individual Assistance (already designated for Public Assistance).

Allamakee, Fayette, Johnson, Jones, and Page Counties for Public Assistance (already designated for Individual Assistance).

Adair, Hancock, Humboldt, Kossuth, Madison, Taylor, and Webster Counties 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; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster

Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8-14318 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-10-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA-1763-DR]

Iowa; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Iowa (FEMA-1763-DR), dated May 27, 2008, and related determinations.

EFFECTIVE DATE: June 13, 2008.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Iowa is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of May 27, 2008.

Benton, Bremer, Fayette, Hardin, Johnson, and Linn Counties for Individual Assistance.

Cerro Gordo, Delaware, and Floyd Counties for Individual Assistance (already designated 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; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially

Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8-14322 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-10-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA-1763-DR]

Iowa; 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 Iowa (FEMA-1763-DR), dated May 27, 2008, and related determinations.

EFFECTIVE DATE: June 15, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Iowa is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of May 27, 2008.

Cedar, Jones, Louisa, Muscatine, Polk, and Winneshiek Counties for Individual Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8-14323 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-10-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA-1763-DR]

Iowa; Amendment No. 2 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 Iowa (FEMA-1763-DR), dated May 27, 2008, and related determinations.

EFFECTIVE DATE: June 13, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Iowa is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of May 27, 2008.

Adams and Page Counties for Individual Assistance.

Marion, Story, Tama, and Union Counties for Individual Assistance and Public Assistance.

Boone, Cerro Gordo, Crawford, Dallas, Dubuque, Floyd, and Franklin Counties 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; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8-14329 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-10-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA-1763-DR]

Iowa; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Iowa (FEMA-1763-DR), dated May 27, 2008, and related determinations.

EFFECTIVE DATE: June 17, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Iowa is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of May 27, 2008.

Allamakee, Des Moines, Fremont, and Harrison Counties for Individual Assistance.

Clayton County for Individual Assistance and Public Assistance.

Adams, Linn, and Winneshiek Counties for Public Assistance (already designated for Individual Assistance).

Grundy, Howard, Iowa, Marshall, Mitchell, Ringgold, Worth, and Wright Counties 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; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8-14358 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-10-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency****[FEMA-1767-DR]****Montana; Major Disaster and Related Determinations****AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Montana (FEMA-1767-DR), dated June 13, 2008, and related determinations.

DATES: *Effective Date:* June 13, 2008.**FOR FURTHER INFORMATION CONTACT:**

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated June 13, 2008, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Montana resulting from a severe winter storm during the period of May 1-2, 2008, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5206 (the Stafford Act). Therefore, I declare that such a major disaster exists in the State of Montana.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, except for any particular projects that are eligible for a higher Federal cost-sharing percentage under the FEMA Public Assistance Pilot Program instituted pursuant to 6 U.S.C. 777. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program also will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Tony Russell, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

The following areas of the State of Montana have been designated as adversely affected by this declared major disaster:

Carter, Custer, Fallon, and Powder River Counties for Public Assistance.

All counties within the State of Montana are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8-14357 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-10-P**DEPARTMENT OF HOMELAND SECURITY****Federal Emergency Management Agency****[FEMA-1768-DR]****Wisconsin; Amendment No. 2 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 Wisconsin (FEMA-1768-DR), dated June 14, 2008, and related determinations.

DATES: *Effective Date:* June 18, 2008.**FOR FURTHER INFORMATION CONTACT:**

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the

State of Wisconsin is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 14, 2008.

Dodge, Green, Washington, Waukesha, and Winnebago Counties for Individual Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8-14316 Filed 6-24-08; 8:45 am]

BILLING CODE 9110-10-P**DEPARTMENT OF HOMELAND SECURITY****Federal Emergency Management Agency****[FEMA-1768-DR]****Wisconsin; Major Disaster and Related Determinations****AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Wisconsin (FEMA-1768-DR), dated June 14, 2008, and related determinations.

EFFECTIVE DATE: June 14, 2008.**FOR FURTHER INFORMATION CONTACT:**

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated June 14, 2008, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Wisconsin

resulting from severe storms, tornadoes, and flooding beginning on June 5, 2008, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such a major disaster exists in the State of Wisconsin.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance in the designated areas and Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation and Other Needs Assistance will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, except for any particular projects that are eligible for a higher Federal cost-sharing percentage under the FEMA Public Assistance Pilot Program instituted pursuant to 6 U.S.C. 777. If Public Assistance is later requested and warranted, Federal funds provided under that program also will be limited to 75 percent of the total eligible costs, except for any particular projects that are eligible for a higher Federal cost-sharing percentage under the FEMA Public Assistance Pilot Program instituted pursuant to 6 U.S.C. 777.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Dolph A. Diemont, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

The following areas of the State of Wisconsin have been designated as adversely affected by this declared major disaster:

Crawford, Columbia, Sauk, Milwaukee, and Vernon Counties for Individual Assistance.

All counties within the State of Wisconsin are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared

Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–14319 Filed 6–24–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1768–DR]

Wisconsin; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Wisconsin (FEMA–1768–DR), dated June 14, 2008, and related determinations.

EFFECTIVE DATE: June 16, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Wisconsin is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 14, 2008.

Racine and Richland Counties for Individual Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared

Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–14359 Filed 6–24–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5195–C–02]

Notice of Funding Opportunity (NOFA) for HOME Investment Partnership Program (HOME)—Competitive Reallocation of CHDO Funds To Provide for Energy Efficient and Environmentally-Friendly Housing for Low-Income Families; Correction

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of funding availability (NOFA), Correction.

SUMMARY: On May 16, 2008, HUD published its NOFA for the Competitive Reallocation of Community Housing Development Organizations (CHDO) Funds to Provide for Energy Efficient and Environmentally-Friendly Housing for Low-Income Families. Today's notice corrects the OMB control number as set out in the May 16, 2008 publication.

DATES: The application deadline date for the Competitive Reallocation of CHDO Funds to Provide for Energy Efficient and Environmentally-Friendly Housing for Low-Income Families NOFA remains as published in the *Federal Register* on May 16, 2008.

FOR FURTHER INFORMATION CONTACT:

Ginger Macomber, Office of Affordable Housing Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7240, Washington, DC 20410–7000; telephone 202–708–2684 (this is not a toll-free number). Persons with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Income Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On May 16, 2008 (73 FR 28664), HUD published its NOFA for the Competitive Reallocation of CHDO Funds to Provide for Energy Efficient and Environmentally-Friendly Housing for Low-Income Families. The NOFA announced the availability of

approximately \$1 million in deobligated HOME CHDO set-aside funds for competitive reallocation in order to expand the supply of energy efficient and environmentally-friendly (Green) housing that is affordable to low-income families, using design and technology models that can be replicated. Today's notice corrects the OMB control number as set out in the May 16, 2008 publication.

Accordingly, HUD is correcting its NOFA for the Competitive Reallocation of CHDO Funds to Provide for Energy Efficient and Environmentally-Friendly Housing for Low-Income Families published on May 16, 2008 (73 FR 28664), as follows:

On page 28665, Section I.H., first column, HUD is amending this paragraph to read as follows:

H. Paperwork Reduction Act Statement. The information collection requirements in this NOFA have been submitted to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2505–0178. Under the Paperwork Reduction Act, a federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Dated: June 18, 2008.

Nelson R. Bregón,

General Deputy Assistant, Secretary for Community Planning and Development.

[FR Doc. E8–14289 Filed 6–24–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES–020–1430–FQ; FLES–016153]

Public Land Order No. 7711; Revocation of the Withdrawal Established by Executive Order Dated December 19, 1883; Florida

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order revokes in its entirety the withdrawal established by an Executive Order as to 667.96 acres of public land withdrawn from surface entry and mining and reserved for use by the United States Coast Guard for lighthouse purposes. The reservation is no longer needed by the United States Coast Guard. This order makes 44.77 acres of the formerly reserved land available for conveyance under the Recreation and Public Purposes Act.

The remaining land was previously conveyed out of Federal ownership.

EFFECTIVE DATE: July 25, 2008.

FOR FURTHER INFORMATION CONTACT: Steven Wells, Bureau of Land Management—Eastern States, 7450 Boston Boulevard, Springfield, Virginia 22153, 703–440–1527.

SUPPLEMENTARY INFORMATION: All of the land, except as described in Paragraph 2, has been conveyed out of Federal ownership. This revocation is for record clearing purposes only for the lands previously conveyed out of Federal ownership.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), *it is ordered* as follows:

1. The withdrawal established by Executive Order dated December 19, 1883, which reserved public land on Sanibel Island, Florida, for lighthouse purposes, *is hereby revoked* in its entirety.

2. The following described land is hereby made available for conveyance under the Recreation and Public Purposes Act, as amended, 43 U.S.C. 869 (2000):

Tallahassee Meridian

T. 46 S., R. 23 E.,

Sec. 21, lots 1 and 4.

The area described contains 44.77 acres in Lee County.

Dated: June 4, 2008.

C. Stephen Allred,

Assistant Secretary—Land and Minerals Management.

[FR Doc. E8–14385 Filed 6–24–08; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–070–1430–FQ; MTM 058317 and MTM 40412]

Public Land Order No. 7712; Modification of Executive Order Dated July 2, 1910 and Secretarial Order Dated May 6, 1910; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order modifies an Executive Order and a Secretarial Order insofar as they affect 20 acres of public lands withdrawn by Power Site Reserve No. 141. This action also notifies the public of a Federal Energy Regulatory Commission determination that opens

10 acres within a Power Project overlapping the Power Site Reserve. The combined actions will open the lands to a land exchange subject to Section 24 of the Federal Power Act.

EFFECTIVE DATE: July 25, 2008.

FOR FURTHER INFORMATION CONTACT: Richard Hotaling, BLM Butte Field Office, 106 North Parkmont, Butte, Montana, 406–533–7600, or Sandra Ward, BLM Montana State Office, 5001 Southgate Drive, Billings, Montana 59101–4669, 406–896–5052.

SUPPLEMENTARY INFORMATION: This action will permit the consummation of a pending land exchange and reserves the power rights to the United States.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), the Act of June 10, 1920, Section 24, as amended, 16 U.S.C. 818 (2000), and pursuant to the determination of the Federal Energy Regulatory Commission in DVMT–251–000, dated May 3, 2007, it is declared and ordered as follows:

1. At 9 a.m. on July 25, 2008, the following described lands, withdrawn by Executive Order dated July 2, 1910, and Secretarial Order dated May 6, 1910, for Power Site Reserve No. 141 and Federal Power Commission Order dated April 23, 1956, for Power Project No. 2188, will be opened to disposal by land exchange, subject to the provisions of Section 24 of the Federal Power Act as specified by the Federal Energy Regulatory Commission in DVMT–251–000, and subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law:

Principal Meridian, Montana

T. 11 N., R. 2 W.,

Sec. 17, lots 3 and 4.

The areas described aggregate approximately 20 acres in Lewis and Clark County.

2. The State of Montana waived its preference right for public highway rights-of-way or material sites as provided by the Act of June 19, 1920, Section 24, as amended, 16 U.S.C. 818 (2000).

Authority: 43 CFR 2320.

Dated: June 4, 2008.

C. Stephen Allred,

Assistant Secretary—Land and Minerals Management.

[FR Doc. E8–14382 Filed 6–24–08; 8:45 am]

BILLING CODE 4310–SS–P

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 7, 2008. 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 10, 2008.

J. Paul Loether,

*Chief, National Register of Historic Places/
National Historic Landmarks Program.*

FLORIDA**Bay County**

Christo, A.A. Payne-John, Sr., House,
940 West Beach Dr., Panama City,
08000671

ILLINOIS**Lake County**

Libertyville High School Brainerd
Building, 416 W. Park Ave.,
Libertyville, 08000678

IOWA**Marion County**

Ten Hagen Cottage—Stegman Store,
1110 W. Washington St., Pella,
08000685

Van Maren, Henry and Johanna,
House—Diamond Filling Station, 615
Main St., Pella, 08000683

Polk County

Des Moines Western Railway Freight
House, (Advent & Development of
Railroads in Iowa MPS) 625 E. Court
Ave., Des Moines, 08000682

Story County

Sigma Sigma-Delta Chi Fraternity
House, 405 Hayward Ave., Ames,
08000684

KANSAS**Harvey County**

McKinley Residential Historic District,
Roughly E. 5th St., SE 3rd St., Allison
St., Walnut St., Newton, 08000670

Shawnee County

Constitution Hall—Topeka, 429 S.
Kansas Ave., Topeka, 08000669

Wilson County

Brown Hotel (Boundary Increase), 519–
523 Main St., Neodesha, 08000690

MAINE**Oxford County**

Rivercroft Farm, 55, 59 and 60 River St.,
Fryeburg, 08000668

Penobscot County

Cliffwood Hall, 15 Rebel Hill Rd.,
Clifton, 08000666
Harold Allan Schoolhouse, 15 Rebel
Hill Rd., Clifton, 08000667

MISSISSIPPI**Forrest County**

Eaton Elementary School, 1105 McInnis
Ave., Hattiesburg, 08000676

MISSISSIPPI**Hinds County**

Mississippi Foundry and Machine
Company Building, 300 W. South St.,
Jackson, 08000674

Marion County

Broad Street—Church Street Historic
District, Roughly bounded by High
School St. on the W. and Pine Ave. on
the E. along Sumrall Ave. along Broad
St., Columbia, 08000672

Oktibbeha County

Greensboro Street Historic District
(Boundary Increase), Earnest Jones Jr.
Dr., Greensboro St., Louisville St.,
Main St. W., Raymond St., Yeates St.,
Starkville, 08000673

Panola County

Como Commercial Historic District,
(Johnson, Andrew, Architecture in
North Mississippi TR) Roughly
bounded by Elder Frank Ward St. on
the W. and N. Main St on the E. On
the N. bounded by Church Ave.,
Como, 08000675

MISSOURI**Cape Girardeau County**

Schultz, Louis J., School, 101 S. Pacific
St., Cape Girardeau, 08000663

Jasper County

Joplin Downtown Historic District,
(Historic Resources of Joplin,

Missouri) S. Main St., roughly
between E. 4th and E. 6th Sts., Joplin,
08000661

Saline County

Arrow Rock Ferry, (Santa Fe Trail MPS)
Address Restricted, Arrow Rock,
08000664
St. Louis Independent city Pendennis
Club Apartment Building, 3737
Washington Ave., St. Louis, 08000665

NORTH DAKOTA**Ramsey County**

Methodist Episcopal Church, 601 5th St.
NE., Devils Lake, 08000680
Westminster Presbyterian Church, 501
5th St. NE., Devils Lake, 08000679

Rolette County

Coghlan Castle, Lot 2, SW 1/4 of the NW
1/4 T163N R69W Section 19, St. John,
08000681

TENNESSEE**Davidson County**

Centennial Park, W. End Ave. jct 25th
Ave. N., Nashville, 08000689

Knox County

North Hills Historic District, (Knoxville
and Knox County MPS) Roughly
bounded by North Hills Blvd., North
Park Blvd., Fountain Park Blvd.,
Knoxville, 08000677

Madison County

Temple B'Nai Israel, 401 W. Grand St.,
Jackson, 08000687

Polk County

Copperhill Historic District (Boundary
Increase), (Tennessee Copper Basin
MPS) Roughly bounded by Depaul St.,
Depot St., and Main St., Copperhill,
08000688

VERMONT**Bennington County**

Johnny Seesaw's Historic District, 3574
VT 11, Peru, 08000686

WISCONSIN**Sawyer County**

Kinnamon School Building, 8493N Co.
Rd. E, Hayward, 08000660
Request for REMOVAL has been made
for the following resources:

MISSISSIPPI**Amite County**

Talbert-Cassels House, Off MS 574,
Gloster, 84002125

Hancock County

Glen Oak—Kimbrough House, (Bay St.
Louis MRA) 806 N. Beach Blvd., Bay
St. Louis, 86003271

Taylor House, (Bay St. Louis MRA) 808
N. Beach Blvd., Bay St. Louis,
86003273
Taylor School, (Bay St. Louis MRA) 116
Leonard St. Bay St. Louis, 87000209
Onward Oaks, (Bay St. Louis MRA) 972
South Beach Blvd., Bay St. Louis,
96001265

Harrison County

Brielmaier House, (Biloxi MRA) 710
Beach Blvd., Biloxi, 84002170
Fisherman's Cottage, (Biloxi MRA) 138
Lameuse St., Biloxi, 84002182
Gillis House, 590 Beach Blvd., Biloxi,
78001599
Hewes, Finley B., House, 604 E. Beach
Blvd., Gulfport, 02000852
House at 771 West Water Street, (Biloxi
MRA) 771 W. Water S., Biloxi,
84002191
Milner House, 720 E. Beach Blvd.,
Gulfport, 72000692
Reed, Pleasant House, 928 Elmer St.,
Biloxi, 79001308
Toledano-Philbrick-Tullis House, 947 E.
Beach Blvd., Biloxi, 76001095

Jackson County

Clark, Clare T., House, (Pascagoula
MPS) 1709 Beach Blvd., Pascagoula,
91001785
Cottage by the Sea Tavern, (Pascagoula
MPS) 1205 Beach Blvd., Pascagoula,
91001789
Farnsworth, R.A., Summer Home,
(Pascagoula MPS) 901 Beach Blvd.,
Pascagoula, 91001790
Halstead Place, (Ocean Springs MRA) E.
Beach Dr., Ocean Springs, 87000594
Hull, Edgar W., House, (Pascagoula
MPS) 2903 Beach Blvd., Pascagoula,
91001797
Kinne, Georgia P., House, (Pascagoula
MPS) 1101 Beach Blvd., Pascagoula,
91001798

Lauderdale County

Meridian Baptist Seminary, 16th St. and
31st Ave. Meridian, 79001326
[FR Doc. E8-14297 Filed 6-24-08; 8:45 am]
BILLING CODE 4310-70-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029-0054 and 1029- 0083

AGENCY: Office of Surface Mining
Reclamation and Enforcement.

ACTION: Notice and request for
comments.

SUMMARY: In compliance with the
Paperwork Reduction Act of 1995, the

Office of Surface Mining Reclamation
and Enforcement (OSM) is announcing
that the information collection requests
for 30 CFR 872, Abandoned mine
reclamation funds; and 30 CFR part 955
and the Form OSM-74, Certification of
Blasters in Federal program States and
on Indian lands have been forwarded to
the Office of Management and Budget
(OMB) for review and reauthorization.
The information collection packages
were previously approved and assigned
clearance numbers 1029-0054 for 30
CFR 872, and 1029-0083 for 30 CFR 955
and the OSM-74 form. This notice
describes the nature of the information
collection activities and the expected
burdens and costs.

DATES: OMB has up to 60 days to
approve or disapprove the information
collection but may respond after 30
days. Therefore, public comments
should be submitted to OMB by July 25,
2008, in order to be assured of
consideration.

ADDRESSES: Submit comments to the
Office of Information and Regulatory
Affairs, Office of Management and
Budget, Attention: Department of
Interior Desk Officer, by telefax at (202)
395-6566 or via e-mail to
OIRA_Docket@omb.eop.gov. Also,
please send a copy of your comments to
John A. Trelease, Office of Surface
Mining Reclamation and Enforcement,
1951 Constitution Ave., NW., Room
202-SIB, Washington, DC 20240, or
electronically to *jtrelease@osmre.gov*.

FOR FURTHER INFORMATION CONTACT: To
request a copy of the information
collection requests, explanatory
information and related forms, contact
John A. Trelease at (202) 208-2783, or
electronically to *jtrelease@osmre.gov*.
SUPPLEMENTARY INFORMATION: The Office
of Management and Budget (OMB)
regulations at 5 CFR 1320, which
implement provisions of the Paperwork
Reduction Act of 1995 (Pub. L. 104-13),
require that interested members of the
public and affected agencies have an
opportunity to comment on information
collection and recordkeeping activities
[see 5 CFR 1320.8(d)]. OSM has
submitted requests to OMB to renew its
approval for the collections of
information for 30 CFR 872, Abandoned
mine reclamation funds; and 30 CFR
955 and the Form OSM-74, Certification
of Blasters in Federal program States
and on Indian lands. OSM is requesting
a 3-year term of approval for these
information collection activities.

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

numbers for these collections of
information are listed in 30 CFR 872.10,
which is 1029-0054; and on the form
OSM-74 and in 30 CFR 955.10, which
is 1029 0083.

As required under 5 CFR 1320.8(d),
Federal Register notices soliciting
comments on these collections of
information were published on March
19, 2008 (73 FR 14838), for 30 CFR 872,
and on March 31, 2008 (73 FR 16908),
for the form OSM-74 and 30 CFR 955.
No comments were received from either
notice. This notice provides the public
with an additional 30 days in which to
comment on the following information
collection activities:

Title: 30 CFR Part 872—Abandoned
mine reclamation funds.

OMB Control Number: 1029-0054.

Summary: 30 CFR part 872 establishes
a procedure whereby States and Indian
tribes submit written statements
announcing the State/Tribe's decision
not to submit reclamation plans, and
therefore, will not be granted AML
funds.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: State and
Tribal abandoned mine land
reclamation agencies.

Total Annual Responses: 1.

Total Annual Burden Hours: 1.

Title: 30 CFR Part 955 and Form
OSM-74—Certification of blasters in
Federal program States and on Indian
lands.

OMB Control Number: 1029-0083.

Summary: This information is being
collected to ensure that the applicants
for blaster certification are qualified.
This information, with blasting tests,
will be used to determine the eligibility
of the applicant. The affected public
will be blasters who want to be certified
by the Office of Surface Mining
Reclamation and Enforcement to
conduct blasting on Indian lands or in
Federal primacy States.

Bureau Form Number: OSM-74.

Frequency of Collection: On occasion.

Description of Respondents:

Individuals intent on being certified as
blasters in Federal program States and
on Indian lands.

Total Annual Responses: 8.

Total Annual Burden Hours: 18.

Total Annual Non-Wage Burden Cost:
\$549.

Send comments on the need for the
collection of information for the
performance of the functions of the
agency; the accuracy of the agency's
burden estimates; ways to enhance the
quality, utility and clarity of the
information collection; and ways to
minimize the information collection

burden on respondents, such as use of automated means of collection of the information, to the addresses listed under **ADDRESSES**. Please refer to the appropriate OMB control number in all correspondence, 1029-0054 for 30 CFR part 872 and 1029-0083 for 30 CFR part 955 and the OSM-74 form.

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.

Dated: June 5, 2008.

John R. Craynon,

Chief, Division of Regulatory Support.

[FR Doc. E8-14212 Filed 6-24-08; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. National Association of Realtors®; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the Northern District of Illinois in *United States of America v. National Association of Realtors®*, No. 05-C-5140. On September 8, 2005, the United States filed a Complaint alleging that the National Association of Realtors® (“NAR”) violated section 1 of the Sherman Act, 15 U.S.C. 1, by adopting policies that suppress competition from real estate brokers who use password-protected “virtual office Web sites” or “VOWs” to deliver high-quality brokerage services to their customers. The proposed Final Judgment, filed on May 27, 2008, requires NAR to repeal the challenged policies and to adopt new rules that do not discriminate against brokers who use VOWs.

Copies of the Amended Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 5th Street, NW., Room 1010, Washington, DC 20530 (telephone: 202

514-2481), on the Department of Justice’s Web site at <http://www.usdoj.gov/atr>, and at the Office of the Clerk of the United States District Court for the Northern District of Illinois. Copies of these materials may be obtained from the Antitrust I Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be addressed to John R. Read, Chief, Litigation III section, Antitrust Division, U.S. Department of Justice, 450 5th Street, NW., Suite 4000, Washington, DC 20530, (202) 307-0468.

J. Robert Kramer II,

Director of Operations, Antitrust Division.

United States District Court for the Northern District of Illinois Eastern Division

United States of America, Department of Justice, Antitrust Division, 325 7th Street, NW., Suite 300, Washington, DC 20530.
Plaintiff,

v.

National Association of Realtors, 430 North Michigan Ave., Chicago, IL 60611,
Defendant.

Civil Action No. 05C-5140,
Judge Filip,
Magistrate Judge Denlow,
Filed: October 4, 2005.

Amended Complaint

The United States of America, by its attorneys acting under the direction of the Attorney General, brings this civil action pursuant to section 4 of the Sherman Act, as amended, 15 U.S.C. 4, to obtain equitable and other relief to prevent and restrain violations of section 1 of the Sherman Act, as amended, 15 U.S.C. 1. The United States alleges:

1. The United States brings this action to enjoin the defendant a national association of real estate brokers—from maintaining or enforcing policies that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers, and from adopting other related anticompetitive rules.

2. The brokers against whom the policies discriminate operate secure, password-protected Internet sites that enable the brokers’ customers to search for and receive real estate listings over the Internet. These Web sites thus replace or augment the traditional practice by which the broker conducts a search of properties for sale and then provides information to the customer by hand, mail, fax, or e-mail. Since these Web sites were first developed in the late 1990s, brokers’ use of the Internet in connection with their delivery of brokerage services has become an important competitive alternative to traditional “brick-and-mortar” business models.

3. Defendant’s members include traditional brokers who are concerned about

competition from Internet-savvy brokers. Before defendant adopted its policies, several of its members voiced opposition to brokers’ delivery of listings to customers through their Web sites—sites that defendant referred to as “virtual office Web sites,” or “VOWs.” The head of the working group created by defendant to develop regulations for VOWs argued that defendant should act quickly in adopting regulations for the use of these Web sites because brokers operating VOWs were “scooping up market share just below the radar.” The chairman of the board of RE/MAX, the nation’s second-largest real estate franchisor, publicly expressed his concern that these Internet sites would inevitably place downward pressure on brokers’ commission rates. One broker complained that because of the lower cost structure of brokers who provide listings to their customers over the Internet, “they are able to kick-back 1% of the sales price to the buyer.” And defendant, the nation’s largest real estate franchisor and owner of the nation’s largest real estate brokerage, asserted in a widely circulated white paper that it was “not feasible” for even the largest traditional brokers to compete with large Internet companies that operated or affiliated with brokers operating VOWs.

4. In response to such concerns, defendant, through its members, adopted a policy (the “Initial VOW Policy”) limiting this new competition. The Initial VOW Policy has been implemented in many markets. After plaintiff informed NAR of its intention to bring this action, NAR announced that it had modified this policy (the “Modified VOW Policy”). Plaintiff challenges both policies in this action as part of a single, ongoing contract, combination, or conspiracy.

5. These policies significantly alter the governing multiple listing services (“MLSs”). MLSs collect detailed information about nearly all properties for sale through brokers and are indispensable tools for brokers serving buyers and sellers in each MLS’s market area. Defendant’s local Realtor associations (“member boards”) control a majority of the MLSs in the United States.

6. Defendant’s VOW Policies permit brokers to withhold their clients’ listings from VOW operators by means of an “opt-out” right. In essence, the policies allow traditional brokers to block the customers of web-based competitors from using the Internet to review the same set of MLS listings that the traditional brokers provide to their customers.

7. The working group that formulated defendant’s Initial VOW Policy understood that the opt-out right was fundamentally anticompetitive and harmful to consumers. Two members of the working group wrote that the opt-out right would be “abused beyond belief” as traditional brokers selectively withhold listings from particular VOW-based competitors. The chairman of the working group admitted that the opt-out right was likely to be exercised by brokers notwithstanding the fact that “it may not be in the seller[’]s best interest to opt out.” But he took comfort in the fact that the rule did not require brokers to disclose to clients that their listings would be withheld from some prospective purchasers as a result of the

brokers' opt-out decision, thus providing brokers "flexibility without conversation."

8. Defendant's VOW Policies restrict the manner in which brokers with efficient, Internet-based business models may provide listings to their customers, and impose additional restrictions on brokers operating VOWs that do not apply to their traditional competitors. Defendant thus denies brokers using new technologies and business models the same benefits of MLS membership available to their competitor brokers, and it suppresses technological innovation, discourages competition on price and quality, and raises barriers to entry. Defendant—an association of competitors—has agreed to policies that suppress new competition and harm consumers.

Jurisdiction and Venue

9. This Complaint is filed under section 4 of the Sherman Act, as amended, 15 U.S.C. 4, to prevent and restrain violations by defendant of section 1 of the Sherman Act, 15 U.S.C. 1. This Court has subject matter jurisdiction over this action under 28 U.S.C. 1331, 1337(a), and 1345.

10. Venue is proper in this district under 28 U.S.C. 1391(b) because defendant maintains its principal place of business in Chicago, Illinois, and is found here.

Defendant

11. Defendant National Association of Realtors ("NAR") is a trade association organized under the laws of Illinois with its principal place of business in Chicago, Illinois. NAR establishes and enforces policies and professional standards for its over one million individual member brokers and their affiliated agents and sales associates ("Realtors"), and 1,600 local and state member boards. NAR's member brokers compete with one another in local brokerage services markets to represent consumers in connection with real estate transactions.

Concerted Action

12. Various others, not named as defendants, have contracted, combined, or conspired with NAR in the violations alleged in this Complaint and have performed acts and made statements in furtherance thereof.

Trade and Commerce

13. NAR's policies govern the conduct of its members in all fifty states, including all Realtors and all of NAR's member boards. NAR's member boards control approximately eighty percent of the approximately 1,000 MLSs in the United States.

14. NAR's activities, and the violations alleged in this Complaint, affect home buyers and sellers located throughout the United States.

15. NAR, through its members, is engaged in interstate commerce and is engaged in activity affecting interstate commerce.

Relevant Markets

16. The provision of real estate brokerage services to sellers of residential real property and the provision of real estate brokerage services to buyers of residential real property are relevant service markets.

17. The real estate brokerage business is local in nature. Most sellers prefer to work

with a broker who is familiar with local market conditions and who maintains an office or affiliated sales associates within a reasonable distance of the seller's property. Likewise, most buyers seek to purchase property in a particular city, community, or neighborhood, and typically prefer to work with a broker who has knowledge of the area in which they have an interest. The geographic coverage of the MLS serving each town, city, or metropolitan area normally establishes the outermost boundaries of each relevant geographic market, although meaningful competition among brokers may occur in narrower local areas.

Background of the Offense

18. At any one time there are over 1.5 million homes for sale in the United States. Most home sellers and buyers engage residential real estate brokers to facilitate transactions.

19. The predominant form of payment for brokerage services is a "commission," a percentage of the price paid for the property. In a typical transaction, the seller agrees to pay a commission to the broker who has contracted with the seller to market the home (the "listing broker"). If the listing broker finds the buyer, the listing broker keeps the full commission. Frequently, however, a second broker (the "cooperating broker") finds the buyer, and the two brokers share the commission.

20. After a listing broker has established an agency relationship with a seller, the broker typically submits detailed information regarding the seller's property to a local NAR-affiliated MLS. Along with the information about the property it submits to the MLS, the listing broker also typically includes an offer to split the commission with any cooperating broker.

Multiple Listing Services

21. MLSs are joint ventures among competing brokers to share their clients' listings and to cooperate in other ways. MLSs list virtually all homes for sale through a broker in the areas they serve. In a substantial majority of markets, a single MLS provides the only available comprehensive compilation of listings. The MLS allows brokers representing sellers to effectively market the sellers' properties to all other broker participants in the MLS and their buyer customers. Conversely, the MLS allows brokers to provide their buyer customers information about all listed properties in which the customers might have an interest.

22. NAR promulgates rules governing the conduct of MLSs and requires its member boards to adopt these rules.

23. The vast majority of brokers believes that they must participate in the MLS operating in their local market in order to adequately serve their customers and compete with other brokers. As a result, few brokers would withdraw from MLS participation even if the fees or other costs associated with that participation substantially increased.

24. By virtue of industry-wide participation and control over a critically important input, the MLS (a joint venture of competing brokers) has market power in almost every relevant market.

25. The methods of making MLS information available to customers have changed as technology has evolved. From the 1920s, when MLSs first became prevalent, brokers allowed customers to view a printed "MLS book." Later, the availability of copy machines allowed brokers to reproduce pages from the MLS book and deliver the pages with responsive listings to customers by hand or mail. The advent of facsimile transmission—and, later, electronic mail—further quickened the process of delivering MLS listings to customers.

Virtual Office Web Sites

26. With the development of the Internet as an information source for consumers, potential home buyers began to seek Internet sources of information about homes for sale. Beginning in the late 1990s, a number of NAR member brokers began creating password-protected Web sites that enabled potential home buyers, once they had registered as customers of the broker and agreed to certain restrictions on their use of the data, to search the MLS database themselves and to obtain responsive MLS listings over the Internet. These Web sites came to be known as virtual office Web sites or VOWs. NAR recognizes the Internet delivery of MLS listings to customers to be an authorized method of providing brokerage services.

27. Brokers can use the Internet to operate more efficiently than they can by using only traditional methods. By transferring search functions from the broker to customers who prefer such control over the process, VOW-operating brokers allow customers to educate themselves at their own pace about the market in which they are considering a purchase. By doing so, brokers with successful password-protected Web sites are able to reduce or eliminate the time and expense involved in identifying and providing relevant listings and otherwise educating their customers. These brokers also spend less time on home tours with their buyer customers, as these buyers frequently tour fewer homes before making a purchase decision than typical buyers. With lower cost structures, brokers with Internet-intensive business models have offered discounted commissions to sellers or commission rebates to buyers.

28. Other sources of listing information on the Internet are inferior to the password-protected VOWs because they do not and cannot guarantee access to all information available in the MLS.

29. Brokers can also use the Internet to support a "referral" business model. Referral services provide brokers information about potential buyers in return for a share of any commission the broker receives if the "lead" results in a completed transaction. Brokers are not obliged to purchase leads from referral services and do so only when they choose to. Some traditional brokers refer customers to other brokers for a fee, and some VOW operators, similarly, have referred (or have considered referring) some of their customers to other brokers for a fee. Many brokers dislike the concept of paying for leads, and the prospect that Internet-savvy brokers could support referral business

models has been a source of industry antipathy to VOWs.

Nature of the Offense

30. Brokers with innovative, Internet-based business models present a competitive challenge to brokers who provide listings to their customers only by traditional methods. Many brick-and-mortar brokers fear the ability of VOW operators to use Internet technology to attract more customers and provide better service at a lower cost.

31. In response to concerns raised by certain NAR members about this new form of competition, NAR's Board of Directors voted on May 17, 2003, to adopt the "Initial VOW Policy," a "Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants ('Virtual Office Web sites')." Prior to the filing of the Complaint in this action, NAR had mandated that all 1,600 of its member boards implement the Initial VOW Policy by January 1, 2006. Approximately 200 member boards implemented the Initial VOW Policy and received NAR's approval of their implementing rules.

32. Section 1.3 of the Initial VOW Policy contains an opt-out provision that forbids any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker. Specifically, the opt-out provision allows brokers to direct that their clients' listings not be displayed on any VOW (a "blanket opt-out"), or on a particular competing broker's VOW (a "selective opt-out").

33. In contrast, prior to NAR's adoption of the Initial VOW Policy, a broker could provide any relevant listing in the MLS database to any customer—by whatever method the customer or broker preferred, including via the Internet. Nearly all of NAR's member boards had also adopted rules requiring all participants in their affiliated MLSs to submit, with minor exceptions, all of their clients' listings to the MLS. More importantly, NAR did not permit any broker to withhold his or her clients' listings from a rival.

34. In several of the markets in which NAR's member boards have implemented the Initial VOW Policy, brokers have already exercised their opt-out rights to withhold their clients' listings from the customers of brokers operating VOWs, as well as from brokers who will use password-protected Web sites to provide listings to their customers in the future. In at least one such instance, an innovative broker discontinued operation of his Web site because all of his competitor brokers had opted out, making him unable to effectively serve his customers through operation of his site.

35. Section II.4.g of the Initial VOW Policy contains an "anti-referral" provision that, with minor exceptions, forbids VOW operators from referring their customers to "any other entity" for a fee. In contrast, no NAR rule limits referrals for a fee by brokers who do not convey MLS listings to customers over the Internet.

36. The Initial VOW Policy includes other provisions that impose greater restrictions and limitations on brokers with Internet-

based business models than on traditional brokers. For example, under section IV.I.b of the Initial VOW Policy, NAR's member boards may forbid VOW operators from displaying advertising on any Web site on which MLS listings information is displayed. In contrast, no NAR rule limits the ability of traditional brokers to include advertisements in packages of printed listings they provide to their customers.

37. The Initial VOW Policy also contains provisions to make it obligatory and enforceable. Section I.4 of the Initial VOW Policy expressly forbids NAR's member boards from adopting rules "more or less restrictive than, or otherwise inconsistent with" the Initial VOW Policy, including the opt-out provisions and the anti-referral provision. Appendix A to the Initial VOW Policy provides for remedies and sanctions for violation of the Policy, including financial penalties and termination of MLS privileges.

38. On September 8, 2005, after plaintiff informed NAR of its intention to bring this action, NAR advised its member boards to suspend application and enforcement of the above-referenced provisions of the Initial VOW Policy, and announced its adoption of a new "Internet Listings Display Policy" and its revision of an MLS membership policy (together, the "Modified VOW Policy"). NAR's Modified VOW Policy continues to impede brokers from using the Internet to serve home sellers and buyers more efficiently and cost effectively. NAR's Modified VOW Policy mandates that all of NAR's member boards enact rules implementing the Internet Listings Display Policy by July 1, 2006, but NAR subsequently communicated to its member boards that they "wait to adopt" the policy "until th[is] litigation is over."

39. Section 1.3 of the Modified VOW Policy contains a blanket opt-out provision that forbids any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker. Specifically, the opt-out provision allows brokers to direct that their clients' listings not be displayed on any competitor's Internet site. When exercised, this provision prevents a broker from providing over the Internet the same MLS information that brick-and-mortar brokers can provide in their offices. Additionally, NAR's Modified VOW Policy specifically exempts its own "Official Site," Realtor.com, from the blanket opt-out that applies to all Internet sites operated by brokers.

40. The portion of the Modified VOW Policy that is NAR's revision to its membership policies—much like the Initial VOW Policy's anti-referral rule—denies MLS membership and access to listings to brokers operating referral services. This membership policy effectively forbids Internet-based brokers from referring their customers to other brokers for a fee.

41. NAR's Modified VOW Policy includes other provisions that restrict brokers' ability to use the Internet to serve their customers effectively. The Modified VOW Policy, for example, allows MLSs to downgrade the quality of the data feed they provide brokers,

effectively restraining brokers from providing innovative, Internet-based features to enhance the service they offer their customers. The Modified VOW Policy also permits MLSs to interfere with efficient "cobranding" relationships between brokers and entities that refer potential customers to the broker.

42. Defendant's policies, both the Initial VOW Policy and the Modified VOW Policy, thus prevent brokers from guaranteeing customers access through the Internet to all relevant listing information, increase the business risk and other costs associated with operating an efficient, Internet-intensive brokerage, deny brokers a source of high-quality referrals, and withhold from Internet brokers revenue streams permitted to other participants in the MLS. Moreover, the opt-out provisions provide brokers an effective tool to individually or collectively punish aggressive competition by any Internet-based broker.

43. Unless permanently restrained and enjoined, defendant will continue to engage in conduct that restricts competition from innovative brokers in violation of section 1 of the Sherman Act, 15 U.S.C. 1.

Violation Alleged

44. NAR's adoption of the above-referenced provisions in its Initial VOW Policy and its Modified VOW Policy, or equivalent provisions, constitutes a contract, combination, or conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States in violation of section 1 of the Sherman Act, 15 U.S.C. 1.

45. The aforesaid contract, combination, or conspiracy has had and will continue to have anticompetitive effects in the relevant markets, including:

- a. Suppressing technological innovation;
- b. Reducing competition on price and quality;
- c. Restricting efficient cooperation among brokers;
- d. Making express or tacit collusion more likely; and
- e. Raising barriers to entry.

46. This contract, combination, or conspiracy is not reasonably necessary to accomplish any procompetitive objective, or, alternatively, its scope is broader than necessary to accomplish any such objective.

Request for Relief

Wherefore, the United States prays that final judgment be entered against defendant declaring, ordering, and adjudging:

a. That the aforesaid contract, combination, or conspiracy unreasonably restrains trade and is illegal under section 1 of the Sherman Act, 15 U.S.C. 1;

b. That the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules implementing the opt-out provisions;

c. That the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules implementing the anti-referral provision or an MLS

membership restriction that denies MLS access to operators of Internet-based referral services;

d. That the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules that restrict—or condition MLS access or MLS participation rights on—the method by which a broker interacts with his or her customers, competitor brokers, or other persons or entities;

e. That the Court grant such other relief as the United States may request and the Court deems just and proper; and

f. That the United States recover its costs in this action.

Dated: October 4, 2005.

J. Bruce McDonald,
Deputy Assistant Attorney General.

J. Robert Kramer II,
Director of Operations.

Patrick J. Fitzgerald,
United States Attorney, Northern District of Illinois, by Linda Wawzenski, Assistant United States Attorney.

Craig W. Conrath,
David C. Kully,
Mary Beth Mcgee,
Allen P. Grunes,
Lisa A. Scanlon,
Attorneys for the United States, Department of Justice, Antitrust Division, 325 Seventh Street, NW., Suite 300, Washington, DC 20530, Telephone: (202) 305-9969, Facsimile: (202) 307-9952.

Certificate of Service

I hereby certify that on this 4th day of October, 2005, I have caused a copy of the foregoing Amended Complaint be served by Federal Express upon counsel for Defendant in this matter:

Jack R. Bierig, Sidley Austin Brown & Wood, LLP, Bank One Plaza, 10 South Dearborn Street, Chicago, IL 60603.

Linda Wawzenski.

United States District Court for the Northern District of Illinois Eastern Division

United States of America, Plaintiff, v.
National Association of Realtors®,
Defendant.

Civil Action No. 05 C 5140,
Judge Kennelly,
Magistrate Judge Denlow.

[Proposed] Final Judgment

Whereas, Plaintiff, the United States of America, filed its Amended Complaint on October 4, 2005, alleging that Defendant National Association of Realtors® (“NAR”) adopted policies that restrain competition from innovative real estate brokers in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Plaintiff and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact, and without this Final Judgment constituting any evidence against, or any admission by, any party regarding any issue of fact or law;

Whereas, Defendant has not admitted and does not admit either the allegations set forth

in the Amended Complaint or any liability or wrongdoing;

Whereas, the United States does not allege that Defendant’s Internet Data Exchange (IDX) Policy in its current form violates the antitrust laws; and

Whereas, the United States requires Defendant to agree to certain procedures and prohibitions for the purpose of preventing the loss of competition alleged in the Complaint;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact, and upon consent of the parties, it is *Ordered, Adjudged and Decreed:*

I. Jurisdiction

This Court has jurisdiction over the Parties and subject matter of this action. The Complaint states a claim upon which relief may be granted against Defendant under section 1 of the Sherman Act, as amended (15 U.S.C. 1).

II. Definitions

As used in this Final Judgment:

A. “Broker” means a Person licensed by a state to provide services to a buyer or seller in connection with a real estate transaction. The term includes any Person who possesses a Broker’s license and any agent or sales associate who is affiliated with such a Broker.

B. “Customer” means a seller client of a Broker or a Person who has expressed to a Broker an interest in purchasing residential real property and who has described the type, features, or location of the property in which he or she has an interest, entitling the Broker to Provide the Customer multiple listing service (“MLS”) listing information by any method (e.g., by hand, mail, facsimile, electronic mail, or display on a VOW).

C. “Final Judgment” includes the Modified VOW Policy attached as Exhibit A and the definition of MLS Participant and accompanying Note attached as Exhibit B.

D. “ILD Policy” means the “ILD (Internet Listing Display) Policy” that NAR adopted on or about August 31, 2005, and any amendments thereto.

E. “Including” means including, but not limited to.

F. “Listing Information” means all records of residential properties (and any information relating to those properties) stored or maintained by a multiple listing service.

G. “Member Board” means any state or local Board of Realtors® or Association of Realtors®, including any city, county, inter-county, or inter-state Board or Association, and any multiple listing service owned by, or affiliated with, any such Board of Realtors® or Association of Realtors®.

H. “Modified VOW Policy” means the policy attached to this Final Judgment as Exhibit A.

I. “NAR” means the National Association of Realtors®, its predecessors, successors, divisions, subsidiaries, affiliates, partnerships, and joint ventures and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person in which there is or has been partial (twenty percent or more) or total

ownership or control between NAR and any other Person.

J. “Person” means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

K. “Provide” means to deliver, display, disseminate, convey, or reproduce.

L. “Rule” means any rule, model rule, ethical rule, bylaw, policy, standard, or guideline and any interpretation of any Rule issued or approved by NAR, whether or not the final implementation date of any such Rule has passed.

M. “VOW” or “virtual office Web site” means a Web site, or feature of a Web site, operated by a Broker or for a Broker by another Person through which the Broker is capable of providing real estate brokerage services to consumers with whom the Broker has first established a Broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search MLS data, subject to the Broker’s oversight, supervision, and accountability.

N. “VOW Policy” means the “Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants (‘Virtual Office Web sites’),” adopted by NAR on or about May 17, 2003, and any amendments thereto.

O. The terms “and” and “or” have both conjunctive and disjunctive meanings.

III. Applicability

This Final Judgment applies to NAR and all other Persons in active concert or participation with NAR who have received actual notice of this Final Judgment. A Member Board shall not be deemed to be in active concert with NAR solely as a consequence of the Member Board’s receipt of actual notice of this Final Judgment and its affiliation with or membership in NAR and its involvement in regular activities associated with its affiliation with or membership in NAR (e.g., coverage under a NAR insurance policy, attendance at NAR meetings or conventions, or review of Member Board policies by NAR).

IV. Prohibited Conduct

Subject to the provisions of sections V and VI of this Final Judgment, the Modified VOW Policy (Exhibit A), and the definition of MLS Participant and accompanying Note (Exhibit B), NAR shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly

A. Prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

B. Unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW to Provide to Customers all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

C. Prohibits, restricts, or impedes the referral of Customers whose identities are obtained from a VOW by a Broker who uses a VOW to any other Person, or establishes the price of any such referral;

D. Imposes fees or costs upon any Broker who operates a VOW or upon any Person who operates a VOW for any Broker that exceed the reasonably estimated actual costs incurred by a Member Board in providing Listing Information to the Broker or Person operating the VOW or in performing any other activities relating to the VOW, or discriminates in such VOW related fees or costs between those imposed upon a Broker who operates a VOW and those imposed upon a Person who operates a VOW for a Broker, unless the MLS incurs greater costs in providing a service to a Person who operates a VOW for a Broker than it incurs in providing the same service to the Broker; or

E. Is inconsistent with the Modified VOW Policy.

V. Required Conduct

A. Within five business days after entry of this Final Judgment, NAR shall repeal the ILD Policy and direct each Member Board that adopted Rules implementing the ILD Policy to repeal such Rules at the next meeting of the Member Board's decisionmaking body that occurs more than ten days after receipt of the directive, but no later than ninety days after entry of this Final Judgment.

B. Within five business days after entry of this Final Judgment, NAR shall direct Member Boards that adopted Rules implementing the VOW Policy to repeal such Rules at the next meeting of the Member Board's decisionmaking body that occurs more than ten days after receipt of the directive, but no later than ninety days after entry of this Final Judgment.

C. Within five business days after entry of this Final Judgment, NAR shall adopt the Modified VOW Policy. NAR shall not change the Modified VOW Policy without either obtaining advance written approval by the United States Department of Justice, Antitrust Division ("DOJ") or an order of the Court pursuant to Section VIII of this Final Judgment authorizing the proposed modification.

D. Within five business days after entry of this Final Judgment, NAR shall direct Member Boards to adopt the Modified VOW Policy within ninety days after entry of this Final Judgment, and to thereafter maintain, act consistently with, and enforce Rules implementing the modified VOW Policy. NAR shall simultaneously direct Member Boards, beginning upon receipt of the directive, not to adopt, maintain, or enforce any Rule or practice that NAR would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment (including Rules or practices that unreasonably discriminate against Brokers in their operation of VOWs).

E. If NAR determines that a Member Board has not timely adopted or maintained, acted consistently with, or enforced Rules implementing the Modified VOW Policy, it shall, within thirty days of such

determination, direct in writing that the Member Board do so. NAR shall deny coverage under any NAR insurance policy (or cause coverage to be denied) to any Member Board for as long as that Member Board refuses to adopt, maintain, act consistently with, and enforce rules implementing the Modified VOW Policy. NAR shall also notify the DOJ of the identity of that Member Board and the Modified VOW Policy provisions it refused to adopt, maintain, act consistently with, or enforce. For purposes of this provision, a failure of a Member Board to adopt, maintain, act consistently with, or enforce Rules implementing the Modified VOW Policy within ninety days of a written directive to that Member Board from NAR shall constitute a refusal by the Member Board to do so.

F. If NAR determines that a Member Board has adopted, maintained, or enforced any Rule or practice that NAR would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment (including Rules or practices that unreasonably discriminate against Brokers in their operation of VOWs), it shall, within thirty days of such determination, direct in writing that the Member Board rescind and cease to enforce that Rule or practice. NAR shall deny coverage under any NAR insurance policy (or cause coverage to be denied) to any Member Board for as long as that Member Board refuses to rescind and cease to enforce that Rule or practice. NAR shall also notify the DOJ of the identity of that Member Board and the Rule or practice it refused to rescind and cease to enforce. For purposes of this provision, a Member board's failure to rescind and cease to enforce the Rule or practice within ninety days of a written directive from NAR shall constitute a refusal by the Member board to do so.

G. Within thirty days of entry of this Final Judgment, NAR shall designate an Antitrust Compliance Officer with responsibility for educating Member Boards about the antitrust laws and for achieving full compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

(1) Supervising NAR's review of Rules of NAR's Member Boards for compliance with this Final Judgment and the Modified VOW Policy;

(2) Maintaining copies of any communications with any Person containing allegations of any Member Board's (i) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment or (ii) failure to enforce any Rules implementing the Modified VOW Policy;

(3) Reporting to the United States 180 days after entry of this Final Judgment and again on the first anniversary of the entry of this Final Judgment, the identity of each Member Board that has not adopted Rules implementing the Modified VOW Policy;

(4) Ensuring that each of NAR's Member Boards that owns or operates a multiple listing service are provided briefing materials, within ninety days of the entry of this Final Judgment, on the meaning and requirements of the Modified VOW Policy and this Final Judgment; and

(5) Holding an annual program for NAR Member Boards and their counsel that

includes a discussion of the antitrust laws (as applied to such Member Boards) and this Final Judgment.

H. NAR shall maintain and shall furnish to the DOJ on a quarterly basis (beginning ninety days after entry of this Final Judgment) copies of any communications with any Person containing allegations of any Member's Board's (1) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment or (2) failure to enforce any Rules implementing the Modified VOW Policy.

I. Within five business days after entry of this Final Judgment, NAR shall provide, in a prominent size and location on its Web site (<http://www.realtor.org>) a hyperlink to a Web page on which NAR has published copies of

(1) This Final Judgment;

(2) A notification that Member Boards must repeal any Rules implementing the ILD and VOW Policies (in accordance with Sections V.A and V.B of this Final Judgment); and

(3) A copy of the Modified VOW Policy.

NAR shall also publish each of the three above items in the first issue of Realtor® Magazine scheduled for publication after the date of entry of this Final Judgment.

VI. Permitted Conduct

A. Subject to section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting and maintaining the definition of MLS Participant and the accompanying Note, together attached as Exhibit B. However, NAR shall direct each Member Board not to suspend or expel any Broker from multiple listing service membership or participation for reasons of the Broker's then-failure to qualify for membership or participation under the definition of MLS Participant and the accompanying Note, together attached as Exhibit B, until May 27, 2009.

B. Notwithstanding any of the above provisions, and subject to section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting, maintaining, or enforcing Rules that are generally applicable on their face and that do not, in their application, unreasonably restrict any method of delivery of Listing Information to Customers.

VII. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the DOJ, including consultants and other Persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to NAR, be permitted:

(1) Access during NAR's office hours to inspect and copy, or at the option of the United States, to require NAR to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of NAR, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, NAR's officers, employees, or agents, who may have their individual counsel and counsel for NAR present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by NAR. NAR may, however, prevent the interviewee from divulging matters protected by the attorney-client privilege, work product doctrine, or other applicable privilege.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, NAR shall submit written reports or response to written interrogatories, under oath if requested, relating to its compliance with any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any Person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by NAR to the United States, NAR marks as confidential any pertinent page of such material on the grounds that such page contains information as to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, then the United States shall give NAR ten calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. No Limitation on Government Rights

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards.

X. Expiration of Final Judgment

This Final Judgment shall expire ten years from the date of its entry.

XI. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the

Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

Matthew F. Kennelly,
United States District Judge.

Exhibit A

Policy Governing Use of MLS Data in Connection With Internet Brokerage Services Offered by MLS Participants ("Virtual Office Web sites")

I. Definitions and Scope of Policy

1. For purposes of this Policy, the term Virtual Office Website ("VOW") refers to a Participant's Internet Web site, or a feature of a Participant's Internet Web site, through which the Participant is capable of providing real estate brokerage services to consumers with whom the Participant has first established a broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search MLS data, subject to the Participant's oversight, supervision, and accountability.

a. A Participant may designate an Affiliated VOW Partner ("AVP") to operate a VOW on behalf of the Participant, subject to the Participant's supervision and accountability and the terms of this Policy.

b. A non-principal broker or sales licensee, affiliated with a Participant, may, with the Participant's consent, operate a VOW or have a VOW operated on its behalf by an AVP. Such a VOW is subject to the Participant's supervision and accountability and the terms of this Policy.

c. Each use of the term "Participant" in this Policy shall also include a Participant's non-principal brokers and sales licensees (with the exception of references in this section to the "Participant's consent" and the "Participant's supervision and accountability," and in section III.10.a, below, to the "Participant acknowledges"). Each reference to "VOW" or "VOWs" herein refers to all VOWs, whether operated by a Participant, by a non-principal broker or sales licensee, or by an AVP.

2. The right to display listings in response to consumer searches is limited to display of MLS data supplied by the MLS(s) in which the Participant has participatory rights. This does not preclude a firm with offices participating in different MLSs from operating a master Web site with links to such offices' VOWs.

3. Participants' Internet Web sites, including those operated for Participants by AVPs, may also provide other features, information, or services in addition to VOWs (including the Internet Data Exchange ("IDX") function).

4. The display of listing information on a VOW does not require separate permission from the Participant whose listings will be available on the VOW.

5. Except as permitted in sections III and IV, MLSs may not adopt rules or regulations that conflict with this Policy or that otherwise restrict the operation of VOWs by Participants.

II. Policies Applicable to Participants' VOWs

1. A Participant may provide brokerage services via a VOW that include making MLS active listing data available, but only to consumers with whom the Participant has first established a lawful consumer-broker relationship, including completion of all actions required by state law in connection with providing real estate brokerage services to clients and customers (hereinafter "Registrants"). Such actions shall include, but are not limited to, satisfying all applicable agency, non-agency, and other disclosure obligations, and execution of any required agreement(s).

2. A Participant's VOW must obtain the identity of each Registrant and obtain each Registrant's agreement to Terms of Use of the VOW, as follows:

a. A Registrant must provide his or her name and a valid e-mail address. The Participant must send an e-mail to the address provided by the Registrant confirming that the Registrant has agreed to the Terms of Use (described in subsection c below). The Registrant may be permitted to access the VOW only after the Participant has verified that the e-mail address provided is valid and that Registrant received the Terms of Use confirmation.

b. The Registrant must supply a user name and a password, the combination of which must be different from those of all other Registrants on the VOW, before being permitted to search and retrieve information from the MLS database via the VOW. The user name and password may be established by the Registrant or may be supplied by the Participant, at the option of the Participant. An e-mail address may be associated with only one user name and password. The Registrant's password and access must expire on a date certain but may be renewed. The Participant must at all times maintain a record of the name and e-mail address supplied by the Registrant, and the user name and current password of each Registrant. Such records must be kept for not less than 180 days after the expiration of the validity of the Registrant's password. If the MLS has reason to believe that a Participant's VOW has caused or permitted a breach in the security of the data or a violation of MLS rules related to use by one or more Registrants, the Participant shall, upon request, provide to the MLS a copy of the record of the name, e-mail address, user name, current password, and audit trail, if required, of any Registrant identified by the MLS to be suspected of involvement in the violation.

c. The Registrant must be required affirmatively to express agreement to a "Terms of Use" provision that requires the Registrant to open and review an agreement that provides at least the following:

i. That the Registrant acknowledges entering into a lawful consumer-broker relationship with the Participant;

ii. That all data obtained from the VOW is intended only for the Registrant's personal, non-commercial use;

iii. That the Registrant has a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through the VOW;

iv. That the Registrant will not copy, redistribute, or retransmit any of the data or information provided;

v. That the Registrant acknowledges the MLS's ownership of, and the validity of the MLS's copyright in, the MLS database.

After the Registrant has opened for viewing the Terms of Use agreement, a "mouse click" is sufficient to acknowledge agreement to those terms. The Terms of Use Agreement may not impose a financial obligation on the Registrant or create any representation agreement between the Registrant and the Participant.

The Terms of Use agreement shall also expressly authorize the MLS, and other MLS Participants or their duly authorized representatives, to access the VOW for the purposes of verifying compliance with MLS rules and monitoring display of Participants' listings by the VOW.

d. An agreement entered into at any time between the Participant and Registrant imposing a financial obligation on the Registrant or creating representation of the Registrant by the Participant must be established separately from the Terms of Use, must be prominently labeled as such, and may not be accepted solely by mouse click.

3. A Participant's VOW must prominently display an e-mail address, telephone number, or specific identification of another mode of communication (e.g., live chat) by which a consumer can contact the Participant to ask questions, or get more information, about properties displayed on the VOW. The Participant, or a non-principal broker or sales licensee licensed with the Participant, must be willing and able to respond knowledgeably to inquiries from Registrants about properties within the market area served by that Participant and displayed on the VOW.

4. A Participant's VOW must protect the MLS data from misappropriation by employing reasonable efforts to monitor for and prevent "scraping" or other unauthorized accessing, reproduction, or use of the MLS database.

5. A Participant's VOW must comply with the following additional requirements:

a. No VOW shall display listings or property addresses of sellers who have affirmatively directed their listing brokers to withhold their listing or property address from display on the Internet. The listing broker or agent shall communicate to the MLS that a seller has elected not to permit display of the listing or property address on the Internet. Notwithstanding the foregoing, a Participant who operates a VOW may provide to consumers via other delivery mechanisms, such as e-mail, fax, or otherwise, the listings of sellers who have determined not to have the listing for their property displayed on the Internet.

b. A Participant who lists a property for a seller who has elected not to have the property listing or the property address displayed on the Internet shall cause the seller to execute a document that conforms to the form attached to this Policy as Appendix A. The Participant shall retain such forms for at least one year from the date they are signed.

c. With respect to any VOW that

(i) Allows third-parties to write comments or reviews about particular listings or displays a hyperlink to such comments or reviews in immediate conjunction with particular listings, or

(ii) Displays an automated estimate of the market value of the listing (or hyperlink to such estimate) in immediate conjunction with the listing, the VOW shall disable or discontinue either or both of those features as to the seller's listing at the request of the seller. The listing broker or agent shall communicate to the MLS that the seller has elected to have one or both of these features disabled or discontinued on all Participants' Web sites. Except for the foregoing and subject to subparagraph (d), a Participant's VOW may communicate the Participant's professional judgment concerning any listing. Nothing shall prevent a VOW from notifying its customers that a particular feature has been disabled "at the request of the seller."

d. A VOW shall maintain a means (e.g., e-mail address, telephone number) to receive comments about the accuracy of any data or information that is added by or on behalf of the VOW operator beyond that supplied by the MLS and that relates to a specific property displayed on the VOW. The VOW operator shall correct or remove any false data or information relating to a specific property upon receipt of a communication from the listing broker or listing agent for that property explaining why the data or information is false. However, the VOW operator shall not be obligated to remove or correct any data or information that simply reflects good faith opinion, advice, or professional judgment.

e. Each VOW shall refresh MLS data available on the VOW not less frequently than every 3 days.

f. Except as provided elsewhere in this Policy or in MLS rules and regulations, no portion of the MLS database may be distributed, provided, or made accessible to any person or entity.

g. Every VOW must display a privacy Policy that informs Registrants of the ways in which information obtained from them will be used.

h. A VOW may exclude listings from display based only on objective criteria, including, but not limited to, factors such as geography, list price, type of property, cooperative compensation offered by listing broker, or whether the listing broker is a Realtor®.

6. A Participant who intends to operate a VOW must notify the MLS of its intention to establish a VOW and must make the VOW readily accessible to the MLS and to all MLS Participants for purposes of verifying compliance with this Policy and any other applicable MLS rules or policies.

7. A Participant may operate more than one VOW itself or through an AVP. A Participant who operates a VOW itself shall not be precluded from also operating VOWs in conjunction with AVPs.

III. Policies Applicable to Multiple Listing Services

1. A Multiple Listing Service shall permit MLS Participants to operate VOWs, or to have VOWs operated for them by AVPs,

subject to the requirements of state law and this Policy.

2. An MLS shall, if requested by a Participant, provide basic "downloading" of all MLS non-confidential listing data, including without limitation address fields, listings types, photographs, and links to virtual tours. Confidential data includes only that which Participants are prohibited from providing to customers orally and by all other delivery mechanisms. They include fields containing the information described in paragraph IV(1) of this Policy, provided that sold data (i.e., listing information relating to properties that have sold) shall be deemed confidential and withheld from a download only if the actual sales prices of completed transactions are not accessible from public records. For purposes of this Policy, "downloading" means electronic transmission of data from MLS servers to a Participant's or AVP's server on a persistent basis. An MLS may also offer a transient download. In such case, it shall also, if requested, provide a persistent download, provided that it may impose on users of such download the approximate additional costs incurred by it to do so.

3. This Policy does not require an MLS to establish publicly accessible sites displaying Participants' listings.

4. If an MLS provides a VOW-specific feed, that feed must include all of the non-confidential data included in the feed described in paragraph 2 above except for listings or property addresses of sellers who have elected not to have their listings or addresses displayed on the Internet.

5. An MLS may pass on to those Participants who will download listing information the reasonably estimated costs incurred by the MLS in adding or enhancing its "downloading" capacity to enable such Participants to operate VOWs.

6. An MLS may require that Participants (1) utilize appropriate security protection, such as firewalls, as long as such requirement does not impose security obligations greater than those employed concurrently by the MLS, and/or (2) maintain an audit trail of Registrants' activity on the VOW and make that information available to the MLS if the MLS has reason to believe that any VOW has caused or permitted a breach in the security of the data or a violation of applicable MLS rules.

7. An MLS may not prohibit or regulate display of advertising or the identification of entities on VOWs ("branding" or "co-branding"), except to prohibit deceptive or misleading advertising or co-branding. For purposes of this provision, co-branding will be presumed not to be deceptive or misleading if the Participant's logo and contact information (or that of at least one Participant, in the case of a VOW established and operated by or for more than one Participant) is displayed in immediate conjunction with that of every other party, and the logo and contact information of all Participants displayed on the VOW is as large as the logo of the AVP and larger than that of any third party.

8. Except as provided in this Policy, an MLS may not prohibit Participants from enhancing their VOWs by providing

information obtained from sources other than the MLS, additional technological services (such as mapping functionality), or information derived from non-confidential MLS data (such as an estimated monthly payment derived from the listed price), or regulate the use or display of such information or technological services on any VOW.

9. Except as provided in generally applicable rules or policies (such as the Realtor® Code of Ethics), an MLS may not restrict the format of data display on a VOW or regulate the appearance of VOWs.

10. Subject to the provisions below, an MLS shall make MLS listing data available to an AVP for the exclusive purpose of operating a VOW on behalf of a Participant. An MLS shall make MLS listing data available to an AVP under the same terms and conditions as those applicable to Participants. No AVP has independent participation rights in the MLS by virtue of its right to receive data on behalf of a Participant, or the right to use MLS data except in connection with operation of a VOW for a Participant. AVP access to MLS data is derivative of the rights of the Participant on whose behalf the AVP is downloading data.

a. A Participant, non-principal broker or sales licensee, or AVP may establish the AVP's right to receive and use MLS data by providing to the MLS a writing in which the Participant acknowledges its or its non-principal broker's or sales licensee's selection of the AVP to operate a VOW on its behalf.

b. An MLS may not charge an AVP, or a Participant on whose behalf an AVP operates a VOW, more than a Participant that chooses to operate a VOW itself (including any fees or costs associated with a license to receive MLS data, as described in (g), below), except to the extent that the MLS incurs greater costs in providing listing data to the AVP than the MLS incurs in providing listing data to a Participant.

c. An MLS may not place data security requirements or restrictions on use of MLS listing data by an AVP that are not also imposed on Participants.

d. An MLS must permit an AVP to download listing information in the same manner (e.g., via a RETS feed or via an FTP download), at the same times and with the same frequency that the MLS permits Participants to download listing information.

e. An MLS may not refuse to deal directly with an AVP in order to resolve technical problems with the data feed. However, the MLS may require that the Participant on whose behalf the AVP is operating the VOW participate in such communications if the MLS reasonably believes that the involvement of the Participant would be helpful in order to resolve the problem.

f. An MLS may not condition an AVP's access to a data feed on the financial terms on which the AVP provides the site for the Participant.

g. An MLS may require Participants and AVPs to execute license or similar agreements sufficient to ensure that Participants and AVPs understand and agree that data provided by the MLS may be used only to establish and operate a VOW on

behalf of the Participant and not for any other purpose.

h. An MLS may not (i) prohibit an AVP from operating VOWs on behalf of more than One Participant, and several Participants may designate an AVP to operate a single VOW for them collectively, (ii) limit the number of entities that Participants may designate as AVPs for purposes of operating VOWs, or (iii) prohibit Participants from designating particular entities as AVPs except that, if an AVP's access has been suspended or terminated by an MLS, that MLS may prevent an entity from being designated an AVP by another Participant during the period of the AVP's suspension or termination.

i. Except as stated below, an MLS may not suspend or terminate an AVP's access to data (a) for reasons other than those that would allow an MLS to suspend or terminate a Participant's access to data, or (b) without giving the AVP and the associated Participant(s) prior notice and the process set forth in the applicable provisions of the MLS rules for suspension or termination of a Participant's access. Notwithstanding the foregoing, an MLS may immediately terminate an AVP's access to data (a) if the AVP is no longer designated to provide VOW services to any Participant, (b) if the Participant for whom the AVP operates a VOW ceases to maintain its status with the MLS, (c) if the AVP has downloaded data in a manner not authorized for Participants and that hinders the ability of Participants to download data, or (d) if the associated Participant or AVP has failed to make required payments to the MLS in accordance with the MLS's generally applicable payment policies and practices.

11. An MLS may not prohibit, restrict, or impede a Participant from referring Registrants to any person or from obtaining a fee for such referral.

IV. Requirements That MLSs May Impose on the Operation of VOWs and Participants

1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants' use of MLS listing data in providing brokerage services via all other delivery mechanisms:

a. A Participant's VOW may not make available for search by or display to Registrants the following data intended exclusively for other MLS Participants and their affiliated licensees:

i. Expired, withdrawn, or pending listings.

ii. Sold data unless the actual sales price of completed transactions is accessible from public records.

iii. The compensation offered to other MLS Participants.

iv. The type of listing agreement, i.e., exclusive right to sell or exclusive agency.

v. The seller(s) and occupant(s) name(s), phone number(s) and e-mail address(es), where available.

vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.

b. The content of MLS data that is displayed on a VOW may not be changed

from the content as it is provided in the MLS. MLS data may be augmented with additional data or information not otherwise prohibited from display as long as the source of such other data or information is clearly identified. This requirement does not restrict the format of MLS data display on VOWs or display of fewer than all of the listings or fewer authorized data fields.

c. There shall be a notice on all MLS data displayed indicating that the data is deemed reliable but is not guaranteed accurate by the MLS. A Participant's VOW may also include other appropriate disclaimers necessary to protect the Participant and/or the MLS from liability.

d. Any listing displayed on a VOW shall identify the name of the listing firm in a readily visible color, and reasonably prominent location, and in typeface not smaller than the median typeface used in the display of listing data.

e. The number of current or, if permitted, sold listings that Registrants may view, retrieve, or download on or from a VOW in response to an inquiry may be limited to a reasonable number. Such number shall be determined by the MLS, but in no event may the limit be fewer than 100 listings or 5% of the listings in the MLS, whichever is less.

f. Any listing displayed on a VOW shall identify the name of the listing agent.

2. An MLS may also impose the following other requirements on the operation of VOWs:

a. Participants displaying other brokers' listings obtained from other sources, e.g., other MLSs, non-participating brokers, etc. shall display the source from which each such listing was obtained.

b. A maximum period, no shorter than 90 days and determined by the MLS, during which Registrants' passwords are valid, after which such passwords must be changed or reconfirmed.

3. An MLS may not prohibit Participants from downloading and displaying or framing listings obtained from other sources, e.g., other MLSs or from brokers not participating in that MLS, etc., but may require either that (i) such information be searched separately from listings obtained from other sources, including other MLSs, or (ii) if such other sources are searched in conjunction with searches of the listings available on the VOW, require that any display of listings from other sources identify such other source.

Effective Date

MLSs have until not later than [90 DAYS AFTER ENTRY OF THE FINAL JUDGMENT] to adopt rules implementing the foregoing policies and to comply with the provisions of section III above, and (2) Participants shall have until not later than 180 days following adoption and implementation of rules by an MLS in which they participate to cause their VOW to comply with such rules.

See Appendix A for Seller Opt-Out Form.

Appendix A. Seller Opt-Out Form

1. [Check one]

a. [Check here] I have advised my broker or sales agent that I do not want the listed property to be displayed on the Internet; or

b. [Check here] I have advised my broker or sales agent that I do not want the address

of the listed property to be displayed on the Internet.

2. I understand and acknowledge that, if I have selected option a, consumers who conduct searches for listings on the Internet will not see information about the listed property in response to their search. initials of seller

Exhibit B

(Statement of MLS Policy)

Statement 7.9. Definition of MIS "Participant"

The term "Participant" in a Board Multiple Listing Service is defined, as follows:

"Where the term REALTOR® is used in this explanation of policy in connection with the word 'Member' or the word 'Participant', it shall be construed to mean the REALTOR® principal or principals, of this or any other Board, or a firm comprised of REALTOR® principals participating in a Multiple Listing Service owned and operated by the Board. Participatory rights shall be held by an individual principal broker unless determined by the Board or MLS to be held by a firm. It shall not be construed to include individuals other than a principal or principals who are REALTOR® Members of this or any other Board, or who are legally entitled to participate without Board membership. However, under no circumstances is any individual or firm, regardless of membership status, entitled to MLS 'Membership' or 'Participation' unless they hold a current, valid real estate broker's license and are capable of offering and accepting offers or accept cooperation and compensation to and from other Participants or are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property. Use of information developed by or published by a Board Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey 'Participation' or 'Membership' or any right of access to information developed by or published by a Board Multiple Listing Service where access to such information is prohibited by law. Additionally, the foregoing does not prohibit Board Multiple Listing Services, at their discretion, from categorizing non-principal brokers, sales licensees, licensed and certified appraisers and others affiliated with the MLS 'Members' or 'Participants' as 'users' or 'subscribers' and, holding such individuals personally subject to the rules and regulations and any other governing provisions of the MLS and to discipline for violations thereof. MLSs may, as a matter of local determination, limit participatory rights to individual principal brokers, or to their firms, and to licensed or certified appraisers, who maintain an office or Internet presence from which they are available to represent real estate sellers, buyers, lessors or lessees or from which they provide appraisal services. (Amended 5/02)

"Where the terms 'subscriber' or 'user' are used in connection with a Multiple Listing Service owned or operated by a Board of REALTOR®, they refer to non-principal

brokers, sales licensees, and licensed and certified real estate appraisers affiliated with an MLS Participant and may, as a matter of local option, also include a Participant's affiliated unlicensed administrative and clerical staff, personal assistants, and individuals seeking licensure or certification as real estate appraisers provided that any such individual is under the direct supervision of an MLS Participant or the Participant's licensed designee. If such access is available to unlicensed or uncertified individuals, their access is subject to the rules and regulations, the payment of applicable fees and charges (if any), and the limitations and restrictions of state law. None of the foregoing shall diminish the Participant's ultimate responsibility for ensuring compliance with the rules and regulations of the MLS by all individuals affiliated with the Participant. (Adopted 4/92)

"Under the 'Board of Choice' policy, MLS participatory rights shall be available to any REALTOR® (principal) or any firm comprised of REALTORS® (principals) irrespective of where they hold primary membership subject only to their agreement to abide by any MLS rules or regulations; agreement to arbitrate disputes with other Participants; and payment of any MLS dues, fees, and charges." Participatory rights granted under Board of Choice do not confer voting privileges or eligibility for office as an MLS committee member, officer, or director, except as granted at the discretion of the local Board and/or MLS. (Amended 5/97)

The universal access to services component of Board of Choice is to be interpreted as requiring that MLS Participatory rights be available to REALTOR® principals, or to firms comprised of REALTOR® principals, irrespective of where primary or secondary membership is held. This does not preclude an MLS from assessing REALTORS® not holding primary or secondary membership locally fees, dues, or charges that exceed those or, alternatively, that are less than those charged Participants holding such memberships locally or additional fees to offset actual expenses incurred in providing MLS services such as courier charges, long distance phone charges, etc., or for charging any Participant specific fees for optional additional services. (Amended 11/96)

None of the foregoing shall be construed as requiring a Board to grant MLS participatory rights, under Board of Choice, where such rights have been previously terminated by action of that Board's Board of Directors." (Adopted 11/95) (Model MLS rules)

Section 3—Participation: Any REALTOR® of this or any other Board who is a principal, partner, corporate officer, or branch office manager acting on behalf of a principal, without further qualification, except as otherwise stipulated in these bylaws, shall be eligible to participate in Multiple Listing upon agreeing in writing to conform to the rules and regulations thereof and to pay the costs incidental thereto.* However, under no circumstances is any individual or firm, regardless of membership status, entitled to Multiple Listing Service "membership" or

"participation" unless they hold a current, valid real estate broker's license and are capable of offering and accepting offers or accept compensation to and from other Participants or are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property.** Use of information developed by or published by a Board Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey "participation" or "membership" or any right of access to information developed by or published by a Board Multiple Listing Service where access to such information is prohibited by law. (Amended 11/96)

Note: Mere possession of a broker's license is not sufficient to qualify for MLS participation. Rather, the requirement that an individual or firm 'offers or accepts cooperation and compensation' means that the Participant actively endeavors during the operation of its real estate business to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS. "Actively" means on a continual and on-going basis during the operation of the Participant's real estate business. The "actively" requirement is not intended to preclude MLS participation by a Participant or potential Participant that operates a real estate business on a part time, seasonal, or similarly time-limited basis or that has its business interrupted by periods of relative inactivity occasioned by market conditions. Similarly, the requirement is not intended to deny MLS participation to a Participant or potential Participant who has not achieved a minimum number of transactions despite good faith efforts. Nor is it intended to permit an MLS to deny participation based on the level of service provided by the Participant or potential Participant as long as the level of service satisfies state law.

The key is that the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation with respect to properties of the type that are listed on the MLS in which participation is sought. This requirement does not permit an MLS to deny participation to a Participant or potential Participant that operates a Virtual Office Website ("VOW") (including a VOW that the Participant uses to refer customers to other Participants) if the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation. An MLS may evaluate whether a Participant "actively endeavors during the operation of its real estate business" to "offer or accept cooperation and compensation" only if the MLS has a reasonable basis to believe that the Participant or potential Participant is in fact not doing so.

The membership requirement shall be applied on a nondiscriminatory manner to all Participants and potential Participants.

United States District Court for the Northern District of Illinois Eastern Division
United States of America, Plaintiff,

v.
National Association of Realtors®, Defendant.
Civil Action No. 05 C 5140
Judge Kennelly.

Competitive Impact Statement

Plaintiff United States of America (“United States”), pursuant to section 2(b) of the Antitrust Procedures and Penalties Act (“APPA” or “Tunney Act”), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceedings

Overview. The United States brought this lawsuit against Defendant National Association of Realtors® (“NAR”) on September 8, 2005, to stop NAR from violating section 1 of the Sherman Act, 15 U.S.C. 1, by its suppression of competition from real estate brokers who use the Internet to deliver real estate brokerage services. NAR’s policies singled out these innovative brokers and denied them equal access to the for-sale listings that are the lifeblood of competition in real estate markets. The settlement will eliminate NAR’s discriminatory policies and restore even-handed treatment for all brokers, including those who use the Internet in innovative ways.

Virtual Office Websites (“VOWs”). The brokers who have been restrained by NAR’s policies operate password-protected websites through which they deliver brokerage services to consumers. NAR has referred to these websites as “virtual office websites” or “VOWs.” As discussed below and in the United States’ October 4, 2005, Amended Complaint, brokers who use VOWs (“VOW brokers”) can operate more productively than other brokers, providing high quality brokerage services efficiently to consumers.

Defendant NAR and MLSs. NAR is a trade association whose membership includes both traditional, bricks-and-mortar real estate brokers and innovative brokers, such as those who operate VOWs. NAR promulgates rules for the operation of the approximately 800 multiple listing services (“MLSs”) affiliated with NAR. MLSs are joint ventures of virtually all real estate brokers in each local or regional area. MLSs aggregate information about all properties in the areas they serve that are offered for sale through brokers.

NAR’s Challenged Policies. On May 17, 2003, NAR adopted its “VOW Policy,” which contained rules that obstructed brokers’ abilities to use VOWs to serve their customers, as described below in Section II. After an investigation, the United States prepared to file a complaint challenging this Policy.

On September 8, 2005, NAR repealed its VOW Policy and replaced it with its Internet Listings Display Policy (“ILD Policy”). NAR hoped that this change would forestall the United States’ challenge to its policies. NAR’s ILD Policy, however, continued to discriminate against VOW brokers. As part of its adoption of the ILD Policy, NAR also revised and reinterpreted its MLS membership rule, which would have excluded sonic brokers who used VOWs, as

detailed below in Section II. (NAR’s VOW and ILD Policies, including its membership rule revision and reinterpretation, are referred to collectively in this Competitive Impact Statement as NAR’s “Challenged Policies.”)

As an association of competitors with market power, NAR’s adoption of policies that suppress new and efficient competition to the detriment of consumers violates section 1 of the Sherman Act, 15 U.S.C. 1.

The Complaint. On September 8, 2005, the day NAR adopted its ILD Policy, the United States filed its Complaint. The United States filed an Amended Complaint on October 4, 2005, that explicitly addressed the ILD Policy and membership rule revision and reinterpretation. The Amended Complaint alleges that NAR’s adoption of the Challenged Policies constitutes a contract, combination, and conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States, in violation of section 1 of the Sherman Act, 15 U.S.C. 1.

In the Amended Complaint, the United States asks the Court to order NAR to stop violating the law. The United States did not seek monetary damages or fines; the law does not provide for these remedies in a case of this nature.

Motion to Dismiss. NAR filed a motion to dismiss the case, claiming that, because NAR did not restrain brokers by compelling them to use the “opt-out” provisions of the Challenged Policies (discussed below in section IIC), those provisions did not constitute actionable restraints of trade. NAR also sought dismissal on two procedural grounds. On November 27, 2006, the Court issued an opinion denying NAR’s motion. The Court found that the appropriate analysis under Section 1 is not whether individual market actors are restrained but instead whether competition is restrained.¹ The Court also rejected NAR’s procedural arguments.²

Course of the Litigation. Discovery began in December 2005 and continued through 2006 and 2007. The case was scheduled for trial on July 7, 2008.

Proposed Settlement. On May 27, 2008, six weeks before trial was scheduled to begin, the United States and NAR reached a settlement. The United States filed a Stipulation and proposed Final Judgment that are designed to eliminate the likely anticompetitive effects of NAR’s Challenged Policies. The proposed Final Judgment, which is explained more fully below, requires NAR to repeal its VOW Policy and its ILD Policy and to adopt and apply new rules that do not discriminate against brokers who use VOWs to provide brokerage services to their customers.

The United States and NAR have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final

¹ See *United States v. NAR*, No. 05–C–5140, 2006–2 Trade Cas. ¶ 75,499, 2006 WL 3434263, at *12–14 (N.D. Ill. Nov. 27, 2006).

² *Id.* at *6–11 & 15.

Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation of the Antitrust Laws

A. Description of Competition and Innovation Enabled by VOWs

In many respects, most VOW brokers operate just like their more traditional competitors. They hold brokers’ licenses in the states in which they operate, they participate in their local MLS, they tour homes with potential buyer customers and guide those customers through the negotiating, contracting, and closing process, and they derive revenues from commissions earned in connection with real estate transactions.³

These VOW brokers differ from other brokers in how they use the Internet to provide brokerage services. VOW brokers use primarily their Web sites, rather than the efforts of their agents, to educate potential buyers about the market. This service necessarily involves—as it does with brokers who operate in a more traditional fashion—providing those MLS listings to buyer customers that meet their expressed needs and interests. NAR’s MLS rules permit brokers to “reproduce from the MLS compilation and distribute to prospective purchasers” information about properties in which the purchaser might have an interest. See NAR, *Handbook on Multiple Listing Policy*, “Model Rules & Regulations for an MLS Operated as a Committee of an Association of Realtors®,” § 12.2 (21st ed. 2008). Rather than providing this information to prospective buyers by hand delivery, mail, fax, or e-mail—the delivery methods historically used by brokers VOW brokers deliver listings over the Internet.⁴

³ The real estate licensing laws of most states allow real estate professionals to be licensed as either brokers or as agents or sales associates. To offer real estate brokerage services, a person licensed as an agent or sales associate must affiliate with and be subject to the supervision of a person who holds a broker’s license. See, e.g., 225 ILCS 454/1–5.

⁴ As the court found in *Austin Board of Realtors v. E-Realty, Inc.*, No. 00–CA–154, 2000 WL 34239114, at *4 (W. D. Tex. Mar. 30, 2000), “all * * * methods of distribution” of listings, including the Internet, “are equivalent” and should be treated equally under MLS rules. Until it began developing its VOW Policy, NAR agreed with this position. For instance, on January 29, 2001, a top NAR official stated in a letter to the president of eRealty (a VOW broker) that eRealty’s distribution of MLS listings through its VOW was “in compliance with” MLS rules governing the provision of MLS listings to prospective buyers. NAR also published a white paper in December 2001 in which it described VOWs as an “emerging, authorized use of MLS current listing data,” and stated that brokers using VOWs are subject to the same MLS rules governing the dissemination of listings to potential buyers that are applicable to all other brokers. The same official reiterated the point in a March 8, 2002, interview, stating that NAR’s rules “don’t discriminate between methods of delivery.”

With lower costs and increased productivity, some VOW brokers have offered discounted commission rates to their seller clients and rebates to their buyer customers.⁵ VOW brokers have already delivered tens of millions of dollars in financial benefits directly to their customers. Another study conducted in connection with this case revealed evidence consistent with a finding that the growth of a VOW broker that offered discounts led a sizeable traditional competitor to reduce its commissions to consumers.

Innovative brokers with VOWs have enhanced the consumer experience by offering tools and information that allow consumers to approach the purchase of a home well informed about all aspects of the markets they are considering. VOW brokers not only provide their customers access to up-to-date MLS listings information, but also offer mapping and property-comparison tools and provide school district information, crime statistics, and other neighborhood information for consumers to consider as they educate themselves regarding the most important purchase in the lives of most Americans. Many VOW brokers also allow customers to maintain a personal portfolio of properties they are monitoring, with the VOWs automatically updating those listings as their price or status changes.

Of course, many traditional brokers provide neighborhood and other similar information to their customers, and some even provide such information on Internet Web sites. VOWs can differ, however, in the quantity and quality of information that they provide. VOW brokers offer their customers complete and up-to-date information and often focus on information most valuable to prospective buyers, identifying price reductions and the number of days a property has been on the market and providing information about comparable recent sales. Customers of VOW brokers can obtain information at their own pace, on their own time, and in the form in which they are most interested in receiving it.

Some VOW brokers have established brokerage businesses that focus solely on the high technology aspects of brokerage services that can be delivered over the Internet. Like

VOWs help brokers operate more efficiently and increase the quality of services they provide. By enabling consumers to search for and retrieve relevant MLS listings, VOW brokers can operate more efficiently than other brokers. Because customers are educating themselves without the broker's expenditure of time, a VOW broker can expend less time, energy, and resources educating his or her customers. Operating a VOW can also enhance broker competitiveness in working with home seller clients by allowing the broker to provide detailed information to both potential and active seller clients about the apparent interests of buyers who are searching for homes in the seller's neighborhood. A study conducted in connection with this case showed that one sizeable VOW broker, for example, was able to generate many more transactions per agent (controlling for years of agent experience) than the traditional brokers it competed against.

⁵ Prospective buyers frequently do not enter contractual relationships with the broker from whom they receive brokerage services and, as such, are considered "customers," rather than "clients," of the broker.

other VOW brokers, these "referral VOWs" educate prospective buyers about the market in which they are considering a purchase by providing buyers MLS listings and other information on a VOW. When the buyer is ready to tour a home, the referral VOW broker can direct the buyer to brokers or agents who specialize in guiding the buyer on tours of homes and advising them during the negotiating, contracting, and closing process. In some instances, referral VOW brokers have obtained a referral fee (contingent on closing) for delivering educated buyer customers to the brokers or agents who received the referrals. Some referral VOW brokers have offered commission rebates or other financial benefits to their customers.

B. Description of the Defendant and Its Activities

Chicago-based MAR is a trade association that establishes and enforces policies and professional standards for its over one million real estate professional members and 1,400 local and state Boards or Associations of Realtors® ("Member Boards"). NAR promulgates rules governing the operation of the approximately 800 MLSs that are affiliated with NAR through their ownership or operation by NAR's Member Boards.⁶ In order to encourage adherence to its policies, NAR can deny coverage under its errors and omissions insurance (i.e., professional liability insurance) policy to any Member Board that maintains MLS rules not in compliance with NAR's policies.

MLSs are joint ventures among virtually all real estate brokers operating in local or regional areas.⁷ MAR's MLS rules require its

⁶ There are approximately 1,000 MLSs in the United States, approximately 800 of which are affiliated with NAR and subject to NAR's rules. The rules of the remaining approximately 200 MLSs are not at issue in this lawsuit, although, as a practical matter, many MLSs that are not affiliated with NAR adopt rules that confirm substantially to NAR's. Some non-NAR MLSs, such as the MLS serving the Columbia, South Carolina, area and the MLS serving the Hilton Head, South Carolina, area, adopted and maintained rules that have been the subject of antitrust enforcement. On May 2, 2008, the United States brought an antitrust action against the MLS in Columbia alleging that its rules restrain competition among real estate brokers in that area and likely harm consumers. See Complaint in *United States v. Consolidated Multiple Listing Service, Inc.*, No. 3:08-cv-01786-SB (D.S.C. May 2, 2008), available at <http://www.usdoj.gov/atr/cases/f232800/232803.htm>. The United States challenged similar allegedly anticompetitive rules imposed by the MLS in Hilton Head, South Carolina, also not affiliated with NAR. See Complaint in *United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-03435-SB (D.S.C. Oct. 16, 2007), available at <http://www.usdoj.gov/atr/cases/f226800/226869.htm>. The MLS in Hilton Head agreed to settle the case by repealing the challenged rules and agreeing to other conduct restrictions, and the court entered the Final Judgment in the case on May 28, 2008. See Final Judgment in *United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-03435-SB (D.S.C. May 28, 2008), available at <http://www.usdoj.gov/atr/cases/f233900/233901.htm>.

⁷ Many MLSs draw brokers and their listed properties from a single local community. Others are substantially larger, with some covering entire

members to submit to the MLS, generally within two to three days of obtaining a listing, information about each property listed for sale through a broker member. By doing so, the broker promotes his or her seller client's listing to all other brokers in the MLS, who can provide information about the listing to their buyer customers. Listing brokers create incentives for other MLS members to try to find buyers for their listed properties by submitting with each new listing an "offer of cooperation and compensation," identifying the amount (usually specified as a percentage of the listing broker's commission) that the listing broker will pay to any other broker who finds a buyer for the property.

Brokers regard participation in their local MLS to be critical to their ability to compete with other brokers for home sellers and buyers. By participating in the MLS, brokers can promise their seller clients that the information about the seller's property can be immediately made available to virtually all other brokers in the area. Brokers who work with buyers can likewise promise their buyer customers access to the widest possible array of properties listed for sale through brokers. An MLS is thus a market-wide joint venture of competitors that possesses substantial market power: To compete successfully, a broker must be a member; and to be a member, a broker must adhere to any restrictions that the MLS imposes.

C. Description of the Alleged Violation

1. The Challenged Policies

NAR's Challenged Policies discriminate against and restrain competition from brokers who use VOWs. In its Challenged Policies, NAR denied VOW brokers the ability to use their VOWs to provide customers access to the same MLS listings that the customer could obtain from all other brokers by other delivery methods. NAR did so by allowing a listing broker to "opt out" and keep his or her client's listings from being displayed on a competitor's VOW.

On May 17, 2003, NAR adopted its "VOW Policy." As the Amended Complaint alleges, the VOW Policy, most significantly, allowed brokers to opt out of VOWs, withholding their seller-clients' listings from display on VOWs. The opt-out provisions discriminated against VOW brokers because NAR's rules do not otherwise permit one broker to dictate how competitors can convey his or her listings to customers. The VOW Policy permitted opt out either against all VOW brokers ("blanket") or against a particular VOW broker ("selective").

The Amended Complaint also alleges that the VOW Policy's "anti-referral" rule restrained competition by prohibiting VOW brokers from receiving any payment for referring prospective buyer customers to other brokers. The prospect that brokers

states and others—such as Metropolitan Regional Information Systems, Inc., which serves the District of Columbia, and parts of the states of Maryland, Virginia, West Virginia, and Pennsylvania—serving multi state regions. As the Amended Complaint alleges, the relevant geographic markets in which brokers compete are local and normally no larger than the service area of the MLS or MLSs in which they participate.

could use VOWs to support referral-based businesses was a source of industry antipathy to VOWs, and NAR's rules singled out VOW brokers for a ban on referring customers for a fee.

NAR's VOW Policy, as alleged in the Amended Complaint, also restrained competition from VOW brokers by prohibiting them from selling advertising on pages of their VOWs on which the VOW broker displayed any listings, and by permitting MLSs to degrade the data they provide to VOWs, thus preventing the use of popular technological features offered by many VOW brokers.

NAR repealed its VOW Policy and replaced it with its ILD Policy on September 8, 2005, the day the United States filed its initial Complaint. As alleged in the Amended Complaint, NAR's ILD Policy continued to discriminate against VOW brokers by permitting their competitors a blanket opt out where they could withhold their listings from display on all VOWs.⁸ Although the ILD Policy did not include an explicit anti-referral rule, NAR revised and reinterpreted its rule on MLS membership to prevent brokers who operate referral VOWs from becoming members of the MLS and obtaining access to MLS listings. The Amended Complaint also alleges that the ILD Policy continued to permit MLSs to downgrade the data they provide to VOWs and to restrict VOW brokers' co-branding or advertising relationships with third parties.

2. Effects of the Challenged Policies

As discussed above, NAR's rules permit brokers to show prospective buyers all MLS listings in which the buyers might have an interest. For most brokers, this means that they can respond to a request from a buyer customer by delivering responsive listings by whatever delivery method the broker and customer choose. NAR's opt-out provisions deny this right only if the method of delivery selected by the broker and the customer is a VOW. Thus, NAR's rules restrain VOW-operating brokers from competing in a way that is efficient and desired by many customers.

Even if no broker uses the opt-out device, its existence renders a VOW broker unable to promise customers access to all relevant MLS listings, materially disadvantaging brokers who use a VOW to compete. When opt out occurs, a VOW broker is further disadvantaged because it cannot deliver complete MLS listings to customers through its VOW. Finally, with the threat of opt outs constantly hanging over it, any VOW broker contemplating a pro-consumer initiative would have to weigh the prospect of an angry response from its incumbent competitors.

Opt outs were an empirical reality. Although the United States' investigation became public just a few months after NAR adopted its VOW Policy, the United States discovered over fifty instances of broker opt outs under a wide variety of circumstances in fourteen diverse markets. Brokers opted out of VOWs in large markets (e.g., Detroit and Cleveland), medium markets (e.g., Des

Moines), and small markets (e.g., Emporia (Kansas), Hays (Kansas), and York (Pennsylvania)). In some markets (Emporia and Hays), virtually all brokers opted out. In others, only one or a few opted out (e.g., Detroit, York, Maine). Opt outs occurred in a market with one dominant broker (Des Moines), in markets with only a small number of broker competitors (Emporia and Hays), and in markets with hundreds of brokers (Detroit). In some markets (e.g., Des Moines, Detroit, Cleveland, York, and Jackson (Wyoming)), large brokers opted out. In others (e.g., Marathon (Florida) and Hudson (New York)), only relatively small brokers opted out. Brokers opted out in markets in which price competition is highly restricted by the state (Kansas, which prohibits brokers from providing commission rebates to home buyers), as well as in markets in which the state does not restrict such price competition (Michigan). Opt outs occurred in circumstances that imply they were independent business decisions by the opting-out brokers (e.g., Detroit) and in circumstances in which opt-out forms were filled out by almost all brokers in the same room at the same time (Emporia).

NAR's Challenged Policies also obstruct the operation of referral VOWs. NAR's VOW Policy prohibited referral fees explicitly and directly. NAR's 2005 modification to the requirements of MLS membership denied MLS membership and of greatest significance to a referral VOW access to MLS data to any broker whose business focused exclusively on educating customers on a VOW and referring those customers to other brokers to receive other in-person brokerage services. Each of these policies prevents two brokers from working together in an innovative and efficient way, with a VOW broker attracting new business and educating potential buyers about the market, and the other broker guiding the buyer through home tours and the negotiating, contracting, and closing process.

As discussed above, NAR's Challenged Policies also permit MLSs to downgrade the MLS data feed provided to VOW brokers, which limits the consumer-friendly features VOW brokers could provide through their VOWs. The Challenged Policies also allow MLSs to prohibit VOW brokers from establishing some advertising or co-branding relationships with third parties, limiting the freedom of VOW brokers to operate their businesses as they desire and enabling MLSs (which are controlled by a VOW broker's competitors) to micromanage the appearance of brokers' VOWs.

3. The Challenged Policies Violate the Antitrust Laws

NAR's Challenged Policies violate section 1 of the Sherman Act, which prohibits unreasonable restraints on competition. The Challenged Policies were the product of an agreement among a group of competitors (the members of NAR) mandating how brokers could use VOWs to compete and unreasonably restraining competition from VOW brokers. Competition from VOW brokers had posed a threat to the established order in the real estate industry. Yet it was clear from prior litigation that antitrust law would not allow incumbent brokers simply

to prevent VOW brokers from providing any listings to customers through their VOWs. See *Austin Board of Realtors v. e-Realty, Inc.*, No. 00-CA-154, 2000 WL 34239114 (W.D. Tex. Mar. 30, 2000). Instead, NAR's Challenged Policies restrained competition from VOW brokers by denying them full access to MLS listings and restricting how VOW brokers could do business.

While an MLS, like other joint ventures with market power, can have reasonable membership restrictions related to a legitimate, procompetitive purpose, it cannot create rules that unreasonably impede competition among brokers and harm consumers. See *United States v. Realty Multi-List*, 629 F.2d 1351, 1371 (5th Cir. 1980). NAR's Challenged Policies restrain competition because they dictate how the MLS's broker-members could compete specifically, restricting how they could compete using a VOW. See *id.*, at 1383-85 (finding MLS rule precluding part-time brokerage to be unlawful); *Cantor v. Multiple Listing Serv. of Dutchess County, Inc.*, 568 F. Supp. 424, 430-31 (S.D.N.Y. 1983) (finding that MLS yard sign restriction violated section 1 of the Sherman Act because it "substantially impair[ed] [the plaintiffs'] freedom to conduct their businesses as they see fit" and "vitiated any competitive advantage which plaintiffs endeavored to obtain" through association with a national franchisor); see also *National Soc'y of Prof'l Eng'rs*, 435 U.S. 679, 695 (1978) (condemning trade association ban on competitive bidding by members). Similarly, NAR's Challenged Policies restrain competition because they impede the operations of a particularly efficient class of competitors: VOW brokers. See *Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir. 1993) (upholding verdict against railroads that "block[ed] the entry of low cost competitors"); see also *RE/MAX v. Realty One, Inc.*, 173 F.3d 995, 1014 (6th Cir. 1999) (upholding Sherman Act § 1 claim where competitors "impose[d] additional costs" on innovative entrant). NAR's Challenged Policies also restrain competition by denying consumers the full MLS listings information (including valuable information such as sold data and data fields such as days on market) that consumers want. See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 457, 462 (1986) ("The Federation's collective activities resulted in the denial of the information the customers requested in the form they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether * * *. The Federation is not entitled to preempt the working of the market by deciding for itself that its customers do not need that which they demand.")

Moreover, NAR's Challenged Policies constitute an unreasonable restraint on competition because they produced no procompetitive benefits that justified the restraints. Although NAR claimed that the Challenged Policies were essential to the continued existence of MLSs, those MLSs without the Challenged Policies functioned just as well without them. Given the market power of the MLS, brokers believe it would amount to economic suicide for them to leave the MLS.

⁸NAR did delete from its ILD Policy its rule allowing brokers to selectively opt out against particular VOW brokers.

D. Harm From the Alleged Violation

Taken together, NAR's Challenged Policies obstruct innovative brokers' use of efficient, Internet-based tools to provide brokerage services to customers and clients. The Challenged Policies inhibit VOW brokers from achieving the operating efficiencies that VOWs can make available and likely diminish the high-quality and low-priced services offered to consumers by VOW brokers. The result is that the Challenged Policies, products of agreements among competitor brokers, likely would deter, delay, or prevent the benefits of innovation and competition from reaching consumers, and thus violate section 1 of the Sherman Act, 15 U.S.C. 1.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment embodies the fundamental principle that an association of competing brokers, operating an MLS, cannot use the aggregated power of the MLS to discriminate against a particular method of competition (in this case, VOWs). The proposed Final Judgment will end the competitive harm resulting from NAR's Challenged Policies and will allow consumers to benefit from the enhanced competition that VOW brokers can provide. The proposed Final Judgment requires NAR to repeal its VOW and ILD Policies and to replace them with a "Modified VOW Policy" (attached to the proposed Final Judgment as Exhibit A) that makes it clear that brokers can operate VOWs without interference from their rivals.⁹ With respect to any issues concerning the operation of VOWs that are not explicitly addressed by the Modified VOW Policy, the proposed Final Judgment's general nondiscrimination provisions apply.¹⁰

The Modified VOW Policy does not allow brokers to opt out and withhold their clients' listings from VOW brokers.¹¹ This change eliminates entirely the most egregious impediment to VOWs that was contained in the Challenged Policies.¹² Under the

Modified VOW Policy, the MLS must provide to a VOW broker for display on the VOW all MLS listings information that brokers are permitted to provide to customers by all other methods of delivery.¹³

The Modified VOW Policy that NAR must adopt under the proposed Final Judgment also permits brokers to operate referral VOWs. It expressly prohibits MLSs from impeding VOW brokers from referring customers to other brokers for compensation.¹⁴ It also provides two avenues by which a broker desiring to serve customers through a referral VOW may do so: As an "Affiliated VOW Partner" ("AVP") and as a member who directly serves some customers.

Under the Modified VOW Policy, a broker who desires to operate a referral business can partner as an AVP with a network of brokers and agents to whom the AVP will ultimately refer educated buyer customers who are ready to tour homes and receive in-person brokerage services.¹⁵ The Modified VOW Policy requires MLSs to provide complete MLS listings information to a broker designated by another broker to be an AVP that will operate a VOW on the designating broker's behalf.¹⁶ The MLS must provide

useful information to other potential purchasers of the same items, the uniqueness of each individual home creates an opportunity for an interested buyer (or his or her broker) to attempt to manipulate the market by providing a negative review in hopes of deterring other buyers from visiting or making an offer on the home. An individual home seller is also permitted under the Modified VOW Policy to request that an automated home valuation feature provided by a VOW broker be disabled as to the seller's individual property, although the VOW broker is permitted to state on the VOW that the seller requested that this type of information not be presented on the VOW about his or her property. *See Id.* Though such valuations might be provided in a bricks-and-mortar environment, they would not likely be provided without evaluation, comment, or input from an agent or sales associate. The Modified VOW Policy also provides a mechanism for sellers to correct any false information about their property that a VOW adds, *id.*, ¶ II.5.d, consistent with the general responsibility of any broker (VOW or otherwise) to present accurate information.

¹³ *See id.*, ¶ III.2. The information that MLSs must provide to VOW brokers for display on their VOWs includes information about properties that have sold (except in areas where the actual sales prices of homes is not accessible from public records) and all other information that brokers can provide to customers by any method, including by oral communications. *Id.*

¹⁴ *Id.*, ¶ III.11.

¹⁵ Nothing in the Modified VOW Policy requires an AVP to hold a broker's license. An unlicensed technology company would be permitted under the Modified VOW Policy to host a VOW for a broker or brokers (or for one or more agents or sales associates, with the consent of their supervising brokers). When a licensed broker operates VOWs as an AVP in conjunction with other brokers (or their agents or sales associates), the AVP can perform services for which a broker's license may be required, including answering questions for customers who register on the VOW and referring customers to the brokers and agents or sales associates for whom the AVP operates the VOWs. *See, e.g.*, 225 ILCS 454/1-10 (describing the activities for which a broker's license is required in Illinois, including "assist[ing] or direct[ing] in procuring or referring of prospects").

¹⁶ Modified VOW Policy, ¶¶ I.1.a & III.10. An AVP's rights to obtain listings information from the

listings information to the AVP on the same terms and conditions on which the MLS would provide listings to the broker who designated the AVP to operate the VOW.¹⁷ This provision will allow referral VOWs to partner with brokers or agents, obtain access to MLS data to operate their referral VOWs, and provide the efficiencies that come from operating a VOW to the brokers and agents with whom they partner.

Under the proposed Final Judgment, a broker who works directly with some buyers and sellers, but who also wants to operate a VOW and focus on referrals, can become a member of the MLS and use MLS data as a member, including for its referral VOW. The Final Judgment permits NAR's Member Boards to implement the new requirements for MLS membership that NAR originally adopted with its ILD Policy,¹⁸ but an interpretive Note (see Exhibit B to the proposed Final Judgment) explains that the new membership rule is not to be interpreted to restrain VOW competition.¹⁹

Finally, the Modified VOW Policy prohibits MLSs from using an inferior data delivery method to provide MLS listings to VOW brokers²⁰ and from unreasonably restricting the advertising and co-branding relationships VOW brokers establish with third parties.²¹ VOW brokers, under the Modified VOW Policy, will be free from MLS interference in the appearance and features of their VOWs.²²

NAR is required by the Final Judgment to direct its Member Boards to adopt rules implementing the Modified VOW Policy within ninety days of this Court's entry of the Final Judgment.²³ To ensure that its Member Boards adopt, maintain, and enforce rules implementing the Modified VOW Policy, NAR is required to deny errors and omissions insurance coverage to any Member Board that refuses to do so and forward to the United States any complaints it receives concerning the failure of any Member Board (or any MLS owned or operated by any Member Board) to abide by or enforce those rules.²⁴ The proposed Final Judgment also broadly prohibits NAR from adopting any other rules that impede the operation of VOWs or that

MLS is derivative of the rights of the brokers for whom the AVP is operating VOWs. *Id.*, ¶ III.10. The AVP would not itself be an MLS member entitled to MLS access directly.

¹⁷ *Id.*, ¶ III.10.

¹⁸ Proposed Final Judgment, ¶ VI.A.

¹⁹ Under the interpretive Note included in Exhibit B to the proposed Final Judgment, if a VOW broker actively endeavors to obtain some seller clients for whom it will market properties or some buyer customers to whom it will offer in-person brokerage services, that VOW broker will be permitted to operate a referral VOW and refer to other brokers the educated customers he or she does not serve directly.

²⁰ *See* Modified VOW Policy, ¶ III.2 ("For purposes of this Policy, 'downloading' means electronic transmission of data from MLS servers to a Participant's or AVP's server on a persistent basis" (emphasis added)).

²¹ *See id.*, ¶ III.7.

²² *See id.*, ¶¶ III.8 & III.9.

²³ Proposed Final Judgment, ¶ V.D.

²⁴ *Id.*, ¶¶ V.E & V.H.

⁹ *See* proposed Final Judgment, ¶¶ V.A-V.D. Under the Modified VOW Policy, with the consent of their supervising broker, agents and sales associates are also expressly permitted to operate VOWs. Brokers cannot agree, by MLS rule or otherwise, to ban VOWs operated by agents or sales associates. *See* Modified VOW Policy, ¶ I.1.b.

¹⁰ *See* proposed Final Judgment, ¶¶ IV.A, IV.B, & IV.C; *see also id.*, ¶ V.F (requiring NAR to deny insurance coverage to any Member Board that maintains rules at odds with ¶ IV of the proposed Final Judgment).

¹¹ *See* Modified VOW Policy, ¶ I.4.

¹² The Modified VOW Policy does allow an individual home seller to direct that information about his or her own home not appear on any Internet Web sites, *id.*, ¶ II.5.a, recognizing the legitimate interests of a seller to protect his or her privacy and not to expose information about his or her property or the fact that it is on the market to the public on the Internet. It also allows a home seller to request that a VOW broker who permits customers to provide written reviews of properties disable that feature as to the seller's listing. *Id.*, ¶ II.5.c. Such comments—which can be anonymous—have no exact analogue in the bricks-and-mortar world. Unlike books, music, or other consumer goods, reviews of which can provide

discriminate against VOW brokers in the operation of their VOWs.²⁵

Finally, the proposed Final Judgment, applicable for ten years after its entry by this Court,²⁶ establishes an antitrust compliance program under which NAR is required to review its Member Board's rules for compliance with the proposed Final Judgment, to provide materials to its Member Boards that explain the proposed Final Judgment and the Modified VOW Policy, and to hold an annual program for its Member Boards and their counsel discussing the proposed Final Judgment and the antitrust laws.²⁷ The proposed Final Judgment expressly places no limitation on the United States' ability to investigate or bring an antitrust enforcement action in the future to prevent harm to competition caused by any rule adopted or enforced by NAR or any of its Member Boards.²⁸

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against NAR.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and NAR have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: John R. Read, Chief, Litigation III Section,

Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.²⁹

VI. Alternatives to the Proposed Amended Final Judgment

At several points during the litigation, the United States received from defendant NAR proposals or suggestions that would have provided less relief than is contained in the proposed Final Judgment. These proposals and suggestions were rejected.

The United States considered, as an alternative to the proposed Final Judgment, proceeding with the full trial on the merits against NAR that was scheduled to commence on July 7, 2008. The United States is satisfied that the relief contained in the proposed Final Judgment will quickly establish, preserve, and ensure that consumers can benefit from the enhanced brokerage service competition brought by VOW brokers as effectively as any remedy the United States likely would have obtained after a successful trial.

VII. Standard of Review Under the APPA for Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); see generally *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C.

2007) (assessing public interest standard under the Tunney Act).³⁰

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See *Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

"[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree."

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).³¹ In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; see also *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the

³⁰The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006); see also *SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

³¹*Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally *Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

²⁵ *Id.*, ¶¶ IV.A & IV.B.

²⁶ *Id.*, ¶ X.

²⁷ *Id.*, ¶ V.G.

²⁸ *Id.*, ¶ IX.

²⁹ Proposed Final Judgment, ¶ VIII.

market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’” *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); see also *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States “need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.” SBC Commc’ns, 489 F. Supp. 2d at 17.

Moreover, the court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459. Because the “court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial (prosecutorial by bringing a case in the first place), it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Id.* at 1459–60. As the United States District Court for the District of Columbia recently confirmed in SBC Communications, courts “cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.” SBC Commc’ns, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that “nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court’s “scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.” SBC Commc’ns, 489 F. Supp.2d at 11.³²

³² See *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the “Tunney

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,
David C. Kully,

Craig W. Conrath,
David C. Kully.

*U.S. Department of Justice, Antitrust
Division, 450 5th Street, NW; Suite 4000,
Washington, DC 20530, Tel: (202) 307–
5779, Fax: (202) 307–9952.*

Dated: June 12, 2008

Certificate of Service

I, David C. Kully, hereby certify that on this 12th day of June 2008, I caused a copy of the foregoing Competitive Impact Statement to be served by ECF on counsel for the defendant identified below.

Jack R. Bierig, Sidley Austin LLP, One South Dearborn Street, Chicago, IL 60603, (312) 853-7000, jbierig@sidley.com.

David C. Kully.

[FR Doc. E8–13902 Filed 6–24–08; 8:45 am]

BILLING CODE 4410-11-M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

June 20, 2008.

The Department of Labor (DOL) hereby announces the submission of 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). A copy of each ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at <http://www.reginfo.gov/public/do/PRAMain> or by contacting Darrin King on 202–693–4129 (this is

Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone”); *United States v. Mid-Am Dairyman, Inc.*, 1977–1 Trade Cas. (CCH ¶ 61,508, at 71,980 (W.D. Mo. 1977) (“Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.”); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (“Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.”).

not a toll-free number)/e-mail: king.darrin@dol.gov.

Interested parties are encouraged to send comments to the 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), E-mail: OIRA_submission@omb.eop.gov within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

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 a previously approved collection.

Title of Collection: Methylene Chloride (29 CFR 1910.1052).

OMB Control Number: 1218–0179.

Affected Public: Private Sector—Business or other for-profits and Not-for-profit institutions.

Estimated Number of Respondents: 92,354.

Estimated Total Annual Burden

Hours: 67,362.

Estimated Total Annual Costs Burden: \$16,753,110.

Description: The information collection requirements contained in the Methylene Chloride Standard (29 CFR 1910.1052) serve to ensure that employees are not being harmed by exposure to Methylene Chloride. For additional information, see related notice published at 73 FR 22176 on April 24, 2008.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension without change of a previously approved collection.

Title of Collection: Occupational Exposure to Hazardous Chemicals in Laboratories Standard.

OMB Control Number: 1218-0131.

Affected Public: Private Sector—Business or other for-profits and Not-for-profit institutions.

Estimated Number of Respondents: 45,616.

Estimated Total Annual Burden Hours: 281,419.

Estimated Total Annual Costs Burden: \$35,978,301.

Description: The information collection requirements contained in the Occupational Exposure to Hazardous Chemical in Laboratories Standard (29 CFR 1910.1450) control employees overexposure to hazardous laboratory chemicals, thereby preventing serious illnesses and death among employees exposed to such chemicals. For additional information see related notice published at 73 FR 20069 on April 14, 2008.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. E8-14352 Filed 6-24-08; 8:45 am]

BILLING CODE 4510-26-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-62,864]

Ametek, Inc., Measurement and Calibration Technology Division, Sellersville, PA; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated May 30, 2008, petitioners requested administrative reconsideration of the Department of Labor's Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, applicable to workers and former workers of the subject firm. The denial notice was signed on April 18, 2008 and published in the **Federal Register** on May 2, 2008 (73 FR 24318).

The initial investigation resulted in a negative determination based on the finding that criteria I.A and II.A have not been met. The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by Section 222 of the Trade Act of 1974.

In the request for reconsideration, the petitioner provided additional information regarding employment and layoffs at the subject firm.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the Department of Labor's prior decision. The application is, therefore, granted.

Signed in Washington, DC, this 16th day of June, 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-14301 Filed 6-24-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-63,019]

Honeywell Aerospace, Aerospace—Defense & Space Division, Teterboro, NJ; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated May 27, 2008, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 153 requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on April 16, 2008. The Notice of determination was published in the **Federal Register** on May 2, 2008 (73 FR 24318).

The initial investigation resulted in a negative determination based on the finding that imports of displays, processors, flight controls, software, and test equipment for aircrafts did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner alleged that workers of the subject firm were separated as a direct result of Honeywell Aerospace opening a facility in Mexico. The petitioner also states that the subject firm is in the

process of importing the articles produced in Mexico to the United States.

The Department has carefully reviewed the request for reconsideration and the existing record and has determined that the Department will conduct further investigation to determine whether there was a shift in production from the subject facility to Mexico and whether the subject firm has imported like or directly competitive products in the relevant time period.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 16th day of June, 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-14302 Filed 6-24-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-60,041]

Delphi Corporation, Automotive Holdings Group, Needmore Road/Dayton Plant 3, Including On-Site Leased Workers from Aerotek Automotive, PDSI Technical Services, Acro Service Corp., G-Tech Professional Staffing, TAC Automotive, Bartech, Manpower Professional Services, Manpower Of Vandalia, Setech, Mays Chemical And Kelly Engineering Services, Dayton, Ohio; Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on November 30, 2006, applicable to workers of Delphi Corporation, Automotive Holdings Group, Needmore Road/Dayton Plant 3, Dayton, Ohio. The notice was published in the **Federal Register** on December 12, 2006 (71 FR 74564).

At the request of a petitioner, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of automotive brake parts.

New information shows that leased workers Aerotek Automotive, PDSI Technical Services, Acro Service Corp., G-Tech Professional Staffing, TAC Automotive, Bartech, Manpower Professional Services, Manpower of Vandalia, Setech, Mays Chemical and Kelly Engineering Services were employed on-site at the Needmore Road/Dayton Plant 3, Dayton, Ohio, location of Delphi Corporation, Automotive Holdings Group. The Department has determined that these workers were sufficiently under the control of the subject firm.

Based on these findings, the Department is amending this certification to include leased workers from the above mentioned firms working on-site at the Needmore Road/Dayton Plant 3, Dayton, Ohio, location of the subject firm.

The intent of the Department's certification is to include all workers employed at Delphi Corporation, Automotive Holdings Group, Needmore Road/Dayton Plant 3 who were adversely affected by increased imports of automotive brake parts.

The amended notice applicable to TA-W-60,041 is hereby issued as follows:

All workers of Delphi Corporation, Automotive Holdings Group, Needmore Road/Dayton Plant 3, including on-site leased workers from Aerotek Automotive, PDSI Technical Services, Acro Service Corp., G-Tech Professional Staffing, TAC Automotive, Bartech, Manpower Professional Services, Manpower of Vandalia, Setech, Mays Chemicals and Kelly Engineering Services, Dayton, Ohio, who became totally or partially separated from employment on or after August 24, 2005, through November 30, 2008, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 17th day of June 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-14299 Filed 6-24-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-61,655]

Westell, Inc., Including on-site Temporary Workers from Kay and Associates, Aurora, IL; Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on June 25, 2007, applicable to workers of Westell, Inc., Aurora, Illinois. The notice was published in the **Federal Register** on July 19, 2007 (72 FR 39642).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of network access products, and are not separately identifiable.

New information shows that temporary workers of Kay and Associates were employed on-site at the Aurora, Illinois, location of Westell, Inc. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered temporary workers.

Based on these findings, the Department is amending this certification to include temporary workers of Kay and Associates working on-site at the Aurora, Illinois, location of the subject firm.

The intent of the Department's certification is to include all workers employed at Westell, Inc., Aurora, Illinois, who were adversely affected by increased imports of network access products.

The amended notice applicable to TA-W-61,655 is hereby issued as follows:

All workers of Westell, Inc., including on-site temporary workers from Kay and Associates, Aurora, Illinois, who became totally or partially separated from employment on or after June 7, 2006, through June 25, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 17th day of June 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-14300 Filed 6-24-08; 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 7, 2008.

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 7, 2008.

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 18th day of June 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

APPENDIX—TAA PETITIONS INSTITUTED BETWEEN 6/9/08 AND 6/13/08

TA-W	Subject firm (Petitioners)	Location	Date of institution	Date of petition
63499	Kincaid Furniture Company, Inc. (Comp)	Hudson, NC	06/09/08	06/05/08
63500	Lumberton Dyeing and Finishing (Rep)	Lumberton, NC	06/09/08	06/06/08
63501	Lab Security Systems Corp (State)	Bristol, CT	06/09/08	06/06/08
63502	Onsite International, Inc. (Wkrs)	El Paso, TX	06/09/08	05/20/08
63503	3 Day Blinds (Wkrs)	Anaheim, CA	06/09/08	06/06/08
63504	Kongsberg Automotive, Inc. (Comp)	Willis, TX	06/09/08	06/05/08
63505	Permacel Automotive (UAW)	Kansas City, MO	06/09/08	06/02/08
63506	SAPA Fabricated Products (State)	Magnolia, AR	06/09/08	06/06/08
63507	Sirenza Microdevices, Inc./RF Microdevices (State)	Broomfield, CO	06/09/08	05/20/08
63508	Bedford Logistics, Inc. (Wkrs)	Bedford, IN	06/09/08	06/02/08
63509	Robin Manufacturing USA, Inc. (Wkrs)	Hudson, WI	06/09/08	06/04/08
63510	Plastech Engineered products (Comp)	Kenton, TN	06/09/08	06/06/08
63511	Liz Claiborne/Ellen Tracy (UNITE)	North Bergen, NJ	06/10/08	06/09/08
63512	Dynamic Technology, Inc. (Comp)	Hartland, MI	06/10/08	06/09/08
63513	CIMA Plastics II Corporation (Wkrs)	Elberton, GA	06/11/08	06/02/08
63514	Plastech Engineered Products, Inc. (Wkrs)	Elwood, IN	06/11/08	06/05/08
63515	Aberdeen Fabrics, Inc. (Comp)	Red Springs, NC	06/11/08	06/05/08
63516	Morlite/Vista (Wkrs)	Pittsburgh, PA	06/11/08	06/09/08
63517	Tredegear Film Products (Union)	Marlin, PA	06/11/08	06/05/08
63518	WRR, Inc. D/B/A State Plating (Wkrs)	Elwood, IN	06/11/08	06/03/08
63519	Parlex USA (State)	Methuen, MA	06/11/08	06/06/08
63520	American Dynamics (Wkrs)	San Diego, CA	06/11/08	06/06/08
63521	Dal Tile, Inc. (Wkrs)	Dallas, TX	06/12/08	06/10/08
63522	Brockway Mould, Inc. (USW)	Brockport, PA	06/12/08	06/11/08
63523	Bee Chemical, DBA NB Coatings, Inc. (Wkrs)	Lansing, IL	06/12/08	05/27/08
63524	Tennessee Orthopaedic Alliance (Comp)	Nashville, TN	06/12/08	05/31/08
63525	Overhead Door Corporation (Union)	Lewistown, PA	06/12/08	06/10/08
63526	St. John Knits (State)	Irvine, CA	06/12/08	06/11/08
63527	Union Tank Car Company (Union)	East Chicago, IN	06/12/08	05/29/08
63528	Callaway Golf Ball Operations, Inc. (Comp)	Johnstown, NY	06/12/08	06/06/08
63529	Fisher and Company/Fisher Dynamics (Comp)	St. Clair Shores, MI	06/13/08	06/12/08
63530	McNaughton Apparel Group, Inc. (State)	New York, NY	06/13/08	05/08/08
63531	William Pinchbeck, Inc. dba Pinchbeck Roses (State)	Guilford, CT	06/13/08	06/12/08
63532	Woodward Controls, Inc. (Rep)	Niles, IL	06/13/08	05/19/08
63533	Thomasville Upholstery Plant #9 (Comp)	Hickory, NC	06/13/08	06/12/08
63534	Novtex Div. of Trintex Company, Inc. (Comp)	Adams, MA	06/13/08	06/12/08
63535	Jefferson Plant of Leviton Manufacturing Company (Comp)	Jefferson, NC	06/13/08	06/12/08
63536	Brazing Concepts South (Comp)	Fairfield, OH	06/13/08	06/12/08
63537	Littelfuse/Account Finance Department (State)	Des Plaines, IL	06/13/08	06/12/08
63538	Plastech Engineered Products (Wkrs)	Gallatin, TN	06/13/08	06/05/08
63539	DMAX, Ltd (IUECWA)	Dayton, OH	06/13/08	06/12/08
63540	Sento Corporation (Wkrs)	Raleigh, NC	06/13/08	06/09/08

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DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-57,700]

Joy Technologies, Inc., dba Joy Mining Machinery, Mt. Vernon Plant, Mt. Vernon, IL; Notice of Negative Determination on Remand

On October 31, 2007, the U.S. Court of International Trade (USCIT) remanded to the U.S. Department of Labor (Department) for further investigation *Former Employees of Joy Technologies, Inc. v. U.S. Secretary of Labor*, Court No. 06-00088.

Case History

On August 2, 2005, the International Brotherhood of Boiler-makers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 483, filed a petition for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) on behalf of workers and former workers of Joy Mining Machinery, Mt. Vernon, Illinois producing underground mining equipment. The petition alleged that the Mt. Vernon facility would close September 23, 2005, due to a shift of production to Canada, China, Mexico and Russia. Administrative Record (AR) 2-3, 20.

Workers of the Mt. Vernon facility were previously denied eligibility to apply for TAA under TA-W-42,234 on the basis that the workers did not produce an article. AR 8, Supplemental Administrative Record (SAR) 127.

During the initial investigation, the petitioners submitted documents in support of the allegation that mining equipment production shifted to Mexico. AR 22-28.

Also, during the initial investigation, Joy officials provided information that the principal functions performed at the Mt. Vernon Illinois facility were building and rebuilding shuttle cars; rebuilding electrical motors used in certain types of mining machinery; and rebuilding gearboxes for armored face conveyors (AFC), AR 12, 14-15, 44. In addition, the Department learned that the Mt. Vernon facility was scheduled to close on September 23, 2005. AR 9, 12, 125.

Joy also provided information that the Mt. Vernon facility's closure was due to the relocation of operations to a new facility in Kentucky. AR 12, 15, 16, 29, 126. The new facility in Kentucky

would “manufacture shuttle cars, rebuild motors and rebuild AFC gearcases.” AR 126. Joy Mining Machinery (Joy) already had warehouse facilities in Kentucky. AR 126.

Information received from Joy documents that the Mt. Vernon facility’s sales during November 2003 through October 2004 increased from November 2002 through October 2003 levels and that sales during November 2004 through July 2005 decreased from November 2003 through July 2004 levels, and that Joy’s domestic sales in fiscal year 2004 increased from fiscal year 2003 levels, and increased during the first three quarters of 2005 when compared to the first three quarters of 2004. AR 14, 29.

The initial negative determination, issued on September 15, 2005, was based on the Department’s findings that:

- Workers at Joy Technologies, Inc., Mt. Vernon, Illinois produced underground mining machinery;
- Sales and employment at the Mt. Vernon facility increased from 2003 to 2004;
- Mt. Vernon facility sales remained stable in January through July 2005 when compared to January through July 2004;
- Company-wide sales increased in January through July 2005 when compared to January through July 2004;
- Joy did not shift production to a foreign country; and
- Joy did not import articles like or directly competitive with those produced by the Mt. Vernon facility. AR 132–135.

By letter dated November 3, 2005, the former employees requested administrative reconsideration, stating that the workers were engaged in fabrication of mining equipment components and that these components are being produced in a foreign country. The request further alleged that the worker separations were due to Joy’s shift of production to a foreign country (Mexico). AR 145–148

The negative reconsideration determination, issued on January 19, 2006, was based on the Department’s findings that:

- There was no shift of production to Mexico;
- the work at issue was temporary work re-assigned to several domestic Joy facilities, including the Mt. Vernon facility;
- The workers’ separations were due to a shift of operations to an affiliated domestic facility in Kentucky; and
- The subject workers were not eligible to apply for TAA as workers of either a primary company or a

secondarily-affected company. AR 180–183.

By letter dated March 15, 2006, Plaintiffs sought judicial review by the USCIT. Plaintiffs’ counsel’s August 24, 2006 letter stated that the Department failed to identify the manufacturing functions of the Mt. Vernon facility and to adequately investigate, and subsequently determine, whether the petitioning workers are eligible to apply for worker adjustment assistance under the Trade Act of 1974, as amended, due to either increased imports of articles like or directly competitive with those produced by the Mt. Vernon facility or a shift of production to a foreign country, specifically Mexico. SAR 193–198.

The Department’s motion for voluntary remand to further investigate the Plaintiffs’ allegations and to issue a re-determination of subject workers’ eligibility to apply TAA and ATAA was granted by the USCIT on September 25, 2006. SAR 240.

During the first remand investigation, the Department contacted Plaintiffs’ counsel for information, SAR 200–234, 242–392, 409–411, reviewed submissions from Plaintiffs, SAR 200–201, 407–408, 416–419, 422–423, and reviewed information provided by Joy. SAR 200–201, 235, 412–415, 420–421.

During the first remand investigation, the Department received 12 affidavits from Plaintiffs. A summary of relevant facts of each affidavit follows:

Ten affiants stated that the subject facility always manufactured both finished products and components of mining machinery; Joy’s main production facility is in Franklin, Pennsylvania but there were Joy facilities throughout the United States, including Utah, Virginia, and West Virginia; and a “substantial part” of the subject facility’s work is performed as “an upstream supplier” for the Franklin, Pennsylvania facility. The same ten affiants stated that the subject facility imported mining machinery components from Mexico, “did the final machining on completed crawler track frames that originated in Mexico,” or some close variation thereof. Nine affiants referenced parts or components stamped “hecho en Mexico.”

Gary Coles further stated that the subject facility had sold completed components “directly to customers.” Steve Lisenbey further stated that in January 2002, a subject facility manager stated that “Joy had formed a partnership with a Mexican supplier to outsource the fabrication of continuous miner components” and “components fabricated in Mexico did not meet the International Organization for

Standardization (“ISO”) standards,” so “the completed components Joy outsourced to Mexico had to be brought to Mt. Vernon for the final machining”; and the Joy, Lebanon, Kentucky facility “does not have the same manufacturing functions and duties” as the subject facility because it does not fabricate components. SAR 280–283.

John Moore further stated that the subject facility “took sales orders directly from customers”; and in “approximately October or November 2005, a sales manager for Joy “told me that Joy was outsourcing manufacture and assembly of mining equipment to Mexico.” SAR 292–296.

Jerome Tobin further stated that on “October 17, 2006,” Merlin Orser, the President of the Union’s local at Franklin, Pennsylvania, “confirmed for me that the Lebanon facility does only assembly work * * * does not perform the manufacturing functions that the Mt. Vernon facility performed when it was open.” SAR 316–320.

David Vaughn further stated that a former Joy supervisor “told me that at Coal Age he is outsourcing the manufacture of continuous miner frames to a company in Mexico * * * the same Mexican company for outsourcing that Joy used to fabricate the continuous miner components.” SAR 328–332.

Steven Kirkpatrick further stated that in 2003, “DMUs came into the Mt. Vernon plant from Mexico.” SAR 366–370.

Darrell Cockrum stated that, in August 2005, Mr. Peircey from Engles Trucking told him that he had picked up a shipment of crawler track frames at Extreme Machine, Youngstown, Ohio; that the shipment had originated in Mexico; that Extreme Machine “had a large number of crawler track frames that Joy had fabricated in Mexico”; Joy had shipped the frames from Mexico to Extreme Machine for final machining; and that the frames in the August 2005 shipments were from Mexico and sent to the subject facility for final machining. SAR 394–395.

William Perkins stated that in 2004 and 2005, he photographed and inspected conveyor supports, discharge tails, and crawler track frames that had originated in Mexico and were stamped “hecho en Mexico.” SAR 410–411.

In the course of the first remand, the Department determined that the subject workers produced mining machinery and finished mining machinery components, and rebuilt mining machinery components. Because the workers who produced finished mining machinery and mining machinery components were not separately

identifiable by product line, AR 12, the Department determined that the subject worker group was engaged in the production of mining machinery and mining machinery components. Since rebuilding machinery is a repair activity, it was considered a service and was not an issue in the first remand investigation.

On January 8, 2007, the Department issued a negative determination on remand. The Department based its determination on the following findings:

- There was no shift of production of either finished mining machinery or components from the Mt. Vernon facility to a foreign country;
- Production shifted from the Mt. Vernon facility to Joy's Lebanon, Kentucky facility;
- Neither the Mt. Vernon facility nor Joy (overall) increased imports of articles like or directly competitive with those produced at the Mt. Vernon facility; and
- Increased imports, if any, could not have contributed importantly to workers' separations because sales increased during the relevant period. SAR 429-448.

The USCIT, in its October 31, 2007 decision, concluded that the denial of benefits was not supported by substantial evidence. Further, the Court found that the Department misstated the Trade Adjustment Assistance requirements, where the Department determined that there was not a shift of production to Equimin, a sometime Mexican supplier, based on the Department's finding that Equimin was not owned by Joy.

Accordingly, the Court ordered a second remand investigation, in order for the Department to determine whether the subject workers were eligible to apply for TAA and ATAA. The Department carefully reviewed USCIT decision for guidance in designing the remand investigation, so that the Department could:

- Review the work performed by the subject workers, regardless of whether the work was "core" or "non-core" functions of the Mt. Vernon facility;
- Determine whether increases (absolute or relative) in imports of articles like or directly competitive with those produced by the Mt. Vernon facility contributed importantly to worker separations (total or partial), or threat thereof, and to declines in Mt. Vernon facility sales and/or production;
- Determine whether there has been a shift in production by Joy of articles like or directly competitive with those produced by the Mt. Vernon facility to a qualified country (a foreign country, such as Mexico, that is either a party to

a free trade agreement with the United States or a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act);

- Determine whether there has been a shift of production by Joy of articles like or directly competitive with those produced by the Mt. Vernon facility to a foreign country followed by an actual or likely increase in imports of articles like or directly competitive with articles which are or were produced by the Mt. Vernon facility; and
- Issue a re-determination whether the subject workers are eligible to apply for TAA and ATAA.

Trade Adjustment Assistance Criteria

To apply for TAA, the group eligibility requirements under section 222(a) of the Trade Act of 1974, as amended, must be met. The requirements can be satisfied in either of two ways:

- I. Section 222(a)(2)(A)—
 - 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; and
 - 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 222(a)(2)(B)—
 - 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; and
 - 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; or
 2. The country to which the workers' firm has shifted production of the articles is 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 like or directly competitive with articles which are or were produced by such firm or subdivision.

Applicable Regulations

Under the definition of "increased imports" presented in 29 CFR 90.2, imports must have increased, absolutely or relative to domestic production, compared to a representative base period. The regulation establishes what the Department refers to as the "relevant period," i.e., the twelve-month period prior to the date of the petition, and the "representative base period," the one-year period preceding the relevant period.

Further, pursuant to 29 CFR 90.2, like articles are "those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which the articles are made, appearance, quality, texture, etc.)" and directly competitive articles are "those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes (i.e., adapted to the same uses and essentially interchangeable therefore)."

Second Remand Investigation Glossary

To more easily understand the terms used in this determination, the Department will use the following definitions:

- "*Continuous miner*" and "*Miner*" are terms that are used interchangeably and refer to a type of heavy underground mining equipment used to remove earth during the mining process;
- "*Crawler Track Frames*" and "*CAT Frames*" are bare steel Structures that serve as the framework for the construction of a continuous miner;
- "*Haulage*" refers to a type of heavy equipment that is used to transport coal and earth during the mining process, and includes shuttle cars;
- "*Joy*" refers to Joy Technologies, Inc., doing business as (DBA) Joy Mining Machinery (corporate entity);
- "*Rebuild*" refers to repair;
- "*Relevant Period*" refers to the 12-month period prior to the petition date, which is August 2004 through July 2005;
- "*Subject Workers*" refers to workers and former workers at Joy Technologies, Inc., DBA Joy Mining Machinery, Mt. Vernon, Illinois.

Mt. Vernon Facility Operations

THIS SECTION CONTAINS BUSINESS CONFIDENTIAL INFORMATION

AND PORTION BETWEEN
BRACKETS MUST BE REDACTED
FROM PUBLIC VERSION

[]

Joy's Relationship With EQUIMIN

THIS SECTION CONTAINS BUSINESS
CONFIDENTIAL INFORMATION
AND PORTION BETWEEN
BRACKETS MUST BE REDACTED
FROM PUBLIC VERSION

[]

Scope of Second Remand Investigation

The Department recognizes the remedial nature of the TAA program, and therefore reviews facts in the light most favorable to the separated workers seeking benefits. However, the Department has a statutory obligation to determine whether the petitioning workers have met the group eligibility criteria of the Trade Act of 1974, as amended. In an effort to effectuate the remedial purposes of the Trade Act, the Department generally incorporated, verbatim, Plaintiff's proposed questions for Joy into the second remand investigation (SAR 496, 507–508) and carefully considered Plaintiffs' relevant input.

In order to determine whether a petitioning worker group has met the statutory criteria, the Department first determines what article(s) the subject workers produced during the relevant period. Second, the Department determines whether, during the relevant period, there were significant worker separations.

After making those determinations, the Department determines whether there were declines (absolute or relative) in Mt. Vernon facility sales and/or production. If so, the Department determines whether increased imports, as described in 29 CFR 90.2, of articles like or directly competitive with those produced by the Mt. Vernon facility contributed importantly to the worker separations and sales and/or production declines.

The Department must also determine whether, in addition to significant worker separations, there has been a shift of production from the Mt. Vernon facility of articles like or directly competitive with those produced by the Mt. Vernon facility to a qualifying country or if there have been, or are likely to be, increased imports of articles like or directly competitive with those produced by the Mt. Vernon facility following Joy's shift of production to a non-qualifying country.

While the Plaintiffs did not allege secondary-impact (the situation where, during the relevant period, the Mt. Vernon facility either supplied

component parts to or assembled/finished for a company with a worker group certified eligible to apply for TAA), it is the Department's practice to consider secondary-impact should a petitioning worker group not meet the statutory criteria.

Where the separated workers meet the group eligibility requirement (significant separations or threat of separation) of the Trade Act, as amended, the Department conducts an investigation to determine if the subject workers are eligible to apply for ATAA.

To determine the subject workers' eligibility to apply for TAA and ATAA, the Department reviewed previously-submitted information, as well as information submitted during the second remand investigation, regardless of whether the work performed by the subject workers could be characterized as "core" functions of the Mt. Vernon facility.

Further, the Department has been consistently mindful during the second remand investigation of the need to base its determination on competent, credible evidence. The plaintiffs have disputed Joy's credibility, observing that a particular Joy official had provided "less than credible information," in a separate proceeding. SAR 862. In response, the Department has taken particular care to seek information from Joy officials [REDACTED IN PUBLIC VERSION] who were qualified to respond based on their familiarity with the Mt. Vernon facility's operations, during the Court-ordered remand investigation. SAR 895, 975. Further, all information received from Joy was provided to Plaintiffs' counsel for review and comment, so that there was full opportunity for exposure of any inaccuracy. Indeed, plaintiffs did respond to Joy's submissions, characterizing them as non-responsive, incomprehensible and insufficient basis for negative determination. SAR 870–872, 910–914, 939–940, 982–983, 985–986. Plaintiffs focus particular attention on Joy's apparent effort to minimize the significance of the crawler track frame work performed at the Mt. Vernon facility and in Mexico. SAR 912, 985. In addition, two of the plaintiffs submitted affidavits that were intended to rebut Joy's information. SAR 915–921, 941–942, 987–988. The plaintiffs raised no issues as to the truthfulness of Joy's informants.

A careful review of previously submitted information revealed that Joy was aware that TAA and ATAA would be paid at no cost to them (AR 19) and, therefore, had no incentive to prevent the subject workers from receiving TAA benefits, AR 29–30. In addition, a Joy

official stated that Joy wanted former workers "to receive all of the benefits to which they are legally entitled." AR 160.

After having given every reasonable consideration to plaintiffs' critiques of Joy's submissions, the Department has determined that the ostensible gaps or flaws in the record developed for the second remand investigation reflect areas of inquiry where either there was no responsive information (SAR 975–976) or there was no responsive information that was relevant to the Department's deliberations. SAR 973. The company officials and Joy counsel have demonstrated that they are knowledgeable of the matters on which they provided information, which included hundreds of pages of company records to substantiate their responses.

Further, while both the plaintiffs and the former firm have directed considerable effort to expounding their views as to whether the fabrication of crawler track frames was a "core" activity at the Mt. Vernon facility, the Department has determined that the distinction between "core" and "non-core" is irrelevant to the Department's decision on remand. Indeed, the application of the statutory criteria for certification requires no such finding.

Based on careful consideration of all relevant factors, the Department has found that the information provided by Joy is competent and credible.

Given the remedial purposes of the Trade Act, the Department carefully scrutinized all information received from the plaintiffs, giving them the benefit of every doubt. However, based on plaintiffs' failure to substantiate their allegations or to rebut information provided by Joy, the Department has determined that the information submitted by the plaintiffs is insufficient to overcome the conclusions drawn from the statements and voluminous documentary evidence by Joy. Further, to the extent that the plaintiffs' information is credible, the facts they have adduced would not have satisfied the statutory criteria for certification. In particular, even when viewed in the light most favorable to the plaintiffs, the plaintiffs' information about [REDACTED IN PUBLIC VERSION] does not support conclusion that there was a shift of production from the Mt. Vernon facility to a foreign source.

In order to ensure that the second remand determination is based on substantial evidence, the Department has made every reasonable effort to obtain pertinent information. To that end, the Department requested Plaintiffs' counsel to provide the

Department with questions that could be sent to Joy. SAR 449–455, 498–500. In response to the Department's requests, Plaintiffs' counsel submitted several questions, including questions regarding imports of mining equipment and components; the outsourcing of mining components; work orders for mining equipment and components; and employee time records for activities related to the production of mining equipment and components. SAR 496, 499, 507.

During the second remand investigation, the Department requested that Joy identify the types of mining equipment and components produced at the Mt. Vernon facility and provide the quantity of each type of mining equipment and component produced at the Mt. Vernon facility. SAR 506–507. In efforts to seek clarification of the initial responses, the Department conducted a conference call with Joy officials to discuss previously-submitted information, SAR 904–908, and requested that Joy submit marketing material that illustrated the mining equipment. SAR 948–966.

Plaintiffs' only submissions during the second remand investigation consist of three affidavits from two former workers of the Mt. Vernon facility. While both former employees asserted that they rebuilt continuous mining equipment and mining component parts, neither former worker alleged increased imports of continuous mining equipment and/or mining component parts or a shift of production abroad. SAR 930, 941.

John P. Moore, a former worker of the Mt. Vernon facility who submitted an affidavit during the first remand investigation, stated in his April 18, 2008 affidavit that:

- In 2001, the Mt. Vernon facility became a “center of excellence for haulage” with haulage being shuttle cars, armored face conveyors, and battery cars;
- Following the change, the Mt. Vernon facility manufactured shuttle cars as well as “miner components, both for its own use, and as overflow work from other Joy facilities”;
- “Joy, Mt. Vernon manufactured many different continuous miner components, not just crawler track frames”;
- “Joy, Mt. Vernon also manufactured and/or serviced other continuous miner components * * * Joy, Mt. Vernon manufactured these * * * for use in rebuilding and also to sell directly to customers”;
- “In May 2004, Joy began producing sixty-nine (69) conveyors and seventy-two (72) conveyor supports as overflow

work for the Franklin, Pennsylvania plant”; and

- “The rebuilding of continuous miners often required manufacturing new continuous miner components to replace old components.” SAR 930–933.

Steven Kirkpatrick, another former worker of the Mt. Vernon facility who also provided an affidavit during the first remand investigation, described in his April 24, 2008 affidavit the fabrication of crawler track frames. SAR 941–942.

John P. Moore, in his May 22, 2008 affidavit, described several continuous miner components and repeated his earlier statement that “In May 2004, Joy began producing sixty-nine (69) conveyors and seventy-two (72) conveyor supports as overflow work for the Franklin, Pennsylvania plant.” SAR 987.

During the second remand investigation, the Department received from Joy data regarding:

- Production and service orders of mining equipment and components at the Mt. Vernon facility during June 2003 through July 2004, SAR 667–727;
- Production orders of mining equipment and components at the Mt. Vernon facility during August 2003 through September 2004, SAR 773–785, 832–844, 882–891;
- Production and service orders of mining equipment and components at the Mt. Vernon facility during August 2004 through September 2005, SAR 728–768;
- Production orders of mining equipment and components at the Mt. Vernon facility during October 2004 through November 2005, SAR 781–798, SAR 821–831;
- Employment figures at the Mt. Vernon facility during June 2003 through August 2005, including the types of workers and the staff level of each worker category, SAR 535–666;
- Mining equipment repair data for 2003, 2004, and 2005, SAR 769; and
- Data regarding labor costs and production costs for various Joy facilities, including Mt. Vernon, Illinois, and Lebanon, Kentucky. SAR 770.

All information obtained from Joy during the second remand investigation was submitted to Plaintiffs' counsel (subject to the USCIT protective order) for review and comment prior to the filing of the second remand determination. Indeed, the Department requested an extension of the time to file the remand determination, in order to provide Plaintiffs' counsel with adequate time to review the materials and submit comments, as well as to allow time for the Department to

consider the Plaintiffs' concerns about Joy's submissions.

Issue #1: Articles Produced by the Mt. Vernon Facility During the Relevant Period

The Department determined in the first remand determination that the subject workers were engaged in the production of mining machinery and mining machinery components.

During the second remand investigation, the Department received information from Joy which clarified that the Mt. Vernon facility produced haulage equipment, SAR 849–856, 905, 908, and rebuilt mining component parts. SAR 728–768, 882–891, 905, 978–979. Joy also provided information which indicated that the subject workers produced a significant quantity of brakes and clutches for after-market sale to customers, SAR 907–908. Joy also provided information which indicated the Mt. Vernon facility produced some crawler track frames, on an “overflow” basis, during the representative base period and the relevant period. SAR 854–855. [REDACTED IN PUBLIC VERSION]

The Department also received three affidavits (two, dated April 18, 2008 and May 22, 2008, from one plaintiff and one dated April 24, 2008 from another). The April 21 affidavit described work performed at the Mt. Vernon facility and estimated that work on crawler track frames constituted at least 30 percent of the Mt. Vernon facility's work in the last year it was open. SAR 917. The April 24 affidavit addressed the production of crawler track frames, estimating that the fabrication, alone, of the frames required 72 man hours. SAR 941. The May 22 affidavit described certain components of continuous miners and stated that the Mt. Vernon facility manufactured components for mining machinery between 2003 and the time the plant closed. SAR 987–988. Joy responded to the plaintiffs' affidavits, questioning the accuracy of the 30 percent estimate and the overall relevance of the affiants' statements.

Based on careful review of the record, the Department has determined that the subject workers were engaged in the production of haulage equipment and mining equipment component parts, including crawler track frames, and that the workers were not separately identifiable by product line.

Issue #2: Significant Worker Separations at the Mt. Vernon Facility During the Relevant Period

The Mt. Vernon facility closed on September 23, 2005. AR 2, 12. As such, the Department determines that, during

the relevant period, a significant number or proportion of workers at the Mt. Vernon facility were totally or partially separated, or threatened to become totally or partially separated.

Issue #3: Sales and/or Production Declines at the Mt. Vernon Facility During the Relevant Period

The Mt. Vernon facility experienced sales and production declines during the period extending from January 2005 through July 2005, as compared to the comparable period the previous year. AR 14. Accordingly, the Department determines that, during the relevant period, sales and production declined absolutely.

Issue #4: Increased Imports Did Not Contribute Importantly to Mt. Vernon Facility Declines or Worker Separations

Pursuant to 29 CFR 90.2, imports must have increased, absolutely or relative to domestic production, during the relevant period when compared to a representative base period. The regulation establishes the representative base period as the one-year period preceding the relevant period.

Plaintiffs have alleged that “continuous miner components like or directly competitive with those manufactured at Joy Mt. Vernon, were being imported to the plant from Mexico,” SAR 456, and provided printed material from the Web site of Equimin that states “Equimin is actually exporting steel structures for underground shielded and belt conveyor to the Joy Mining Machinery in U.S.A.” SAR 458–469.

Plaintiffs do not dispute that Joy does not import finished mining machinery. AR 13–14, 170. Accordingly, the scope of the second remand investigation is limited to mining equipment component parts.

According to Joy, [REDACTED IN PUBLIC VERSION] SAR 970.

Because the imports occurred during the relevant period (August 2004 through July 2005), the Department finds that there were imports of mining equipment component parts like or directly competitive with those produced by the Mt. Vernon facility.¹ However, the Department has determined, given that production of crawler track frames at the Mt. Vernon facility increased during the relevant period (SAR 854) and the imports ceased before the Mt. Vernon facility closed (SAR 970), that imports of

crawler track frames did not contribute importantly to Mt. Vernon facility sales and/or volume declines and worker separations. If anything, the import of frames created work for the Mt. Vernon facility, which might otherwise have closed even sooner. SAR 907.

If the Department were to consider imports from Mexico as a possible basis for certification, the Department would need to determine if such imports were “like or directly competitive with” articles produced at the Mt. Vernon facility. Joy has stated that it imported crawler track frames, while averring that it did not import any article like or directly competitive with the component parts produced at the Mt. Vernon facility. This can best be understood by discussing the application of the terms “like” and “directly competitive” within the context of the Trade Act.

Pursuant to 29 CFR 90.2, like articles are “those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which the articles are made, appearance, quality, texture, etc.)” and directly competitive articles are “those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes (i.e., adapted to the same uses and essentially interchangeable therefore).”

Under this definition, prescription glasses are like non-prescription glasses and are directly competitive with contact lenses, but are not directly competitive with non-prescription sunglasses and are not like contact lenses. As illustrated, two articles may be like each other without being directly competitive with each other, and two articles may be directly competitive with each other without being like each other.

According to information provided by both Joy and the plaintiffs the crawler track frame work performed in Mexico produced “just grids—metal frames with nothing on them.” SAR 907. The finishing process required substantial additional work. SAR 854, 916. Therefore, frames imported from Mexico were components of a finished product, rather than the product itself. Accordingly, the crawler track frames fabricated in Mexico and imported to the United States for finishing were not like or directly competitive with the frames that were fully manufactured at the Mt. Vernon facility and elsewhere in the United States.

Issue #5: Joy Did Not Shift Production to a Foreign Country

The plaintiffs have asserted that production of crawler track frames shifted from the Mt. Vernon facility to Mexico. SAR 293–296. Based on the information the Department obtained during previous investigations and confirmed during the second remand investigation, the Department has determined that there was no shift of production to a foreign country. Rather, production shifted from the Mt. Vernon facility to other domestic facilities. AR 9, 20, 29–30, 130–131, 159–160, 169–170, SAR 248, 251, 415, 425.

Joy has presented credible and competent evidence that the work previously performed at the Mt. Vernon facility has been shifted to other Joy facilities or to vendors in the United States, because of cost considerations. SAR 971, 975. In particular, Joy noted that the number of employees at the Kentucky plant to which some of the work previously performed by the Mt. Vernon facility had been shifted is roughly equivalent to the number of employees at the Mt. Vernon facility. SAR 973. The plaintiffs have not produced evidence that calls into question Joy’s statement that foreign production sources have done no work for Joy since 2005. Therefore, the Department has determined that the subject workers are not eligible to apply for TAA based on a shift of production to a foreign country. The mere fact that the Mt. Vernon facility did work on some products produced in Mexico is not, in itself, evidence that production shifted to Mexico when the facility closed. Joy’s explanation of where the Mt. Vernon facility’s work went and the reasons for its closure are consistent and well supported in the record.

Issue #6: The Mt. Vernon Facility Did Not Supply Component Parts to a Company With a Worker Group Certified Eligible To Apply for TAA

Plaintiffs have asserted that the subject workers manufactured components for Joy’s Franklin, Pennsylvania facility, SAR 194, 204–205, and may have produced components for Joy’s Duffield, Virginia plant, Bluefield, West Virginia plant, and the Price, Utah plant. SAR 205.

In order to make an affirmative determination and issue a certification of eligibility to apply for adjustment assistance based on secondary impact, the following group eligibility requirements under section 222(b) must be met:

(1) A significant number or proportion of the workers in the workers’ firm or

¹ The record is not clear about the volume of imports, so it cannot be determined whether imports increased during the relevant period. For the purposes of this finding, the Department will assume that imports increased.

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 of business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

The Department has reviewed the record and has determined that section 222(b)(2) has not been met, because (1) the Mt. Vernon facility was a supplier for other Joy facilities, not for another firm, and (2) there is no certified worker group with which the plaintiffs could be associated. Therefore, the Department determines that the subject workers are not eligible to apply for TAA as secondarily-affected workers.

Issue #7: The Worker Group Cannot Be Certified as Eligible To Apply for ATAA

In addition, in accordance with section 246 of the Trade Act of 1974, as amended, the Department herein presents the results of its investigation regarding certification of eligibility to apply for ATAA.

In order for the Department to issue a certification of eligibility to apply for ATAA, the subject worker group must be certified as eligible to apply for TAA. Since the workers are denied eligibility to apply for TAA, they cannot be certified eligible to apply for ATAA.

Conclusion

After careful review of the findings of the remand investigation, I affirm the notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Joy Technologies, Inc., DBA Joy Mining Machinery, Mt. Vernon Plant, Mt. Vernon, Illinois.

Signed at Washington, DC, this 12th day of June 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-14298 Filed 6-24-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-63,451]

Columbia Falls Aluminum Company, LLC, Columbia Falls, MT; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on May 30, 2008 in response to a petition filed by a company official on behalf of workers of Columbia Falls Aluminum Company, LLC, Columbia Falls, Montana.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 18th day of June 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-14304 Filed 6-24-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-63,542]

Home Depot, Store Number 0379, Opelousas, LA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 16, 2008 in response to a worker petition filed by a state agency representative on behalf of workers of Home Depot, Store Number 0379, Opelousas, Louisiana.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 18th day of June 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-14295 Filed 6-24-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-63,360]

Motorola, Inc., Fort Worth, TX; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an

investigation was initiated on May 9, 2008 in response to a petition filed on behalf of workers of Motorola, Inc., Fort Worth, Texas.

The workers are covered under an existing certification (TA-W-62,897) issued for all workers of Motorola, Inc., Integrated Supply Chain Division, Fort Worth, Texas, which expires on April 2, 2010. Consequently, further investigation in this case would serve no purpose and the investigation has been terminated.

Signed at Washington, DC, this 17th day of June, 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-14303 Filed 6-24-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-63,519]

Parlex USA, Methuen, MA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 11, 2008 in response to a worker petition filed by a state agency representative on behalf of workers of Parlex USA, Methuen, Massachusetts.

The petitioning group of workers is covered by an active certification (TA-W-62,771) which expires on April 28, 2010. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 12th day of June 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8-14305 Filed 6-24-08; 8:45 am]

BILLING CODE 4510-FN-P

DEPARTMENT OF LABOR

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 visit and participate in transition programs at area military installations on Thursday, July 24. The business meeting is on Friday, July 25, from 7:30 a.m. to 2 p.m. at the Doubletree Hotel, 11915 El Camino Real, San Diego/Del Mar, California.

The committee will discuss programs assisting veterans seeking employment and raising employer awareness as to the advantages of hiring veterans with special emphasis on employer outreach and wounded and injured veterans.

Individuals needing special accommodations should notify Bill Offutt at (202) 693–4717 by July 16, 2008.

Signed in Washington, DC, this 16th day of June, 2008.

John M. McWilliam,

Deputy Assistant Secretary, Veterans Employment and Training Service.

[FR Doc. E8–14307 Filed 6–24–08; 8:45 am]

BILLING CODE 4510–79–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request extension of a currently approved information collection used when veterans or other authorized individuals request information from or copies of documents in military service records. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before August 25, 2008 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments

(NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd., College Park, MD 20740–6001; or faxed to 301–713–7409; or electronically mailed to tamee.fechhelm@nara.gov.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the proposed information collections and supporting statements should be directed to Tamee Fechhelm at telephone number 301–837–1694, or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed collection information is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collections; (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 information technology; and (e) whether small businesses are affected by this collection. The comments that are submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Request Pertaining to Military Records.

OMB number: 3095–0029.

Agency form number: SF 180.

Type of review: Regular.

Affected public: Veterans, their authorized representatives, state and local governments, and businesses.

Estimated number of respondents: 1,028,769.

Estimated time per response: 5 minutes.

Frequency of response: On occasion (when respondent wishes to request information from a military personnel record).

Estimated total annual burden hours: 85,731 hours.

Abstract: The authority for this information collection is contained in 36 CFR 1228.168(b). In accordance with rules issued by the Department of Defense (DOD) and Department of Homeland Security (DHS, U.S. Coast Guard), the National Personnel Records

Center (NPRC) of the National Archives and Records Administration (NARA) administers military service records of veterans after discharge, retirement, and death. When veterans and other authorized individuals request information from or copies of documents in military service records, they must provide in forms or in letters certain information about the veteran and the nature of the request. Federal agencies, military departments, veterans, veterans' organizations, and the general public use Standard Forms (SF) 180, Request Pertaining to Military Records, in order to obtain information from military service records stored at NPRC. Veterans and next-of-kin of deceased veterans can also use eVetRecs (http://www.archives.gov/research_room/vetrecs/) to order copies.

Dated: June 20, 2008.

Martha Morphy,

Assistant Archivist for Information Services.

[FR Doc. E8–14496 Filed 6–24–08; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL CAPITAL PLANNING COMMISSION

Senior Executive Service; Performance Review Board; Members

AGENCY: National Capital Planning Commission.

ACTION: Notice of Members of Senior Executive Service Performance Review Board.

SUMMARY: Section 4314(c) of Title 5, U.S.C. (as amended by the Civil Service Reform Act of 1978) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more Performance Review Boards (PRB) to review, evaluate and make a final recommendation on performance appraisals assigned to individual members of the agency's Senior Executive Service. The PRB established for the National Capital Planning Commission also makes recommendations to the agency head regarding SES performance awards, rank awards and bonuses. Section 4314(c)(4) requires that notice of appointment of Performance Review Board members be published in the **Federal Register**.

The following persons have been appointed to serve as members of the Performance Review Board for the National Capital Planning Commission: Deidre Flippen, Paula Hayes, Eric J. Gangloff and Charles Schneider from June 23, 2008, to June 23, 2010.

FOR FURTHER INFORMATION CONTACT:

Phyllis A. Vessels, Human Resources Specialist, National Capital Planning Commission, 401 Ninth Street, NW., Suite 500, Washington, DC 20004, (202) 482-7217.

Dated: June 20, 2008.

Barry S. Socks,

Chief Operating Officer.

[FR Doc. E8-14398 Filed 6-24-08; 8:45 am]

BILLING CODE 7520-01-P

THE NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

Notice of Extension of Expiring Information Collection: IMLS Library Workforce Study

AGENCY: Institute of Museum and Library Services, National Foundation for the Arts and Humanities.

ACTION: Notice.

SUMMARY: The Institute of Museum and Library Service (IMLS) as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently the Institute of Museum and Library Services is soliciting comments concerning a study to promote improved workforce planning including strategies for recruitment and retention of workers in the LIS field. In particular, the study aims to collect current and projected employment in terms of numbers of positions (filled and vacant), functional specialization, educational requirements, skill/competency requirements, salaries and benefits, demographics, annual budget/expenditures, constituency or market size. Information to be collected from LIS professionals includes current employment, career path and career progression, professional association/union membership and demographics.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before 60 days from the date of this publication. *IMLS is particularly*

interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the 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 submissions of responses.

ADDRESSES: Send comments to: Lesley Langa, Research Specialist, Institute of Museum and Library Services, 1800 M Street, NW., 9th floor, Washington, DC 20036, by telephone: 202-653-4760; fax: 202-653-4611; or by e-mail at llanga@imls.gov.

SUPPLEMENTARY INFORMATION:

1. Background

The Institute of Museum and Library Services is authorized under U.S.C. 20 Chapter 72, and is the primary source of federal support for the nation's 122,000 libraries and 17,500 museums. The Institute's mission is to create strong libraries and museums that connect people to information and ideas. The Institute works at the national level and in coordination with state and local organizations to sustain heritage, culture, and knowledge; enhance learning and innovation; and support professional development.

II. Current Actions

Agency: Institute of Museum and Library Services.

Title: National Study on the Future of Librarians in the Workforce.

OMB Number: 3137-0063, expiration date: 06/30/2008.

Agency Number: 3137.

Frequency: One time.

Affected Public: Libraries, librarians, other information professionals.

Number of Respondents: To be determined.

Estimated Time per Respondent: To be determined.

Total Annualized Capital/Startup Costs: To be determined.

Total Costs: To be determined.

FOR FURTHER INFORMATION CONTACT:

Lesley Langa, Research Specialist,

Institute of Museum and Library Services, 1800 M Street, NW., 9th floor, Washington, DC 20036, by telephone: 202-653-4760; fax: 202-653-4611; or by e-mail at llanga@imls.gov.

Dated: June 19, 2008.

Lesley Langa,

Research Specialist, Institute of Museum and Library Services.

[FR Doc. E8-14344 Filed 6-24-08; 8:45 am]

BILLING CODE 7036-01-P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on March 19, 2008.

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* NRC Form 241, "Report of Proposed Activities in Non-Agreement States, Areas of Exclusive Federal Jurisdiction, or Offshore Waters."

3. *Current OMB approval number:* 3150-0013.

4. *The form number if applicable:* NRC Form 241.

5. *How often the collection is required:* NRC Form 241 must be submitted each time an Agreement State licensee wants to engage in or revise its activities involving the use of radioactive byproduct material in a non-Agreement State, areas of exclusive Federal jurisdiction, or offshore waters. The NRC may waive the requirements for filing additional copies of NRC Form 241 during the remainder of the calendar year following receipt of the initial form.

6. *Who will be required or asked to report:* Any licensee who holds a specific license from an Agreement

State and wants to conduct the same activity in non-Agreement States, areas of exclusive Federal jurisdiction, or offshore waters under the general license in 10 CFR 150.20.

7. *An estimate of the number of annual responses:* 2,188 responses.

8. *The estimated number of annual respondents:* 140 respondents.

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 582 hours.

10. *Abstract:* Any Agreement State licensee who engages in the use of radioactive material in non-Agreement States, areas of exclusive Federal jurisdiction, or offshore waters, under the general license in Section 150.20, is required to file, with the NRC regional administrator for the region in which the Agreement State that issues the license is located, a copy of NRC Form 241 ("Report of Proposed Activities in Non-Agreement States, Areas of Exclusive Federal Jurisdiction, or Offshore Waters"), a copy of its Agreement State specific license, and the appropriate fee as prescribed in Section 170.31 at least 3 days before engaging in such activity. This mandatory notification permits NRC to schedule inspections of the activities to determine whether the activities are being conducted in accordance with requirements for protection of the public health and safety.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O-1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: <http://www.nrc.gov/public-involve/doc-comment/omb/index.html>. The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by July 25, 2008. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. Nathan J. Frey, Office of Information and Regulatory Affairs (3150-0013), NEOB-10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to Nathan_J._Frey@omb.eop.gov or submitted by telephone at (202) 395-7345.

The NRC Clearance Officer is Margaret A. Janney, (301) 415-7245.

Dated at Rockville, Maryland, this 19th day of June, 2008.

For the Nuclear Regulatory Commission.

Gregory Trussell,

Acting NRC Clearance Officer, Office of Information Services.

[FR Doc. E8-14345 Filed 6-24-08; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on April 2, 2008.

1. *Type of submission, new, revision, or extension:* Extension.

2. *The title of the information collection:* 10 CFR Part 61—Licensing Requirements for Land Disposal of Radioactive Waste.

3. *Current OMB approval number:* 3150-0135.

4. *How often the collection is required:* Applications for licenses are submitted as needed. Other reports are submitted annually and as other events require.

5. *Who will be required or asked to report:* Applicants for and holders of an NRC license (to include Agreement States) for land disposal of low-level radioactive waste; and all generators, collectors, and processors of low-level waste intended for disposal at a low-level waste facility.

6. *An estimate of the number of annual responses:* 12.

7. *The estimated number of annual respondents:* 4.

8. *An estimate of the total number of hours needed annually to complete the requirement or request:* The number of hours needed annually to complete the requirement or request: 5,412 hours (56 hours for reporting [approximately 4.6 hours per response] and 5,356 hours for

recordkeeping [approximately 1,339 hours per recordkeeper]).

9. *Abstract:* 10 CFR Part 61 establishes the procedures, criteria, and license terms and conditions for the land disposal of low-level radioactive waste. Reporting and recordkeeping requirements are mandatory or, in the case of application submittals, are required to obtain a benefit. The information collected in the applications, reports, and records is evaluated by the NRC to ensure that the licensee's or applicant's physical plant, equipment, organization, training, experience, procedures, and plans provide an adequate level of protection of public health and safety, common defense and security, and the environment.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O-1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC World Wide Web site: <http://www.nrc.gov/public-involve/doc-comment/omb/index.html>. The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by July 25, 2008. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Nathan J. Frey, Office of Information and Regulatory Affairs (3150-0135), NEOB-10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to Nathan_J._Frey@omb.eop.gov or submitted by telephone at (202) 395-7345.

The NRC Clearance Officer is Margaret A. Janney, (301) 415-7245.

Dated at Rockville, Maryland, this 19th day of June 2008.

For the Nuclear Regulatory Commission.

Gregory Trussell,

Acting NRC Clearance Officer, Office of Information Services.

[FR Doc. E8-14347 Filed 6-24-08; 8:45 am]

BILLING CODE 7590-01-P

**NUCLEAR REGULATORY
COMMISSION**

[Docket Nos.: 50-335, 50-389; License
Nos.: DPR-67, NPF-16; EA-07-321]

**In the Matter of Florida Power and
Light Company, St. Lucie Nuclear
Plant; Confirmatory Order (Effective
Immediately)****I**

Florida Power and Light Company (FPL or Licensee) is the holder of Operating License Nos. DPR-67 and NPF-16, issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 50 on March 1, 1976, and April 6, 1983, respectively. The license authorizes the operation of St. Lucie Nuclear Plant, Units 1 and 2, (St. Lucie or facility) in accordance with conditions specified therein. The facility is located on the Licensee's site in Jensen Beach, Florida.

This Confirmatory Order is the result of an agreement reached during an alternative dispute resolution (ADR) mediation session conducted on May 16, 2008.

II

On September 1, 2006, the NRC Office of Investigations (OI) began an investigation (OI Case No. 2-2006-034) at St. Lucie Nuclear Plant. Based on the evidence developed during the investigation, the NRC staff concluded that a supervisor at St. Lucie willfully failed to take action to identify two contract workers as untrustworthy, subsequent to their actions to falsify a work order related to valve maintenance activities they performed. The results of the investigation were sent to FPL in a letter dated April 2, 2008.

The NRC's letter of April 2, 2008, documented the forgoing incident which occurred on or about March 10, 2005. Two contractors documented a work order to indicate that they had used the torque wrench required by the work order when, in fact, they had used a different torque wrench, in an apparent effort to conceal their over-torquing of a valve. The April 2nd letter also documented the subsequent investigation of this incident by FPL and the corrective actions taken by FPL's St. Lucie management. Although FPL's immediate actions to ensure all maintenance and operational issues associated with the valve in question were prompt and comprehensive, the NRC's letter of April 2, 2008, documented two apparent violations associated with FPL's initial review and investigation into the matter.

III

On May 16, 2008, the NRC and FPL met in an ADR session mediated by a professional mediator, arranged through Cornell University's Institute on Conflict Resolution. ADR is a process in which a neutral mediator with no decisionmaking authority assists the parties in reaching an agreement or resolving any differences regarding their dispute. This confirmatory order is issued pursuant to the agreement reached during the ADR process. The elements of the agreement consist of the following:

1. The NRC and FPL agreed that a violation occurred involving FPL's failure to adhere to FPL Nuclear Division Policy, NP-415, Revision 3, and ADM-15.02. These procedures require, in part, that in all instances where the trustworthiness and reliability of a person who is currently granted unescorted access (UA) is called into question by credible objective evidence, the responsible supervisor or manager of that individual shall promptly contact the appropriate site security manager at the nuclear plant site. In this case, the falsification of the work order called into question the trustworthiness and reliability of the two contract workers. However, FPL did not ensure that the site security manager was contacted or otherwise initiate action such that the trustworthiness and reliability of the two contract workers could be assessed at that time. The actions of the two contract workers should have been considered in evaluating the two contract workers' suitability for continued unescorted access and possible entry into the Personnel Access Data System (PADS). As a result, FPL did not meet the Access Authorization program objective in 10 CFR 73.56(b)(1), which is to provide high assurance that individuals granted UA are trustworthy and reliable, and do not constitute an unreasonable risk to the health and safety of the public including a potential to commit radiological sabotage. Subsequently, the two contract workers' trustworthiness was evaluated and they were entered into PADS. Prior to being entered into PADS, however, the contract workers were granted access to a number of nuclear sites, including St. Lucie.

2. The NRC and FPL agreed that CR 2005-7449 did not fully document the circumstances of the matter to permit FPL to conduct a thorough review such that corrective actions and a trustworthiness and reliability assessment would be performed.

3. The NRC and FPL agreed that the violation described above did not result

in any adverse consequences. However, the failure to conduct a trustworthiness and reliability assessment is of concern to the NRC because the potential consequences, under different circumstances, could be significant.

4. FPL reiterated its commitment to the conduct of trustworthiness and reliability assessments as required. FPL agreed that the violation discussed above occurred as stated, and in response, agreed to implement or has completed the following corrective actions and enhancements:

a. FPL will issue a fleet-wide training brief to managers and supervisors reinforcing the requirements of NP-415, the corporate policy governing Denial of Unescorted Access to FPL's Nuclear Facilities, and the site implementing procedures on access control.

b. FPL will revise the site administrative procedures on access control as necessary to ensure that they require that contractor representatives and supervisors immediately notify FPL management of any incident or behavior that may call into question the trustworthiness or reliability of an individual.

c. Site-specific Control and Acceptance of Contracted Services procedures will be revised as necessary to ensure that the NP-415 requirements are reviewed by the Site Technical Representative (STRs) as part of the termination request process. FPL will also conduct a review of existing procedures related to contractor oversight and administration to ensure that the processes therein properly reflect the access control responsibilities of FPL.

d. All STRs will receive a training bulletin that reinforces management expectations regarding FPL ownership of access control as part of the procedure revision. The initial and continuing training lesson plan will be revised to ensure that STRs, supervisors and managers understand management expectations regarding FPL ownership of access control.

e. FPL will review fleet-wide the site administrative procedures for access control to ensure they require an express declaration of favorable or unfavorable termination, and to ensure that contractors are not allowed to manage their own access terminations without FPL management or STR approval.

f. Plant management will reinforce management expectations via a fleet-wide training brief to all managers and supervisors, including the Management Review Committee (MRC) and the Initial Screening Team (IST), reinforcing the requirements of NP-415 and the site

access control procedures. A Lessons-Learned Bulletin will be deployed for all Corrective Action Program Coordinators (CAPCOs) to ensure that identified CRs contain sufficient detail for the MRCs to make informed decisions regarding level, investigation type, and immediate action recommendations.

g. A representative from the Security Department will be added as a primary member of the MRC at each site.

h. Management will conduct a briefing to MRC members with a focus on the lessons learned from the NNI event and need for conservative action for any issues that question the trustworthiness or reliability of any individual. FPL will institutionalize an MRC Job Familiarization Guide requiring new MRC and IST members to receive an orientation from management on the importance of recognizing potential security concerns while reviewing CRs.

i. To address situations where the CR evaluator is not the person primarily responsible for the event/issue, plant procedures will be revised to require the system/process owner to review the evaluator's analysis and approve of the evaluation.

j. Supervisor initial and continuing Fitness-For-Duty and Continued Behavioral Observation Program training will reinforce FPL's expectation of each Supervisor's obligations to notify the Security Department of any potential trustworthiness and reliability issues.

k. At St. Lucie, FPL validated that each fleet nuclear policy was appropriately implemented in a site implementing procedure. FPL will conduct an extent of condition review to validate the implementation of nuclear policies throughout the fleet.

l. FPL agrees to complete all corrective actions and enhancements identified in this paragraph 4 (items a. through k.) within six months of the date of issuance of the Confirmatory Order.

5. The NRC and FPL agree that the above elements will be incorporated into a Confirmatory Order.

6. In consideration of the commitments delineated in Item 4 above, the NRC agrees to exercise enforcement discretion to forego issuance of a Notice of Violation against FPL for all matters discussed in the NRC's letter to FPL of April 2, 2008 (EA-07-321).

7. This agreement is binding upon successors and assigns of the St. Lucie Nuclear Plant and FPL.

On June 10, 2008, the Licensee consented to issuance of this Order with

the commitments, as described in Section V below. The Licensee further agreed that this Order is to be effective upon issuance and that it has waived its right to a hearing.

IV

Since the licensee has agreed to take additional actions to address NRC concerns, as set forth in Section III above, the NRC has concluded that its concerns can be resolved through issuance of this Order.

I find that the Licensee's commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety are reasonably assured. In view of the foregoing, I have determined that public health and safety require that the Licensee's commitments be confirmed by this Order. Based on the above and the Licensee's consent, this Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 104b, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Part 50, *it is hereby ordered*, effective immediately, that License Nos. DPR-67 and NPF-16 are modified as follows:

a. FPL will issue a fleet-wide training brief to managers and supervisors reinforcing the requirements of NP-415, the corporate policy governing Denial of Unescorted Access to FPL's Nuclear Facilities, and the site implementing procedures on access control.

b. FPL will revise the site administrative procedures on access control as necessary to ensure that they require that contractor representatives and supervisors immediately notify FPL management of any incident or behavior that may call into question the trustworthiness or reliability of an individual.

c. Site-specific Control and Acceptance of Contracted Services procedures will be revised as necessary to ensure that the NP-415 requirements are reviewed by the Site Technical Representative (STRs) as part of the termination request process. FPL will also conduct a review of existing procedures related to contractor oversight and administration to ensure that the processes therein properly reflect the access control responsibilities of FPL.

d. All STRs will receive a training bulletin that reinforces management expectations regarding FPL ownership of access control as part of the procedure revision. The initial and

continuing training lesson plan will be revised to ensure that STRs, supervisors and managers understand management expectations regarding FPL ownership of access control.

e. FPL will review fleet-wide the site administrative procedures for access control to ensure they require an express declaration of favorable or unfavorable termination, and to ensure that contractors are not allowed to manage their own access terminations without FPL management or STR approval.

f. Plant management will reinforce management expectations via a fleet-wide training brief to all managers and supervisors, including the Management Review Committee (MRC) and the Initial Screening Team (IST), reinforcing the requirements of NP-415 and the site access control procedures. A Lessons-Learned Bulletin will be deployed for all Corrective Action Program Coordinators (CAPCOs) to ensure that identified CRs contain sufficient detail for the MRCs to make informed decisions regarding level, investigation type, and immediate action recommendations.

g. A representative from the Security Department will be added as a primary member of the MRC at each site.

h. Management will conduct a briefing to MRC members with a focus on the lessons learned from the NNI event and need for conservative action for any issues that question the trustworthiness or reliability of any individual. FPL will institutionalize an MRC Job Familiarization Guide requiring new MRC and IST members to receive an orientation from management on the importance of recognizing potential security concerns while reviewing CRs.

i. To address situations where the CR evaluator is not the person primarily responsible for the event/issue, plant procedures will be revised to require the system/process owner to review the evaluator's analysis and approve of the evaluation.

j. Supervisor initial and continuing Fitness-For-Duty and Continued Behavioral Observation Program training will reinforce FPL's expectation of each Supervisor's obligations to notify the Security Department of any potential trustworthiness and reliability issues.

k. At St. Lucie, FPL validated that each fleet nuclear policy was appropriately implemented in a site implementing procedure. FPL will conduct an extent of condition review to validate the implementation of nuclear policies throughout the fleet.

l. FPL agrees to complete all corrective actions and enhancements identified in this paragraph (Section V, items a. through k.) within six months of the date of issuance of the Confirmatory Order.

The Regional Administrator, NRC Region II, may relax or rescind, in writing, any of the above conditions upon a showing by FPL of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and include a statement of good cause for the extension.

If a person other than FPL requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309 (d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will 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 Confirmatory Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), any person adversely affected by this Order may, within 20 days of the issuance of this order, in addition to requesting a hearing, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations or error. The motion must state with particularity the reasons why the Order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on.

A request for a hearing or to set aside the immediate effectiveness of this Order must be filed in accordance with the NRC E-Filing rule, which became effective on October 15, 2007. The NRC E-filing Final Rule was issued on August 28, 2007 (72 FR 49,139) and was codified in pertinent part at 10 CFR Part 2, Subpart B. The E-Filing process requires participants to submit and serve documents over the Internet or, in some cases, to mail copies on electronic optical storage media. Participants may not submit paper copies of their filings

unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements associated with E-Filing, at least five (5) days prior to the filing deadline the requestor must contact the Office of the Secretary by e-mail at HEARINGDOCKET@NRC.GOV, or by calling (301) 415-1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any NRC proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances when the requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at <http://www.nrc.gov/site-help/e-submittals/install-viewer.html>. Information about applying for a digital ID certificate also is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for a hearing through EIE. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the filer submits its document through EIE. To be timely, electronic filings must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, any others who wish to participate in the proceeding (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request is filed so that they may obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the "Contact

Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html> or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397-4209 or locally, (301) 415-4737.

Participants who believe that they have good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at http://ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, Participants are requested not to include copyrighted materials in their works.

VII

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received. A

request for hearing shall not stay the immediate effectiveness of this order.

Dated this 13th day of June 2008.

For the Nuclear Regulatory Commission.

Luis A. Reyes,

Regional Administrator.

[FR Doc. E8-14317 Filed 6-24-08; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-305]

Dominion Energy Kewaunee, Inc.; Kewaunee Power Station; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment pursuant to Title 10 of the Code of Federal Regulations (10 CFR) Part 50, Section 50.90, for Facility Operating License No. DPR-43, issued to Dominion Energy Kewaunee, Inc. (the licensee), for operation of the Kewaunee Power Station (KPS), located in Kewaunee County, Wisconsin. Therefore, as required by 10 CFR 51.21, the NRC is issuing this environmental assessment and finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would revise the facility operating license by removing condition 2.C(5), "Fuel Burnup," which had limited the peak rod average burnup to 60 gigawatt-days per metric ton uranium (GWD/MTU) until completion of an NRC environmental assessment supporting an increased limit. The proposed action would allow an increase of the maximum rod average burnup to as high as 62 GWD/MTU. The licensee has procedures in place to ensure that maximum rod burnup will not exceed 62 GWD/MTU.

The proposed action is in accordance with the licensee's application dated July 2, 2007.

The Need for the Proposed Action

The proposed action to delete the license condition for fuel burnup would allow a higher maximum rod average burnup of 62 GWD/MTU, which would allow for more effective fuel management. If the amendment is not approved, the licensee will not be provided the opportunity to increase maximum rod average burnup to as high as 62 GWD/MTU and allow fuel management flexibility.

Environmental Impacts of the Proposed Action

In this environmental assessment regarding the impacts of the use of extended burnup fuel beyond 60 GWD/MTU, the Commission is relying on the results of the updated study conducted for NRC by the Pacific Northwest National Laboratory (PNNL), entitled "Environmental Effects of Extending Fuel Burnup Above 60 GWD/MTU" (NUREG/CR-6703, PNNL-13257, January 2001). Environmental impacts of high burnup fuel up to 75 GWD/MTU were evaluated in the study, but some aspects of the review were limited to evaluating the impacts of the extended burnup up to 62 GWD/MTU because of the need for additional data on the effect of extended burnup on gap release fractions. All the aspects of the fuel-cycle were considered during the study, from mining, milling, conversion, enrichment and fabrication through normal reactor operation, transportation, waste management, and storage of spent fuel.

The amendment would allow KPS to extend lead rod average burnup to 62 GWD/MTU. The NRC staff has completed its evaluation of the proposed action and concludes that such changes would not adversely affect plant safety, and would have no adverse effect on the probability of any accident. For the accidents that involve damage or melting of the fuel in the reactor core, fuel rod integrity has been shown to be unaffected by extended burnup under consideration; therefore, the probability of an accident will not be affected. For the accidents in which core remains intact, the increased burnup may slightly change the mix of fission products that could be released in the event of a serious accident, but because the radionuclides contributing most to the dose are short-lived, increased burnup would not have an effect on the consequences of a serious accident beyond the previously evaluated accident scenarios. Increases in projected consequences of postulated accidents associated with fuel burnup up to 62 GWD/MTU are not considered significant, and remain well below regulatory limits.

Regulatory limits on radiological effluent releases are independent of burnup. The requirements of 10 CFR 50.36a and Appendix I to 10 CFR Part 50 ensure that any release of gaseous, liquid or solid radiological effluents to unrestricted areas is kept "As Low As is Reasonably Achievable." Therefore, NRC staff concludes that during routine operations, there will be no significant increase in the amount of gaseous

radiological effluents released into the environment as a result of the proposed action, nor will there be a significant increase in the amount of liquid radiological effluents or solid radiological effluents released into the environment.

The proposed action will not change normal plant operating conditions. No changes are expected in the fuel handling, operational or storing processes. There will be no significant changes in radiation levels during these evolutions. No significant increase in the allowable individual or cumulative occupational radiation exposure is expected to occur.

The use of extended irradiation will not change the potential environmental impacts of incident-free transportation of spent nuclear fuel or the accident risks associated with spent fuel transportation if the fuel is cooled for 5 years after being discharged from the reactor. The PNNL report for the NRC (NUREG/CR-6703, January 2001), concluded that doses associated with incident-free transportation of spent fuel with burnup to 75 GWD/MTU are bounded by the doses given in 10 CFR 51.52, Table S-4 for all regions of the country, based on the dose rates from the shipping casks being maintained within regulatory limits. Increased fuel burnup will decrease the annual discharge of fuel to the spent fuel pool, which will postpone the need to remove spent fuel from the pool.

NUREG/CR-6703 determined that no increase in environmental effects of spent fuel transportation accidents are expected as a result of increasing fuel burnup to 75 GWD/MTU.

The proposed action does not affect non-radiological plant effluents, and no changes to the National Pollution Discharge Elimination System permit are needed. No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or on endangered and/or threatened species and their habitats are expected. The proposed action does not involve any historical or archaeological sites.

The proposed action will not change the method of generating electricity or the method of handling any influents from the environment or non-radiological effluents to the environment. Therefore, no changes or different types of non-radiological environmental impacts are expected as a result of this amendment. Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action. For more detailed information regarding the environmental impacts of extended fuel burnup, please refer to the

study conducted by PNNL for the NRC, entitled "Environmental Effects of Extending Fuel Burnup Above 60 GWD/MTU" (NUREG/CR-6073, PNL-13257, January 2001, ADAMS Accession No. ML010310298). The details of the staff's safety evaluation will be provided in the amendment that will be issued as part of the letter to the licensee approving the amendment.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (i.e., the "no-action" alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those previously considered in the Final Environmental Statement for Kewaunee Power Station, dated December 1972.

Agencies and Persons Consulted

In accordance with its stated policy, on June 12, 2008, the staff consulted with the Wisconsin State official, Mr. Jeff Kitsemel, of the Public Service Commission, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated July 2, 2007 (ADAMS Accession No. ML071860075). Documents may be examined, and/or copied for a fee, at the NRC'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 Agencywide Documents Access and Management System (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 encounter problems in accessing the documents located in ADAMS should contact the NRC PDR

Reference staff by telephone at 1-800-397-4209 or 301-415-4737, or send an e-mail to pdr.resource@nrc.gov.

Dated at Rockville, Maryland, this day of June 2008.

For the Nuclear Regulatory Commission.

Justin C. Poole,

Project Manager, Plant Licensing Branch 3-1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8-14315 Filed 6-24-08; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Notice of Issuance of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Issuance and Availability of Regulatory Guide 6.4, Revision 3.

FOR FURTHER INFORMATION CONTACT:

Mark Orr, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6373 or e-mail to Mark.Orr@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing a revision to an existing guide in the agency's "Regulatory Guide" series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency'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.

Revision 3 of Regulatory Guide 6.4, "Verification of Containment Properties of Sealed Radioactive Sources," was issued with a temporary identification as Draft Regulatory Guide DG-6005. This guide directs the reader to the type of information acceptable to the NRC staff to evaluate and verify the containment properties of sealed radioactive sources. The NRC licenses the manufacture and distribution of devices containing radioactive byproduct material under Title 10, Part 32, "Specific Domestic Licenses to Manufacture or Transfer Certain Items Containing Byproduct Material," of the Code of Federal Regulations (10 CFR Part 32). The regulations require, in part, that each application for a specific

license to distribute devices containing byproduct material include information on procedures for prototype tests and the results of such tests to demonstrate that the source or device will maintain its integrity during the most severe conditions that are likely to be encountered under normal or accidental conditions of handling, storage, use, and disposal of the sealed radioactive source.

This regulatory guide endorses the methods and procedures for evaluation and verification of the containment properties of sealed radioactive sources contained in the current revision of NUREG-1556, Volume 3, "Consolidated Guidance about Materials Licenses: Applications for Sealed Source and Device Evaluation and Registration" as a process that has been found acceptable to the NRC staff for meeting the regulatory requirements. Since the publication of Revision 2 of Regulatory Guide 6.4 in August 1980, the NRC has revised the requirements for byproduct material containments in 10 CFR Part 32 to implement a risk-informed, performance-based approach to regulation. NUREG-1556 incorporates this revised approach.

II. Further Information

In January 2008, DG-6005 was published with a public comment period of 60 days from the issuance of the guide. No comments were received and the public comment period closed on April 18, 2008. Electronic copies of Regulatory Guide 6.4, Revision 3 are available through the NRC's public Web site under "Regulatory Guides" at <http://www.nrc.gov/reading-rm/doc-collections/>.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852-2738. 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) 397-4209, by fax at (301) 415-3548, and by e-mail to pdr@nrc.gov.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 18th day of June 2008.

For the Nuclear Regulatory Commission.

Stephen C. O'Connor,

Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E8-14314 Filed 6-24-08; 8:45 am]

BILLING CODE 7590-01-P

POSTAL REGULATORY COMMISSION**[Docket No. PI2008-1; Order No. 83]****Administrative Practice and Procedure,
Postal Service****AGENCY:** Postal Regulatory Commission.**ACTION:** Notice.

SUMMARY: Changes in the law governing the nation's postal system mandate adoption of service performance measurement and reporting systems for market dominant products, which include First-Class Mail. This notice presents a service measurement and reporting plan for public review and comment. The comments will assist the Commission in formulating its position on the plan.

DATES: Comments are due July 9, 2008.**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>.**FOR FURTHER INFORMATION CONTACT:**Stephen L. Sharfman, General Counsel, 202-789-6820 and stephen.sharfman@prc.gov.**SUPPLEMENTARY INFORMATION:***Regulatory History*, 72 FR 72395 (December 20, 2007).**I. Background**

Section 301 of the Postal Accountability and Enhancement Act (PAEA), Public Law 109-435, 120 Stat. 3218, requires the Postal Service, in consultation with the Postal Regulatory Commission (Commission), to establish by regulation a set of modern service standards for market dominant products.¹ The Postal Service completed this initial task with the publication of "Modern Service Standards for Market-Dominant Products" as a final rule, effective December 19, 2007.²

By statute, the service standards must be measured by an objective external performance measurement system, unless the Commission approves the use of an internal measurement system. 39 U.S.C. 3691(b)(1)(D) and (b)(2). The Postal Service is in the process of developing its performance measurement system, and has kept the Commission informed of its progress through a series of meetings to discuss service performance measurement issues. The Commission has solicited public input on the Postal Service's measurement system proposals by providing the public with an

opportunity to comment on the Postal Service's November 2007 draft Service Performance Measurement plan.³

Since November, the Postal Service has made significant progress in working with its external measurement vendors and working through the implementation of the internal Intelligent Mail Barcode system. The result of this progress has led to a continuous refinement of the Service Performance Measurement plan. The Commission is in the process of preparing a reply to the Postal Service's most recent plan which will address the proposals for internal versus external measurement systems and the proposals for data reporting.

The text of the June 2008 version of the Service Performance Measurement plan appears below the signature line of this order. The perspective of the mailing community will aid the Commission in developing its reply to the Postal Service and help the Commission carry out its performance measurement responsibilities under the PAEA. Interested persons are invited to comment on any or all aspects of the proposed service performance measurement and reporting systems. This provides an opportunity for those that previously commented to update their comments, and for those that have yet to comment to provide initial comments. Comments are due July 9, 2008. All comments will be available for review on the Commission's Web site, <http://www.prc.gov>.

II. United States Postal Service Service Performance Measurement*A. Glossary of Terms*

The description of the approach for service performance measurement includes references to certain postal terminology. For clarification, the following brief definitions and descriptions are provided.

The *Intelligent Mail® barcode (IMb)* is a height-modulated barcode that encodes up to 31-digits of mailpiece data. The IMb combines and expands the capabilities of the POSTNET barcode and the Planet Code® barcode into one unique barcode and is intended to replace the POSTNET and Planet Code barcodes by May 2010.

A *service standard* is defined as "a stated goal for service achievement for each mail class." See *Publication 32, Glossary of Postal Terms* (May 1997, updated through July 5, 2007). The service standard for each market-dominant mail service incorporates the days-to-deliver for each 3-digit ZIP Code

origin-destination pair within the Postal Service network. The standards serve as the benchmark for measuring service performance.

The *service performance* is the number of calendar days from the "start-the-clock" to the "stop-the-clock". However, if the day of the "stop-the-clock" event is immediately after a non-delivery day (Sunday or a holiday), then one day is subtracted from the service performance measurement calculation for each consecutive non-delivery day preceding the delivery day.

For *inclusion* in service performance measurement, a mail piece, container/handling unit, or mailing must pass verification and meet the applicable inclusion criteria listed in the appendix to this document. Verification is a system of checks used to determine if a mailing is properly prepared and if the correct postage is paid.

The *critical entry time (CET)* is the latest time that a reasonable amount of a class of mail can be received at designated induction points in the postal network for it to be processed and dispatched in time to meet service standards.

The *"start-the-clock"* is the date and time when the mail piece enters the mailstream. If the Postal Service accepts a mail piece before the posted CET for that day, the day of entry is designated as the "start-the-clock" date. If the mail piece is accepted after the CET or dropped at a collection box, business mail chute, or Post Office location after the last posted pickup time or on a day when pickup does not occur, the mail piece has a "start-the-clock" date of the following applicable acceptance day.

"Start-the-clock" Day zero (or Day-0) is the date when the clock starts for purposes of service measurement.

The *"stop-the-clock"* is the date on which delivery occurs or is initially attempted.

A *Customer/Supplier Agreement (C/SA)* is a written notice that confirms, for a commercial mailer, the origin-entry acceptance window during which mail that meets applicable preparation requirements will be considered to have been entered into the postal network on "start-the-clock Day zero," for purposes of service performance measurement. The notice may include mail containerization specifications, designated postal mail facility entry locations and time-sensitive mail entry windows.

The *Annual Compliance Report* includes the national annual service performance report for market-dominant products and is subject to compliance review by the Postal Regulatory Commission on a fiscal year basis.

¹ Section 301 of the PAEA is codified at 39 U.S.C. 3691.

² See 72 FR 72216 (December 19, 2007) (to be codified at 39 CFR parts 121 and 122).

³ PRC Order No. 48, December 4, 2007; 72 FR 72395 (December 20, 2007).

A *postal area* is the administrative level directly below national headquarters and is comprised of multiple subordinate *postal districts*. There are currently nine areas that span the entirety of the postal network; these

nine areas are comprised of a total of 80 subordinate districts. In *service variance reports*, the Postal Service reports the cumulative percentage for mail pieces delivered after the applicable service standard.

The Postal Service refers to the delivery performance of pieces delivered after the service standard as “Within +X” days of the standard.

The following are examples of calculating service variance:

TABLE 1.—EXAMPLES OF CALCULATING SERVICE VARIANCE—MAY 08

[Adapted from the original, which can be viewed on the Commission’s Web site, <http://www.prc.gov/prc-pages/daily-listing>]

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
April 28	29	30	May 1	2	3	4
			Example One.			Non-Delivery Day.
5	6	7	8 Day Zero	9 Day One	10 Day Two	11 Day Three
		Mail Entered After CET with 2 Day Service Standard	.....	.....	.....	Non-Delivery Day.
12 Day Four	13	14	15	16	17	18
Actual Delivery Day			Example Two.			Non-Delivery Day.
19	20	21	22 Day Zero	23 Day One	24 Day Two	25 Day Three
			Mail Entered Prior to CET with 3 Day Service Standard			Non-Delivery Day.
26 Day Four	27 Day Five	28	29	30	31	June 1
Holiday	Actual Delivery Day					Non-Delivery Day.

Example 1—Mail was entered after CET on Wednesday and delivered on Monday with a two-day service standard. Since the entry was after Wednesday’s CET, day zero is now Thursday. Actual Delivery is the number of days it took (calendar days) to deliver the mail (Thursday to Monday) or 4 days. Expected Delivery is the service standard, which in this case is 2 days. The service performance measurement is Actual Delivery Day (4) minus Expected Delivery (2) minus any non-delivery days between the Expected Delivery Day and the Actual Delivery Day (1) = 1.

Example 2—Mail was entered prior to CET on Thursday and delivered on Tuesday with a three-day service standard. Actual Delivery is the time it took (calendar days) to deliver the mail (Thursday to Tuesday) or 5 days. Expected Delivery is the service standard, which in this case is 3 days, plus 2 days since Sunday and Monday are non-delivery days. The service performance measurement is Actual Delivery Day (5) minus Expected Delivery (5) minus any non-delivery days between the Expected Delivery Day and the Actual Delivery Day (0) = 0. Therefore, the mail piece was delivered on time.

Definition of Terms:

1. The Actual Delivery Day is the calendar day of the “stop-the-clock” for a mail piece.
2. Non-Delivery Days are nationally recognized days on which the Postal Service does not deliver mail to delivery points. Sundays and holidays are non-delivery days. Non-delivery days may also occur by Presidential proclamation such as a national day of mourning.
3. The Expected Delivery Day is calculated by adding the applicable service standard to the “start-the-clock” date for a mail piece. When that date lands on a non-delivery day, the expected delivery date becomes the next possible delivery date.
4. Service variance, represented as “Within +X”, is the number of delivery days between the Expected Delivery Date for the mail piece and the Actual Delivery Date of the piece. “Within +X” is calculated by subtracting the Expected Delivery Date from the Actual Delivery Date and then subtracting any Non-Delivery Days between the Actual and Expected Delivery Dates from the result:
 $X = \text{Actual Delivery Day} - \text{Expected Delivery Day} - \text{Non-Delivery Days between Actual and Expected Delivery Days}$

1. Introduction

Among many requirements, the Postal Accountability and Enhancement Act (PAEA) instructs the United States Postal Service (Postal Service) to establish modern service standards for its market-dominant mail products. According to the law, these standards should be designed “to provide a system of objective external performance measurements for each market-dominant product as a basis for measurement of Postal Service performance.” However, with the

approval of the Postal Regulatory Commission (PRC), an internal measurement system may be implemented instead of an external system.⁴

The service performance measurement systems used for measurement will evolve over time as capacity increases. For example, the measurement system may be modified annually pending the outcome of the

annual service standards review process. The measurement systems are designed to provide the Postal Service and its customers with data sufficiently accurate and reliable for purposes of assessing the quality of mail service in a cost effective manner. These data are expected to provide the PRC with the ability to perform its responsibilities under the PAEA with a high degree of confidence. The following table

⁴Postal Accountability and Enhancement Act, Public Law 109-435, 120 Stat. 3198, 39 U.S.C. 3691(b)(1)(D) and (b)(2).

summarizes the measurement system at full rollout.

TABLE 2.—POSTAL SERVICE MEASUREMENT APPROACH AT FULL ROLLOUT¹
[Measurement approach by mail segment]

	Single-piece			Presort		
	Letters	Flats	Parcels	Letters	Flats	Parcels
First-Class Mail	EXFC	EXFC	Start: Acceptance scan. Stop: Delivery Confirmation delivery scan.	Start: Documented Arrival Time at Postal facility. Stop: External reporting.	EXFC as Proxy ² 	Start: Documented Arrival Time at Postal facility. Stop: Delivery Confirmation delivery scan.
Single-Piece First-Class Mail International. Periodicals ⁶	IMMS ³	EXFC as proxy ⁴ N/A	Single-Piece First-Class Mail parcels as proxy. ⁵ N/A	N/A	N/A	N/A. N/A.
Standard Mail	N/A	N/A	N/A	Start: Documented Arrival Time at Postal facility. Stop: External reporting.	Start: Documented Arrival Time at Postal facility. Stop: External reporting.	Start: Documented Arrival Time at Postal facility. Stop: Delivery Confirmation delivery scan.
Package Services ..	N/A	N/A ⁸	Start: Acceptance scan. Stop: Delivery Confirmation delivery scan.	N/A	Start: Documented Arrival Time at Postal facility. Stop: External reporting.	Start: Documented Arrival Time at Postal facility. Stop: Delivery Confirmation delivery scan.

¹ Special Services are not included in Table 1 as they have different methods to “start-the-clock” and “stop-the-clock” from the market-dominant mail products.

² The Postal Service will use the External First-Class Mail Measurement System (EXFC) measurement for single-piece flats as a proxy for Presort First-Class Mail flats due to the very small volume of Presort flats.

³ The International Mail Measurement System (IMMS) is an external measurement system for which an independent measurement contractor seeds mail into the mailstream.

⁴ The EXFC measurement for domestic single-piece First-Class Mail flats will serve as a proxy for single-piece First-Class Mail International flats due to the small volume in the latter category. After clearing customs, single-piece First-Class Mail International flats enter the domestic mailstream and are handled with domestic single-piece First-Class Mail flats.

⁵ The Postal Service will use the measurement for domestic single-piece First-Class Mail parcels as a proxy for single-piece First-Class Mail International parcels.

⁶ Two mailer-operated external systems, Red Tag and Time Inc.’s DelTrak, will be used for Periodicals measurement during FY 2009, as the Postal Service transitions to a long-term internal solution.

2. Measurement Approach

For purpose of service performance measurement, the Postal Service will continue use of the External First-Class Measurement system (EXFC) for single-piece First-Class Mail letters and flats and the International Mail Measurement System (IMMS) for single-piece First-Class Mail International letters.⁵ For letter- and flat-shaped Presort mail within First-Class Mail, Periodicals, and Standard Mail services, the Postal

Service uses an external measurement approach that supplements mail scans available from an internal Intelligent Mail system with externally collected data. For parcel-shaped mail within First-Class Mail, Standard Mail, and Package Services,⁶ the Postal Service uses an internal solution based on Delivery Confirmation scans obtained at acceptance and delivery. Additionally, the performance measurement of

various domestic special services uses an internal measurement approach.

Destination-entered Standard Mail is subject to national Critical Entry Times (CETs). All other classes of mail are subject to locally-defined facility CETs. A Customer/Supplier Agreement between a bulk mailer and the Postal Service may identify an alternate acceptance window. In the case where a Customer/Supplier Agreement exists, it is the responsibility of the mailer to enter mail within the agreed-upon acceptance window. Customer/Supplier Agreements may include terms regarding seasonal volumes or split processing windows.

The two critical elements for service performance measurement of a mail

⁵ The only major type of International Mail classified as market-dominant is single-piece First-Class Mail International. For single-piece First-Class Mail International flats and parcels, the Postal Service will use the domestic flats and parcel measurements as proxies, as explained in Section 4.1.

⁶ Package Services market-dominant products include Parcel Post, Bound Printed Matter, Library Mail, and Media Mail, by operation of 39 U.S.C. 3621. For purposes of service standard establishment and service performance measurement, these market-dominant products are grouped together as Package Services due to their relatively small volumes.

piece are the date and time when the mail piece enters the mailstream, otherwise known as the “start-the-clock,” and the date when delivery occurs or is attempted, otherwise known as the “stop-the-clock.”⁷ The mail piece service performance measurement can be viewed as the difference between the “start-the-clock” and “stop-the-clock” dates, excluding non-delivery days, which is then compared to the established service standard for the mail category. When assessing mail piece service performance, relevant facility Critical Entry Times (CETs) must be taken into account. For commercial mail, Customer/Supplier Agreements (C/SAs) may also be employed and used to assign the “start-the-clock” Day-0 for purposes of service performance measurement. If the Postal Service accepts a mail piece either before the CET or within the acceptance window specified in the C/SA on a given acceptance day, the mail piece will have a “start-the-clock” date of the current day. If the mail piece is accepted after the CET, and outside the acceptance window specified in the C/SA, the mail piece will have a “start-the-clock” date of the following applicable acceptance day for that facility.⁸

2.1 Presort Letter and Flat-Shaped Mail

For Presort First-Class Mail, Standard and Periodical letters and for Standard and Periodical flats, the Postal Service’s service performance measurement system uses documented arrival time at the postal facility to “start-the-clock,” and an external, third-party “stop-the-clock” performed by reporters with scanners in their homes. Additional data on mail piece tracking from Intelligent Mail barcode (IMb) scans are also used to supplement the external data. However, data collected by the Postal Service are provided to an independent, external contractor to calculate service measurement and compile the necessary reports.

To facilitate an accurate “start-the-clock” measurement, mailers prepare mail with IMb’s and, as a part of the acceptance process, submit electronic mailing information that describes the mail profile. Mailings are verified at acceptance to ensure they meet applicable preparation requirements necessary to qualify for service

performance measurement.⁹ For mailers that meet the Full Service Intelligent Mail® Option, the Postal Service makes mail arrival time and mail preparation quality information available.

The external measurement contractor determines service performance based on the elapsed time between the “start-the-clock” event recorded by the Postal Service and the “stop-the-clock” event scan recorded by anonymous households and small businesses that report delivery information directly to the contractor. The end-to-end service measure consists of two parts: (1) How long mail pieces take to get through processing, and (2) how long mail takes from the last processing scan to delivery. The second portion is used as a delivery factor differential to determine the percent of mail that is delivered on the last processing date and the percent delivered after the last processing date. For Presort letters and non-saturation flats entered at Delivery Units that do not receive processing scans, postal personnel scan IMb’s to indicate intention to deliver that day. By comparing the date of the Postal Service’s final IMb scan with the reported delivery date for these mail pieces, the external measurement contractor calculates the delivery factor differential for each mail category. With this measurement approach, the core service performance score is augmented by data provided by external reporters, which provides a cost-effective method for end-to-end measurement.

External scanning offers many benefits to the Postal Service, the PRC, and mailers concerning the accuracy and auditability of service performance measurement: Delivery sampling data are used to provide the granularity required for district level reporting, and association of the reporter scan data to the final mail processing equipment scan is used to assess delivery failures.

The use of external reporters allows for barcoded mail that falls out of automation to be included in service performance measurement. To ensure that the external service measurement contractor is able to measure service performance for properly prepared and addressed mail pieces, the Postal Service provides the contractor with mail quality information that it derives by scanning IMb’s.

This measurement approach leverages IMb data from internal systems for Presort letters and flat-shaped mail to enhance service measurement. It also allows for: Greater representation of

mail characteristics; richer diagnostics; and robust and reliable measurement at low cost.

2.2 Measurement System Requirements for Presort Mailers of Letters, Cards, and Flats

The Postal Service performs service measurement on mail that satisfies generally applicable mail preparation requirements and also meets the requirements of the Full Service Intelligent Mail® Option, which gives the Postal Service the ability to identify unique mail pieces in the mailstream. These service measurement requirements include, unique Intelligent Mail® barcodes on mail pieces, trays and containers where appropriate, and appointment scheduling for Destination Bulk Mail Center (DBMC), Destination Area Distribution Center (DADC), and Destination Sectional Center Facility (DSCF) drop shipments, and for authorized mailers choosing to transport origin-entered, postal-verified mail to downstream facilities. They also may include electronic submission of postage statements and mailing documentation. More information on the Full Service Intelligent Mail® Option can be found in **Federal Register** notices¹⁰ and will be published in future revisions of the Domestic Mail Manual (DMM).¹¹

2.3 Parcels

For parcel-shaped First-Class Mail, Standard Mail, and Package Services, the Postal Service uses an internal solution based on Delivery Confirmation scans obtained at acceptance and delivery. For reporting purposes, First-Class Mail parcels are included with the First-Class Mail aggregate performance results and Standard Mail parcels are included with the Standard Mail aggregate performance.

For parcel-shaped Retail mail for which Delivery Confirmation service has been purchased, the Postal Service uses the Delivery Confirmation scan at the retail counter as the “start-the-clock” event. Parcel-shaped Presort mail uses the documented arrival time at the postal facility as the “start-the-clock”. For Presort parcels, validation similar to that for letters and flats is performed to ensure that the parcels were dropped at the correct postal facility.

¹⁰ See 73 FR 1158 (January 7, 2008) and 73 FR 23393 (April 30, 2008).

¹¹ The requirements for service performance measurement are separate from addressing, presortation, containerization, or other requirements generally governing price eligibility published in the Mail Classification Schedule or USPS Domestic Mail Manual.

⁷ Mail must pass verification before being included in service measurement.

⁸ National CETs have been established for Standard Mail destination-entered at Sectional Center Facilities (SCFs) and Bulk Mail Centers (BMCs).

⁹ Such requirements are in addition to those which must be met to qualify for mailing within a particular product or price category.

The “stop-the-clock” event is the Delivery Confirmation scan performed by postal personnel at delivery.¹² Since postal personnel scan pieces with a Delivery Confirmation barcode at delivery, the measurement system is truly an end-to-end performance system. In addition, the sender has access to the Delivery Confirmation “stop-the-clock” information from the Track & Confirm function at the Postal Service’s public Web site, <http://www.usps.com> and, thus, can independently verify the delivery date.

In accordance with section 3652 of the Postal Accountability and Enhancement Act, the Postal Service is required to report measures of the quality of service on an annual basis. The Postal Service’s proposal for service measurement goes far beyond annual reporting and will instead provide quarterly reporting for all market-dominant products, almost entirely at a district level.

2.4 Reporting

The Postal Service uses an independent, external contractor to prepare service performance reports for domestic First-Class Mail, Periodicals, Standard Mail, and single-piece First-Class Mail International letters.

The Postal Service will continue collecting performance data for parcels within each domestic market-dominant mail class based on Delivery Confirmation acceptance and delivery scans. The Postal Service sends performance data for First-Class Mail parcels and Standard Mail parcels to the external service performance contractor for consolidated reporting of the performance of each mail class. Quarterly reports include data on the percentage of mail delivered on-time, as well as the percentage of mail delivered within 1-day, 2-days, and 3-days of the standard being measured. Annual compliance reports for each market-dominant product will include the annual target and the annual percentage of mail delivered on time.

For Special Services, the Postal Service reports a performance index that combines the measurement of a number of Special Services into a single index for comparison on an annual basis.

3 First-Class Mail

3.1 Background

First-Class Mail pieces represented 45.2 percent of the overall mail volume in FY2007,¹³ with nearly 96 billion pieces. Of First-Class Mail, 41.3 percent are single-piece cards, letters or flats, 0.4 percent are single-piece parcels, 57.1 percent are Presort cards and letters, 1.0 percent are Presort flats, and 0.2 percent are Presort parcels. The Postal Service plans to measure each of these different segments and report a weighted average measurement separately for presort and single-piece categories. Below, Table 3—First-Class Mail Volume illustrates the make-up of First-Class Mail by entry volume and shape. The table also illustrates the percentage of the overall mailstream that each of these First-Class Mail segments represents.

TABLE 3.—FIRST-CLASS MAIL VOLUME

	Single-Piece			Presort			
	Letters (percent)	Flats (percent)	Parcels (percent)	Letters (percent)	Flats (percent)	Parcels (percent)	Total (percent)
First-Class Mail	38.0	3.3	0.4	57.1	1.0	0.2	100
Overall Mailstream	17	1.5	0.2	25.8	0.4	0.1	45.2

3.2 First-Class Mail Single-Piece Letters and Flats

Collection boxes and office building chutes are the primary methods for entering First-Class Mail single-piece letters and flats. Combined, this mail represents 18.7 percent of the total mailstream. Service performance is measured through EXFC.

EXFC continuously measures nearly all 3-digit ZIP Code service areas. EXFC mail pieces are designed to resemble the rest of the mailstream; pieces are hand- or machine-addressed, stamped or metered, and are of different colors, sizes, and weights. Quality reviews are conducted for droppers and reporters, and data are reviewed on a daily, weekly, bi-weekly, monthly, and quarterly basis.

3.2.1 “Start-the-Clock”

The date and time that the mail piece is dropped into a collection box or business mail chute is the “start-the-clock”. Mail piece droppers report the

“start-the-clock” directly to the external service measurement contractor. If a mail piece is dropped at a collection box, business mail chute, or Post Office location after the last posted pickup time or on a day when pickup does not occur, the next pickup day is the “start-the-clock”.

The induction points for the “start-the-clock” are determined before the start of each fiscal quarter. External droppers are provided with a listing of collection boxes that they are allowed to use for their assigned inductions in a given 3-digit ZIP Code service area. Enough locations are chosen to ensure a certain amount of coverage, to accommodate any unforeseen issues that may arise with the selected induction points. The collection boxes are chosen in a random selection process with replacement, meaning that the same induction location may be chosen multiple times. The induction points are weighted going into the selection process, so that locations in 5-

digit ZIP Code areas with a larger number of collection boxes have a greater chance of being selected than locations in ZIP Codes areas with a smaller number of collection boxes. The external contractor monitors drop compliance continuously throughout the quarter to ensure proper diversification of mail locations.

EXFC origin-destination mail flows are based on estimated 3-digit ZIP Code origin-destination pair volume flows for corresponding 3-digit ZIP Code pairs over the past 12 quarters. The number of pieces entered from each postal administrative district is proportionate to the corresponding origin-destination volumes by service standard.

3.2.2 “Stop-the-Clock”

The date that the mail piece is received at a household, small business, or Post Office Box is reported by the recipient as the “stop-the-clock” event directly to the external contractor for purposes of EXFC. The service

¹² Either by a carrier on a delivery route or a clerk in a Post Office Box section as delivery is completed or attempted.

¹³ See http://www.usps.com/financials/_pdf/RPW_FY_2007.pdf.

performance is the number of calendar days from the “start-the-clock” to the “stop-the-clock”. However, if the day of the stop-the-clock event occurs immediately after a non-delivery day (Sunday or a holiday), then one day is subtracted from the service performance calculation for each consecutive non-delivery day.

3.3 First-Class Mail Presort Letters and Cards

The primary induction method for Presort letters and cards is bulk entry at postal mail processing plants and Business Mail Entry Units (BMEUs) across the United States. Presort First-Class Mail letters and cards represent 25.8 percent of the total mailstream. The Postal Service’s measurement approach uses externally generated delivery scans of mail pieces containing IMb’s by reporters to record delivery dates. In combination with Intelligent Mail scan data collected by the Postal Service, this approach enables the granular level of reporting being sought by the mailing industry.

3.3.1 “Start-the-Clock”

Full Service IMb mailers are required to submit electronic mailing documentation listing the IMb’s used. Mail is verified to ensure it meets mail preparation requirements. Mail that does not meet mail preparation standards is excluded from service performance measurement. If a mailer decides to rework the mail so that it meets preparation requirements or decides to pay additional postage, the mail will be included in service performance measurement but it may have a new “start-the-clock” Day-0. Mail “start-the-clock” times and mail preparation quality information are made available to Full Service IMb mailers.

3.3.2 “Stop-the-Clock”

External reporters use scanners capable of reading IMb’s to record the “stop-the-clock” delivery event for individual mail pieces they receive and to transmit scan data to the external reporting system. By comparing the date of the final Postal Service processing scan with the actual receipt date for these pieces, the external measurement contractor calculates a delivery factor for the service performance of First-Class Mail Presort letters and cards. This delivery factor is combined with postal mail processing data to determine the end-to-end service performance measurement for mail that may not receive an external reporter scan.

The use of external reporters allows for mail that is manually processed and

that falls out of automation to be included in service performance measurement. In these cases, the external reporters record the actual “stop-the-clock” event and provide that information to the external measurement contractor, which calculates the service performance for those pieces.

3.4 First-Class Mail Presort Flats

Presort First-Class Mail flats represent only 0.4 percent of the total mailstream, producing one of the smallest mail categories. The Postal Service uses the EXFC measurement of single-piece First-Class Mail flats as a proxy for Presort flats. In order to determine a more accurate estimate for First-Class Mail Presort flats, the portion of EXFC that reflects this mail category, i.e., machine-addressed flats, rather than hand-addressed, is used. If the external measurement contractor determines that sufficient volume of Presort Flats contains IMb’s, the measurement system for Presort letters will be employed for Presort flats.

3.5 First-Class Mail Retail Parcels

The Postal Service measures service performance for this mail via Delivery Confirmation barcode scans. For reporting purposes, performance results are sent to the external measurement contractor for inclusion in aggregate First-Class Mail service performance results. First-Class Mail Retail parcels represent 0.4 percent of all First-Class Mail and less than 0.2 percent of the total mailstream.

3.5.1 “Start-the-Clock”

Primarily, the “start-the-clock” event occurs at retail counters when customers purchase Delivery Confirmation for parcels they intend to mail. When postal retail personnel apply the Delivery Confirmation PS Form 152 to these parcels, they scan the unique Delivery Confirmation barcode on each form. The scan is captured via either a Point of Sale (POS) or Integrated Retail Terminal (IRT) at the retail counter or an Intelligent Mail scanning device. Since the customer is present at the “start-the-clock” event and receives a time-stamped receipt with purchase, there are several validation points for the “start-the-clock” event.

3.5.2 “Stop-the-Clock”

At delivery, postal personnel scan the Delivery Confirmation PS Form 152 barcode to denote delivery or that delivery was attempted, either of which serves to “stop-the-clock” for service performance measurement. More

information on delivery and attempted delivery can be found in the Appendix.

3.6 First-Class Mail Presort Parcels

First-Class Mail presort parcels represent under 0.2 percent of all First-Class Mail and less than 0.1 percent of the total mailstream. One differentiating characteristic of First-Class Mail Presort parcels is the propensity of senders to purchase Delivery Confirmation service. Using Delivery Confirmation scan data, performance results are calculated by the Postal Service and then sent to the external measurement contractor for inclusion into the First-Class Mail service aggregate performance results.

3.6.1 “Start-the-Clock”

For service performance measurement of First-Class Mail Presort parcels, mailers use Delivery Confirmation and will submit electronic mailing documentation listing the unique Delivery Confirmation barcodes used. Mail is verified to ensure it meets applicable mail preparation requirements. Mail that does not meet mail preparation requirements is excluded from service performance measurement. If a mailer decides to rework the mail so that it meets preparation requirements or decides to pay additional postage, the mail will be included in service performance measurement but it may have a new “start-the-clock” Day-0. The “start-the-clock” event is the documented arrival time of the mailing at the Postal Service acceptance facility. Arrival times are made available to mailers.

3.6.2 “Stop-the-Clock”

Postal personnel scan the Delivery Confirmation barcode upon delivery and can denote the delivery or attempted delivery, either of which serves to “stop-the-clock” for service performance measurement.

3.7 Reporting for First-Class Mail

3.7.1 Quarterly Reporting

For Single-Piece First-Class Mail, the Postal Service reports on-time service performance separately by day (i.e., overnight, 2-day, and 3-day/4-day/5-day), for each postal district on a quarterly basis. This greatly expands the number of performance measures reported, yet is consistent with the way EXFC currently reports single-piece First-Class Mail service. The use of data from the final Intelligent Mail scans allows reporting at a higher degree of granularity. The Postal Service sends performance data for First-Class Mail parcels to the external service performance contractor for consolidated reporting purposes.

The quarterly report format for on-time performance of Single-Piece First-Class Mail is as follows:

TABLE 4.—QUARTERLY PERFORMANCE FOR SINGLE-PIECE FIRST-CLASS MAIL; SAMPLE QUARTERLY REPORT FORMAT FOR SINGLE-PIECE FIRST-CLASS MAIL

District	Overnight	Two-day	Three-day/four-day/ five-day
	% On-time	% On-time	% On-time
Capital Metro Area	xx	xx	xx
Baltimore District	xx	xx	xx
Capital District	xx	xx	xx
South Carolina District	xx	xx	xx
Greensboro District	xx	xx	xx
Mid-Carolinas District	xx	xx	xx
No. Virginia District	xx	xx	xx
Richmond District	xx	xx	xx

A similar report is produced to report quarterly service performance for Presort First-Class Mail.

The service variance for Single-Piece First-Class Mail pieces is reported separately as the percentage of mail that is delivered within one-day, two-days,

and three-days of the applicable standard. The quarterly service variance report format for Single-Piece First-Class Mail is as follows:

TABLE 5.—QUARTERLY PERFORMANCE FOR SINGLE-PIECE FIRST-CLASS MAIL SERVICE VARIANCE; SAMPLE QUARTERLY REPORT FORMAT WITH SERVICE VARIANCE FOR SINGLE-PIECE FIRST-CLASS MAIL

District	Overnight			Two-day			Three-day/four-day/five-day		
	Within + 1-day (percent)	Within + 2-days (percent)	Within + 3-days (percent)	Within + 1-day (percent)	Within + 2-days (percent)	Within + 3-days (percent)	Within + 1-day (percent)	Within + 2-days (percent)	Within + 2-days (percent)
Capital Metro Area	xx.x	xx.x	xx	xx.x	xx.x	xx.x	xx.x	xx.x	xx.x
Baltimore District	xx.x	xx.x	xx	xx.x	xx.x	xx.x	xx.x	xx.x	xx.x
Capital District	xx.x	xx.x	xx	xx.x	xx.x	xx.x	xx.x	xx.x	xx.x
South Carolina District	xx.x	xx.x	xx	xx.x	xx.x	xx.x	xx.x	xx.x	xx.x
Greensboro District	xx.x	xx.x	xx	xx.x	xx.x	xx.x	xx.x	xx.x	xx.x
Mid-Carolinas District	xx.x	xx.x	xx	xx.x	xx.x	xx.x	xx.x	xx.x	xx.x
No. Virginia District	xx.x	xx.x	xx	xx.x	xx.x	xx.x	xx.x	xx.x	xx.x
Richmond District	xx.x	xx.x	xx	xx.x	xx.x	xx.x	xx.x	xx.x	xx.x

A similar service variance report is produced to report quarterly service performance for Presort First-Class Mail.

3.7.2 Annual Reporting

Separate national measures are compiled per fiscal year for each First-

Class Mail segment (Single-Piece and Presort) and by service standard (one-day, two-day, and three-day/four-day).

Annual performance consists of a weighted average for each First-Class Mail segment that allots weight based

on the volume of mail in each district. If the segments are not representatively distributed, the weighting ensures that each district counts for the appropriate portion of the national aggregate.

TABLE 6.—ANNUAL COMPLIANCE REPORT; SAMPLE ANNUAL REPORT FORMAT FOR FIRST-CLASS MAIL

Mail class	Target (percent)	Percent on-time
First-Class Mail:		
Single-Piece Overnight	xx	xx
Single-Piece Two-Day	xx	xx
Single-Piece Three-Day/Four-Day	xx	xx
Presort Overnight	xx	xx
Presort Two-Day	xx	xx
Presort Three-Day/Four-Day	xx	xx

4 Single-Piece First-Class Mail International

4.1 Background

The United States Postal Service accepts outbound single-piece First-Class Mail International pieces for processing and transfer to foreign postal administrations for delivery to their destination address. The service standard for the outbound domestic transit of this mail is the same as for First-Class Mail pieces from the domestic 3-digit ZIP Code of origin to the domestic 3-digit ZIP Code area in which the Postal Service International Service Center (ISC) designated for that origin is located.¹⁴

Inbound single-piece First-Class Mail International originates from other countries and is destined for delivery to addresses in 3-digit ZIP Code areas of the United States. The service standard for the inbound domestic transit of this mail is the same as for First-Class Mail that originates from the 3-digit ZIP Code in which the designated ISC is located to the 3-digit ZIP Code area of the delivery address.

Service performance for the domestic transit of both inbound and outbound single-piece First-Class Mail International is measured through the International Mail Measurement System (IMMS), which is operated by an external service performance measurement contractor.

IMMS utilizes only letter-shaped mail pieces, which is the predominant shape of both outbound and inbound single-piece First-Class Mail International. The processing of single-piece First-Class Mail International—during either outbound transit from domestic origin to the designated ISC or inbound transit from the designated ISC to the domestic delivery address—is the same as for domestic single-piece First-Class Mail letters and parcels, which are discussed above in sections 3.2 and 3.5,

¹⁴ The postal mail processing network includes a handful of ISCs, each of which serves a region of the postal network and is responsible for conducting the initial international processing for outbound international mail or the final international processing for inbound international mail. For outbound mail, the ISC for a postal network region may be the gateway facility from which mail is transported from the postal network to the custody of a foreign postal administration. In a small percentage of cases, outbound mail may be transported from its designated ISC to another ISC for the outbound gateway processing that precedes its exit from the postal network.

respectively. The domestic transit service standards are the same. Accordingly, the Postal Service will use service performance data for domestic single-piece First-Class Mail flats (EXFC) and parcels (Delivery Confirmation) as a proxy for estimating the service performance for outbound and inbound single-piece First-Class Mail International flats and inbound surface parcels.

4.1.1 “Start-the-Clock”

To measure outbound single-piece First-Class Mail International letters service performance, the external contractor arranges for sample international pieces to be commingled with pieces created for the domestic EXFC testing program, which is described above in section 3.2. The date and time that the test pieces are dropped into collection boxes or business mail chutes is the “start-the-clock” event reported by droppers directly to the independent contractor.

To test inbound single-piece First-Class Mail International letter service performance, sample letters addressed to reporters in the United States employed by the external contractor are mailed from foreign countries by droppers also employed by the IMMS service performance measurement contractor, which has worldwide operations. To maintain the confidentiality of the program, the identities and addresses of the reporters and droppers (as well as the participating foreign countries of the droppers and receivers) are known only to the contractor. The inbound “start-the-clock” tracking begins with the date and time of the first Postal Service scan of the PLANET Code barcode¹⁵ on a piece at the ISC that first handles the mail. Mailpieces received at the designated ISC on a Sunday or holiday have a “start-the-clock” date of the next processing date.

4.1.2 “Stop-the-Clock”

As an outbound international mail letter travels through the Postal Service’s mail processing system, the PLANET Code information on the piece

¹⁵ The PLANET Code is a barcode printed on mail pieces by mailers participating in the CONFIRM program. CONFIRM enables mailers to receive detailed scan information about the pieces they mail in order to track mail through the postal network. The PLANET Code will be phased out by May 2010 and replaced by the IMb.

is captured and used to measure its progress. When the letter is sorted at the designated ISC, it receives an ID tag and/or PLANET Code scan. The “stop-the-clock” for an outbound mail piece is the date of the last scan at this facility. The number of transit days for outbound mail is the difference between the induction date and the last PLANET Code read at the designated ISC. Because the “stop-the-clock” event takes place at an ISC, as opposed to a delivery point, the transit days calculation includes Sundays and holidays.

An inbound international mail letter flows through the USPS network from the ISC to the delivery addresses. The “stop-the-clock” event data for inbound mail pieces are the dates on which they are delivered to reporters employed by the service measurement contractor. The reporter is part of the EXFC survey group and is responsible for receiving the mail and reporting the date of delivery. The number of transit days for inbound test mail is the difference between the delivery date and the date of the first PLANET Code read or ID tag at the designated ISC. The service performance is calculated in the same method as described in the Glossary.

Because the service standards for both outbound and inbound single-piece First-Class Mail International flats and parcels are based on the domestic transit of such mail, on-time performance is measured against the same set of origin-destination 3-digit ZIP Code area service standards as domestic First-Class Mail.

4.2 Reporting Single-Piece First-Class Mail International

4.2.1 Quarterly Reporting

Since not all postal administrative districts have sufficient international volumes for statistically representative reporting, the Postal Service reports international quarterly service performance at a postal administrative area level. Each measurement includes the percent delivered on time for outbound and for inbound single-piece First-Class Mail International. All scores are weighted at the area level using proportions derived from a rolling average of estimated volumes for 12 fiscal quarters.

The quarterly report format for Single-Piece First-Class Mail International is as follows:

TABLE 7.—QUARTERLY PERFORMANCE FOR SINGLE-PIECE INTERNATIONAL MAIL; SAMPLE QUARTERLY REPORT FORMAT FOR SINGLE-PIECE FIRST-CLASS MAIL INTERNATIONAL

Area	% On-time inbound	% On-time outbound
Northeast Area	xx.x	xx.x
New York Metro Area	xx.x	xx.x
Eastern Area	xx.x	xx.x
Capital Metro Area	xx.x	xx.x
Southeast Area	xx.x	xx.x
Great Lakes Area	xx.x	xx.x
Western Area	xx.x	xx.x
Southwest Area	xx.x	xx.x
Pacific Area	xx.x	xx.x
National	xx.x	xx.x

The service variance for Single-Piece First-Class Mail International is reported separately as the percentage of mail that is delivered within one-day, two-days, and three-days of the applicable service standard. The quarterly report format is as follows:

TABLE 8.—QUARTERLY PERFORMANCE FOR SINGLE-PIECE INTERNATIONAL MAIL SERVICE VARIANCE; SAMPLE QUARTERLY REPORT FORMAT WITH THE SERVICE VARIANCE FOR SINGLE-PIECE FIRST-CLASS MAIL INTERNATIONAL

Area	Inbound			Outbound		
	Within + 1-day (percent)	Within + 2-days (percent)	Within + 3-days (percent)	Within + 1-day (percent)	Within + 2-days (percent)	Within + 3-days (percent)
Northeast Area	xx.x	xx.x	xx	xx.x	xx.x	xx.x
New York Metro Area	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Eastern Area	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Capital Metro Area	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Southeast Area	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Great Lakes Area	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Western Area	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Pacific Area	xx.x	xx.x	xx	xx.x	xx.x	xx.x
National	xx.x	xx.x	xx	xx.x	xx.x	xx.x

4.2.2 Annual Reporting

The Postal Service’s Annual Compliance Report includes the national measure per fiscal year for the percentage of single-piece First-Class Mail International delivered on time. Annual performance consists of a weighted average that allots weight based on the volume of mail in each of the nine postal administrative areas. If the data are not representatively distributed, the weighting ensures that each area counts for the appropriate portion of the national aggregate.

The Annual Compliance Report format for the Single-Piece First-Class Mail International is as follows:

TABLE 9.—ANNUAL COMPLIANCE REPORT; SAMPLE ANNUAL REPORT FOR SINGLE-PIECE FIRST-CLASS MAIL INTERNATIONAL

Mail Class	Target (percent)	% on-time
Single-Piece International Mail .....	.....	.....
First-Class Mail	xx.x	xx.x

5 Standard Mail

5.1 Background

Standard Mail pieces represented 49.2 percent of the overall mail volume in FY2007.¹⁶ At over 103 billion mail

¹⁶ See http://www.usps.com/financials/_pdf/RDW_FY_2007.pdf.

pieces, it has the largest annual volume of any mail product. By shape, Standard Mail, is 61.1 percent letters, 38.3 percent flats, and 0.6 percent parcels. Table 10—Standard Mail Volume below illustrates the make-up of Standard Mail and illustrates the percentage that Standard Mail letters, flats, and parcels represent in relation to the overall mailstream. Different categories of Standard Mail have different preparation and entry requirements for mailers and thus are measured separately. Accordingly, this section has been separated into the following subsections: Non-saturation letters, non-saturation flats, saturation letters and flats, and parcels.

TABLE 10.—STANDARD MAIL VOLUME¹

	Presort			Total (percent)
	Letters (percent)	Flats (percent)	Parcels (percent)	
Standard Mail	61.1	38.3	0.6	100
Overall Mailstream	30.1	18.8	0.3	49.2

¹ For purposes of publication, the reference to Table 3 in the plan has been changed to Table 10.

5.2 Standard Mail Non-Saturation Letters

The primary induction method for Standard Mail non-saturation letters is bulk entry. The Postal Service bases service performance measurement on the documented arrival time at the postal facility where the mail is accepted, and in-home IMb delivery scan data provided by external reporters.

5.2.1 “Start-the-Clock”

Full Service IMb mailers are required to prepare mail with IMb’s and submit electronic mailing documentation listing the IMb’s used. Mail is verified to ensure it meets preparation requirements. Mail that does not meet mail preparation requirements is excluded from service performance measurement. If a mailer decides to rework the mail so that it meets preparation requirements or decides to pay additional postage, the mail will be included in service performance measurement, but it may have a new “start-the-clock” Day-0. Drop shipment mailers schedule appointments for Standard Mail non-saturation letters in the Postal Service’s Facility Access and Shipment Tracking (FAST) system for DBMC, DADC and DSCF drop shipments. The “start-the-clock” is the documented arrival time at the Postal Service acceptance facility. For mailers that meet the Full Service Intelligent Mail® Option, mail arrival times and mail preparation quality information are made available.

5.2.2 “Stop-the-Clock”

External reporters are equipped with IMb scanners for recording the “stop-the-clock” delivery event for all mail they receive containing an IMb and transmitting data to the external reporting system. By comparing the date of the final postal mail processing scan with the actual receipt date for these pieces, the external service performance measurement contractor calculates a delivery factor for Standard Mail letters. This delivery factor is combined with the mail processing data for Full Service IMb Standard Mail letters that may not receive an external reporter scan to

determine the end-to-end service performance measurement.

The use of external reporters allows for mail that is not exposed to or that falls out of automation to be included in service performance measurement. The external reporters provide the actual “stop-the-clock” on such pieces, and the external measurement contractor calculates the service performance for those pieces that go to the external reporters.

5.3 Standard Mail Non-Saturation Flats

The primary induction method for Standard flats is bulk entry. As of May 2009, mailers of automation non-saturation flats will be required to have a delivery point POSTNET or IMb. Also as of May 2009, in order to qualify for the lowest automation prices, Full Service IMb mailers will be required to apply an IMb on automation non-saturation flats.

5.3.1 “Start-the-Clock”

Full Service IMb mailers are required to submit electronic mailing documentation listing the IMb’s used. Mail is verified to ensure it meets mail preparation criteria. Mail that does not meet mail preparation standards is excluded from service performance measurement. If a mailer decides to rework the mail so that it meets preparation requirements or decides to pay additional postage, the mail will be included in service performance measurement, but it may have a new “start-the-clock” Day-0. Drop shipment mailers create appointments for Standard Mail flats in the Postal Service’s Facility Access and Shipment Tracking (FAST) system at DBMC, DADC and DSCF facilities. The “start-the-clock” is the documented arrival time at the Postal Service acceptance facility. For mailers that meet the Full Service Intelligent Mail® Option, mail arrival times and mail preparation quality information are made available.

5.3.2 “Stop-the-Clock”

External reporters are equipped with IMb scanners for use in recording the “stop-the-clock” delivery event for individual mail pieces that bear an IMb

and transmitting data to the external reporting system. By comparing the date of the final postal mail processing scan with the receipt date for these pieces, the external service measurement contractor can calculate a delivery factor for the service performance of Standard Mail flats. This delivery factor is combined with the mail processing data that may not receive an external reporter scan to determine the end-to-end service performance measurement for Standard Mail flats.

5.4 Standard Mail Saturation Letters and Flats

For Standard Mail saturation letters and flats, the primary induction method is Sectional Center Facility or Delivery Unit dropped bundles and saturation trays. Due to the distinct characteristics of saturation letters and flats, the Postal Service is proposing a measurement approach specific to these mail types.

5.4.1 “Start-the-Clock”

When required, Full Service IMb mailers submit electronic mailing documentation listing the IMb’s used. Mail is verified to ensure it meets mail preparation criteria. Mail that does not meet mail preparation standards is excluded from service performance measurement. If a mailer decides to rework the mail so that it meets preparation requirements or decides to pay additional postage, the mail will be included in service performance measurement, but it may have a new “start-the-clock” Day-0. Drop shipment mailers create appointments for Standard Mail in the Postal Service’s FAST system at DBMC, DADC and DSCF facilities providing advance notification of the mail profile and arrival times. The “start-the-clock” is the documented arrival time at the Postal Service acceptance facility. For mailers that meet the requirements of the Full Service Intelligent Mail® Option, mail arrival times and mail preparation quality information are made available.

5.4.2 “Stop-the-Clock”

As with non-saturation Standard Mail letters and flats, saturation mail with IMb’s is scanned by external reporters to

“stop-the-clock”. However, unique barcodes are not required on saturation mail. The Postal Service will develop methods for external reporters to capture the “stop-the-clock,” such as requiring training for external reporters to identify saturation mail and have them report delivery of such pieces without an IMb on the date of receipt. These data will be sent to the external reporting system and will be the “stop-the-clock” for the individual mail pieces. The external service measurement contractor calculates the service performance for the pieces that go to the external reporters.

5.5 Standard Mail Parcels

Many Standard Mail parcel shippers choose to purchase special services such as Delivery Confirmation for their mail. The Postal Service performs service measurement on Standard Mail parcels that pass verification and use Delivery Confirmation service. For reporting purposes, results are calculated by the

Postal Service then sent to the external measurement contractor for inclusion into aggregate Standard Mail results. Full Service implementation will include electronic submission of postage statements and mailing documentation, unique Intelligent Mail Package barcodes, unique Intelligent Mail Container barcodes, and appointment scheduling for drop shipments at DBMC, DADC and DSCF facilities. These requirements are separate from addressing, presortation, containerization, or other specifications generally governing price eligibility.

5.5.1 “Start-the-Clock”

The “start-the-clock” for Standard Mail parcels is the documented arrival time at the Postal Service facility.

5.5.2 “Stop-the-Clock”

Postal personnel scan Delivery Confirmation barcodes upon delivery of parcels for which Delivery Confirmation service has been purchased. They can

denote the delivery or attempted delivery, either of which serves to “stop-the-clock”.

5.6 Reporting for Standard Mail

5.6.1 Quarterly Reporting

Quarterly reporting for Standard Mail reflects performance by postal district separately for destination entry mail and end-to-end mail. Reporting destination entry mail and end-to-end mail separately by service standard day significantly expands the number of performance measures reported and the number of external reporters required. The measurements provide ample detail to assess the quality of service without becoming cost prohibitive for the Postal Service. The Postal Service sends performance data for Standard Mail parcels to the external service performance contractor for consolidated reporting purposes.

The quarterly report format for Standard Mail is as follows:

TABLE 11.—QUARTERLY PERFORMANCE FOR STANDARD MAIL; SAMPLE QUARTERLY REPORT FORMAT FOR STANDARD MAIL

District	Destination entry	End-to-end
	On-time (Percent)	On-time (Percent)
Capital Metro Area	xx.x	xx.x
Baltimore District	xx.x	xx.x
Capital District	xx.x	xx.x
Greater South Carolina District	xx.x	xx.x
Greensboro District	xx.x	xx.x
Mid-Carolinas District	xx.x	xx.x
No. Virginia District	xx.x	xx.x
Richmond District	xx.x	xx.x

The service variance for Standard Mail pieces is reported separately as the percentage of mail that is delivered

within one-day, two-days, and three-days of the applicable standard. The

quarterly report format for Standard Mail service variance is as follows:

TABLE 12.—QUARTERLY PERFORMANCE FOR STANDARD MAIL SERVICE VARIANCE; SAMPLE QUARTERLY REPORT FORMAT FOR STANDARD MAIL SERVICE VARIANCE

District	Destination entry			End-to-end		
	Within +1-day (Percent)	Within +2-days (Percent)	Within +3-days (Percent)	Within +1-day (Percent)	Within +2-days (Percent)	Within +3-days (Percent)
Capital Metro Area	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Baltimore District	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Capital District	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Greater South Carolina District	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Greensboro District	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Mid-Carolinas District	xx.x	xx.x	xx	xx.x	xx.x	xx.x
No. Virginia District	xx.x	xx.x	xx	xx.x	xx.x	xx.x
Richmond District	xx.x	xx.x	xx	xx.x	xx.x	xx.x

5.6.2 Annual Reporting

The Postal Service reports a national aggregate measure per fiscal year for the percentage of Standard Mail delivered on time. The Annual Compliance Report includes letter, flat, and parcel-shaped

Standard Mail. It consists of a weighted average for each Standard Mail segment that allots weight based on the volume of mail in each postal administrative district. If the segments are not representatively distributed, the

weighting ensures that each district counts for the appropriate portion of the national aggregate.

The Postal Service's Annual Compliance Report format for Standard Mail is as follows:

TABLE 13.—ANNUAL COMPLIANCE REPORT; SAMPLE ANNUAL REPORT FORMAT FOR STANDARD MAIL

Mail class	Target (percent)	Percent on-time
Standard Mail. Letters, Flats, and Parcels	xx.x	xx.x

6 Periodicals

6.1 Background

Periodicals represented just over 4 percent of the overall mail volume in FY2007,¹⁷ with 8.8 billion mail pieces. Periodicals consist of letter- and flat-shaped pieces, most of which are destination-dropped. The Postal Service

uses the same interim service measurement approach for both letters and flats, which relies on external reports generated by Red Tag and DelTrak.

6.2 Periodicals Letters and Flats

All Periodicals are bulk entry or drop shipments, and the vast majority of the

volume is flats. Table 14—Periodicals Mail Volume illustrates the make-up of Periodicals Mail. It also illustrates the percentage that each Periodicals shape represents within the overall mailstream.

TABLE 14.—PERIODICALS MAIL VOLUME ¹

	Letters (Percent)	Flats (Percent)	Total (Percent)
Periodicals	1.5	98.5	100.0
Overall Mailstream	0.1	4.1	4.2

¹ For purposes of publication, the reference to Table 3 in the plan has been changed to Table 14.

6.2.1 Interim Approach

Until the Intelligent Mail system has sufficient Periodicals volume using IMb's, the Postal Service uses two external systems, Red Tag and DelTrak, to measure Periodicals service performance. The "start-the-clock" for both external systems is the mailer-reported induction time. For Red Tag and DelTrak, the "stop-the-clock" is the delivery date reported online by the external reporters. These reporters are mainly concentrated in postal administrative districts with high population density. Due to the limited number of reporters participating in these programs, data are only statistically valid for the desired precision at a postal administrative area level.

The data from both systems will be provided to an external measurement contractor for application of business rules and combining of the data for overall performance reporting.

The Postal Service reports service performance at a postal administrative area level in the interim until the volume of Periodicals with IMb's and electronic mailing documentation is sufficiently robust to provide statistically significant results at a lower level of aggregation. As additional performance data become available, the granularity will increase and may allow for reporting at the district level.

The quarterly report format for Periodicals is as follows:

TABLE 15.—QUARTERLY PERFORMANCE FOR PERIODICALS; SAMPLE QUARTERLY REPORT FORMAT FOR PERIODICALS

Area	Percent on-time
Northeast Area	xx.x
New York Metro Area	xx.x
Eastern Area	xx.x
Capital Metro Area	xx.x
Southeast Area	xx.x
Great Lakes Area	xx.x
Western Area	xx.x
Southwest Area	xx.x
Pacific Area	xx.x
National	xx.x

The service variance for Periodicals is reported separately, reflecting the percentage of mail that is delivered within one-day, two-days, and three-days of the applicable standard. The quarterly service variance report format for Periodicals is as follows:

6.3 Reporting for Periodicals

6.3.1 Quarterly Reporting

In FY2009, the Postal Service will use Red Tag and DelTrak data for reporting at the area level on a quarterly basis.

¹⁷ See http://www.usps.com/financials/_pdf/ RPW_FY_2007.pdf.

TABLE 15.—QUARTERLY PERFORMANCE FOR PERIODICALS SERVICE VARIANCE; SAMPLE QUARTERLY REPORT FORMAT WITH SERVICE VARIANCE FOR PERIODICALS

Area	Within +1-day (percent)	Within +2-days (percent)	Within +3-days (percent)
Northeast Area	xx.x	xx.x	xx.x
New York Metro Area	xx.x	xx.x	xx.x
Eastern Area	xx.x	xx.x	xx.x
Capital Metro Area	xx.x	xx.x	xx.x
Southeast Area	xx.x	xx.x	xx.x
Great Lakes Area	xx.x	xx.x	xx.x
Western Area	xx.x	xx.x	xx.x
Southwest Area	xx.x	xx.x	xx.x
Pacific Area	xx.x	xx.x	xx.x
National	xx.x	xx.x	xx.x

6.3.2 Annual Reporting

The Postal Service reports national measures per fiscal year for the percentage of Periodicals mail delivered on time.

Annual performance consists of a weighted average for each Periodicals segment that allots weight based on the volume of mail in each Area. If the data are not representatively distributed, the weighting ensures that each Area counts for the appropriate portion of the national aggregate.

The Postal Service’s Annual Compliance Report format for Periodicals Mail is as follows:

TABLE 16.—ANNUAL COMPLIANCE REPORT; SAMPLE ANNUAL REPORT FORMAT FOR PERIODICALS

Mail class	Target (Percent)	Percent on-time
Periodicals. Letters, Flats, and Parcels ...	xx.x	xx.x

7 Package Services

7.1 Background

Market-dominant Package Services products include single-piece Parcel Post, Bound Printed Matter, Library Mail, and Media Mail. Presort Package Services flat-shaped mail is mainly

composed of oversized catalogs, which are operationally handled the same as Standard Mail flats. Accordingly, the Postal Service measures Presort Package Services flats using the same approach as Standard Mail flats.

Package Services parcel-shaped mail represented less than 0.3 percent of overall mail volume in FY2007.¹⁸ Among Package Services parcels, 14.5 percent are Retail and 85.5 percent are Presort.

Table 17—Package Services Parcel-Shaped Mail Volume illustrates the make-up of parcels by entry method. The table also illustrates the percentage that market-dominant Package Services parcel-shaped mail represents within the overall domestic mailstream.

TABLE 17.—PACKAGE SERVICES PARCEL-SHAPED MAIL VOLUME ¹

	Retail (Percent)	Presort (Percent)	Total (Percent)
Package Services (Parcel-shaped)	14.5	85.5	100
Total Domestic Mailstream	0.1	0.3	0.4

¹ For purposes of publication, the reference to Table 5 in the plan has been changed to Table 17.

7.2 Retail Package Services

The Postal Service measures service performance for Package Services Retail mail via Delivery Confirmation scans. Retail Package Services parcels represent 14.5 percent of all Package Services parcels, but less than 0.1 percent of the total mailstream. Delivery Confirmation is included on 16 percent of such parcels, which represents a significant volume.

7.2.1 “Start-the-Clock”

The “start-the-clock” for Retail Package Services mail occurs at the retail counter when the customer purchases Delivery Confirmation. When

retail personnel apply the Delivery Confirmation PS Form 152 to parcels, they scan the Delivery Confirmation form barcode. The scans are captured via either a POS or IRT terminal at the retail counter or an Intelligent Mail handheld scanning device. Because the customer is present at the “start-the-clock” event and receives a time-stamped receipt with purchase, there are several validation points.

7.2.2 “Stop-the-Clock”

Postal personnel scan the Delivery Confirmation barcodes upon delivery or attempted delivery, either of which serves to “stop-the-clock”.

7.3 Presort Package Services

The Postal Service performs service measurement on presorted mail that passes verification and uses Delivery Confirmation service or the IMb. Service performance preparation requirements include electronic submission of postage statements and mailing documentation (when required), unique Intelligent Mail® Package barcodes or IMb’s, unique Intelligent Mail® Container barcodes, and appointment scheduling for drop shipments at DBMC, DADC and DSCF facilities. These requirements are separate from addressing, presortation,

¹⁸ See http://www.usps.com/financials/_pdf/RPW_FY_2007.pdf.

containerization, or other requirements generally governing price eligibility.

7.3.1 "Start-the-Clock"

The "start-the-clock" for Presort Package Services is the documented arrival time at the Postal Service acceptance facility. For drop shipments at DBMC, DADC and DSCF facilities, the "start-the-clock" event is based on the customer's documented appointment and the driver-reported arrival time to the Postal Service, which are used to determine when the mail is available for processing. For mail that is presented at the BMEU, the arrival of the mailing is used as the "start-the-clock" as long as the mailing meets applicable preparation and service measurement requirements. For mail that is presented at the Delivery Unit, delivery confirmation or Intelligent Mail Container barcode scan events are used to "start-the-clock". As with other mailings that enter a postal facility loading dock area, the Postal Service scans containers that have an Intelligent Mail Container barcode or uses electronic documentation to validate

mailer shipment content and acceptance time.

7.3.2 "Stop-the-Clock"

For Package Services parcels, postal personnel scan Delivery Confirmation barcodes upon delivery or attempted delivery, either of which serves to "stop-the-clock" for service performance measurement. For flats, mail with IMb's is scanned by external reporters to record "stop-the-clock" delivery events and transmitted to the external reporting system. By comparing the date of the final postal mail processing scan with the delivery date for these pieces, the external service measurement contractor can calculate a factor for the service performance for Package Services flats. The delivery factor is combined with the mail processing data that may not receive an external reporter scan to determine the end-to-end service performance measurement for Package Services flats.

7.4 Reporting for Package Services

7.4.1 Quarterly Reporting

The Postal Service reports quarterly on the percentage of mail that is

delivered on time. The quarterly report format for Package Services parcels is as follows:

TABLE 18.—QUARTERLY PERFORMANCE FOR PACKAGE SERVICES; SAMPLE QUARTERLY REPORT FORMAT WITH SERVICE VARIANCE FOR PACKAGE SERVICES PARCELS

District	Percent on-time
Capital Metro Area	xx.x
Baltimore District	xx.x
Capital District	xx.x
Greater South Carolina District	xx.x
Greensboro District	xx.x
Mid-Carolinas District	xx.x
No. Virginia District	xx.x
Richmond District	xx.x

The service variance for Package Services parcels is reported separately as the percentage of mail that is delivered within one-day, two-days, and three-days of the applicable standard. The quarterly report format with the service variance for Package Services is as follows:

TABLE 19.—QUARTERLY PERFORMANCE FOR PACKAGE SERVICES SERVICE VARIANCE; SAMPLE QUARTERLY REPORT FORMAT WITH SERVICE VARIANCE FOR PACKAGE SERVICES PARCELS

	Within +1-day (percent)	Within +2-days (percent)	Within +3-days (percent)
Capital Metro Area	xx.x	xx.x	xx.x
Baltimore District	xx.x	xx.x	xx.x
Capital District	xx.x	xx.x	xx.x
Greater South Carolina District	xx.x	xx.x	xx.x
Greensboro District	xx.x	xx.x	xx.x
Mid-Carolinas District	xx.x	xx.x	xx.x
No. Virginia District	xx.x	xx.x	xx.x
Richmond District	xx.x	xx.x	xx.x

7.4.2 Annual Reporting

The Postal Service reports national measures per fiscal year for the percentage of Package Services mail delivered on time.

The Postal Service's Annual Compliance Report format for Package Services parcels is as follows:

TABLE 20.—ANNUAL COMPLIANCE REPORT; SAMPLE ANNUAL REPORT FORMAT FOR PACKAGE SERVICES

Mail class	Target (percent)	Percent on-time
Package Services. Parcels	xx.x	xx.x

8 Special Services

8.1 Background

There are two categories of special services: Ancillary and stand-alone. Ancillary special services are purchased in addition to the postage applicable to First-Class Mail, Periodicals, Standard Mail, and Package Services. These optional special services are varied in nature and include Delivery Confirmation, Signature Confirmation, Certified Mail, Electronic Return Receipt, Registered Mail, Collect on Delivery, and Address Correction Service, among others. In contrast to ancillary special services, stand-alone special services are not contingent on sending or receiving a particular mail piece and include services such as P.O.

Box Service, CONFIRM, and Address List Services, among others.

8.2 Delivery Confirmation, Signature Confirmation, Certified Mail, Registered Mail, Electronic Return Receipt, and Collect on Delivery

A principal feature of these special services is the electronic provision of information by the Postal Service to the sender regarding the delivery status of a particular mail piece. That information may consist of confirmation that delivery was attempted, completed, or that a copy of the recipient's signature was captured.

For a number of these services, delivery-related information is generated by postal scanning of mail pieces at delivery units or during delivery. Before the completion of daily

work shifts, postal personnel dock their portable handheld scanners, so that delivery information pertinent to each scanned mail piece can be transmitted to appropriate postal data systems. Handheld scanners allow for signatures to be captured at delivery and transmitted with the delivery information. Delivery information captured is then made available to the purchaser of the special service.

The service measurement for Delivery Confirmation, Signature Confirmation, Certified Mail, Registered Mail, electronic Return Receipt, and Collect on Delivery uses data generated from delivery event barcode scans to measure the time between when delivery information is collected and when that information is made available to the customer. When the delivery scan event is captured by the handheld scanner, a time-stamp is associated with the scan, which is the "start-the-clock". When the scanning device is docked, the delivery scan event information is transmitted through postal data systems to the customer-accessible Track & Confirm page at <http://www.usps.com>, the Postal Service public Web site. The posting time to the customer-accessible Web site is the "stop-the-clock".

8.3 CONFIRM and Address Correction

The electronic provision of information by the Postal Service to the mail piece sender is a key component for CONFIRM and automated Address Correction services as well. CONFIRM scanning of mail and identification of automated Address Correction of applicable mail pieces are each performed passively by automated mail processing equipment, which then transmits information to postal data systems. Information from these systems is made available to the purchaser of the special service.

The service measurement for both CONFIRM and automated Address Correction uses the IMb on individual mail pieces. For CONFIRM, when mail processing equipment scans a mail piece, the scan information is transmitted to the CONFIRM system in near-real time and made available to CONFIRM subscribers. The "start-the-clock" is the time stamp associated with the scan. The "stop-the-clock" is the date and time when data are made available to subscribers. For automated Address Correction customers, scans are transmitted to the Address Correction System (ACS) at preset intervals during the day and the corrected address information is forwarded to customers

who subscribe to the service. The "start-the-clock" is the date and time when data is transmitted to ACS. The "stop-the-clock" is the date and time when data are forwarded to participants.

8.4 Post Office Box Service

Post Office Box service is internally measured using scanning technology to compare the availability of mail delivered to a P.O. Box section by the posted "uptime". The "uptime" is the posted time of day when customers can expect to collect the mail from their P.O. Box. A barcode in the P.O. Box section is scanned when the distribution of mail is complete.

8.5 Insurance Claims Processing

The Postal Service's Customer Inquiry Claims Response System (CICRS) is an application used to process indemnity claims when domestic insured articles are lost or damaged in the mail. For domestic claims, after the customer has submitted the appropriate claim form, Postal Service employees verify completion of the form and submit it for processing to the CICRS system. The claim is keyed into the system and the data are uploaded for processing. For claims that are not complete and that require additional information from the customer, correspondence is mailed to the customer requesting the missing information, with instructions regarding where to send the additional information. Once all information is received by CICRS, the system proceeds to the claims processing resolution phase. The date that all information is available for claims processing resolution is the "start-the-clock". Depending on the value of the item lost or damaged, the claim may be automatically paid or denied by the system or sent for review by a postal insurance claims adjudicator or the Postal Service Consumer Advocate. The adjudicator or Consumer Advocate decides if the claim should be paid, denied, or closed. The date on which the system, adjudicator, Consumer Advocate pays, denies, or closes the claim and transmits a response to the customer is the "stop-the-clock".

8.6 Postal Money Order Inquiry Processing

The Money Order Inquiry System (MOIS) is an application used to process customer inquiries regarding Postal Money Orders they have purchased. After the customer has completed PS Form 6401 and paid for the inquiry service, Postal Service employees

submit the form to a centralized facility for processing. The inquiry is scanned into the system and the data are uploaded for processing. MOIS verifies whether the money order in question has been cashed by running the money order number against a database of cashed money orders. The system generates correspondence to the inquiring customer regarding the status of the money order in question. The purchase of the inquiry service is the "start-the-clock" event. Transmission of a response to the customer is the "stop-the-clock" event.

8.7 Address List Services

Address List Services are available to customers seeking correction of the addresses or ZIP Codes on their mailing lists, or the sequencing of their address cards. The Postal Service will use a system to record "start-the-clock" and "stop-the-clock" times for these services. The "start-the-clock" event is the receipt of the address list or address cards from the mailer at the delivery unit or the postal district Address Management Systems office. The "stop-the-clock" event is the transmission of the corrected address information from the delivery unit or district AMS office to the requestor.

8.8 Reporting

8.8.1 Quarterly Reporting

The Postal Service reports Delivery Confirmation, Signature Confirmation, Certified Mail, Registered Mail, electronic Return Receipt, and Collect on Delivery as an aggregate score on a quarterly basis by district. The service performance for these special services is aggregated, as they all use the same system to measure the time elapsed from when the delivery information is captured by the Postal Service until it is available to the customer. Post Office Box service is also reported quarterly by district.

Since CONFIRM, automated Address Correction, Insurance Claims Processing, Money Order Inquiry Processing, and Address List Services each use a national or centralized system for providing the majority if not all of each respective service, performance will be reported at a national level. The Postal Service reports quarterly on the percentage of those services that meet the service standard.

The quarterly report format for Special Services is as follows:

TABLE 21.—QUARTERLY PERFORMANCE FOR SPECIAL SERVICES; SAMPLE QUARTERLY REPORT FORMAT FOR SPECIAL SERVICES REPORTED AT THE DISTRICT LEVEL; SAMPLE QUARTERLY REPORT FORMAT FOR SPECIAL SERVICES REPORTED AT THE DISTRICT LEVEL

District	Delivery information special services combined score	Post office box service
	Percent on-time	Percent on-time
Capital Metro Area	xx.x	xx.x
Baltimore District	xx.x	xx.x
Capital District	xx.x	xx.x
Greater South Carolina District	xx.x	xx.x
Greensboro District	xx.x	xx.x
Mid-Carolinas District	xx.x	xx.x
No. Virginia District	xx.x	xx.x
Richmond District	xx.x	xx.x

The quarterly report format for CONFIRM, automated Address Correction, Insurance Claims Processing, Address List Services, and Postal Money Order Inquiry Processing is as follows:

TABLE 22.—SAMPLE QUARTERLY REPORT FORMAT FOR SPECIAL SERVICES REPORTED AT THE NATIONAL LEVEL

	CONFIRM	Address Correction	Insurance Claims Processing	Address List Services	Money Order Inquiry
	Percent on-time	Percent on-time	Percent on-time	Percent on-time	Percent on-time
National	xx.x	xx.x	xx.x	xx.x	xx.x

8.8.2 Annual Reporting

The Postal Service has developed a Special Services Index to reflect an annual combined service measurement score per fiscal year for Special Services. This index weights and aggregates various special services so that all components are reflected appropriately and still maintain distinctness. The Annual Compliance Report format for Special Services is as follows:

TABLE 23.—ANNUAL COMPLIANCE REPORT; SAMPLE ANNUAL REPORT FORMAT FOR SPECIAL SERVICES REPORTED AT THE NATIONAL LEVEL

	Target	Index
Special Services	xxxx	xxxx

9 Appendix

9.1 Service Measurement Business Rules

The business rules for service performance measurement are intended to maintain a clearly defined structure for and ensure the reliability of the measurement system. The business rules are grouped into the four subject areas below: “Start-the-clock”, “Stop-

the-clock”, Special Services, and Inclusions.

1 “Start-the-Clock”

Generally, if the mail arrival time is before the CET, the “start-the-clock” Day-0 will be the day of entry. If the day of entry is a Sunday or holiday, the “start-the-clock” Day-0 will be the next applicable acceptance day. If the mail arrival time is after the CET, then the mail will have a “start-the-clock” Day-0 of the next acceptance day for that facility. CET rules apply to mail entered at retail and through bulk induction.

As mail entry processes and systems change over time, so too will the methods by which the Postal Service will gather “start-the-clock” and “stop-the-clock” information. The following rules apply to current entry scenarios.

1.1 Mail Entered at the Business Mail Entry Unit (BMEU)

1.1.1 Customer/Supplier Agreement

Bulk mailers subject to a Customer/Supplier Agreement may have different acceptance windows than the established BMEU hours of operation. Each Customer/Supplier Agreement will specify the applicable “start-the-clock” Day-0 window mutually established by the mailer and the Postal Service. Mailers who require BMEU verification

must work within the posted BMEU hours of operation unless alternate arrangements specified through Customer/Supplier Agreements.

1.1.2 Critical Entry Time

For mailers who deposit mail at a BMEU, the CET for specific classes of mail is determined locally by the facility manager at the Postal Service mail facility at which bulk entry will occur.

1.1.3 “Start-the-Clock”

The “start-the-clock” event for mail deposited at a BMEU is either the time the mailer arrives, as documented in PostalOne!® or when mailing verification is complete, depending on the circumstances surrounding the mail entry. Mailer arrival time is recorded by postal personnel in PostalOne! upon mailer arrival at the BMEU. Mailing verification completion also is documented in the PostalOne! system.

For mailers with a Customer/Supplier Agreement in place, the “start-the-clock” Day-0 will be the day of entry if the mailer arrival time is prior to the latest acceptance time specified by the Customer/Supplier Agreement. The “start-the-clock” Day-0 for mailers that arrive after the latest acceptance time specified by their Customer/Supplier Agreement is the day of entry if

verification is completed before the facility CET; otherwise, the “start-the-clock” Day-0 will be the following applicable acceptance day.

For mailers without a Customer/Supplier Agreement in place, if the mailer arrival time is prior to the facility CET for the class of mail, the “start-the-clock” Day-0 will be the day of entry; otherwise, the “start-the-clock” Day-0 will be the following acceptance day.

If the mailing fails acceptance verification, the mailer will be notified and presented with the option of fixing the mailing so that it conforms to the preparation requirements associated with acceptance at the requested price categories or paying additional postage based upon the degree of preparation associated with the mail as presented. A new “start-the-clock” event may occur when mail that initially fails verification is finally released for processing.

A decision tree illustrating the “start-the-clock” Day-0 for mail deposited at a BMEU is depicted below [and identified as] Appendix Figure 1—“Start-the-Clock” Decision Tree for mail deposited at the BMEU.] [Appendix Figure 1 omitted for publication purposes, but can be viewed on the Commission’s Web site, <http://www.prc.gov/prc-pages/daily-listing>.]

1.2 “Start-the-Clock”

Mail Deposited at a BMEU: Mailer has Customer/Supplier Agreement; latest time of acceptance in agreement is 3 p.m.; verification start time is 4:30 p.m.; verification complete time is 5:15 p.m.; hours of Operation are 8 a.m. to 4 p.m.; and “start-the-clock” Day-0 is the next day of acceptance. [Decision Tree omitted for publication purposes, but can be viewed on Commission’s Web site, <http://www.prc.gov/prc-pages/daily-listing>.]

1.3 Plant Load Using Postal Transportation

1.3.1 Critical Entry Time

The CET is determined locally by postal facility managers and is documented in a Customer/Supplier Agreement.

1.3.2 “Start-the-Clock”

The “start-the-clock” event for a plant load mailing using postal transportation is based on the mail ready time as indicated by mailers and verified by postal personnel in PostalOne!®. Mailers document that mail was ready within the acceptance window specified in the Customer/Supplier Agreement and this is verified by postal personnel. If the “start-the-clock” event occurs before the latest acceptance time specified by the Customer/Supplier

Agreement, the “start-the-clock” Day-0 will be the day of entry. If this activity occurs after the latest acceptance time, the “start-the-clock” Day-0 will be the following acceptance day.

If a mailer with multiple dispatch events cannot identify what is physically in each container or tray, the “start-the-clock” Day-0 for all mail entered within the mailing period defined in the mailer’s electronic documentation will be based on the “start-the-clock” event of the last truck dispatched.

1.4 Plant Load Using Mailer Transportation

1.4.1 Critical Entry Time

For plant load using mailer transportation, the CET for each class is determined locally by postal facility managers.

1.4.2 “Start-the-Clock”

For plant load using mailer transportation, the “start-the-clock” event will be defined in the mailer’s Customer/Supplier Agreement. If the “start-the-clock” event occurs before the latest acceptance time specified by the Customer/Supplier Agreement, the “start-the-clock” Day-0 will be the day of entry. If this event occurs after the latest acceptance time, the “start-the-clock” Day-0 will be the following acceptance day.

1.5 Destinating Drop Shipment at Plants—Standard Letters and Flats

1.5.1 Critical Entry Time

The CET for destination-entered Standard Mail drop shipments is a nationally standardized entry time documented in the Postal Service’s Mail Processing Operating Plan System (MPOPS) and made visible to the mailers.

1.5.2 “Start-the-Clock”

The “start-the-clock” event is documented in FAST at the destination entry facility. For mailings that arrive at the scheduled appointment time, the “start-the-clock” event is the driver-reported arrival time. For mailings that arrive prior to the scheduled appointment, the “start-the-clock” event is either the appointment time or unload start time, whichever is earlier. For mailings that arrive after the mailer-scheduled appointment time, the “start-the-clock” event is the unload start time.

Mailings will be subject to the national CET. For mailings that have a “start-the-clock” event prior to the CET, then Day-0 is day of entry. For mailings that have a “start-the-clock” event after

the CET, then Day-0 is the next applicable acceptance day.

When a mailer schedules multi-stop appointments to drop mail at two or more facilities using the same surface transportation vehicle and mail arrives late at a downstream facility because of a delay caused solely by the Postal Service, the following litmus test will be used to determine “start-the-clock” Day-0. If the multi-stop appointment schedule reflects consideration of inter-facility drive-times and designated unload times for the category of mail and is on time at the first appointment, the mailer will receive credit for on-time arrival at downstream facilities and the “start-the-clock” Day-0 will be the day of entry. If the mailer fails to adhere to these considerations in making multi-stop appointments, the “start-the-clock” Day-0 will be the next processing day.

The Postal Service encourages mailers to account for foreseeable traffic and construction delays in scheduling all drop ship appointments. Mailers who schedule the minimum time for transportation and designated unload times run a higher risk of missing appointments versus mailers who allow for traffic and construction delays.

Where available, a postal acceptance facility will use handheld scanning devices or computer terminals located on the dock to record the mailing’s driver-reported arrival time. The FAST system uses these arrival times. Otherwise, manual-entered appointment data will be used to document the mailing’s arrival time.

A decision tree illustrating the “start-the-clock” Day-0 for destinating drop shipment at plants is depicted below [.] [and identified as Appendix Figure 2—“Start-the-clock” Decision Tree for Destinating Drop Shipment at Plants.] [Appendix Figure 2 omitted for publication purposes, but can be viewed on the Commission’s Web site, <http://www.prc.gov/prc-pages/daily-listing>.]

1.6 “Start-the-Clock”

Drop Shipment at an SCF; mail received after appointment time: FAST appointment at 12 p.m.; arrival 1 p.m.; CET is 4 p.m.; unload start time is 1:30 p.m.; and “start-the-clock” Day-0 is the day of entry. [Decision Tree omitted for publication, but can be viewed on the Commission’s Web site, <http://www.prc.gov/prc-pages/daily-listing>.]

1.7 Destinating Drop Shipment—Periodicals

1.7.1 Critical Entry Time

The CET for destination-entered Periodicals drop shipments is determined locally by facility managers.

1.7.2 "Start-the-Clock"

The "start-the-clock" rules for destination-entered Periodicals drop shipments are the same as the rules for destinating drop shipment at plants for Standard letters and flats, with one exception. For destination-entered Periodicals, if the day of entry is a Sunday or holiday, the "start-the-clock" Day-0 will be the day of entry.

1.8 Drop Shipment at the Delivery Unit

1.8.1 Critical Entry Time

The CET for drop shipment at a Delivery Unit is determined locally by postal facility managers, documented in the Postal Service's Facilities Database (FDB), and will be made visible to the mailers. A Customer/Supplier Agreement may be established between a bulk mailer and the Postal Service. In the case where a Customer/Supplier Agreement exists, it is the responsibility of the mailer to enter mail in compliance with the agreement.

1.8.2 "Start-the-Clock"

The "start-the-clock" event at the delivery unit will be based on the container acceptance scans generated by postal personnel via the Intelligent Mail Data Acquisition System (IMDAS) scanner. When the "start-the-clock" event occurs at or before the CET, the "start-the-clock" Day-0 will be the day of acceptance. If the "start-the-clock" event occurs after the CET, the "start-the-clock" Day-0 will be the next applicable acceptance day.

2 "Stop-the-Clock"

The "stop-the-clock" event for service measurement will be a scan by an external reporter or postal personnel.

2.1 Final Scan by Postal Personnel

If a mail piece meeting the requirements for service performance measurement also is subject to Delivery Confirmation service, postal personnel will scan the Delivery Confirmation barcode on the piece at delivery. The time of this scan will be the "stop-the-clock" for the piece. In cases where multiple acceptable "stop-the-clock" events take place, the first event assigned will "stop-the-clock". Any of the following Delivery Confirmation scans may be a "stop-the-clock" event: Delivery; attempted delivery; forwarded; undeliverable-as-addressed; refused; return to sender; dead mail; and arrival at pickup point.

2.2 External Reporter "Stop-the-Clock" Scan

When an external reporter scans a mail piece, the time of the scan will be

the "stop-the-clock" for the external measurement contractor. Reporters are required to scan mail on the day of receipt. Quality control checks will verify process compliance.

2.3 Delivery Factor

The external measurement contractor will calculate delivery factors and apply those factors to calculate service measurement for categories of mail. The external measurement contractor will determine the delivery factor for each district on a quarterly basis. Because the following mail segments are processed differently by postal operations, the delivery factor will be distinct for the following mail segments: First-Class Mail and Standard Mail Presort Letters with DPS secondary sort scans; Standard Mail Non-Carrier Route Flats (scanned on postal mail processing equipment); Standard Mail Carrier Route Flats (including saturation flats, scanned at delivery unit); Standard Mail Letters without DPS scan; Standard Mail Saturation Flats (visually identified by external reporters); and manual mail (mail that falls out of automation or does not destinate in an automated zone).

If the delivery factor is not sufficiently precise for the mail piece characteristics over the period of a fiscal quarter, an annual factor will be used.

3 Special Services

3.1 Delivery Information Services

3.1.1 Delivery information from the following Special Services riding on market-dominant products will be included in service measurement: Delivery Confirmation, Signature Confirmation, Certified Mail, electronic Return Receipt, Collect On Delivery, and Registered Mail.

3.1.2 "Start-the-Clock" and "Stop-the-Clock"

The "start-the-clock" is the time-stamp associated to the delivery event scan. The "stop-the-clock" is the posting of the delivery information for customers via the customer-accessible Web site. Delivery information services included in service measurement must have both a recorded "start-the-clock" and "stop-the-clock".

3.2 CONFIRM and Automated Address Correction Service

3.2.1 "Start-the-clock" and "Stop-the-Clock" for CONFIRM

The time stamp associated with the mail processing equipment scan is the "start-the-clock". The posting time of the scan information in CONFIRM is the "stop-the-clock". CONFIRM scan

information included in service measurement must have both a recorded "start-the-clock" and "stop-the-clock".

3.2.2 "Start-the-Clock" and "Stop-the-Clock" for Automated Address Correction

The date and time scans are transmitted to the ACS system is the "start-the-clock". The date and time information is forwarded to subscribers is the "stop-the-clock". ACS scan information included in service measurement must have both a recorded "start-the-clock" and "stop-the-clock".

3.2.3 Customers that choose to receive data outside of the service standard will not be included in service measurement.

3.3 Post Office Box Service

3.3.1 Post Office Box service is internally measured using scanning technology to compare the actual availability of the day's mail delivered to a P.O. Box section to the posted "uptime". If there is no daily scan from an office, the P.O. Box uptime for that office on that day will be considered late for service measurement.

3.3.2 Contract postal units will not be included in service measurement.

3.3.3 Sundays, postal holidays and other non-delivery days will not be counted in measuring service standard compliance.

3.4 Insurance Claims Processing

3.4.1 "Start-the-Clock" and "Stop-the-Clock"

The date that all information is available for claims processing resolution is the "start-the-clock". The date on which either the system or the adjudicator pays, denies, or closes the claim and sends a response for the customer is the "stop-the-clock". Insurance claims included in service measurement must have both a recorded "start-the-clock" and "stop-the-clock".

3.4.2 Designated postal holidays will not be counted in measuring service standard compliance.

3.5 Postal Money Order Inquiry Processing

3.5.1 "Start-the-Clock" and "Stop-the-Clock"

The purchase of the inquiry service is the "start-the-clock" event. The response to the customer in the Money Order Inquiry System (MOIS) is the "stop-the-clock" event. Money Order Inquiries included in service measurement must have both a recorded "start-the-clock" and "stop-the-clock".

3.5.2 Money Order Inquiries with a start-the-clock date prior to the Money Order issue date will not be included in service measurement.

3.5.3 Saturdays, Sundays, designated postal holidays, and other non-delivery days will not be counted in measuring service standard compliance.

3.5.4 Only fee-based Money Order Inquiries will be included in service measurement.

3.6 Address List Service

3.6.1 "Start-the-Clock" and "Stop-the-Clock"

The "start-the-clock" event is the receipt of the address list or address cards from the mailer at the delivery unit or the postal district Address Management Systems office. The "stop-the-clock" event is the transmission of the corrected address information from the district AMS office to the requestor. Address List Service requests included in service measurement must have both a recorded "start-the-clock" and "stop-the-clock".

3.6.2 Saturdays, Sundays, designated postal holidays, and other non-delivery days will not be counted in measuring service standard compliance.

3.6.3 Requests received between November 16 and January 1 will not be included in service measurement.¹⁹

4 Inclusions

For purposes of measuring end-to-end market-dominant bulk mail service quality, only mail that is verified by the Postal Service as satisfying mail preparation requirements associated with applicable price categories, and complies with requirements of the Full Service Intelligent Mail® option, will be included in service measurement. Manual Mailing Evaluation Readability Lookup Instrument (MERLIN) and automated verification results are methods used to verify the mail.

4.1 Mailing Level Validation

When a bulk mailing does not pass a particular mail preparation criterion in the verification process, no pieces from that mailing will be included in service measurement (unless "Next Day" Day-0 can be applied). When a mailing fails

¹⁹The exclusion of the Nov 16–Jan 1 time frame for Address List Services performance measurement conforms to the service standard for this product published at 39 CFR 122.2(b). See 72 *Federal Register* 72231 (December 19, 2007). As explained at 72 FR 58963 (October 17, 2007), the surge of holiday mail volume places an extraordinary demand on Postal Service personnel ordinarily responsible for fulfilling Address List Services requests, making it very difficult for them to fulfill such requests during this time frame.

verification, the mailing will not be included in service measurement until the mailer fixes the problem or pays additional postage. After the mailer fixes the problem, the mailing will be included in service measurement, although a new "start-the-clock" Day-0 may apply. If additional postage is needed, the mailer may have to submit additional information in order for the mailing to be included in service measurement.

4.2 Appointment Level Validation

Containers associated with an appointment with one of the irregularities identified below will not be included in service measurement.

1. Incorrect Entry Facility; and
2. Damaged Mail.

4.3 Container Level Validation

All pieces inducted at the correct destination facility based on container preparation and that can be associated with an appointment will not be included in service measurement per the scenarios below.

4.3.1 *Scenario 1.* Container inducted at the correct destination facility based on container preparation, but not included on any appointment: Pieces associated with that container will not be included in service measurement.

4.3.2 *Scenario 2.* Container inducted at wrong destination facility based on container preparation, but not included on any appointment: Pieces associated with that container will not be included in service measurement.

4.4 Piece Level Validation

Mail pieces identified with mail preparation quality issues by the automated verification system will not be included in service measurement. Piece level validations include: Barcode uniqueness; barcode quality; unmanifested mail piece; address validity; address hygiene (per Postal Service Publication 28); and presort accuracy.

4.5 Parcel Validation

Parcels destined for unique or 100 percent business 5-digit ZIP Codes will not be included in service measurement.

4.6 Mailer Documentation Validation

Automated validations will be conducted to ensure the integrity of the electronic documentation submitted by mailers and that it accurately reflects the mail preparation requirements, price eligibility and other physical characteristics of the mail to which it pertains.

4.7 ZIP Codes

All active 3-digit ZIP Codes are included in Service Measurement, with the following exceptions:

4.7.1 090–098, 340, and 962–966 are all APO/FPO (military) ZIP Codes and fall outside of the capability of this measurement system. The mail is processed in a manner that will not produce a final automation scan that can serve as a reasonable proxy for delivery.

4.7.2 Mail destined to 202–205, which are the Federal Agency ZIP Code ranges in Washington, DC. All of this mail continues to be processed through a complex process of treatment and surveillance prior to delivery. There is no reliable means to measure actual service performance.

4.7.3 005, 192, 375, 399, 459, 649, 733, 842 and 938 are unique 3-digit ZIP Codes for IRS Processing Centers. Due to the unique processing and flow of this mail, there is no means to provide service measurement.

4.7.4 For purposes of service measurement, the origin for mail from Alaska, Hawaii, Guam, Puerto Rico and the U.S. Virgin Islands is the 3-digit ZIP Code area in which the interstate/ interterritorial gateway processing facility for each state or territory is located. The destination for mail to Alaska, Hawaii, Guam, Puerto Rico and the U.S. Virgin Islands is the 3-digit ZIP Code area in which the interstate/ interterritorial gateway mail processing facility for each state or territory is located.

4.7.5 509, 555, 821, 872, 885, 889, 901, and 942 are unique 3-digit ZIP Codes for either large businesses or government agencies. Due to the unique processing and flow of this mail, there is no means to provide service measurement. 569 is a unique 3-digit ZIP Code that is used only for a competitive product.

9.2 Implementation Status (June 2008)

The Postal Service will use a phased rollout of the service performance measurement system, which will correspond with Full Service Intelligent Mail® Option adoption. A significant adoption of IMb's by Full Service mailers is expected after May 2009, when IMb-based price incentives are expected to take effect, with progressively higher levels of adoption thereafter. As more and varied mailers adopt Full Service IMb's, the data available for service performance measurement will become even more

robust and representative of the full population.²⁰

Some components of the measurement system are already in place. The Postal Service will continue to use EXFC to measure single-piece First-Class Mail letters and flats, as well as IMMS to measure single-piece First-Class Mail International letters. EXFC and IMMS are specifically designed to be representative of those mailstreams and already provide an external, statistically valid performance measurement. Measurement is also available for Package Services parcels entered at retail.²¹ The existing Delivery Confirmation performance reports for mail originating at postal retail facilities can be used in the short-term to measure the service performance of all Package Services.

Although use of the IMb will not be required on all automation mail until May 2010, several mailers have already adopted the IMb and submit electronic documentation. Pilot programs are currently underway for measurement of Presort First-Class Mail and Standard Mail. Mailer adoption rates are expected to continue growing since the lowest automation price, Full-Service IMb, is expected to be implemented in May 2009.

Toward the end of FY2008, selected external reporters will be trained to use a new scanning device for in-home delivery reporting of all mail received that contains an IMb. In FY2009, IMb and electronic mailing information adoption will occur in sufficient quantity that measurement based on scans generated by external reporters

will provide statistically valid measurements for service performance of Presort First-Class Mail letters and Standard Mail.

For Periodicals mailers, adoption of IMb's and electronic mailing information is projected to be slower. Measurements from DelTrak and Red Tag, which are two external measurement systems, will be used during FY2009 as the Postal Service transitions to a statistically viable long-term solution using the same methodology explained above.

The following table provides an illustration of the measurement timeline that the Postal Service will implement while long-term measures are being developed and adopted.

TABLE 23.—MEASUREMENT IMPLEMENTATION TIMELINE

	FY2009	FY2010
First-Class Mail Single-Piece Letters and Flats	EXFC	EXFC.
First-Class Mail Presort Flats and Single-Piece International Mail Flats.	EXFC as Proxy	EXFC as Proxy.
Single-Piece First-Class Mail International Letters.	IMMS	IMMS.
First-Class Mail Presort Letters	Pilot and Reporter + IMb/Electronic Mailing Information.	Reporter + IMb/ Electronic Mailing Information.
First-Class Mail Parcels and International Mail Parcels ¹ .	Retail and Presort Delivery Confirmation	Retail and Presort Delivery Confirmation.
Standard Mail Letters and Flats	Pilot and Reporter + IMb/Electronic Mailing Information.	Reporter + IMb/ Electronic Mailing Information.
Standard Mail Parcels ²	Delivery Confirmation	Delivery Confirmation.
Periodicals Letters and Flats	Red Tag/DelTrak	Reporter + IMb/ Electronic Mailing Information. ³
Package Services Parcels (includes Bound Printed Matter, Library Mail, Media Mail and Parcel Post).	Retail and Presort Delivery Confirmation	Retail and Presort Delivery Confirmation.
Special Services	Internal Measurement	Internal Measurement.

¹ First-Class Mail parcels will be rolled into the First-Class Mail measurement based on percent of mail.

² Standard Mail parcels will be rolled into the Standard Mail measurement based on percent of mail.

³ The Postal Service may elect to have its external provider use data from DelTrak or Red Tag even in future years, if it proves to increase the overall robustness of the data and the statistical validity.

9.3 Modern Service Standards for Market Dominant Products

The following tables are provided as a reference for the modern service standards.

TABLE 24.—DOMESTIC ORIGIN ENTRY MAIL

Mail class	End-to-end flow range (days) ¹
First-Class Mail	1–3
Periodicals	1–9
Standard Mail	3–10

TABLE 24.—DOMESTIC ORIGIN ENTRY MAIL—Continued

Mail class	End-to-end flow range (days) ¹
Package Services	2–8

¹ See 72 FR 72216 (December 19, 2007) for Alaska, Hawaii, Puerto Rico, Guam, and U.S. Virgin Islands.

²⁰ Excluding Periodicals Mail.

²¹ Under Order No. 43, the PRC has classified inbound single-piece surface parcels tendered at Universal Postal Union inward land rates as a market-dominant product. This mail includes parcels, which enter the United States via surface transportation at the New Jersey International Bulk Mail Center, as well as surface airlift parcels, which enter at the five International Service Centers in

Miami, Chicago, Los Angeles, New York JFK, and San Francisco. Once parcels clear U.S. Customs, they are transferred from the acceptance facility to a Bulk Mail Center (BMC). Once entered into the BMC network, inbound surface parcels undergo the same processing as domestic single-piece Package Services parcels. Because the volume of the inbound surface parcels is small in proportion to other market-dominant categories, creating a

separate measurement system for these parcels is not cost-justified. Given that inbound surface parcels are handled through the domestic BMC network, the Postal Service will use the service performance measurement statistics for corresponding domestic parcels as a reasonable proxy for International Mail inbound surface parcels (at UPU rates).

TABLE 25.—DOMESTIC DESTINATION ENTRY MAIL ¹

Mail Class	End-to-end flow range (days) ¹			
	DDU (days)	SCF (days)	ADC (days)	BMC (days)
Periodicals	1	1	1–2	1–2 ²
Standard Mail	2	3	.....	5
Package Services	1	2	.....	3

¹ See 72 FR 72216 (December 19, 2007) for Alaska, Hawaii, Puerto Rico, Guam, and U.S. Virgin Islands.

² Only applies to Periodicals receiving the DBMC Container rate.

TABLE 26.—SPECIAL SERVICES

Delivery Information Services: Delivery Confirmation. Signature Confirmation Certified Mail Registered Mail ¹ Collect on Delivery Electronic Return Request	Availability of delivery information within 24 hours.
CONFIRM	Availability of scan information within 24 hours.
Address Correction Service (automated).	Availability of address information within 24 hours.
P.O. Box Service ...	Mail delivered by post- ed P.O. Box uptime.
Insurance Claims Processing.	Claims processing within 30 calendar days.
Money Order Inquiry.	Customer response within 15 business days.
Address List Services.	Information within 15 business days.

¹ Registered Mail includes domestic mail and inbound international mail.

III. Trademarks

The following are among the trademarks owned by the United States Postal Service: Certified Mail™, Click-N-Ship®, CONFIRM®, Delivery Confirmation™, 1DMM®, Express Mail®, FASTforward®, First-Class Mail®, Intelligent Mail®, MERLIN™, P.O. Box™, Parcel Post®, Parcel Select®, PC Postage®, PLANET®, PLANET Code®, Post Office™, PostalOne!®, Postal Service™, Priority Mail®, Registered Mail™, Signature Confirmation™, Standard Mail®, United States Postal Service®, U.S. Mail™, U.S. Postal Service®, USPS®, USPS <http://www.usps.com>®, ZIP+4®, and ZIP Code™. This is not a comprehensive list of all Postal Service trademarks.

IV. Ordering Paragraphs

It is Ordered:

1. Interested persons may submit written comments on any or all aspects of the Postal Service’s proposed service performance measurement systems and reporting systems by no later than July 9, 2008.

2. The Secretary shall arrange for publication of this notice in the **Federal Register**.

By the Commission.

Steven W. Williams,

Secretary.

[FR Doc. E8–14396 Filed 6–24–08; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57987; File No. S7–966]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing and Order Approving and Declaring Effective an Amendment to the Plan for the Allocation of Regulatory Responsibilities Among the American Stock Exchange, LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Incorporated, the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., the New York Stock Exchange, LLC, the NYSE Arca, Inc., The NASDAQ Stock Market, LLC, and the Philadelphia Stock Exchange, Inc

June 18, 2008.

Notice is hereby given that the Securities and Exchange Commission (“Commission”) has issued an Order, pursuant to Section 17(d) of the Securities Exchange Act of 1934 (“Act”),¹ approving and declaring effective an amendment to the plan for allocating regulatory responsibility filed pursuant to Rule 17d–2 of the Act,² by the American Stock Exchange, LLC (“Amex”), the Boston Stock Exchange, Inc. (“BSE”), the Chicago Board Options Exchange, Incorporated (“CBOE”), the International Securities Exchange, (“ISE”), Financial Industry Regulatory

Authority, Inc. (“FINRA”), The NASDAQ Stock Market LLC (“NASDAQ”), the New York Stock Exchange LLC (“NYSE”), NYSE Arca, Inc. (“NYSE Arca”), and the Philadelphia Stock Exchange, Inc. (“Phlx”) (collectively, “SRO participants”).

I. Introduction

Section 19(g)(1) of the Act,³ among other things, requires every self-regulatory organization (“SRO”) registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO’s own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)⁴ or Section 19(g)(2)⁵ of the Act. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (“common members”). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act⁶ was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.⁷ With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.⁸ Rule 17d–1 authorizes the Commission

³ 15 U.S.C. 78s(g)(1).

⁴ 15 U.S.C. 78q(d).

⁵ 15 U.S.C. 78s(g)(2).

⁶ 15 U.S.C. 78q(d)(1).

⁷ See Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

⁸ 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

¹ 15 U.S.C. 78q(d).

² 17 CFR 240.17d–2.

to name a single SRO as the designated examining authority (“DEA”) to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.⁹ When an SRO has been named as a common member’s DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO’s obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.¹⁰ Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. The Plan

On September 8, 1983, the Commission approved the SRO participants’ plan for allocating regulatory responsibilities pursuant to Rule 17d–2.¹¹ On May 23, 2000, the Commission approved an amendment to the plan that added the ISE as a participant.¹² On November 8, 2002, the

⁹ See Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

¹⁰ See Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

¹¹ See Securities Exchange Act Release No. 20158 (September 8, 1983), 48 FR 41256 (September 14, 1983).

¹² See Securities Exchange Act Release No. 42816 (May 23, 2000), 65 FR 34759 (May 31, 2000).

Commission approved another amendment that replaced the original plan in its entirety and, among other things, allocated regulatory responsibilities among all the participants in a more equitable manner.¹³ On February 5, 2004, the parties submitted an amendment to the plan, primarily to include the BSE, which was establishing a new options trading facility to be known as the Boston Options Exchange (“BOX”), as an SRO participant.¹⁴ On December 5, 2007, the parties submitted an amendment to the plan to, among other things, provide that the National Association of Securities Dealers (“NASD”) (n/k/a the Financial Industry Regulatory Authority, Inc. or “FINRA”) and NYSE are Designated Options Examining Authorities under the plan.¹⁵ On December 27, 2007, the parties submitted an amendment to the plan, primarily to add NASDAQ as an SRO participant and to reflect the name change of NASD to FINRA.¹⁶

The plan reduces regulatory duplication for a large number of firms currently members of two or more of the SRO participants by allocating regulatory responsibility for certain options-related sales practice matters to one of the SRO participants. Generally, under the current plan, the SRO participant responsible for conducting options-related sales practice examinations of a firm, and investigating options-related customer complaints and terminations for cause of associated persons of that firm, is known as the firm’s “Designated Options Examining Authority” (“DOEA”). Pursuant to the current plan, any other SRO of which the firm is a member is relieved of these responsibilities during the period in which the firm is assigned to another SRO acting as that firm’s DOEA.

III. Proposed Amendment to the Plan

On June 5, 2008, the parties submitted a proposed amendment to the plan. The primary purpose of the amendment is to remove the NYSE as a Designated Options Examining Authority (“DOEA”), leaving FINRA as the sole DOEA for all common members that are members of FINRA. The amended plan replaces the previous agreement in its entirety. The text of the proposed

¹³ See Securities Exchange Act Release No. 46800 (November 8, 2002), 67 FR 69774 (November 19, 2002).

¹⁴ See Securities Exchange Act Release No. 49197 (February 5, 2004), 69 FR 7046 (February 12, 2004).

¹⁵ See Securities Exchange Act Release No. 55532 (March 26, 2007), 72 FR 15729 (April 2, 2007).

¹⁶ See Securities Exchange Act Release No. 57481 (March 12, 2008), 73 FR 15571 (March 14, 2008).

amended 17d–2 plan is as follows (additions are *italicized*; deletions are [bracketed]):¹⁷

* * * * *

Agreement by and among the American Stock Exchange, LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., the New York Stock Exchange, LLC, the NYSE Arca Inc., The NASDAQ Stock Market, LLC, and the Philadelphia Stock Exchange, Inc., Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934.

This agreement (“Agreement”), by and among the American Stock Exchange, LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc. (“FINRA”), The NASDAQ Stock Market, LLC (“NASDAQ”), the New York Stock Exchange, LLC (“NYSE”), the NYSE Arca, Inc., and the Philadelphia Stock Exchange, Inc., hereinafter collectively referred to as the Participants, is made this 5th [27th] day of June [December], 2008[7], pursuant to the provisions of Rule 17d–2 under the Securities Exchange Act of 1934 (the “Exchange Act”), which allows for plans among self-regulatory organizations to allocate regulatory responsibility. This Agreement shall be administered by a committee known as the Options Self-Regulatory Council (the “Council”).

This Agreement amends and restates the agreement entered into among the Participants on December 27[1], 2007[6], entitled “Agreement by and among the American Stock Exchange, LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, LLC, *Financial Industry Regulatory Authority, Inc.*, [National Association of Securities Dealers, Inc.] the New York Stock Exchange, LLC, the NYSE Arca Inc., *the NASDAQ Stock Market LLC*, and the Philadelphia Stock Exchange, Inc., Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934.”

Whereas, the Participants are desirous of allocating regulatory responsibilities with respect to broker-dealers, and persons associated therewith, that are members^{†1} of more than one Participant

¹⁷ The parties have not proposed any changes to Exhibit A of the plan. The full text of Exhibit A may be found in Release No. 34–57481. See *supra* note 16 (citing to Release No. 34–57481).

^{†1} In the case of the Boston Stock Exchange, Inc., and NASDAQ members are those persons who are

Continued

(the "Common Members") and conduct a public business for compliance with Common Rules (as hereinafter defined) relating to the conduct by broker-dealers of accounts for listed options, index warrants, currency index warrants and currency warrants (collectively, "Covered Securities"); and

Whereas, the Participants are desirous of executing a plan for this purpose pursuant to the provisions of Rule 17d-2 and filing such plan with the Securities and Exchange Commission ("SEC" or the "Commission") for its approval;

Now, therefore, in consideration of the mutual covenants contained hereafter, the Participants agree as follows:

I. As used herein the term Designated Options Examining Authority ("DOEA") shall mean: (1) FINRA [and NYSE] insofar as it [each] shall perform Regulatory Responsibility (as hereinafter defined) for its broker-dealer members that also are members of another Participant[, and allocated to it in accordance with the terms hereof.] or (2) [T]he Designated Examination Authority ("DEA") pursuant to SEC Rule 17d-1 under the Securities Exchange Act ("Rule 17d-1") for a broker-dealer that is a member of a more than one Participant (but not a member of [a DOEA] shall perform the Regulatory Responsibility under the Agreement as if such DEA were the DOEA) *FINRA*).

II. As used herein, the term "Regulatory Responsibility" shall mean the examination and enforcement responsibilities relating to compliance by [broker-dealers that are members of more than one Participant (the "[Common Members]")] with the rules of the applicable Participant that are substantially similar to the rules of the other Participants (the "Common Rules"), insofar as they apply to the conduct of accounts for Covered Securities. A list of the current Common Rules of each Participant applicable to the conduct of accounts for Covered Securities is attached hereto as Exhibit A. Each year within 30 days of the anniversary date of the commencement of operation of this Agreement, each Participant shall submit in writing to [each DOEA] *FINRA* and each DEA performing as a DOEA for any members of such Participant any revisions to Exhibit A reflecting changes in the rules of the Participant [or DOEAs], and confirm that all other rules of the Participant listed in Exhibit A continue to meet the definition of Common Rules

as defined in this Agreement. Within 30 days from the date that [each DOEA] *FINRA* and each DEA performing as a DOEA has received revisions and/or confirmation that no change has been made to Exhibit A from all Participants, [the DOEAs] *FINRA* and each DEA performing as a DOEA shall confirm in writing to each Participant whether the rules listed in any updated Exhibit A are Common Rules as defined in this Agreement. Notwithstanding anything herein to the contrary, it is explicitly understood that the term "Regulatory Responsibility" does not include, and each of the Participants shall (unless allocated pursuant to Rule 17d-2 otherwise than under this Agreement) retain full responsibility for, each of the following:

(a) Surveillance and enforcement with respect to trading activities or practices involving its own marketplace, including without limitation its rules relating to the rights and obligations of specialists and other market makers;

(b) Registration pursuant to its applicable rules of associated persons;

(c) Discharge of its duties and obligations as a DEA; and

(d) Evaluation of advertising, responsibility for which shall remain with the Participant to which a Common Member submits same for approval.

III. Apparent violations of another Participant's rules discovered by a DOEA, but which rules are not within the scope of the discovering DOEA's Regulatory Responsibility, shall be referred to the relevant Participant for such action as the Participant to which such matter has been referred deems appropriate. Notwithstanding the foregoing, nothing contained herein shall preclude a DOEA in its discretion from requesting that another Participant conduct an enforcement proceeding on a matter for which the requesting DOEA has Regulatory Responsibility. If such other Participants agree, the Regulatory Responsibility in such case shall be deemed transferred to the accepting Participant and confirmed in writing by the Participants involved. Each Participant agrees, upon request, to make available promptly all relevant files, records and/or witnesses necessary to assist another Participant in an investigation or enforcement proceeding.

IV. The Council shall be composed of one representative designated by each of the Participants. Each Participant shall also designate one or more persons as its alternate representative(s). In the absence of the representative of a Participant, such alternate representative shall have the same

powers, duties and responsibilities as the representative. Each Participant may, at any time, by notice to the then Chair of the Council, replace its representative and/or its alternate representative on such Council. A majority of the Council shall constitute a quorum and, unless specifically otherwise required, the affirmative vote of a majority of the Council members present (in person, by telephone or by written consent) shall be necessary to constitute action by the Council. [From time to time, the Council shall elect one member from the DOEAs to] *The representative from FINRA shall serve as Chair of the Council* [and another from the Council to serve as Vice Chair (to substitute for the Chair in the event of his or her unavailability at a meeting of the Council)]. All notices and other communications for the Council shall be sent to it in care of the Chair or to each of the representatives.

V. The Council shall determine the times and locations of Council meetings, provided that the Chair, acting alone, may also call a meeting of the Council in the event the Chair determines that there is good cause to do so. To the extent reasonably possible, notice of any meeting shall be given at least ten business days prior thereto. Notwithstanding anything herein to the contrary, representatives shall always be given the option of participating in any meeting telephonically at their own expense rather than in person.

VI. *FINRA shall have Regulatory Responsibility for all Common Members that are members of FINRA.* For the purpose of fulfilling the Participants' Regulatory Responsibilities for Common Members that are not members of *FINRA*, the Participant that is the DEA shall serve as the DOEA. [DOEAs shall allocate Common Members that conduct a public business in Covered Securities among DOEAs from time to time in such manner as the DOEAs deem appropriate, provided that any such allocation shall be based on the following principles except to the extent affected DOEAs consent:

(a) The DOEAs may not allocate a member to a DOEA unless the member is a member of that DOEA, nor shall any member be allocated to a Participant that is not a DOEA or DEA acting as a DOEA.

(b) To the extent practical and desired by the DOEAs, Common Members that conduct a public business in Covered Securities shall be allocated among the DOEAs of which they are members in such manner as to equalize as nearly as possible the allocation of such Common Members among such DOEAs.

(c) To the extent practical and desired by the DOEAs, the allocation of Common Members shall take into account the amount of customer activity conducted by each member in Covered Securities such that Common Members shall be allocated among the DOEAs of which they are members in such manner as most evenly divides the Common Members with the largest amount of customer activity among such DOEAs.

(d) The DOEAs shall make general reallocations of Common Members from time-to-time, as it deems appropriate.

(e) All Participants shall promptly notify the DOEAs no later than the next scheduled meeting of any change in membership of Common Members. [Whenever a Common Member ceases to be a member of its DOEA, that DOEA shall promptly inform the other DOEAs, which will promptly review the matter and reallocate the Common Member to the extent practical.

(f) A DOEA may request that a Common Member that is allocated to it be reallocated to another DOEA by giving thirty days written notice thereof. The DOEAs in their discretion may approve such request and reallocate such Common Member to another DOEA.

(g) All determinations by the DOEAs with respect to allocations, if there are more than two DOEAs, shall be by the affirmative vote of a majority of the DOEAs of which such firm is a Common Member, otherwise by negotiation and consensus.]

VII. Each DOEA shall conduct an examination of each Common Member [allocated to it on a cycle not less frequently than agreed upon by all DOEAs]. The [other] Participants agree that, upon request, relevant information in their respective files relative to a Common Member will be made available to the applicable DOEA. At each meeting of the Council, each DOEA shall be prepared to report on the status of its examination program for the previous quarter and any period prior thereto that has not previously been reported to the Council. [In the event a DOEA believes it will not be able to complete the examination cycle for its allocated firms, it will so advise the Council. The DOEAs may undertake to remedy this situation by reallocating selected firms or lengthening the cycles for selected firms, with the approval of all other DOEAs.]

VIII. Each DOEA will promptly furnish a copy of the Examination report, relating to Covered Securities, of any examination made pursuant to the provisions of this Agreement to each

other Participant of which the Common Member examined is a member.

IX. Each DOEA's Regulatory Responsibility shall for each Common Member allocated to it include investigations into terminations "for cause" of associated persons relating to Covered Securities, unless such termination is related solely to another Participant's market. In the latter instance, that Participant to whose market the termination for cause relates shall discharge Regulatory Responsibility with respect to such termination for cause. In connection with a DOEA's examination, investigation and/or enforcement proceeding regarding a Covered Security-related termination for cause, the other Participants of which the Common Member is a member shall furnish, upon request, copies of all pertinent materials related thereto in their possession. As used in this Section, "for cause" shall include, without limitation, terminations characterized on Form U5 under the label "Permitted to Resign," "Discharge" or "Other."

X. Each DOEA shall discharge the Regulatory Responsibility for each Common Member allocated to it relative to a Covered Securities-related customer complaint^{†2} unless such complaint is uniquely related to another Participant's market. In the latter instance, the DOEA shall forward the matter to that Participant to whose market the matter relates, and the latter shall discharge Regulatory Responsibility with respect thereto. If a Participant receives a customer complaint for a Common Member related to a Covered Security for which the Participant is not the DOEA, the Participant shall promptly forward a copy of such complaint to the DOEA.

XI. Any written notice required or permitted to be given under this Agreement shall be deemed given if sent by certified mail, return receipt requested, or by a comparable means of electronic communication to each Participant entitled to receipt thereof, to the attention of the Participant's representative on the Council at the Participant's then principal office or by e-mail at such address as the representative shall have filed in writing with the Chair.

XII. The Participants shall notify the Common Members of this Agreement by means of a uniform joint notice approved by the Council.

XIII. This Agreement may be amended in writing duly approved by each Participant.

XIV. Any of the Participants may manifest its intention to cancel its participation in this Agreement at any time by giving the Council written notice thereof at least 90 days prior to the effective date of such cancellation. Upon receipt of such notice the Council shall allocate, in accordance with the provisions of this Agreement, any Common Members for which the petitioning party was the DOEA. Until such time as the Council has completed the reallocation described above, the petitioning Participant shall retain all its rights, privileges, duties and obligations hereunder.

XV. The cancellation of its participation in this Agreement by any Participant shall not terminate this Agreement as to the remaining Participants. This Agreement will only terminate following notice to the Commission, in writing, by the then Participants that they intend to terminate the Agreement and the expiration of the applicable notice period. Such notice shall be given at least six months prior to the intended date of termination, provided that in the event a notice of cancellation is received from a Participant that, assuming the effectiveness thereof, would result in there being just one remaining member of the Council, notice to the Commission of termination of this Agreement shall be given promptly upon the receipt of such notice of cancellation, which termination shall be effective upon the effectiveness of the cancellation that triggered the notice of termination to the Commission.

XVI. [LIMITATION OF LIABILITY]

No Participant nor the Council nor any of their respective directors, governors, officers, employees or representatives shall be liable to any other Participant in this Agreement for any liability, loss or damage resulting from or claimed to have resulted from any delays, inaccuracies, errors or omissions with respect to the provision of Regulatory Responsibility as provided hereby or for the failure to provide any such Responsibility, except with respect to such liability, loss or damages as shall have been suffered by one or more of the Participants and caused by the willful misconduct of one or more of the other participants or their respective directors, governors, officers, employees or representatives. No warranties, express or implied, are made by any or all of the Participants or the Council with respect to any Regulatory Responsibility to be performed by each of them hereunder.

^{†2} For purposes of complaints, they can be reported pursuant to Form U4, Form U5 or RE-3 and any amendments thereto.

XVII. [RELIEF FROM RESPONSIBILITY]

Pursuant to Section 17(d)(1)(A) of the Securities Exchange Act of 1934 and Rule 17d-2 promulgated pursuant thereto, the Participants join in requesting the Securities and Exchange Commission, upon its approval of this Agreement or any part thereof, to relieve those Participants which are from time to time participants in this Agreement which are not the DOEA as to a Common Member of any and all Regulatory Responsibility with respect to the matters allocated to the DOEA.

* * * * *

IV. Solicitation of Comments

In order to assist the Commission in determining whether to approve the 17d-2 plan, interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/other.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-966 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number S7-966. 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/other.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan that are filed with the Commission, and all written communications relating to the proposed plan 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 the plan also will be available for inspection and copying at the principal offices of Amex, BSE, CBOE, ISE, FINRA, NASDAQ, NYSE, NYSE Arca, and the Phlx. 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 S7-966 and should be submitted on or before July 16, 2008.

V. Discussion

The Commission continues to believe that the proposed plan is an achievement in cooperation among the SRO participants, and will reduce unnecessary regulatory duplication by allocating to the designated SRO the responsibility for certain options-related sales practice matters that would otherwise be performed by multiple SROs. The plan promotes efficiency by reducing costs to firms that are members of more than one of the SRO participants. In addition, because the SRO participants coordinate their regulatory functions in accordance with the plan, the plan promotes, and will continue to promote, investor protection.

Under paragraph (c) of Rule 17d-2, the Commission may, after appropriate notice and comment, declare a plan, or any part of a plan, effective. In this instance, the Commission believes that appropriate notice and comment can take place after the proposed amendment is effective. The primary purpose of the amendment is to make FINRA the sole DOEA for common members that are members of FINRA. By declaring it effective today, the amended plan can reflect, without undue delay, the fact that the NASD and the member regulation functions of the NYSE have been consolidated, resulting in the transfer of certain regulatory responsibilities, including regulatory responsibilities under the amended plan, to FINRA.¹⁸ The prior version was similarly noticed and declared effective all in one document. Finally, the Commission does not believe that the amendment to the plan raises any new regulatory issues that the Commission has not previously considered.

VI. Conclusion

This order gives effect to the amended plan submitted to the Commission that is contained in File No. S7-966.

It is therefore ordered, pursuant to Section 17(d) of the Act,¹⁹ that the amended plan dated June 5, 2008 by and between the Amex, BSE, CBOE, ISE, FINRA, NASDAQ, NYSE, NYSE Arca,

¹⁸ See Securities Exchange Act Release No. 56145 (July 27, 2007), 72 FR 42169 (August 1, 2007) (SR-NASD-2007-23).

¹⁹ 15 U.S.C. 78q(d).

and Phlx filed pursuant to Rule 17d-2 is hereby approved and declared effective.

It is further ordered that those SRO participants that are not the DOEA as to a particular common member are relieved of those regulatory responsibilities allocated to the common member's DOEA under the amended plan to the extent of such allocation.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8-14330 Filed 6-24-08; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

In the Matter of: Acclaim Entertainment, Inc., Benguet Corp., Clean Systems Technology Group, Ltd., Family Golf Centers, Inc., Graham-Field Health Products, Inc., Lechters, Inc., Symbiat, Inc., Texfi Industries, Inc., and Value Holdings, Inc. (n/k/a Galea Life Sciences, Inc.); Order of Suspension of Trading

Date: June 23, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Acclaim Entertainment, Inc. because it has not filed any periodic reports since the period ended March 31, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Benguet Corp. because it has not filed any periodic reports since the period ended December 31, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Clean Systems Technology Group Ltd. because it has not filed any periodic reports since the period ended September 30, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Family Golf Centers, Inc. because it has not filed any periodic reports since the period ended September 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information

²⁰ 17 CFR 200.30-3(a)(34).

concerning the securities of Graham-Field Health Products, Inc. because it has not filed any periodic reports since the period ended September 30, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Lechters, Inc. because it has not filed any periodic reports since the period ended May 5, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Symbiat, Inc. because it has not filed any periodic reports since the period ended December 31, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Texfi Industries, Inc. because it has not filed any periodic reports since the period ended July 30, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Value Holdings, Inc. (n/k/a Galea Life Sciences, Inc.) because it has not filed any periodic reports since the period ended July 31, 2001.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on June 23, 2008, through 11:59 p.m. EDT on July 7, 2008.

By the Commission.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 08-1388 Filed 6-23-08; 10:50 am]

BILLING CODE 8010-01-P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before August 25, 2008.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Lisa Lopez-Suarez, Senior Advisor, Office of Disaster, Small Business Administration, 409 3rd Street SW., 6th floor, Wash., DC 20416.

FOR FURTHER INFORMATION CONTACT: Lisa Lopez-Suarez, Senior Advisor, Office of Disaster, 202-619-0458, lisa.lopez.suarez@sba.gov, Curtis B. Rich, Management Analyst, 202-205-7030, curtis.rich@sba.gov.

SUPPLEMENTARY INFORMATION: The Small Business Administration is authorized to make loans to victims of declared Disasters for the purpose of restoring their damaged property to, as near as possible, pre-disaster conditions. SBA's Office of Disaster Assistance provides customer service to individuals and businesses on the phone and via e-mail through its Disaster Assistance Customer Service Center (DACSC) and in-person through its Field Operations Centers (FOC).

Title: "Customer Satisfaction Survey."

Description of Respondents: A team of Quality Assistance staff at the DACSC would conduct a brief telephone survey of a representative sample of customers to measure their satisfaction with the service received from the DACSC and FOC.

Form Numbers: N/A.

Annual Responses: 975.

Annual Burden: 1,950.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. E8-14336 Filed 6-24-08; 8:45 am]

BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11286 and #11287]

Indiana Disaster Number IN-00019

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Indiana (FEMA-1766-DR), dated 06/11/2008.

Incident: Severe Storms, Flooding, and Tornadoes.

Incident Period: 05/30/2008 and continuing.

EFFECTIVE DATE: 06/17/2008.

Physical Loan Application Deadline Date: 08/11/2008.

EIDL Loan Application Deadline Date: 03/11/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of INDIANA, dated 06/11/2008 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties: (Physical Damage and Economic Injury Loans):
Gibson, Posey

Contiguous Counties: (Economic Injury Loans Only):

Indiana: Vanderburgh, Warrick

Illinois: Gallatin, White

Kentucky: Henderson, Union

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E8-14334 Filed 6-24-08; 8:45 am]

BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #11264 and #11265]

Iowa Disaster Number IA-00015

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Iowa (FEMA-1763-DR), dated 05/27/2008.

Incident: Severe Storms, Tornadoes, and Flooding.

Incident Period: 05/25/2008 and continuing.

EFFECTIVE DATE: 06/17/2008.

Physical Loan Application Deadline Date: 07/28/2008.

EIDL Loan Application Deadline Date: 02/27/2009.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance,

U.S. Small Business Administration,
409 3rd Street, SW., Suite 6050,
Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the Presidential disaster declaration for the State of Iowa, dated 05/27/2008 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties: (Physical Damage and Economic Injury Loans):
Allamakee, Clayton, Des Moines,
Fremont, Harrison

Contiguous Counties: (Economic Injury Loans Only):

Iowa: Crawford, Lee, Monona,
Pottawattamie, Shelby

Illinois: Henderson

Nebraska: Burt, Cass, Otoe,
Washington

Wisconsin: Crawford, Grant, Vernon

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. E8-14333 Filed 6-24-08; 8:45 am]

BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

Interest Rates

The Small Business Administration publishes an interest rate called the optional "peg" rate (13 CFR 120.214) on a quarterly basis. This rate is a weighted average cost of money to the government for maturities similar to the average SBA direct loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. This rate will be 4.5 (4½) percent for the July-September quarter of FY 2008.

Pursuant to 13 CFR 120.921(b), the maximum legal interest rate for any third party lender's commercial loan which funds any portion of the cost of a 504 project (see 13 CFR 120.801) shall be 6% over the New York Prime rate or, if that exceeds the maximum interest rate permitted by the constitution or laws of a given State, the maximum interest rate will be the rate permitted by the constitution or laws of the given State.

Grady B. Hedgespeth,

Director, Office of Financial Assistance.

[FR Doc. E8-14369 Filed 6-24-08; 8:45 am]

BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

National Small Business Development Center Advisory Board

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of open Federal advisory committee meeting.

SUMMARY: The SBA is issuing this notice to announce the location, date, time and agenda for the next meeting of the National Small Business Development Center (SBDC) Advisory Board.

DATES: The meeting will be held on Tuesday, July 15, 2008 at 1 p.m. EST.

ADDRESSES: This meeting will be held via conference call.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) of the Federal Advisory Committee Act (5 U.S.C. Appendix 2), SBA announces the meeting of the National SBDC Advisory Board. This Board provides advice and counsel to the SBA Administrator and Associate Administrator for Small Business Development Centers.

The purpose of this meeting is to discuss following issues pertaining to the SBDC Advisory Board:

—Follow-up to June 10th meeting in North Carolina.

—Recommendations for Board Orientation and Training.

—SBA Update from AA/OSBDCs.

—Annual Association of Small Business Development Center (ASBDC) Conference on September 2-5 in Chicago, IL.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public however advance notice of attendance is requested. Anyone wishing to attend and/or make a presentation to the Board must contact Alanna Falcone by Friday, July 11, 2008, by fax or e-mail in order to be placed on the agenda. Alanna Falcone, Program Analyst, 409 Third Street, SW., Washington, DC 20416, Phone, 202-619-1612, Fax 202-481-0134, e-mail, alanna.falcone@sba.gov.

Additionally, if you need accommodations because of a disability or require additional information, please contact Alanna Falcone at the information above.

Cherylyn H. Lebon,

Committee Management Officer.

[FR Doc. E8-14335 Filed 6-24-08; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF STATE

[Public Notice: 6276]

60-Day Notice of Proposed Information Collection: DS-7001 and DS-7005, DOS-Sponsored Academic Exchange Program Application, OMB Control No. 1405-0138

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* DOS-sponsored Academic Exchange Program Application.

- *OMB Control Number:* 1405-0138.

- *Type of Request:* Revision of a Currently Approved Collection.

- *Originating Office:* Bureau of Educational and Cultural Affairs, ECA/A/E/EUR.

- *Form Numbers:* DS-7001, DS-7005.

- *Respondents:* Applicants for the Academic Exchange Program.

- *Estimated Number of Respondents:* 6638.

- *Estimated Number of Responses:* 6638.

- *Average Hours per Response:* 0.75.

- *Total Estimated Burden:* 4978 hours.

- *Frequency:* Annually.

- *Obligation to Respond:* Voluntary.

DATES: The Department will accept comments from the public up to 60 days from June 25, 2008.

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

- E-mail: ChavezCC@state.gov. You must include the DS form number (if applicable), information collection title, and OMB control number in the subject line of your message.

- Mail (paper, disk, or CD-ROM submissions): ECA/A/E/EUR, Carolina Chavez, SA-44, Room 246, 301 Fourth Street, SW., Washington, DC 20547.

- Fax: 202-453-8524.

- Hand Delivery or Courier: Same as mailing address.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Carolina Chavez, U.S. Department of State, Bureau of Educational and

Cultural Affairs, Room 246, 301 Fourth Street, SW., Washington, DC 20547, who may be reached on 202-453-8524 or *ChavezCC@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of Proposed Collection

This collection was formerly entitled Application and Evaluation of DOS-sponsored Academic Exchange Programs. The Department of State collects this information to identify qualified candidates for the Office's academic exchange programs.

Methodology

Applications are delivered physically to the offices of the grantee organization, submitted electronically, or through the mail.

Additional Information: None.

June 16, 2008.

Thomas Farrell,

Deputy Assistant Secretary for Academic Programs, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. E8-14375 Filed 6-24-08; 8:45 am]

BILLING CODE 4710-05-P

DEPARTMENT OF STATE

[Public Notice: 6247]

30-Day Notice of Proposed Information Collection: DS-3091; Thomas R. Pickering Foreign Affairs Fellowship Program, OMB Control No. 1405-0143

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

• *Title of Information Collection:* Thomas R. Pickering Foreign Affairs Fellowship Program.

- *OMB Control Number:* 1405-0143.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* HR/REE/REC.
- *Form Number:* DS-3091.
- *Respondents:* College Students.
- *Estimated Number of Respondents:* 500.
- *Estimated Number of Responses:* 500.
- *Average Hours per Response:* 5.
- *Total Estimated Burden:* 2,500 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from June 25, 2008.

ADDRESSES: Direct comments and questions to Katherine Astrich, the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB), who may be reached at 202-395-4718. You may submit comments by any of the following methods:

- E-mail: *Katherine_T._Astrich@omb.eop.gov*. You must include the DS form number, information collection title, and OMB control number in the subject line of your message.

• Mail (paper, disk, or CD-ROM submissions): Office of Foreign Missions, U.S. Department of State, 2201 C Street, NW., Washington, DC 20520.

- Fax: 202-395-6974.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from Stedman D. Howard, Department of State, 2401 E. Street, NW., Washington, DC 20522, who may be reached at: 202-261-8958 or *Howardsd2@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including through the use of automated collection techniques or other forms of technology.

Abstract of Proposed Collection

This collection is necessary for the process of identifying highly motivated students with an interest in international affairs. Our goal is to identify and select these students from a nation-wide pool of very talented applicants. Through our application process, the Thomas R. Pickering Foreign Affairs Fellowship has managed to attract many students from diverse backgrounds to consider a career in the Foreign Service.

Methodology

This information collection is posted on the Woodrow Wilson National Fellowship Foundation Web sites, where an applicant can complete, and submit, the application online.

Additional Information: None.

Dated: June 16, 2008.

Ruben Torres,

Executive Director, Bureau of Human Resources, Department of State.

[FR Doc. E8-14376 Filed 6-24-08; 8:45 am]

BILLING CODE 4710-15-P

DEPARTMENT OF STATE

[Public Notice 6275]

Culturally Significant Objects Imported for Exhibition Determinations: "Artistic Luxury: Faberge Tiffany Lalique"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition "Artistic Luxury: Faberge Tiffany Lalique," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Cleveland Museum of Art, from on or about October 19, 2008, until on or about January 19, 2009; at the Palace of the Legion of Honor, Fine Arts Museums of San Francisco, from on or about February 14, 2009, to on or about May 31, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest.

Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453-8048). The address is U.S. Department of State, SA-44, 301 4th Street, SW., Room 700, Washington, DC 20547-0001.

Dated: June 18, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8-14378 Filed 6-24-08; 8:45 am]

BILLING CODE 4710-05-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-RSPA-2004-19856]

Pipeline Safety: Notice to Hazardous Liquid Pipeline Operators of Request for Voluntary Advance Notification of Intent To Transport Biofuels

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice; Issuance of Advisory Bulletin.

SUMMARY: PHMSA is requesting that any hazardous liquid pipeline operator intending to transport ethanol, ethanol-gasoline blends, or other biofuels by pipeline voluntarily provide us with advance notice of their intent to transport these fuels to facilitate cooperation in achieving safety. We request that any operator intending to field test transportation of biofuels by pipeline notify PHMSA of such testing in advance so that PHMSA can work with the operator to address any safety concerns that arise. PHMSA will be interested in discussing the steps the operator will take to ensure safety during the test and informing the local emergency response officials about the product being transported.

FOR FURTHER INFORMATION CONTACT: Alan Mayberry, (202) 366-5124, or by e-mail at alan.mayberry@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On August 10, 2007, PHMSA published a **Federal Register** document regarding the transportation of ethanol and biofuels by pipeline (72 FR 45002). PHMSA advised pipeline operators that

the transportation of batches of ethanol or other biofuels in an existing petroleum products pipeline, and the transportation of blends of biofuels and petroleum products, are subject to the pipeline safety regulations and standards. The document described the potential technical issues associated with transporting biofuels by pipeline including internal corrosion and stress corrosion cracking, and the performance of seals, gaskets and internal coatings. As with the transportation of any hazardous liquid by pipeline, operators intending to transport these new fuels are expected to conduct risk analysis, monitoring, and controls as needed to move biofuels safely as well as conduct spill response planning for the new product. PHMSA seeks to work with pipeline operators that plan to transport these new fuels in existing regulated hazardous liquid pipelines (or in new pipelines that might be constructed for the purpose of transporting ethanol or biofuels). Accordingly, we are requesting that operators provide us with advance notice of their intent to transport these fuels to facilitate cooperation in achieving safety.

II. Advisory Bulletin (ADB-08-05)

To: Owners and Operators of Hazardous Liquid Pipeline Systems.

Subject: Notice to Operators of Request for Voluntary Advance Notification of Intent to Transport Biofuels.

Advisory: On August 10, 2007, PHMSA published a **Federal Register** document on the applicability of the pipeline safety regulations to the transportation of ethanol and biofuels by pipeline (72 FR 45002). In the document, PHMSA noted the technical issues associated with transporting biofuels by pipeline including internal corrosion and stress corrosion cracking, and the performance of seals, gaskets and internal coatings. As with the transportation of any hazardous liquid by pipeline, operators intending to transport these new fuels are expected to conduct risk analysis, monitoring, and controls as needed to move biofuels safely as well as conduct spill response planning for the new product. PHMSA seeks to work with pipeline operators that plan to transport these new fuels in existing regulated hazardous liquid pipelines or in new pipelines that might be constructed for the purpose of transporting ethanol or biofuels. Accordingly, we are requesting that operators provide us with advance notice of their intent to transport these fuels to facilitate cooperation in achieving safety.

Notice of Field Testing: PHMSA seeks to encourage field testing by pipeline operators to accelerate the development of knowledge about the safe and reliable transportation of ethanol and biofuels by pipeline. We are requesting that any operator intending to field test transportation of biofuels by pipeline provide advance notification to PHMSA of such testing so that PHMSA can work with the operator to address any safety concerns that arise. To the extent proprietary concerns permit, PHMSA also seeks to share in the evaluation of the results to supplement the information we are receiving from our collaborative research efforts and help facilitate standards development. Although such field testing would be limited in scope and duration, PHMSA will be interested in discussing the steps the operator will take to ensure safety during the test and inform local emergency response officials about the product being transported.

Commencement of Commercial Operations: Under 49 CFR part 195, an operator is obligated to modify its operating procedures, integrity management programs, and emergency response plans, among other things, prior to commencing commercial transportation of a new hazardous liquid. Under part 194, operators must also update their spill response plans to account for the new product being transported. PHMSA will apply its proven risk-based regulatory approach to the operation of pipelines transporting these fuels. PHMSA requests that any operator intending to commence regular commercial transportation of ethanol or other biofuels provide advance notification to PHMSA as soon as possible, but preferably 60 days in advance, to provide time for review. PHMSA is interested in learning about: The work to be performed to prepare the pipeline for ethanol or biofuel service; the anticipated blend concentration and batch frequency; the additional employee training to be conducted; the additional emergency response planning and liaison with local emergency response officials, including spill response plans; and the plans for ongoing monitoring of the integrity of the pipe. We would also like to know what modifications operators will make to their written operating and maintenance procedures, including their integrity management program and spill response plans prior to commencement of operations. On being notified by an operator about the new biofuel operations and associated program modifications, PHMSA will

work closely with the operator and provide technical review and feedback.

Submittal: Notifications may be submitted in writing to: Information Resources Manager, Office of Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590, by e-mail to informationresourcesmanager@phmsa.dot.gov, or by fax to 202-366-7128. PHMSA requests the name, title, telephone number, and e-mail address of the person responsible for compliance with the integrity management requirements and a physical description of facilities involved including pipe design, manufacture, vintage, diameter, relevant operating history, and presence of any breakout tanks along with project timelines. The public may view summaries of all notifications that have been submitted by operators, and the status of PHMSA review of each notification, via this Web site. PHMSA expects to receive fewer than ten notifications per year.

Review: PHMSA will review all notifications received from operators. Review may include site inspections by PHMSA or state pipeline safety agencies, particularly in states with certified hazardous liquid programs. If PHMSA finds that an operator's plans and operating procedures need additional attention or modification, we will provide feedback to the operator.

Authority: 49 U.S.C. chapter 601; 49 CFR 1.53.

Issued in Washington, DC, on June 18, 2008.

William H. Gute,

Deputy Associate Administrator for Pipeline Safety.

[FR Doc. E8-14137 Filed 6-24-08; 8:45 am]

BILLING CODE 4910-60-P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Amendment of a Savings Association's Bylaws

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort

to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before August 25, 2008.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906-6518; or send an e-mail to infocollection.comments@ots.treas.gov. OTS will post comments and the related index on the OTS Internet Site at www.ots.treas.gov. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906-5922, send an e-mail to public.info@ots.treas.gov, or send a facsimile transmission to (202) 906-7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Patricia D. Goings, (202) 906-65668, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Amendment of a Savings Association's Bylaws.

OMB Number: 1550-0017.

Form Numbers: N/A.

Regulation requirement: 12 CFR 544.5 and 552.5.

Description: All federally chartered savings associations are required to file bylaw amendment applications or notices with OTS. OTS Regions Office staff review the applications and notices to determine whether the bylaw amendments comply with the regulations and OTS policy. If an application or notice raises a significant issue of policy or law, or if it involves non-routine anti-takeover provisions or non-standard indemnification provisions, the Washington, DC office will also review the application or notice.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 57.

Estimated Number of Responses: 57.

Estimated Frequency of Response: Other; as needed.

Estimated Total Burden: 456 hours.

Clearance Officer: Ira L. Mills, (202) 906-6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: June 20, 2008.

Deborah Dakin,

Senior Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. E8-14379 Filed 6-24-08; 8:45 am]

BILLING CODE 6720-01-P



Federal Register

**Wednesday,
June 25, 2008**

Part II

Office of Government Ethics

**5 CFR Parts 2637 and 2641
Post-Employment Conflict of Interest
Restrictions; Final Rule**

OFFICE OF GOVERNMENT ETHICS**5 CFR Parts 2637 and 2641**

RIN 3209-AA14

Post-Employment Conflict of Interest Restrictions**AGENCY:** Office of Government Ethics (OGE).**ACTION:** Final rule.

SUMMARY: OGE regulations have provided guidance concerning the post-employment conflict of interest restrictions of 18 U.S.C. 207 for Government employees terminating service between July 1, 1979 and December 31, 1990. As a result of amendments to section 207 that became effective January 1, 1991, and subsequently, employees terminating service in the executive branch or in an independent agency (or terminating service from certain high-level Government positions) since that date are subject to substantially revised post-employment restrictions. The purpose of these new regulations is to provide regulatory guidance explaining the scope and content of the statutory restrictions as they apply to employees terminating service on or after January 1, 1991. This final rule would expand the regulatory guidance OGE has previously published concerning the current version of section 207 and make minor modifications to those earlier rulemakings. It would also remove the old obsolete regulations from the Code of Federal Regulations.

DATES: July 25, 2008.**FOR FURTHER INFORMATION CONTACT:**

Richard M. Thomas, Associate General Counsel, Office of Government Ethics; Telephone: 202-482-9300; TDD: 202-482-9293; FAX: 202-482-9237.

SUPPLEMENTARY INFORMATION:**I. Rulemaking History**

On February 18, 2003, the Office of Government Ethics (OGE) published for comment a proposed rule that would provide guidance and certain implementing procedures concerning the post-employment conflict of interest statute, 18 U.S.C. 207, as applied to former officers and employees of the executive branch. See 68 FR 7844-7892 (February 18, 2003). The proposed rule was issued pursuant to OGE's authority under the Ethics in Government Act of 1978, as amended, and Executive Order 12674, as modified by E.O. 12731.

As explained in the preamble, the proposed rule provided for minor modifications to existing guidance and procedures in part 2641, as well as

substantially expanded guidance to address more comprehensively the application of section 207.

The proposed rule also provided for the removal of part 2637 (formerly part 737). Part 2637 interpreted and implemented a version of section 207 that was in effect prior to January 1, 1991, the effective date of the relevant provisions of the Ethics Reform Act of 1989. Although part 2637 had provided comprehensive post-employment advice in the past, numerous statutory changes, beginning with the Ethics Reform Act of 1989, rendered the content of much of part 2637 inapplicable to the current statute. For this reason, the current version of part 2637 carries an introductory note emphasizing that the regulation applies to "individuals terminating Government service prior to January 1, 1991." It is OGE's intent that the advice now contained in part 2641, as amended by the final rule, will provide both comprehensive and current guidance applicable to employees terminating subsequent to January 1, 1991. Therefore, part 2637 is being removed in its entirety, with the proviso that the last published edition of the 5 CFR in which part 2637 was published (the one revised as of January 1, 2008) will be retained by OGE, and should be retained by agency ethics officials, to provide interpretive guidance to employees who terminated service before January 1, 1991.

The history of parts 2637 and 2641 is discussed in detail in the preamble to the proposed rule, at 68 FR 7844-7845. In addition, since the publication of the proposed rule, the appendices to part 2641 have been amended three times. First, by a final rule issued November 23, 2004, OGE modified the list of separate agency and departmental component designations in Appendix B, pursuant to 18 U.S.C. 207(h), for purposes of the one-year cooling-off restriction applicable to former senior employees of an agency or department, under 18 U.S.C. 207(c). See 69 FR 68053-68056 (November 23, 2004). Second, by a final rule issued March 8, 2007, OGE again modified the list of separate agency and departmental component designations in Appendix B and also modified the list of waived positions in Appendix A, pursuant to 18 U.S.C. 207(c)(2)(C), for purposes of the one-year restriction applicable to former senior employees. See 72 FR 10339-10342 (March 8, 2007). Third, by a final rule issued March 6, 2008, OGE once more modified the list of separate agency and departmental component designations in Appendix B. See 73 FR 12007-12009 (March 6, 2008).

Additionally, three amendments to 18 U.S.C. 207 have become effective since the publication of the proposed rule, and the effect of these amendments is addressed in the final rule. First, the amendments enacted by section 209(d) of the E-Government Act of 2002, Public Law 107-347, were noted in the preamble of the proposed rule, but the amendments did not become effective until nearly two months after the proposed rule was published. See 68 FR 7844. The proposed rule did not implement these statutory amendments, but the preamble specifically invited comments concerning the implementation of the amendments and noted that the effect of the amendments would be addressed in the final rule, as appropriate. During the comment period applicable to the proposed rule, OGE received no recommendations concerning the implementation of these amendments, which involve the addition of a new category of senior employee under 18 U.S.C. 207(c)(2)(A)(v) and a new restriction on contract advice under section 207(l), both applicable only to former private sector assignees under the Information Technology Exchange Program. The final rule implements these amendments, as discussed more fully below, through changes to proposed sections 2641.104 (definition of senior employee), 2641.301(j) (waiver of restrictions of 18 U.S.C. 207(c) and (f) for certain positions), and 2641.301(l) (guide to available exceptions and waivers), and the promulgation of new section 2641.207 (setting out basic outline of new restriction in 18 U.S.C. 207(l)). Second, one category of senior employees covered by 18 U.S.C. 207(c) was amended by section 1125(b)(1) of the National Defense Authorization Act for Fiscal Year 2004, Public Law 108-136, November 24, 2003. Therefore, as discussed more fully below, the definition of senior employee in proposed section 2641.104 has been revised to conform to the current version of 18 U.S.C. 207(c)(2)(A)(ii). Third, the Honest Leadership and Open Government Act of 2007 amended 18 U.S.C. 207(d) by extending the cooling-off period for very senior employees to two years, which is addressed in revised section 2641.205. See Public Law 110-81, sec. 101(a), September 14, 2007. Section 104 of the same Act also added a cross-reference, in 18 U.S.C. 207(j)(1)(B), to a revised exception in the Indian Self-Determination and Education Assistance Act; proposed section 2641.301(k)(4) has been revised accordingly.

The proposed rule provided a 90-day comment period. Timely comments were received from 17 sources. After carefully considering all comments and making appropriate modifications, the Office of Government Ethics is publishing this final rule after consulting with the Office of Personnel Management and the Department of Justice in accordance with section 402(b) of the Ethics in Government Act, and further, pursuant to section 201(c) of Executive Order 12674, as modified by E.O. 12731, after obtaining the concurrence of the Department of Justice.

II. Summary of Comments and Changes to Proposed Rule

OGE received comments from 17 entities, all Federal executive branch offices. Most of these comments were from agency ethics offices. Two agency inspector general offices commented, as did the Office of the Vice President. Five different Department of Defense components commented, although these comments were substantially similar or identical in many respects.

General Comments

A number of commenters stated that the proposed rule generally was helpful, thorough and well-organized. Many of these commenters remarked that the examples included in the proposed rule were particularly useful.

The Use of Examples

With respect to the subject of examples, one agency thought that OGE generally needed to include more explanatory information in its examples. The same agency also recommended that OGE address, either in the preamble or the text of the rule, "the way in which examples are to be used as illustrative guidance." Given the limits of the regulatory format, OGE has attempted to provide examples that contain sufficient explanatory information to illustrate the particular provision of the rule that is at issue. OGE's practice has been to include examples in most of its rules, e.g., 5 CFR parts 2634, 2635, 2637, and 2640, for the purpose of providing factual scenarios that demonstrate the operation of the substantive provisions articulated in the rules. These examples illustrate how OGE would apply the rule in certain contexts.

Three agencies raised related questions about why various examples in the proposed regulation do not contain facts satisfying each element of the relevant statutory prohibition. OGE has organized its treatment of each of the prohibitions in section 207 by

treating each element separately and then providing examples to illustrate that particular element. OGE believes that it would be unnecessarily discursive to reiterate each statutory element in each example and that the lack of focus would render the examples less convenient for readers to use in analyzing the particular element in the accompanying regulatory text. In a similar vein, one agency also commented on the absence of facts in one particular example to illustrate a knowledge element in the statute. See proposed § 2641.201(f) (example 3). The example to which this commenter referred is intended to illustrate the element that the post-employment contact must be "to or before" a Federal employee, not the scope of the statutory term "knowingly." Additionally, it is important to note that OGE has not attempted to provide comprehensive guidance as to the scope of the knowledge requirement in the various prohibitions in section 207. In OGE's experience, knowledge questions more typically arise after the post-employment conduct has already occurred, and legal analysis of such issues is not always well-suited to a regulation that provides general, prospective guidance.

Coordination With the Department of Justice

One commenter recommended that part 2641 be issued "jointly" by the Director of OGE and the Attorney General. The commenter stated that, because "the Attorney General is the officer charged by law to enforce the criminal statutes, including section 207, the Attorney General's issuance of part 2641 along with the Director of OGE increases the likelihood that the Federal Courts, in construing section 207, will give the interpretive guidance in part 2641 judicial deference."

OGE has not followed this recommendation. Section 201(c) of Executive Order 12731 states that is the responsibility of OGE to promulgate regulations interpreting sections 207, 208, and 209 of title 18, United States Code. The Executive Order provides that OGE obtain the concurrence of the Attorney General, which OGE has done (and also did with the prior post-employment regulations, see 5 CFR 2637.101(b)). Compare E.O. 12731, section 201(c) (concurrence); with *id.*, section 301(a) (joint promulgation). OGE also has its own statutory rulemaking authority with respect to conflicts of interest in the executive branch, which is exercised in consultation with the Attorney General. See 5 U.S.C. app. section 402. Furthermore, it may be

debatable whether joint promulgation of part 2641 with the Attorney General would necessarily entail judicial deference. See *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring). In any event, there is already a history of judicial recognition and reliance on OGE's section 207 regulations. E.g., *EEOC v. Exxon Corp.*, 202 F.3d 755 (5th Cir. 2000); *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989); *U.S. v. Clark*, 333 F.Supp.2d 789 (E.D. Wisc. 2004); *U.S. v. Martin*, 39 F.Supp.2d 1333 (D. Utah 1999); *Conrad v. United Instruments, Inc.*, 988 F. Supp. 1223 (W.D. Wisc. 1997); *Robert E. Derecktor of R. I., Inc. v. U.S.*, 762 F. Supp. 1019 (D.R.I. 1991); *U.S. v. Dorfman*, 542 F.Supp. 402 (N.D. Ill. 1982).

Legislative Recommendations

Several agencies did not confine their comments to the proposed rule, but asked OGE to consider proposing legislative changes to the post-employment statute. Subsequently, OGE completed a review of the criminal conflict of interest statutes, pursuant to section 8403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458. See OGE, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment* (January 2006), at http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/reports_plans/rpt_title18.pdf. In connection with this review, OGE solicited the views of the public with respect to possible changes to the criminal conflict of interest statutes, including 18 U.S.C. 207. See 70 FR 22661 (May 2, 2005); 67 **Federal Register** 43321 (June 27, 2002). OGE's evaluation of the need for legislation must be viewed as a separate undertaking from the present rulemaking, which is limited by the text of section 207 as it is currently written.

OMB Circular A-76

Seven agencies, including four DOD components, submitted comments about the application of 18 U.S.C. 207 in the context of public-private competitions under Office of Management and Budget Circular A-76. See OMB Circular A-76, May 29, 2003, available at http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf. In A-76 proceedings, an agency determines whether to contract out certain "commercial" (i.e., not inherently governmental) functions, after a competition between private bids and an agency tender offer based on the agency's cost estimate for performing

the same function internally. The commenting agencies focused on a number of different elements of section 207(a) as they apply to A-76 proceedings: particular matter involving specific parties, *see* § 2641.201(h); same particular matter involving specific parties, *see* § 2641.201(h)(5); personal and substantial participation, *see* § 2641.201(i); and intent to influence, *see* § 2641.201(e).

The central thrust of the arguments advanced by most of these agencies is that OGE should propound a “workable” interpretation of section 207 that does not interfere with the operation of the A-76 process. In particular, most of the commenting agencies were especially concerned that the interpretation of section 207 not unduly restrict affected employees, whose Government jobs may be contracted out, from going to work for a winning private bidder after those employees participated in some part of the A-76 process. Many affected employees are provided a “right of first refusal” to perform their privatized functions for the winning private bidder, *see* OMB Circular A-76, Attachment B, § D.3.a(2), and these agencies fear that this right may be eroded if significant numbers of affected employees are disqualified from performing private jobs involving communications or appearances that are deemed to be prohibited representational contacts under section 207. A related concern expressed by some of the commenters is that directly affected employees may be reluctant to participate in the A-76 process—whether by serving on the Most Efficient Organization or Performance Work Statement teams or simply by providing relevant job-related information to those teams—for fear of jeopardizing their ability to work for the winning bidder in the event that their Federal positions are eliminated.

The final rule does not address issues pertaining to A-76 proceedings. For one thing, OGE did not raise this subject in the proposed rule. Moreover, the subjects are sufficiently complex and novel that OGE finds it prudent to defer any treatment, for example, to a later rulemaking or other guidance.

Subpart A—General Provisions

Section 2641.101—Purpose

One agency commented on the note following proposed section 2641.101, now designated as paragraph (b) of the section in this final rule, which indicates that part 2641 is not intended to address post-employment restrictions in statutes or authorities other than 18

U.S.C. 207. This agency asked that OGE maintain a list of post-employment restrictions, other than section 207, somewhere in part 2641. OGE expressly declined to propose such a list, as explained more fully in the preamble to the proposed rule. 68 **Federal Register** 7845. The commenter has not persuaded OGE that the reasons for so declining are no longer valid. OGE foresees a burden in maintaining such a list in the regulation and ensuring that it is accurate and up-to-date, which burden is not outweighed by the potential value. The commenter’s suggestion that OGE could include a disclaimer in the regulation indicating that the list is not intended to be exhaustive simply underscores the risks and limitations inherent in promulgating such a list in the Code of Federal Regulations, especially in view of OGE’s experience that post-employment restrictions are a relatively frequent subject of legislative action. However, OGE will consider compiling such a list and making it available to agencies and the public through the DAEOgram process.

On a related topic, another agency recommended that OGE include, in example 1 following proposed § 2641.204(d), a cross-reference to the restrictions on the representational activities of current employees, under 18 U.S.C. 203 and 205. OGE has not followed this recommendation. The purpose of part 2641, and OGE’s responsibility under section 201(c) of Executive Order 12731, is to provide guidance with respect to 18 U.S.C. 207, not guidance with respect to 18 U.S.C. 203 and 205. The rule cannot reasonably identify every restriction, other than section 207, that might apply to a hypothetical set of circumstances. Moreover, OGE believes that agency ethics officials may be relied upon to provide comprehensive training and counseling with respect to the entire range of ethical restrictions that may be applicable in a given situation.

Section 2641.104—Definitions

Employee

OGE has made one change to the definition of “employee” as proposed in section 2641.104. In order to clarify that employees serving without compensation from the Government are subject to the post-employment law, OGE has added the phrase “employees serving without compensation” to the final sentence (before the parenthetical) in the definition.

Former Employee

Three agencies commented on the definition of “former employee” in

proposed section 2641.104. OGE also received one comment concerning the treatment of the Vice President under this definition, which is discussed separately below, under “Applicability of Certain Provisions to the Vice President.”

One of the agencies recommended that OGE amend example 4, in order to clarify when a special Government employee (SGE) serving on an advisory committee becomes a former employee. Consistent with this comment, OGE is revising the example to make clear that the SGE in that example becomes a former employee when his appointment terminates, provided that there is no reappointment without a break in service. However, OGE is not adopting the commenter’s suggestion that the SGE necessarily becomes a former employee immediately upon the expiration of the term of the advisory committee. Personnel appointments for SGEs could outlast the term of the committee on which they serve, and agencies sometimes may use SGEs for other expert or consultant services beyond the work of a particular advisory committee.

Another agency recommended that OGE add a new example to illustrate the post-employment implications of what the agency stated was a common practice of appointing retired Foreign Service officers in civil service positions without any break in service. We have adopted this recommendation and have added a new example 6 to the definition of former employee. Additionally, we have amended the definition of “Government service” to emphasize that a period of Government service is not completed, and the individual does not therefore become a former employee, unless there is a break in service.

A third agency recommended that examples 3 and 4 be amended to indicate that current Federal employees remain subject to the representational restrictions of 18 U.S.C. 203 and 205 even though they may not be former employees subject to the restrictions of 18 U.S.C. 207. We have not adopted this recommendation. Presumably, agencies already advise current employees, as appropriate, concerning their restrictions under sections 203 and 205, as well as any other applicable conflict of interest statutes or rules, and it is not the purpose of this post-employment rule to explain those requirements.

Person

One agency recommended that the definition of “person” be amended specifically to include Indian tribal governments. We have not made the recommended change. The definition of

person in section 2641.104 emphasizes that it is “all-inclusive,” and it includes, among other things, “any other organization.” We believe that this definition is sufficiently broad to include tribal governments. Moreover, we note that similar definitions of person in other OGE regulations do not expressly address tribal governments, and we are not aware that this has created any particular difficulties. *See* 5 CFR 2635.102(k); 2638.104; 2640.102(o).

Senior Employee

OGE received two substantive comments concerning the definition of “senior employee,” which governs the application of the one-year cooling-off restriction of 18 U.S.C. 207(c) (described in § 2641.204). One comment was from an agency Inspector General office, which requested that OGE provide a new example addressing the effect of “Law Enforcement Availability Pay” (LEAP) on the rate of basic pay of certain criminal investigators, for purposes of determining whether such investigators would be senior employees under 18 U.S.C. 207(c)(2)(A)(ii) and paragraph (2) of the definition of senior employee in § 2641.104 as proposed. The commenter stated that “LEAP is not meant to ‘elevate’ a GS–14 or GS–15 supervisor into the ‘senior employee’ category” and urged OGE to determine that LEAP is not to be considered part of basic pay. We agree with the commenter that LEAP should not be viewed as part of basic pay for purposes of section 207(c)(2)(A)(ii). The statutory and regulatory provisions governing LEAP make clear that it is to be treated as part of basic pay only for certain specified purposes, which do not include the post-employment restrictions. *See* 5 U.S.C. 554a(h)(2); 5 CFR 550.186(b). We have confirmed this conclusion with the Office of Personnel Management. In view of the number of Federal investigators who may receive LEAP, we are adding a new example 3 following the definition of senior employee to provide guidance on this subject.

A second agency commented that example 2 following the definition of senior employee does not adequately illustrate the fact that step increases, or their equivalent, must be considered in determining whether an employee’s basic rate of pay equals or exceeds the threshold rate of basic pay for senior employee status. *See* 68 FR 7848. OGE has made no change to the rule as proposed in adopting it as final. Example 2 illustrates the point that basic pay, for pay systems employing pay bands, is the actual pay of the employee, including any periodic

adjustments, not the minimum possible pay that employees in the system might receive. *See* OGE Informal Advisory Letters 98 x 2; 92 x 20.

Finally, OGE has made two conforming amendments to the definition of senior employee to reflect statutory amendments to 18 U.S.C. 207(c) since the proposed rule was developed. First, a new paragraph (6) has been added, to reflect section 209(d)(1) of the E-Government Act, Public Law 107–347, December 17, 2002, which became effective 120 days after enactment. This law amended 18 U.S.C. 207(c)(2)(A) by adding a new category of senior employee: Assignees from private sector organizations under the new Information Technology Exchange Program created by the Act. *See* 18 U.S.C. 207(c)(2)(a)(v). Second, paragraph (2) of the proposed definition has been changed to reflect section 1125(b)(1) of the National Defense Authorization Act for Fiscal Year 2004, Public Law 108–136, November 24, 2003, which became effective on the first day of the first pay period on or after January 1, 2004. This law amended 18 U.S.C. 207(c)(2)(A)(ii) by replacing the former standard—a rate of basic pay equivalent to the former level 5 of the Senior Executive Service—with a standard based on 86.5 percent of level II of the Executive Schedule. As reflected in paragraph (2) of the revised definition of senior employee in the final rule, the statutory amendment also provided that employees who had a rate of basic pay equivalent to level 5 of the SES on the day prior to enactment of the new law would be deemed senior employees for two years following the date of enactment. OGE also has made conforming changes to other parts of the rule that refer to the statutory pay threshold for senior employee status, including the provisions in § 2641.204(c) concerning the application of 18 U.S.C. 207(c) to special Government employees and Intergovernmental Personnel Act appointees or detailees.

Section 2641.105—Advice

Two commenters recommended that OGE amend proposed section 2641.105(e), concerning attorney-client privilege. They requested OGE to clarify that the Government itself still may be able to claim certain privileges, even though employees and former employees personally may not enjoy any personal attorney-client privilege with respect to information conveyed to ethics officials. OGE agrees that, although employees and former employees may not enjoy any personal attorney-client privilege with respect to

their communications with ethics officials, this does not mean that the Government itself may not be able to claim its own privileges with respect to such communications. At the same time, however, OGE is concerned that nothing in the regulation should suggest that agencies may invoke attorney-client privilege in connection with an information request made by OGE. Therefore, we are modifying § 2641.105(e) in this final rule only so far as to emphasize that employees do not personally benefit from an attorney-client privilege: “A current or former employee who discloses information to an agency ethics official, to a Government attorney, or to an employee of the Office of Government Ethics does not personally enjoy an attorney-client privilege with respect to such communications.”

One of the commenters also recommended that we revise proposed § 2641.105(b), concerning advice by OGE, to specify how conflicts of opinion between OGE and agency ethics officials will be resolved. We do not believe this subject is amenable to any general rule and therefore have not modified this section in the final rule. On the one hand, OGE recognizes and respects the opinions of agency ethics officials, and we start from the premise that those officials often are in a better position to obtain and understand the facts pertinent to post-employment questions involving their agencies. On the other hand, OGE cannot ignore its oversight responsibilities under title IV of the Ethics in Government Act. When differences of opinion arise, OGE must handle each case as the demands of the situation require.

Section 2641.106—Applicability of Certain Provisions to the Vice President

OGE received a set of comments from one commenter raising issues pertaining to the treatment of the Vice President under section 207 and the proposed rule. The commenter recommended an organizational change, which OGE has made in the final rule. This commenter recommended that OGE place all references to the application of section 207 to the Vice President in one stand-alone section in the rule. The commenter noted that the Vice President is subject only to section 207(d) and section 207(f) and recommended that a single provision governing the Vice President state this fact, without the need for any further references to the Vice President in the definitions of “employee,” “former employee,” or “very senior employee” in § 2641.104. Among other reasons, the commenter requested this change in

order to avoid “the confusion that may result from straining the normal meaning of the words ‘employee’ and ‘former employee’ to reach (for one narrow purpose) a constitutional officer.”

OGE agrees that this recommendation would add clarity. Consequently, this final rule removes the references to the Vice President in the various definitions from § 2641.104 as proposed, and adds a new § 2641.106 to the general provisions in subpart A of part 2641. Following the language proposed by the commenter, OGE has added the new § 2641.106, titled “Applicability of certain provisions to Vice President,” which reads: “Subsections 207(d) (relating to restrictions on very senior personnel) and 207(f) (restrictions with regard to foreign entities) of title 18, United States Code, apply to a Vice President, to the same extent as they apply to employees and former employees covered by those provisions. See §§ 2641.205 and 2641.206. There are no other restrictions in 18 U.S.C. 207 applicable to a Vice President.” Nevertheless, OGE has omitted one recommended phrase, which would have indicated that the Vice President is not subject to any other restriction in part 2641: For one thing, part 2641 itself does not impose any criminal restrictions, and, furthermore, there are other provisions in part 2641, for example, the sections dealing with certain exemptions or exceptions, that may be applicable to the Vice President.

The same commenter also recommended a new section governing certain communications made by former employees at the request of the President or the Vice President. The recommended new section would state that whenever the President, in the performance of constitutional, statutory or ceremonial duties, requests information or advice from a former employee, the provision of such information or advice is made on behalf of the United States or on behalf of the former employee himself or herself and therefore is not prohibited by section 207. The recommended provision would apply this same standard to requests from the Vice President for information or advice, in aid of the President’s functions. In support of this proposal, the commenter cited the President’s “constitutionally-based right to gather information to aid the President in the performance of Presidential functions,” including the gathering of such information “through the Vice President.”

OGE does not dispute the importance of the authority of the President and the Vice President to gather information in

the performance of their constitutional duties. OGE also recognizes that constitutional considerations may have a bearing on post-employment issues in certain circumstances, including circumstances beyond those described by the commenter. *See, e.g., Conrad v. United Instruments*, 988 F. Supp. 1223, 1226 (W.D. Wisc. 1997) (first amendment); *U.S. v. Martin*, 39 F.Supp. 2d 1333 (D. Utah 1999) (sixth amendment). However, OGE does not believe that anything in the post-employment regulations should be viewed as determining, limiting, or otherwise addressing the scope of the constitutional authority of the President or Vice President. Such questions are beyond OGE’s jurisdiction and the scope of this rule, and OGE would have to leave such questions to the guidance of the Department of Justice.

Subpart B—Prohibitions

Section 2641.201—Permanent Restriction

Section 2641.201(d)—Communication or Appearance

Five agencies raised concerns about the guidance in proposed § 2641.201(d) concerning the meaning of the statutory term “communication.” Specifically, these agencies raised questions about the concept, illustrated in example 5 to § 2641.201(d) as proposed, that a former employee can make a prohibited communication to the Government through a third party intermediary, provided that the former employee intends that the information be attributed to himself or herself. Several of these agencies also raised similar concerns about example 7 to proposed § 2641.201(f), as well as the note following proposed § 2641.205(g) and the related example 5 to proposed § 2641.205. Most of the commenters objected on the ground that these proposed provisions blurred the distinction between permissible behind-the-scenes assistance and prohibited contact with Government officials. Some also objected on the ground that the analysis, particularly in example 5 to proposed § 2641.201(d), depended too much on circumstantial evidence of the intent of the former employee that the information be attributed to himself or herself. Two agencies recommended that, if OGE were to retain any version of this third party intermediary concept, it should at least adopt a simpler standard, such as actual attribution by the third party (*e.g.*, “Mr. A told me to tell you this”). Two other agencies also commented that the facts set out in example 4 to § 2641.201(d) as proposed—which deals with

circumstances in which a former employee prepares a grant application and is listed as principal investigator—is difficult to reconcile with the result in example 5.

As OGE pointed out in the preamble to the proposed rule, 68 FR 7850, 7852, 7860, the provisions cited above are based on an opinion issued by the Office of Legal Counsel, Department of Justice, Memorandum for Amy L. Comstock, Director, OGE, from Joseph R. Guerra, Deputy Assistant Attorney General, OLC, January 19, 2001 (OLC Opinion), available under “Other Ethics Guidance, Conflict of Interest Prosecution Surveys and OLC Opinions” on OGE’s Web site, <http://www.usoge.gov>. Indeed, the facts of example 5 to proposed section 2641.201(d) are taken directly from the OLC Opinion, which several of the commenters acknowledged. Although we do not doubt that the OLC Opinion may make it somewhat more difficult to distinguish between permissible behind-the-scenes assistance and prohibited communications, we also think that it is more consistent with the purposes of section 207 to prohibit former employees from using third party intermediaries to make their contacts for them under circumstances in which the former employees intend to be recognized as the source of the information conveyed. *See* OLC Opinion at 5 (“any attempt to draw bright line rules would inevitably create artificial distinctions between equally pernicious types of conduct”). With respect to the concern that the circumstances in example 5 cannot sufficiently be distinguished from example 4 or other common situations in which we have said that former employees may engage in behind-the-scene activities, we believe that example 5 to section 2641.201(d) contains enough significant facts to make it clear that the former employee in that scenario does not intend to limit herself to behind-the-scenes assistance but rather intends to be identified as the real source of the communication. Accordingly, OGE has not revised the cited examples in this final rule.

Finally, one agency proposed that the basic definition of “communication” in proposed § 2641.201(d)(1) should not itself contain any references to the former employee’s intent that the information be attributed to himself or herself, but that additional numbered paragraphs be added to explain in more detail the relevance of attribution under different circumstances. This agency was concerned that the significance of the attribution principle might be lost

on readers if it were simply folded into the basic definition of communication.

OGE has not changed the definition in the final rule. For one thing, attribution is clearly part of the basic definition of communication found in the OLC Opinion. *See* OLC Opinion at 4 (“we conclude that a ‘communication’ is the act of imparting or transmitting information with the intent that the information be attributed to the former official”). Moreover, we believe that proposed example 5 adequately illustrates the concept of attribution without further complicating the basic definition in § 2641.201(d)(1).

Section 2641.201(e)—Intent To Influence

OGE received nine substantive comments on the proposed treatment of the statutory element of intent to influence, including five comments from components of the Department of Defense that made similar or identical recommendations.

Two agencies recommended that OGE use the word “appreciable” in various places in proposed § 2641.201(e)(2) and the accompanying examples—which illustrate situations in which intent to influence is not present—in order to emphasize, as proposed § 2641.201(e)(1)(ii) already does, that the representational activity must not merely present the “potential” for dispute but that such potential must be appreciable. Along similar lines, another agency recommended that OGE add the word “reasonably” before the proposed phrase “involves an appreciable element of actual or potential dispute or controversy” in § 2641.201(e)(1)(ii), which describes the basic concept of intent to influence. OGE has not adopted either recommendation in this final rule. The word “appreciable” already appears in the provision that defines the basic concept of intent to influence, § 2641.201(e)(1)(ii), and we think it is unnecessary to repeat the entire definition of intent to influence in every subsequent discussion. Furthermore, we think that insertion of the word “reasonably” would add little to the concept of “appreciable element of actual or potential dispute or controversy,” because the ordinary meaning of “appreciable” sufficiently limits the intended scope of the phrase. *See Webster’s Third New International Dictionary* 105 (1986) (appreciable means “capable of being perceived and recognized”).

Two agencies commented on proposed § 2641.201(e)(2)(vi), which recognizes certain circumstances in which there is no intent to influence

during the course of a routine Government site visit to non-Federal premises used by actual or prospective contractors or grantees. Both agencies recommended that the provision not be limited to non-Federal premises, in recognition of the fact that many Government contracts are performed in Government space. OGE has not adopted this recommendation either. Section 2641.201(e)(2)(vi), both as proposed and in this final rule, restates a provision that has been in the prior section 207 regulations, in virtually the same form, for over two decades. *See* 5 CFR 2637.201(b)(4). This provision was intended to cover communications “strictly for the Government’s convenience” given the practical realities of site visits. OGE Informal Advisory Letter 81 x 35. Government officials who have gone to the effort to conduct a routine site visit should not have to worry about cutting short their trip or curtailing their activities simply because they happen to encounter a former employee at the site. Where performance of the contract is to occur on Government premises, however, the Government’s practical interests in scheduling site visits are not implicated. Moreover, where the former employee is present on Government premises on an ongoing basis to perform the contract, one can envision more potential for a wider range of communications than would be the case in an occasional site visit. Of course, the fact that a particular set of circumstances may not fall directly within one of the specific types of situations identified in the regulations as involving no intent to influence does not mean that the element of intent to influence is necessarily present. The situations addressed in § 2641.201(e)(2) are not intended to be exclusive, and other situations must be addressed in light of all the relevant facts.

Another agency commented on § 2641.201(e)(4) of the proposed rule, which provides guidance on when an employee’s mere “appearance,” even in the absence of a substantive “communication,” can be viewed as involving an intent to influence the Government. This commenter objected that the rule was too vague because it simply lists a set of factors that may be considered on a case-by-case basis, rather than a definitive set of circumstances that must be present for the statute to be implicated. OGE does not agree that interpretive guidance is fatally vague just because it provides factors to be considered in light of the totality of the circumstances. With a statutory concept such as intent to

influence, any analysis unavoidably must involve the particularized consideration of all the relevant facts. *See, e.g., United States v. Schaltenbrand*, 930 F.2d 1554, 1560–61 (11th Cir. 1991) (reviewing entire record to determine whether former employee could be said to have acted as agent of contractor in meeting with Government). Therefore, this section has not been modified in the final rule OGE is now promulgating.

Finally, six commenters, including five DOD components, commented on the application of proposed section 2641.201(e) to communications made by former employees during the course of performing a Government contract. The five DOD components made substantially similar proposals to exclude from the concept of intent to influence all communications required in order to perform a Government contract. All of the commenters on this subject indicated that the Government sometimes needs to hear the expert advice of former employees with respect to contracts in which they participated as a Government employee, even though the former employees may have gone to work for contractors on the same contract in which they participated personally and substantially for the Government. (Apart from issues under the intent to influence element, the subject of contacts made during the performance of contracts also raises issues under the “on behalf of another person” element, *see* § 2641.201(g), and the exception for communications on behalf of the United States, *see* § 2641.301(a), both of which are discussed below.) Some of the commenters specifically mentioned the prospect of increasing privatization of Government functions, for example, through public-private competitions under OMB Circular A–76, which may result in increasing numbers of former Government employees working for Government contractors on projects in which the former employees had prior Government involvement.

OGE has dealt with similar questions many times over the years in published letters and other informal advice. For example, in OGE Informal Advisory Letter 99 x 19, we concluded that, although certain routine or ministerial communications made during contract performance may lack the requisite intent to influence, many contract performance communications may involve the potential for improper influence because the contractor and the Government have potentially differing views or interests with respect to the matter being discussed. *See also* OGE Informal Advisory Letter 03 x 6. The

fact that a particular Government contract may require certain communications between the Government and the contractor does not eliminate this problem, as we noted in an early OGE advisory letter: "The very terms of the contract between [the Department] and [the Corporation] require communications between the two entities. Their personnel must confer on the terms of subcontracts which [the Corporation] has authority to recommend or award depending on the size of the subcontract. These communications, contractually appropriate, would become legally prohibited in most instances * * * if [the former employee] should perform these services for [the Corporation]. The purpose of the post-employment provisions is to avoid the 'revolving door' syndrome inherent in which are the potentialities for the use of inside information and for continuing personal influence." OGE Informal Advisory Letter 81 x 35; *see also* OGE Informal Advisory Article 95 x 10; 2 Op. O.L.C. 313 (1978).

We also think it is significant that two related statutes, unlike section 207, contain express exceptions for certain representational activity during the performance of Government contracts. Sections 203 and 205 of title 18, which were enacted originally as part of the same legislation as section 207, expressly exempt certain representational activity "in the performance of work under a grant by, or a contract with or for the benefit of, the United States." 18 U.S.C. 203(e), 205(f). These provisions indicate that Congress knew how to exempt, explicitly, representational activity in the performance of contracts. Perhaps more telling, these provisions also indicate that Congress carefully imposed very significant limitations and safeguards when it did choose to exempt such activity. *See* section 203(e) (applicable only to special Government employees; requires certification from agency head that activity is in national interest; requires publication of certification in **Federal Register**); section 205(f) (same). It is difficult to believe that Congress would have intended a broad exclusion in section 207 without even mentioning the subject, let alone without imposing any limits on the circumstances under which such activity would be permitted.

The proposition that Government contractors may have their own interests in recommending certain courses of action as opposed to others should not be surprising. This concern is even illustrated by newspaper headlines. *See* Ariana Eunjung Cha, *Shuttle Safety vs.*

Profit: Contractors Had 'Potential' Conflict, Washington Post, August 27, 2003, at A13. In some cases, for example, it may be more efficient or economical for a contractor to develop and communicate one option for the Government, even though the Government's interests might best be served by a fuller development of a range of alternatives, as discussed in example 5 following § 2641.201(e)(2). In any event, as we indicated in advisory opinion 99 x 19, this is not a subject with respect to which OGE can or should make broad pronouncements of safe harbor in the abstract. Therefore, we decline to include a broad exception for all communications required in the course of performing Government contracts and are not modifying this section in the final rule. We note, as we did in the preamble to the proposed rule, that some contract performance communications may well fall within other categories described in § 2641.201(e)(2), as illustrated by examples 3 and 7. *See* 68 **Federal Register** at 7850.

Several commenters, recognizing that OGE might not be in a position to read a broad exclusion for contract performance communications into the statute, asked that OGE at least consider seeking legislation that would create an exception. OGE appreciates these comments and in fact has considered the merits of similar proposals in the context of the agency's review of the effectiveness of the conflict of interest statutes, which is discussed above under "Legislative Recommendations."

Finally, in this final rulemaking OGE has made minor changes to example 1 following section 2641.201(e)(3), in order to better illustrate the concept that changes in circumstances during the course of an originally permissible communication or appearance may render further contact impermissible.

Section 2641.201(f)—To or Before an Employee of the United States

One agency objected to the conclusion, in example 7 following proposed § 2641.201(f), that a communication conveyed to a Federal employee through an intermediary who is not a Federal employee would be covered by 18 U.S.C. 207. This issue is addressed above, under "Section 2641.201(d)—Communication or Appearance," in the discussion of communications through a "third party intermediary." OGE would add only that the idea of communications conveyed by means of another person is quite commonplace, as people routinely convey instructions or requests through a messenger of one kind or another.

Therefore, OGE has not followed this agency's recommendation to revise example 7 in the final rule. For similar reasons, OGE does not believe it is necessary, as suggested by this agency and another commenter, to add a reference to third parties in the text of § 2641.201(f)(2), especially as example 7 amply illustrates the concept. It should be remembered also that the definition of "communication," in § 2641.201(d)(1), expressly requires an intent on the part of the former employee that the message be attributed to himself or herself, and example 5 following that provision illustrates this attribution principle in the context of a communication through a third party.

One agency also recommended that example 7 be revised to emphasize that the communication must not only be directed to, but also received by, an agency employee. OGE does not believe this change is necessary either. The basic description of the statutory element, in § 2641.201(f)(2), both as proposed and now final, already uses the language "[d]irected to and received by," and the facts recited in example 7 make clear that the information was conveyed to "the project supervisor, who is an agency employee."

The same agency thought that proposed § 2641.201(f), which includes contacts with independent agencies in the legislative and judicial branches, was inconsistent with the definition of "agency" in § 2641.104, which does not include such legislative and judicial agencies. OGE does not believe that the provisions are inconsistent or should be revised. Although the definition of "agency" in proposed and now final § 2641.104 excludes agencies in the legislative and judicial branches, the relevant provision in § 2641.201(f)(1) expressly covers more than an agency as defined in § 2641.104: In subparagraph (i), it includes any "Agency," but in subparagraph (ii) it also includes any "Independent agency in the * * * legislative, or judicial branch." This is necessary in order to emphasize that representational contacts with independent agencies of the legislative or judicial branches are covered by section 207, which is the point of subparagraph (ii). *See* 5 Op. O.L.C. 194 (1981) (related statute, 18 U.S.C. 205, covers representational contact with agencies of legislative branch).

Another agency commented that example 3 following § 2641.201(f) as proposed should state that the former employee in that scenario knows that one of the persons to which she is directing her communications is a Government employee. The agency stated that the example as written does

not account for the knowledge element in section 207(a). OGE has not followed this recommendation. As discussed elsewhere, it is not OGE's intent to illustrate every element of the statute in each example in the rule, as this would be impractical and would detract from the focus of the examples on individual elements. Moreover, OGE has not attempted to define the general scienter element in any of the prohibitions in section 207. Questions about whether a particular representational activity involves the requisite degree of scienter to warrant prosecution are usually addressed to the Department of Justice.

Finally, in this final rule OGE has made minor modifications to two examples following § 2641.201(f) as proposed. OGE has modified example 5 for reasons discussed below under "Treaties and Trade Agreements." OGE also has modified example 6 by coordinating it with the facts of the previous example, which not only illustrates the relationship among subparagraphs (i), (ii), and (iii) of § 2641.201(f)(3), but also avoids extraneous issues pertaining to base closure decisions.

Section 2641.201(g)—On Behalf of Any Other Person

One agency recommended that OGE create an "exception" in proposed § 2641.201(g) to permit former employees to make certain contacts during the performance of a Government contract. According to this agency, a former employee who is now employed by a Government contractor should be permitted to make communications and appearances before the Government during the performance of the contract, provided that the contractor exerts no control over the former employee in the making of the communication or appearance. Under such circumstances, the commenter thought "it is at least arguable that the communication is not made on behalf of" the contractor.

OGE has not followed this recommendation in the final rule. A contractor's employee is fulfilling his or her duties as an employee when performing the work of the contractor. Under such circumstances, OGE cannot avoid the conclusion that the contractor's employee is acting on behalf of his or her employer. *See, e.g.*, Restatement of the Law (Second) Agency section 2(2) (1958) (servant is agent employed by master to perform service in his affairs whose physical conduct in performance of service is controlled or is subject to right to control by master); *id.*, comment a (servant is species of agent).

Another agency recommended that OGE revise example 3 following proposed section 2641.201(g) in order to emphasize that it is primarily the element of "control" by another that is lacking. OGE agrees and has amended the final sentence in the example in the final rule accordingly.

Section 2641.201(h)—Particular Matter Involving Specific Parties

Basic Concept

OGE received seven comments on proposed § 2641.201(h)(1), which articulates the basic statutory concept of "particular matter involving specific parties." Six agencies objected to the use of the phrase "activity or undertaking" in the last sentence of paragraph (1): "These matters involve a specific activity or undertaking affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case." These commenters perceived this phrase as an expansion beyond the settled understanding of the scope of the concept of particular matter involving specific parties. As one commenter pointed out, the corresponding provision in the old post-employment regulations lacks this phrase and instead reads: "Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties." 5 CFR 2637.201(c)(1). In the view of these commenters, the proposed rule reflects a shift in focus from specific "proceedings" to a more expansive, and less well-defined, category of "activities or undertakings."

It was not OGE's intention to expand, narrow, or otherwise alter the accepted meaning of a statutory concept that has been fundamental not only to section 207 but also to many other provisions in the conflict of interest laws and ethics regulations for many years. However, in order to dispel any possible confusion concerning the intent of the rule, OGE is replacing the phrase, "involve a specific activity or undertaking," with the language found in the former post-employment regulations (as well as in OGE's current financial conflict of interest regulations at 5 CFR 2640.102(l)): "typically involves a specific proceeding." Nevertheless, in making this change, OGE emphasizes that it does not necessarily agree with several commenters who argued that the statutory definition of "particular

matter," in 18 U.S.C. 207(i)(3), was intended to limit the application of section 207(a) to those types of matters that are specifically enumerated in that statutory definition. Nothing in the legislative history of the Ethics Reform Act of 1989, which added the definition, suggests any intent to contract the scope of section 207(a). More important, the definition starts with the phrase "the term 'particular matter' includes * * *" 18 U.S.C. 207(i)(3) (emphasis added). The word "includes," in a statutory definition, is usually a term of enlargement, rather than limitation, and indicates that other items are includable even if not specifically enumerated. *See* Norman J. Singer, *Sutherland on Statutory Construction* 231 (2000).

Four commenters also raised issues concerning the relationship between the concept of particular matter involving specific parties and the broader concept of "particular matter." These commenters made several related points: The treatment of particular matter involving specific parties should not be more expansive than the statutory definition of particular matter in 18 U.S.C. 207(i)(3); OGE should not mix the concept of particular matter with the narrower category of particular matters involving specific parties; and the rule should make clear that general policy matters are not covered by the concept of particular matters involving specific parties.

Although OGE understands these concerns, some of the commenters' proposals appear mutually inconsistent. For example, if OGE is to ensure that the description of particular matters involving specific parties is no broader than the statutory definition of "particular matter" in section 207(i)(3), it must somehow incorporate that statutory definition into the regulatory definition of particular matter involving specific parties. That is why the second sentence in paragraph (h)(1) begins with the definition of particular matter found in section 207(i)(3). However, in order to emphasize that this statutory category of particular matters is further narrowed by the addition of the phrase "involving a specific party or parties" in section 207(a), the second sentence of § 2641.201(h)(1), goes on to state that "such particular matters *also* must involve a specific party or parties in order to fall within the prohibition" (emphasis added). By drafting the rule in this way, it was OGE's intent to remain faithful to the statutory definition of "particular matter" while at the same time pointing out that the phrase is further limited when used in section 207(a) because of the additional requirement that the particular matter

involve specific parties. Furthermore, OGE thinks it unlikely that readers might be misled to think that policy matters of general applicability would be covered by section 207(a), because the very next paragraph is pointedly titled "Matters of general applicability not covered," and it expressly excludes "[l]egislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability." § 2641.201(h)(2). In response to one comment specifically objecting to the use of the term "rulemaking" in paragraph (h)(1), OGE notes, first, that the statutory definition in 18 U.S.C. 207(i)(3) itself uses this word, and, second, that it has long been accepted that certain rulemakings, although rare, may be so focused on the rights of specifically identified parties as to fall within the ambit of section 207(a), even though most rulemaking proceedings are matters of general applicability beyond the scope of section 207(a). See OGE Informal Advisory Letter 96 x 7, n. 1. In response to all of the comments noted above, however, OGE has made one change in the final rule in order to emphasize the "specific party" limitation: the second sentence of paragraph (h)(1), while still starting with the broader statutory definition of "particular matter," goes on to specify that "only" those particular matters that involve specific parties are covered by section 207(a)(1).

Treaties and Trade Agreements

One agency, whose comment was expressly endorsed by another agency, commented on proposed example 3 following § 2641.201(h)(1), which concludes that a treaty between the United States and a foreign government is a particular matter involving specific parties. See also proposed example 5 to § 2641.201(f); proposed example 1 to § 2641.202(j) (official responsibility for a class of treaty negotiations). The commenter objected that example 3 as proposed implies that all treaties are particular matters involving specific parties, even though treaties may involve the adoption of broad national policies that do not focus on the rights of any specific individual or non-sovereign organization. The basic argument is that treaties often are more analogous to legislation and rulemaking of general applicability, which are not particular matters involving specific parties, than to contracts, which are. Although not the focus of this comment, international trade agreements also raise similar concerns, and OGE did receive one comment from another agency, after the close of the comment period,

recommending that OGE change the analysis in proposed example 3 as it would apply to international trade agreements.

The conclusion in proposed example 3 is based largely on a 1979 opinion issued to the Department of State by the Office of Legal Counsel. See 3 Op. O.L.C. 373 (1979). This opinion, which held that the Panama Canal Treaty was a particular matter involving specific parties, expressly rejected the argument that treaties are more analogous to legislation and general rulemaking than to contracts: "Unlike general legislation or rulemaking, treaties are intended to affect specific participating parties, namely their signatories. In form, treaties closely resemble contracts, which are expressly covered by the statute. They are signed after the type of quasi-adversarial proceedings or negotiations that precede or surround the other types of 'particular matters' enumerated in section 207(a). The phrase 'involving a specific party or parties' has been read to limit the section's concern to 'discrete and isolatable transactions between identifiable parties.' * * * Such a characterization aptly describes the treaty negotiation process." *Id.* at 375. Relying on this same analysis, OGE later published an opinion concluding that "bilateral trade agreements," like bilateral treaties, normally are to be viewed as particular matters involving specific parties. See OGE Informal Advisory Letter 90 x 7.

The commenting agency, however, adduces arguments which it suggests may not have been considered in the 1979 OLC opinion. The agency contends that treaties have a status under international law akin to the status of domestic legislation, in that treaties are the "primary way of creating international legal regimes," in the absence of any international legislative body comparable to the U.S. Congress that could create international legislation. The agency also points out that the U.S. Constitution expressly recognizes the status of treaties as a source of law equivalent to Federal legislation: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land * * *." United States Constitution, Art. VI, cl. 2. In this connection, OGE's own examination indicates that courts have long held that treaties are on the same footing with Federal legislation and in fact supersede prior acts of Congress. See *Foster v. Neilson*, 27 U.S. 253 (1829); *Whitney v.*

Robertson, 124 U.S. 190 (1888); *Alvarez y Sanchez v. U.S.*, 216 U.S. 167 (1910). Finally, the agency cites a more recent unpublished OLC opinion, which concluded that certain deliberations, decisions and actions (including discussions with foreign governments) in response to the 1990 invasion of Kuwait by Iraq were not "particular matters." Based on these arguments, the agency maintains that treaties should at least be evaluated on a case-by-case basis to determine whether they are particular matters involving specific parties.

Although this commenter did not suggest specific criteria for making such determinations, OGE believes it is possible to articulate criteria that could be applied on a case-by-case basis. For example, one might argue that treaties that are narrowly focused on specific properties or territories are more closely akin to contractual exchanges of property. Cf. OGE 96 x 7 (although rulemaking usually does not involve parties, rule establishing health and safety standards for operations at a specific site was party matter). Arguably, this was the case with the Panama Canal treaty itself. By contrast, treaties addressing more general sovereign requirements, such as extradition procedures, might be viewed as more akin to general legislation.

In the case of trade agreements, we believe that similar considerations can apply. Some trade agreements, such as the Uruguay Round Agreements under the auspices of the General Agreement on Tariffs and Trade, may be "adopted by the passage of implementing legislation by both Houses of Congress, together with signing by the President." Opinion of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, November 22, 1994, available at <http://www.usdoj.gov/olc/gatt.htm>. In determining whether trade agreements are more akin to legislation of general application than to contracts, OGE thinks that relevant criteria could include such factors as whether the agreement addresses a wide range of economic sectors and issues. In this connection, OGE notes the difficulties that some agency ethics officials have experienced in the past in determining whether such matters as the various phases of World Trade Organization negotiations over a wide range of subjects are particular matters involving specific parties and, if so, how to define the scope or limits of any such matters. These matters often involve multifaceted discussions among representatives of numerous countries in a decision-making process that more

closely resembles legislative policymaking than contracting.

Therefore, OGE is adding a new sentence, at the end of § 2641.201(h)(2) of the final rule, to provide guidance with respect to international agreements between sovereigns, such as treaties and trade agreements. In this final rule, OGE has moved proposed example 3 following § 2641.201(h)(1) to be a new example 7 following § 2641.201(h)(2), and the example text has been revised to follow more closely the facts in the OLC Panama Canal opinion. OGE also has added new example 8 following § 2641.201(h)(2) and has made related revisions to example 5 following § 2641.201(f) and example 1 following § 2641.202(j).

Parties During Preliminary or Informal Stages

Three agencies commented on the proposed guidance in § 2641.201(h)(4) concerning when a particular matter first may be said to involve specific parties. The comments particularly concerned the discussion of contracts in the last sentence of proposed paragraph (h)(4), as well as examples 4 and 5. The proposed rule stated that matters such as contracts “ordinarily” involve specific parties when expressions of interest are first received by the Government, but that, “in unusual circumstances,” a prospective contract may involve specific parties even earlier “if there are sufficient indicia that the Government has specifically identified a party.” Two agencies objected that this provision and the accompanying examples do not provide adequate guidance as to what might constitute “sufficient indicia” that the Government has identified parties prior to the expression of interest by those parties. These agencies believed that ethics officials and others would be led to conclude that a potential contract involves specific parties virtually any time the Government has conducted purely internal discussions about the possibility that a particular potential contractor might be particularly qualified to perform the work. In the view of these commenters, it will often be the case that the Government can identify potential contractors who might bid and who might be particularly well-qualified, and thus the “ordinary” rule that the Government must receive expressions of interest would be swallowed by the exception. Another agency indicated that sole source procurements are a good example of a contract that might be said to involve specific parties even before an expression of interest is received. Along the same lines, another agency

suggested that internal discussions about a potential sole source procurement would be a clearer example than proposed example 5 of a situation where specific parties have been identified prior to any expression of interest by a prospective contractor.

OGE did not mean to suggest in the proposed rule that parties are involved in a potential contract merely because the Government might be able to identify potentially qualified bidders in advance. OGE intended, in proposed example 5, to provide a number of factors indicating that a particular potential contractor was more directly involved because of work on a prior contract that is “intimately related” to the potential new contract. OGE recognizes, nonetheless, that the provision may be difficult to apply. Consequently, OGE is making two changes to the proposed rule in this final rulemaking. First, OGE is replacing proposed example 5 with a new example that deals specifically with a sole source procurement, which is determined to be a matter involving specific parties even prior to any expression of interest on the part of the prospective sole source contractor being considered internally by the Government. Second, OGE is making minor revisions to the last sentence of § 2641.201(h)(4) as proposed, in order to refer to sole source procurements, as well as other procurements (and prospective grants and agreements) in which the Government explicitly may identify a specific party prior to the receipt of a proposal or expression of interest. By making these changes, OGE does not mean to suggest that a sole source procurement is necessarily the only set of circumstances in which specific parties may be identified prior to an expression of interest in the contract, but it is probably the one most often encountered.

Same Particular Matter Involving Specific Parties

Eight agencies commented on proposed § 2641.201(h)(5), which provides guidance on determining whether two particular matters involving specific parties are the same.

Five DOD agencies raised related questions concerning the treatment of multi-contract programs. By “multi-contract program,” the commenters appear to mean a large Government program, such as the development of a new generation of military aircraft, that is supported by a number of contracts to develop discrete aspects of the project, such as separate contracts to develop the engine, body, electronics, etc. In the view of these agencies, each of the

separate contracts should be viewed as a separate particular matter involving specific parties, rather than simply as parts of the same project, viewed as one comprehensive particular matter involving specific parties.

Depending on how the project is structured, OGE agrees with this point. OGE does not necessarily equate “Government program” with “particular matter involving specific parties.” For one thing, some Government programs are not even, in and of themselves, particular matters involving specific parties. For example, a Government program to understand the causes of a particular disease is not, in and of itself, a particular matter involving specific parties, even though the program may involve several grants, contracts or cooperative agreements all designed to support or implement different aspects of the overall program. *See, e.g.*, OGE Informal Advisory Letter 80 x 9; 5 CFR 2637.201(c)(1) (example 4).

Furthermore, OGE generally views separate contracts as being separate particular matters involving specific parties, absent either some indication that one contract directly contemplated the other contract or other circumstances indicating that both contracts are really part of the same proceeding involving specific parties. *See id.*; 5 CFR 2637.201(c)(4) (example 1). Although a number of commenters raised questions about whether OGE’s 2002 Yucca Mountain opinion has opened the door to a general “doctrine of convergence,” whereby multiple contracts in support of a Government project can be viewed as being merged into a single “super contract,” OGE does not agree with that interpretation of the opinion: We concluded there that all of the contracts in that case were in support of one adjudicatory proceeding, and work produced under those contracts was directly involved in the ensuing adjudication, such that former employees who participated personally and substantially in the support contracts could not be permitted to represent private parties in the adjudication. *See* OGE Informal Advisory Letter 02 x 5, at 9 and n. 7. Not only did Yucca Mountain involve a very unique set of circumstances, but nothing in that opinion indicates that separate contracts must be viewed as being part of the same particular matter involving specific parties where those contracts are not directly in support of the same proceeding involving specific parties.

Nevertheless, it is not clear from the examples proffered by the commenters exactly what the relationship is between the separate contracts involved in the particular Government programs. If, for

example, the so-called “super contract” is a prime contract involving oversight of several subcontracts, it could be problematic to view the subcontracts as being separate particular matters from the prime contract, depending on the circumstances. *Cf.* OGE Informal Advisory Letter 82 x 2. Because the exact scenarios are not specified, and the same particular matter determination would have to depend on an examination of the circumstances of each situation, OGE does not believe this area is ripe for any general standard in the post-employment regulations at this time.

However, in response to a related comment from another agency, OGE is making one change in the final rule. This commenter recommended that OGE add a new sentence at the end of proposed § 2641.201(h)(5) indicating that new contracts generally will be viewed as being separate particular matters from each other. The same agency also recommended the addition of an example illustrating that a new contract, even if awarded to an existing contractor with no major changes to the prior contract, is a new particular matter. OGE generally agrees with this recommendation. Therefore, OGE has reorganized § 2641.201(h)(5) in this final rule by designating the first part of the text as proposed, dealing with the same particular matter generally, as new subparagraph (i) and by creating a new subparagraph (ii), emphasizing several considerations especially relevant in the case of contracts and other agreements. The new subparagraph adds, among other things, the following: “Generally, successive or otherwise separate contracts (or other agreements) will be viewed as different matters from each other, absent some indication that one contract (or other agreement) contemplated the other or that both are in support of the same specific proceeding.” OGE thought it necessary to include the qualifying clause at the end of the latter sentence because OGE has encountered various situations in which an initial contract contemplated additional contracts, *see* OGE 80 x 9, one contract was in support of agency operations in connection with another contract, *see* OGE 99 x 19, or successive support contracts were deemed inseparable from the same underlying adjudication, *see* OGE 02 x 5. We also agree that a new example 2 illustrating the more typical “successive contract” question would be helpful, and we are including the recommended example in the final rule, with certain modifications.

The new subparagraph (ii) also addresses another related issue that was

raised by several commenters: The treatment of what some have called “umbrella” contracts, which involve multiple task orders or delivery orders placed against an existing contract. Several DOD agencies referred to the procurement mechanism for indefinite delivery contracts, outlined in the Federal Acquisition Regulation at 48 CFR 16.500–16.506, as one example. As described by these agencies, such contracts often involve a “broad scope of work encompassing a wide geographical area.” Under such contracts, according to these agencies, “the general nature of the work (*e.g.*, environmental remediation) and contract terms will remain the same,” while “the precise timing, quantity, location, and specific performance of the work may vary from delivery order to delivery order.” In at least some cases, the actual scope of work under the task or delivery orders is separately negotiated by different agency offices with different needs, sometimes even with multiple contractors competing for work under the same task or delivery order.

In response to these comments, OGE has added subparagraph (ii)(c) to the final version of § 2641.201(h)(5). This provision states OGE’s general view that a contract is almost always a single particular matter involving specific parties. However, the provision recognizes that, in compelling circumstances, an umbrella contract may be of such magnitude and cover such a large scope of work that it could be divided into individual particular matters involving specific parties. Accordingly, the provision acknowledges that agencies may determine that such a contract is divisible into separate particular matters involving specific parties where articulated lines of division exist. The regulation lists various considerations for agencies to take into account when applying the previously described factors in determining whether two particular matters involving specific parties are the same. These agency determinations may be made in consultation with OGE and, if more than one agency is involved, other affected agencies.

OGE wants to emphasize that the treatment of certain large umbrella contracts under this rule is a special case, owing to the use of distinct task or delivery orders that sometimes can involve very different circumstances. In this connection, it is also relevant that individual task or delivery orders sometimes are viewed as having the attributes of contracts in and of themselves. *See, e.g.*, Comptroller

General Decisions B–278404.2 (1998) (task orders are “contracts” within the overall contract, under the FAR definition of contract at 48 CFR 2.101); B–277979 (1998) (delivery order is a “contract” under FAR definition of contract). Therefore, nothing in this provision should be taken as authority for dividing contracts generally, or for dividing other kinds of particular matters involving specific parties, such as lawsuits or enforcement actions.

New examples 7 and 8 have been added to § 2641.201(h)(5) of the final rule to illustrate situations in which it would be justifiable for an agency to make the determination that an umbrella contract should be divided into individual particular matters involving specific parties. Example 7, the substance of which was taken from submitted comments, also includes a caution that anyone participating personally and substantially in the overall contract will be deemed to have also participated personally and substantially in all particular matters involving specific parties that result from an agency determination to divide such contract. The basis for this conclusion is that each task or delivery order is subject to the terms and conditions of the overall contract. *See, e.g.*, 48 CFR 52.216–18.

Three agencies proposed identical language for a new example to illustrate that a contract “may become a different particular matter involving specific parties as a result of changes in the work to be performed under the contract, not as a result of a specific milestone, such as a contract modification.” OGE has not made the recommended change in the final rule. OGE already has provided several “contracting” examples following § 2641.201(h)(5). The examples cannot illustrate every type of contract issue that may arise under that section, nor are those examples that are included intended to be exhaustive. Another agency proposed a fact-specific and agency-specific example to illustrate when two proceedings related to antitrust issues are to be viewed as the same particular matter. Again, OGE believes that an additional example is unnecessary at this time, in view of the relatively large number of examples already included.

One agency recommended that re-numbered example 6 (proposed example 5), which concerns the relationship between certain wiretap applications and subsequent prosecutions, be rewritten with the assistance of the Department of Justice in order to make the example more clear and detailed. OGE has not changed the example. This example, in its present

form, has been in the prior post-employment regulations for over two decades, and we are not aware that it has created any particular difficulties during that time. *See* 5 CFR 2637.201(c)(4) (example 2). Moreover, the prior post-employment regulations, like the present regulations in part 2641, were developed in consultation with the Department of Justice. *See* 5 U.S.C. app. section 402(b)(2); Executive Order 12731, section 201(c) (1990); 5 CFR 2637.101(b). Also in connection with example 6, we note that another agency recommended that OGE provide a new example following proposed § 2641.201(h)(3) to illustrate that the same parties need not always be present for a matter to be deemed the same particular matter involving specific parties. We believe that example 6 to § 2641.201(h)(5) already illustrates this point, and, in fact, the example recommended by this agency is very similar to example 6. Therefore, we are not including the recommended new example in the final rule.

Section 2641.201(i)—Personal and Substantial Participation

OGE received several comments on aspects of the proposed provision dealing with personal and substantial participation. One agency thought it was potentially confusing to include the phrase, “to purposefully forbear in order to affect the outcome of a matter,” in the definition of participation. *See* proposed § 2641.201(i)(1). The agency thought that this language might suggest that every act of forbearance, including recusal from a matter, could constitute personal and substantial participation in a matter. OGE has not changed the text of proposed § 2641.201(i)(1) in adopting it as final. For one thing, the prior post-employment rule had similar language concerning the subject of inaction, and we are not aware that this language created any particular confusion over the last two decades. *See* 5 CFR 2637.201(d)(3). Moreover, the proposed rule makes clear that definition includes only “purposeful” forbearance with the object to “affect the outcome of the matter,” which plainly does not include every kind of inaction. OGE also does not believe that such purposeful forbearance reasonably can be confused with recusal, as the latter constitutes the removal of the employee from a matter, whereas the former involves intentional inaction in order to affect a matter to which an employee remains assigned. At the recommendation of this agency, however, OGE has provided a new example to this section in the final rule to illustrate what is meant by purposeful forbearance to affect the outcome of a

matter. New example 7 pertains to the director of an office who must personally sign off on every application for a certain type of agency assistance. A particular application comes across her desk, but she intentionally takes no action on it because of her belief that the application may raise difficult policy concerns for her agency at this time. As a consequence of her inaction, resolution of the application is deferred indefinitely. The example concludes that the employee has participated personally and substantially in the matter.

Another agency commented that example 2 following proposed § 2641.201(i) did not contain sufficient facts to support the conclusion that the attorney in that scenario, who provided advice concerning discovery strategy in a lawsuit, participated substantially in that matter. OGE does not believe that further detail is needed and has not modified the text of the example in this final rule. Advice concerning discovery strategy requires the exercise of discretion and professional judgment and does not concern an aspect that is merely peripheral to a lawsuit, but rather pertains to an integral and important part of the litigation process.

One agency commented on example 4, which concludes that a supervisor did not participate in any particular matter merely by checking on the status of a subordinate’s work on all matters of a certain type without commenting on any particular matter. The agency recommended that OGE state more specifically that the supervisor did not participate “substantially” in any particular matter. OGE agrees that the agency’s recommendation more fully describes the application of the statutory element and has revised the wording of the example accordingly.

Section 2641.201(j)—U.S. Is Party or Has Direct and Substantial Interest

One agency commented on OGE’s proposed treatment of what it means for the United States to have a direct and substantial interest. This agency stated that it frequently must advise former employees concerning representational activity in various antitrust proceedings and that it has found the example dealing with antitrust proceedings in the prior post-employment regulations to be particularly helpful. *See* 5 CFR 2637.201(c)(5) (example 1). The agency noted that the proposed rule did not include this example and requested that OGE restore the example to § 2641.201(j). OGE agrees that the particular example from the old post-employment regulations is useful, not only for the reasons stated by the

commenter, but also because it illustrates circumstances in which an agency can be said to have a direct and substantial interest in a matter involving purely private parties, which is a question that arises periodically. *See* OGE Informal Advisory Letter 94 x 7 (relying on example 1 to 5 CFR 2637.201(c)(5)). Therefore, OGE is adding this example to the final rule.

Section 2641.202—Two-Year Restriction Concerning Matters Under Official Responsibility

Four agencies commented on proposed § 2641.202, interpreting 18 U.S.C. 207(a)(2), the two-year restriction on representation of others in connection with a particular matter involving specific parties with respect to which the former employee had official responsibility.

One agency commented on example 7 following proposed § 2641.202(j), which illustrates when an employee temporarily acting as head of an office does not acquire official responsibility for all matters pending in the office. This commenter recommended that OGE add an additional scenario to the example, positing that the acting official actually assigned a matter to a subordinate during this period of temporary service. OGE has not made this change in the final rule, as it would raise complicated questions, extraneous to the purpose of the example, concerning whether, or under what factual circumstances, the assignment of work might constitute personal and substantial participation, not just official responsibility.

Another agency objected that example 4 following proposed § 2641.202(j) is not a good illustration of the knowledge requirement in section 207(a)(2), which is set out in proposed § 2641.202(j)(7). The same agency also recommended that the basic definition of “official responsibility” in proposed § 2641.202(j)(1) should specify that nonsupervisory employees have no official responsibility for their own work. Example 4 was not intended to address the issue of knowledge of one’s official responsibility, and, in fact, makes no reference to this subject. Moreover, § 2641.202(j)(1) already does state that “[a] nonsupervisory employee does not have official responsibility for his own assignments within the meaning of section 207(a)(2).”

A different agency objected to the latter provision and found it illogical to say that a nonsupervisory employee does not have official responsibility for his or her own assignments. OGE does not agree with this comment. As described by the Senate Judiciary

Committee in connection with the 1962 act, the rationale for the restriction is that there is “a distinct possibility of harm to the Government when a *supervisory employee* may sever his connection with it one day and come back the next seeking an advantage for a private interest in the very area where he has just had *supervisory functions*.” S. Rep. 2213, 87th Cong., 2d Sess., 1962 U.S.C.C.A.N. 3861 (emphasis added). The proposed rule, by limiting “official responsibility” to persons with supervisory functions, is consistent with the legislative purpose.

The same agency also objected to two other aspects of the treatment of official responsibility. First, the agency argued that the list of sources that ordinarily determine the scope of an employee’s official responsibility—i.e., “those functions assigned by statute, regulation, Executive order, job description, or delegation of authority”—is too limited and ignores the reality of the workplace. See § 2641.202(j)(1). The commenter, however, did not suggest any additional or alternative sources of official authority, or any other method for determining the scope of official authority. More important, the language in question is virtually identical to the language that has been used in the prior post-employment regulation for over two decades, and OGE is not aware that this provision has proven inadequate. See 5 CFR 2637.202(b)(2). Therefore, as noted, OGE is not changing § 2641.202(j)(1) in this final rule.

Second, the agency objected to proposed § 2641.202(j)(5), which indicates that an employee’s self-disqualification or avoidance of personal participation in a matter is not sufficient to remove the matter from his or her official responsibility. The agency recommended, instead, a kind of totality-of-the-circumstances test that would recognize recusal as an appropriate means to limit official responsibility in some cases. OGE has not made the recommended change to this section of the final rule. A very similar provision concerning self-disqualification has been a part of the post-employment rules since 1979, and OGE has seen no indication during that time that this approach has, as the commenter predicted with respect to the proposed rule, done “serious harm to the Executive Branch’s continuing problems in recruiting and retaining talented individuals from outside of Government to serve in managerial positions.” See 5 CFR 2637.202(b)(5). Moreover, the court in *United States v. Dorfman* specifically endorsed OGE’s approach with respect to self-

disqualification and added that a contrary rule would mean that employees “could selectively recuse themselves from particular matters actually pending under their official responsibility enabling them to participate directly in those matters a year hence,” thus evading the intent of Congress “to avoid even the appearance of a public office being used for personal or private gain.” 542 F. Supp. 402, 409–410 (N.D. Ill. 1982) (quoting S. Rep. 170, 95th Cong., 2d Sess. 32 (1977)).

One agency acknowledged that example 9 following proposed § 2641.202(j) was intended to illustrate the effect of a break in Government service on the application of 18 U.S.C. 207(a)(2), as discussed in the preamble to the proposed rule at 68 FR 7857. However, this agency recommended that the effect of a break in service be discussed in the regulatory text of this provision as well. The agency made a similar comment in connection with proposed § 2641.204, concerning the effect of a break in service on the application of 18 U.S.C. 207(c), as illustrated by example 3 following proposed section 2641.204(g). OGE has not made the recommended changes to these sections in the final rule. The effect of a break in service is a subject relevant to all of the prohibitions discussed in the rule, not just the prohibitions discussed in §§ 2641.202 and 2641.204. Consequently, the requirement that an individual must have “completed a period of service as an employee” is already treated generally in the definition of “former employee” in § 2641.104 and is illustrated in example 3 following that definition, which discusses “break in service.” In any event, we believe that the examples cited by the agency adequately illustrate the application of 18 U.S.C. 207 in situations involving a break in service. Moreover, as noted above, OGE has revised the definition of “Government service” in § 2641.104 of the final rule to illustrate the effect of a break in service.

Finally, OGE has modified example 1 following § 2641.202(j), for reasons discussed above under “Treaties and Trade Agreements.”

Section 2641.203—One-Year Restriction Concerning Trade or Treaty Negotiations

One agency commented that it was not immediately clear, from the language of proposed § 2641.203(a), whether “on the basis of covered information” modifies only “advise” or also modifies “represent” and “aid.” This commenter recommended that the

rule be revised to track the language of the statute more closely by placing the phrase “on the basis of covered information” before “represent, aid, or advise,” thus clarifying that the phrase modifies all three verbs. It was not OGE’s intention, in proposed § 2641.203(a), to go beyond a recitation of the basic statutory prohibition. As discussed in the preamble to the proposed rule, 68 FR 7857, the present rule is intended only to provide a brief introductory summary of the statute, and paragraphs have been reserved for additional guidance in the future. Therefore, OGE is making the recommended change to § 2641.203(a) of the final rule, in order to follow the statutory language more closely.

Section 2641.204—One-Year Restriction for Senior Employees

Proposed section 2641.204 interprets various elements of the so-called “one-year cooling-off period” for senior employees. OGE received comments on several parts of this provision, discussed below. As noted above, in connection with the definition of “senior employee” in § 2641.104, 18 U.S.C. 207(c) has been amended twice since the proposed rule was developed, and those amendments are implemented in the final definition of “senior employee.”

Section 2641.204(c)—SGEs and IPAs

Five agencies, including four DOD components, commented on proposed § 2641.204(c), which concerns special issues arising in the application of section 207(c) to special Government employees (SGEs) and persons assigned to the Federal Government under the Intergovernmental Personnel Act (IPAs).

With respect to SGEs, one agency commented on the statement in the preamble to the proposed rule that “certain de minimis activities performed by an SGE on a given day might not be sufficient to count that day, under limited circumstances.” 68 FR 7858. The commenter agreed with this statement, but recommended that it be incorporated into the text of § 2641.204(c)(1). OGE has not changed the text of this section in the final rule. Delineation of the circumstances in which certain de minimis activities would not be sufficient to count as a day of service would require an extended explication that is not well-suited to the text of this provision. Moreover, the question of when to count a particular day of service for an SGE is not peculiar to section 207(c), and we believe this issue is better addressed in more general guidance concerning the ethical requirements applicable to SGEs. See

OGE DAEOgram DO-07-002, available on OGE's Web site at http://www.usoge.gov/pages/daeograms/dgr_files/2007/do07002.pdf.

With respect to IPAs, four DOD components made essentially the same point concerning proposed § 2641.204(c)(2). These commenters objected to the fact that the proposed rule makes the applicability of section 207(c) turn on the amount of pay received by IPA detailees and appointees, without sufficient regard for either the source of pay (i.e., Federal or non-Federal) or the level of responsibility associated with the particular position. OGE has not changed the rule in response to these comments. As explained in the preamble to the proposed rule, 68 FR 7858, § 2641.204(c)(2) merely implements an opinion on this subject issued by the Office of Legal Counsel, Department of Justice. See "Applicability of the Post-Employment Restrictions of 18 U.S.C. 207(c) to Assignees Under the Intergovernmental Personnel Act," Memorandum of Daniel L. Koffsky, Acting Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Susan F. Beard, Acting Assistant General Counsel, Department of Energy, June 26, 2000, available at <http://www.usdoj.gov/olc/doe207.htm>.

One commenter also objected that the focus on an individual's pay, for purposes of applying section 207(c) to IPA personnel, appears to be at odds with OGE's recent guidance concerning the circumstances in which IPA detailees are required to file a public financial disclosure statement, under section 101 of the Ethics in Government Act of 1978 (EIGA), as amended. See OGE Informal Advisory Memorandum 02 x 11. As OGE has explained on other occasions, the language and legislative history of the financial disclosure provisions in EIGA differ from those of 18 U.S.C. 207(c), and different approaches to coverage are warranted. See OGE Informal Advisory Letter 98 x 2.

Section 2641.204(g)—To or Before an Employee of Former Agency

One commenter suggested that proposed § 2641.204(g)(1)(iii), which states that a former senior employee may not contact "an individual detailed to the former senior employee's former agency from another agency," is inconsistent with a provision in proposed § 2641.201(f), which states that the permanent restriction of section 207(a)(1) applies to contacts with any employee who is detailed to the various entities listed in proposed § 2641.201(f).

The reference to detailees in proposed § 2641.204(g)(1)(iii) was intended to implement a statutory provision that has particular significance in connection with the senior employee restriction. Specifically, § 2641.204(g)(1)(iii) implements 18 U.S.C. 207(g), which states that "a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both departments, agencies, or such entities." Proposed § 2641.204(g)(1)(iii) therefore emphasized that a detailee from another agency is also deemed to be an employee of the former senior employee's former agency. However, to clarify that the rule is intended to implement section 207(g), OGE is revising the provision in this final rule to track the language of the statute more closely. The revised final rule provision also indicates that detailees from the legislative and judicial branches are included.

For similar reasons, OGE is making a minor change to § 2641.204(g)(3)(ii). As proposed, this provision stated that a communication or appearance is to or before an employee of the former senior employee's former agency if, inter alia, it is directed to and received by "an employee in his capacity as an employee of a former senior employee's former agency" (emphasis added). OGE is concerned that the highlighted language could be interpreted as indicating that an employee of the former senior employee's agency may be contacted if that employee is serving on a detail to a different agency and is acting in his capacity as a detailee to that agency. Such an interpretation would be inconsistent with 18 U.S.C. 207(g), as explained in OGE Informal Advisory Letter 03 x 9, which concluded that the representational bar applies to contacts with current employees of the former senior employee's former agency, even if those employees happen to be on a detail to another agency in which the former senior employee did not serve. Therefore, the final rule simply uses the phrase, "in his official capacity," without the further limitation that the contact be made with an employee specifically in his capacity as an employee of the former senior employee's former agency.

Another commenter asked why proposed § 2641.204(g)(4) repeated the "public commentary" provision from proposed § 2641.201(f)(3), even though other elements common to the senior employee restriction and the permanent restriction are handled simply by cross-

references to § 2641.201. The treatment in § 2641.204(g)(4) actually differs from the provision in 2641.201(f)(3) in an important respect. Whereas the permanent restriction covers contacts with employees of a broad range of Federal entities, the senior employee cooling-off period applies only to contacts with the individual's own former agency. Therefore, the provisions in § 2641.204(g)(4) contain references to the former agency, in place of the broader language found in § 2641.201(f)(3).

Section 2641.205—Two-Year Restriction for Very Senior Employees

Two agencies commented on proposed § 2641.205(g), specifically the conclusion, which is reflected in the proposed explanatory note to paragraph (g) and in proposed example 5 to § 2641.205, that a former very senior employee is considered to be communicating with an official described in 5 U.S.C. 5312-5316 if the communication is made to a subordinate of such official with the intent that the information be conveyed directly to the official and attributed to the former very senior employee. Both commenters objected to this conclusion on the same grounds on which they objected to similar provisions in proposed § 2641.201(d) and (f), i.e., they disagreed that a prohibited communication could include a communication conveyed through a third party to an officer or employee of the United States. As discussed in the preamble to the proposed rule, 68 FR 7860, the principle that section 207 may cover certain communications conveyed through a third party is supported by a 2001 opinion issued by the Office of Legal Counsel. Memorandum for Amy L. Comstock, Director, OGE, from Joseph R. Guerra, Deputy Assistant Attorney General, OLC, January 19, 2001, available under "Other Ethics Guidance, Conflict of Interest Prosecution Surveys and OLC Opinions" on OGE's Web site, <http://www.usoge.gov>.

The rationale is further discussed above, under "Section 2641.201(d)—Communication or Appearance" and "Section 2641.201(f)—To or Before an Employee of the United States." For these reasons, OGE has retained the explanatory note to paragraph (g) of § 2641.205 and example 5 to that section in this final rule. OGE has, however, made minor changes to example 5, including an additional sentence at the end of the example, to emphasize that the circumstances indicate the former very senior employee intends that the information he provides to the subordinate will be conveyed directly to

the Secretary of Labor and attributed to the former senior employee; these changes are consistent with the language of the explanatory note.

Finally, subsequent to the publication of the proposed rule, Congress amended 18 U.S.C. 207(d) to extend the cooling-off period for very senior employees from one year to two years. See Public Law 110–81, § 101(a), September 14, 2007. Therefore, § 2641.205 has been modified in the final rule to replace all references to a one-year cooling-off period with references to a two-year period. The two-year restriction provided in the amendments to 18 U.S.C. 207(d) is applicable to very senior employees who “who leave Federal office or employment to which such amendments apply on or after * * * December 31, 2007.” Public Law 110–81, section 105(a). Very senior employees who left office or employment prior to this effective date remain subject to the previous one-year restriction.

Section 2641.206—Foreign Entity Restriction

Three DOD components submitted virtually identical comments on proposed § 2641.206, pertaining to the foreign entity restriction found in 18 U.S.C. 207(f). They pointed out that recitation of the basic prohibition, in proposed § 2641.201(a), does not reproduce the statutory language limiting the restriction on representation of foreign entities to representation before “an officer or employee of any department or agency of the United States.” The omission of the language cited by these commenters was inadvertent, and OGE agrees that the rule as proposed should be changed and has done so in this final rule to reflect more clearly the statutory language. It should be noted, however, that this change will not affect the final rule’s treatment of the separate prohibition on aiding and advising foreign entities.

Additionally, OGE has modified proposed § 2641.206(a) in this final rule to reflect subsequent guidance provided by the Office of Legal Counsel in a 2004 opinion issued to OGE. Memorandum of Renée Lettow Lerner, Deputy Assistant Attorney General, for Marilyn L. Glynn, Acting Director, OGE, June 22, 2004, available at http://www.usoge.gov/pages/laws_regs_fedreg_stats/lrfs_files/othr_gdnc/olc_06_22_04.pdf.

This opinion concludes that 18 U.S.C. 207(f) prohibits covered former employees from representing a foreign entity before Members of Congress. The opinion cites the language in section 207(i)(1)(B), which indicates that

Members of Congress are included in the term “officer or employee” for purposes of describing the persons to whom representational contacts may not be made under section 207(f). In this connection, the opinion also concludes that the term “department,” as included in the language of section 207(f) prohibiting representational contact with an “officer or employee of any department or agency,” includes the legislative department, *i.e.*, the legislative branch of the Federal Government. OGE has reworked the final rule consistent with the OLC opinion.

Section 2641.207—Information Technology Exchange Program Assignee Restriction

The final rule includes a new section, § 2641.207, which provides a brief description of a new restriction in 18 U.S.C. 207(l) that became effective after the proposed rule was published. Section 209(c) of the E-Government Act of 2002, Public Law 107–347, December 17, 2002, created the Information Technology Exchange Program. Under this new program, an agency and a “private sector organization” may agree to the assignment of certain information technology personnel from the private sector organization to the agency for a period of time. Section 209(d)(3) of the Act amended 18 U.S.C. 207 by adding a new section (l), which applies to former assignees to an agency under the program. Specifically, section 207(l) prohibits these former assignees, for one year after the termination of their assignment, from representing or aiding, counseling or assisting in representing any other person in connection with any contract with their former agency.

Section 2641.207 is not intended to provide comprehensive guidance with respect to 18 U.S.C. 207(l). Rather, it is intended to provide a basic description of the restriction, and consequently paragraphs (d) and (e) are reserved. As OGE and other officials in the executive branch acquire more experience with the operation of the Information Technology Exchange Program and the post-employment issues related to former private sector assignees under the program, it is expected that OGE will revisit the reserved provisions.

Subpart C—Exceptions, Waivers and Separate Components

Section 2641.301—Statutory Exceptions and Waivers

Section 2641.301(a)—Action on Behalf of United States

Section 2641.301(a) interprets both the exemption in 18 U.S.C. 207(j)(1) for

acts done in carrying out official duties on behalf of the United States and the parenthetical exemption, found in sections 207(a), (b), (c), and (d), for communications and appearances on behalf of the United States. One agency recommended that the rule as proposed be revised to permit certain communications and appearances made by a former employee during the performance of a contract with the Government. Specifically, this agency argued that communications made to perform contracts pertaining to “internal agency operations” would be analogous to the other types of activities recognized to be on behalf the United States in proposed § 2641.301(a)(2).

For the reasons discussed above, under “Section 2641.201(e)—Intent to Influence,” we do not view contacts made during the performance of a Government contract to be free from the concerns at which section 207 is directed. As we indicated in that earlier discussion, the Government and its contractors have their own interests in the performance of a contract, which are not necessarily identical. Moreover, as we discussed in the preamble to the proposed rule, not all contractors agree to represent or act on behalf of the Government. See 68 **Federal Register** at 7862. Accordingly, with the exception of the one change discussed in the next paragraph, OGE has not modified the text of § 2641.301(a) in adopting it as final in this rulemaking document.

We have made one change, however, to the language of § 2641.301(a)(2)(ii)(1). As proposed, this provision required that the activity be undertaken as a “representative of the United States pursuant to a specific agreement with the United States to provide representational services *involving a fiduciary duty* to the United States” (emphasis added). The final rule omits the phrase pertaining to fiduciary services. OGE has made this change so that this provision will more closely parallel the provision in the rule in which OGE states what it means for a former employee to act “on behalf of” another person, § 2641.201(g)(1). Although the latter provision describes a number of circumstances that no doubt involve fiduciary duties, the rule does not require a showing that a former employee has fiduciary duties in order to be acting on behalf of another person. Since the same statutory language is at issue in § 2641.301(a)(2), OGE has concluded that it is unnecessary to include the fiduciary duty phrase in this provision. The practical effect of this change may not be great, as we would expect that most instances in which there is a specific agreement to provide

representational services to the United States will involve some kind of fiduciary relationship, such as a contract to provide legal services to the Government.

Another agency proposed that OGE add a new example following § 2641.301(a) to illustrate that the representation of a “co-party,” such as a co-defendant in a lawsuit in which the United States also is a defendant, does not constitute acting on behalf of the United States. This agency reported that former employees frequently assume, erroneously, that they may represent a co-party with the United States because they do not see this as switching sides. OGE certainly agrees that the representation of a co-party does not constitute acting on behalf of the United States. OGE is not sure, however, how frequently this is misunderstood. Moreover, the potential for misunderstanding is diminished by § 2641.301(a)(2)(B), which states that a “former employee will not be deemed to engage in an activity on behalf of the United States merely because * * * he or the person on whose behalf he is acting may share the same objective as the Government.” OGE also notes that there are already seven examples following paragraph (a) of § 2641.301. Therefore, OGE has determined that the proposed new example is not necessary and has not made the recommended change in this final rule.

Section 2641.301(b)—Acting as Elected Official of State or Local Government

One agency commented on proposed § 2641.301(b), which interprets the part of 18 U.S.C. 207(j)(1) that excepts acts done in carrying out official duties as an elected official of a State or local government. The commenter objected to example 2 following the proposed provision. Example 2 states that a former employee who serves in a non-elective position with a State government is not eligible for this exception. The commenter stated that the proposed communication in that example is otherwise permissible under a different exception—18 U.S.C. 207(j)(2)(A), as implemented by proposed 5 CFR 2641.301(c)—and recommended that OGE use a different scenario that is not covered by some other exception. OGE does not agree that the scenario in proposed example 2 would be covered by the exception in section 207(j)(2)(A) and, therefore, is not changing this example in the final rule. In this example, the individual had participated personally and substantially as a Federal employee in the decision to award a grant to a state for a particular construction project. The

exception in section 207(j)(2)(A) does not apply to the permanent restriction on representation of others in connection with particular matters involving specific parties in which the former employee participated personally and substantially.

Section 2641.301(c)—Representation of Specified Entities

Two agencies commented on proposed section 2641.301(c), which interprets 18 U.S.C. 207(j)(2), the exception to the prohibitions of section 207(c) and (d) for representation of certain specified entities. One agency requested that OGE provide an additional example to illustrate the scope of the exception for representation as an employee of an “accredited, degree-granting institution of higher education, as defined in section 101 of the Higher Education Act of 1965 [20 U.S.C. 1001].” Section 207(j)(2)(B). Specifically, this commenter requested a new example “clarifying” that private colleges are included in the definition. OGE does not believe that an additional example is necessary and has not added one in the final rule. The definition of institution of higher education, which is referenced in both the rule and the statute, makes clear that both “public” and “other nonprofit” institutions are covered. 20 U.S.C. 1001(a)(4). Moreover, if only public institutions, and not private colleges, were included in section 207(j)(2)(B), the provision would be surplusage, as section 207(j)(2)(A) already covers “an agency or instrumentality of a State or local government.”

As discussed above, under “Section 2641.301(b)—Acting as Elected Official of State or Local Government,” another agency suggested that the exception in section 207(j)(2)(A) would cover activity otherwise prohibited by the permanent restriction in section 207(a)(1). It bears repeating that section 207(j)(2)(A)—unlike the exception for actions as an elected State or local government official in section 207(j)(1)—is not an exception to the permanent restriction or any other prohibition applicable to executive branch personnel besides the cooling-off provisions in section 207(c) and (d).

Section 2641.301(d)—Uncompensated Statements Based on Special Knowledge

Two agencies commented on § 2641.301(d) as proposed, interpreting the exception in 18 U.S.C. 207(j)(4). One agency objected that the proposed definition of “statement” is too narrow. Proposed § 2641.301(d) provides that a “statement for purposes of this

paragraph is a communication of facts directly observed by the former employee.” The commenter asserted that this definition would preclude certain “innocent” communications that are not, strictly speaking, facts that the former employee observed, “such as a statement defining a technical principle or asserting that the principle is widely interpreted a certain way.”

OGE acknowledges that its interpretation of the exception for statements based on special knowledge is relatively narrow, but this is consistent with the history of the provision. As discussed more fully in the preamble to the proposed rule, this exception was originally provided in the 1978 Act to mitigate the impact of the new senior employee cooling-off restriction, which then prohibited even self-representation. 68 **Federal Register** 7863. After section 207(c) was amended in 1989 to remove the ban on self-representation, the need for reliance on the special knowledge exception was greatly reduced, and OGE believes it would undermine the purposes of section 207(c) to take an expansive view of the exception that would allow a wide range of representational activity solely on the ground that the former employee has personal familiarity with certain “principles.” Moreover, OGE notes that its definition of “statement” is not unusual. See *Black’s Law Dictionary* 1263 (1979) (“a declaration of matters of fact”). That is not to say that a statement of fact would fall outside the scope of the exception simply because the former employee made incidental references to certain principles necessary to understand the significance of the facts conveyed. Nevertheless, in view of the fact that the statute already contains other exceptions allowing “expert” communications under carefully limited circumstances—e.g., 18 U.S.C. 207(j)(5), (6)(A)—OGE cannot read section 207(j)(4) as a broad license for former employees to engage in communications focusing on general principles with which they may claim some particular expertise. However, recognizing that statements based on inferences from facts observed by a former employee may be permissible, OGE has revised the text of § 2641.301(d)(2) by removing the word “directly.”

A second agency proposed that OGE include an express statement, either in a note or in the text of section 2641.301(d), to the effect that “statements and opinions made on one’s own behalf are not prohibited.” OGE has not followed this recommendation in the final rule. The provisions stating the basic prohibitions to which this

exception applies are quite clear in excluding self-representation. *See* § 2641.201(g)(2), as referenced in §§ 2641.204(h) and 2641.205(h).

Section 2641.301(e)—Scientific or Technological Information

Two agencies commented on proposed § 2641.301(e), which implements the exception in 18 U.S.C. 207(j)(5) for communicating scientific or technological information. One agency recommended that OGE remove a parenthetical reference in proposed § 2641.301(e)(5)(iii)(E) to a deputy or acting head of an agency, since there are no other references to deputy or acting agency heads in the provision. By technical correction published in the **Federal Register** on March 31, 2003, 68 FR 15385, OGE already removed this phrase from the proposed rule as “unintended text.”

Another agency commented on the list of possible considerations for agency procedures in § 2641.301(e)(4)(i) as proposed. The agency recommended that OGE specify, in § 2641.301(e)(4)(i)(B), when a former employee must give notice that he or she is invoking the exemption pursuant to agency procedures. OGE does not agree with this recommendation and is adopting this section as final without change. It is not OGE’s intent to mandate any particular procedures for agencies that wish to implement section 207(j)(5) through agency procedures. The statute itself specifies that the procedures must be “acceptable to the department or agency concerned.” Agencies may well have different preferences with respect to the timing of any notices or the need for any such notices at all.

Section 2641.301(f)—Testimony Under Oath and Statements Under Penalty of Perjury

One agency commented on proposed § 2641.301(f), which interprets the exception in 18 U.S.C. 207(j)(6) for testimony under oath and statements required to be made under the penalty of perjury. The agency referenced § 2641.301(f)(2)(ii), which deals with the limitation, found in section 207(j)(6)(A), on service as an expert witness in matters covered by the permanent ban in section 207(a)(1). This provision states that the limitation on expert testimony may be lifted by court order and then specifies that neither a subpoena nor a court order qualifying an individual as an expert satisfies the court order requirement in section 207(j)(6)(A). The commenter asked that OGE address specifically whether experts appointed by a court itself,

pursuant to Rule 706 of the Federal Rules of Evidence, would be covered by the “pursuant to court order” language in the exception.

In adopting § 2641.301(f) as final, OGE has not changed the rule text as proposed to address this subject. By its own terms, Rule 706 does not displace authorities permitting parties to call “expert witnesses of their own selection.” Rule 706(d). Under Rule 706, court-appointed experts may be appointed by the court either upon the motion of the parties or upon the court’s own motion, and the latter may be either with or without nominations by the parties. Rule 706 also contemplates that the parties may agree upon an expert to be appointed by the court. Furthermore, Rule 706 provides that the appointed expert then may be called to testify by either party, or by the court itself, and that either party may cross-examine the expert, including that party that called the expert as a witness. Under some or all of these possible scenarios, there may be questions as to whether 18 U.S.C. 207(a)(1) even applies in the first place, as it may not be clear whether the court-appointed experts are acting “on behalf of” any party within the meaning of the statute. *See* § 2641.201(g). OGE does not believe this regulation is the appropriate place to opine generally about Rule 706. Such questions as may actually arise can be handled on a case-by-case basis.

The same agency also commented on the relationship between section 207(j)(6) and a provision in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450i(j), which is listed as a miscellaneous statutory exception in section 2641.301(k) of the proposed rule. This comment is addressed below, under “Section 2641.301(k)—Miscellaneous Statutory Exemptions.”

Section 2641.301(h)—Acting on Behalf of International Organization

OGE received one comment on proposed § 2641.301(h), which concerns the provision in 18 U.S.C. 207(j)(3) for waivers issued by the Secretary of State to permit former employees to represent, aid or advise an international organization in which the United States participates. The comment, from the Department of State, suggested that a statement in the preamble to the proposed rule, to the effect that the “Secretary of State has issued several section 207(j)(3) waivers,” does not completely reflect the actual operation of this provision in the Department. 68 **Federal Register** 7866. Specifically, the comment pointed out that the Secretary of State had delegated the authority to

issue such waivers to the Assistant Secretary for International Affairs, who has issued a number of waivers. OGE takes notice of this delegation, which was issued by the Secretary of State in 1992.

The same commenter objected to the language of the proposed rule stating that “the Secretary of State may grant a former employee a waiver.” Proposed § 2641.301(h)(1) (emphasis added). The commenter pointed out that the statutory provision itself does not even use the phrase “former employee” or otherwise specify that a waiver must be issued to a former employee, as opposed to a current employee who has plans for post-employment activity on behalf of an international organization. The commenter noted that “207(j)(3) certifications are usually issued prior to the employees’ departure from U.S. Government service, to apply prospectively with the employees’ taking up of the position at the international organization.” The commenter recommended that OGE use the following substitute language in the first sentence of § 2641.301(h)(1): “(1) The Secretary of State may grant an individual certification that one or more of the restrictions in 18 U.S.C. 207 not apply where the former employee would act on behalf of, or provide advice or aid to, an international organization in which the United States participates.”

OGE has largely adopted the recommended language in this final rule, with minor modifications for the sake of consistency with the statutory language and the treatment of other waiver provisions in subpart C of the rule: “(1) The Secretary of State may grant an individual waiver of one or more of the restrictions in 18 U.S.C. 207 where the former employee would appear or communicate on behalf of, or provide aid or advice to, an international organization in which the United States participates.” OGE recommends, however, that any current employees who receive such waivers be counseled that the waivers permit only certain activities covered by section 207 and do not affect any restrictions still applicable to current employees under 18 U.S.C. 203 and 205.

Section 2641.301(j)—Waiver of Certain Senior Positions

In this final rule, OGE has modified the proposed version of § 2641.301(j), which pertains to the authority of OGE, under 18 U.S.C. 207(c)(2)(C), to waive the application of section 207(c) and (f) with respect to certain senior positions. The revisions were necessary because, as described above in connection with

the definition of "senior employee," a new category of senior employee was added by the E-Government Act of 2002. *See* 18 U.S.C. 207(c)(2)(A)(v). This new category, assignees from private organizations under the Information Technology Exchange Program, is not covered by the position waiver provision in section 207(c)(2)(C). Therefore, this section of the rule being adopted as final has been changed to make clear that assignees under the Information Technology Exchange Program may not benefit from a position waiver.

Section 2641.301(k)—Miscellaneous Statutory Exemptions

Proposed § 2641.301(k) lists statutes, other than section 207 itself, that provide relief from the post-employment restrictions. OGE specifically invited commenters on the proposed rule to review the list of miscellaneous statutory exceptions and suggest modifications or additions, in part because such provisions occasionally are enacted as part of organic acts and other legislation not primarily focused on conflict of interest subjects. 68 **Federal Register** 7868.

Only one agency responded to this invitation, and it proposed the addition of three statutory provisions. Two of those statutes, however, do not actually provide exceptions to the prohibitions of 18 U.S.C. 207, but rather add certain post-employment restrictions or requirements for employees in specific positions or agencies. *See* Public Law 99–239, section 107 (1986) (extending certain provisions of section 207(b), as it then read, with respect to persons involved in Micronesian status negotiations or Micronesian Interagency Group); Public Law 104–293, section 402 (1996) (requiring agreements restricting post-employment activities of Central Intelligence Agency employees). Consequently, OGE does not believe it would be appropriate to list these statutes in a provision devoted to "Miscellaneous statutory exceptions." The third statute suggested by the commenter, Public Law 97–241, section 120 (1982), is an actual exception to section 207. The exception is applicable to private sector representatives, designated to speak on behalf of or otherwise represent the interests of the United States on a United States delegation to an international telecommunication meeting or conference, provided that the Secretary of State (or a designee) certifies that no Government employee on the delegation is well qualified to represent United States interests with respect to such matter and that the designation serves

the national interest. OGE has added a new paragraph (k)(8) to § 2641.301 of this final rule to reflect this statutory exemption.

Another agency submitted detailed comments on proposed § 2641.301(k)(4), which lists a statutory exception, found in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450i(j), for certain activity on behalf of Indian tribal organizations and inter-tribal consortia. Among other things, the commenter recommended that OGE's rule "elaborate" on the scope of coverage of this provision, explain the effect of a notice requirement specified in the provision, clarify the applicability of this provision to expert testimony, and reflect the charging practices of the Department of Justice. OGE has not made these recommended changes in the final rule. OGE does not believe that part 2641 is the appropriate place to provide detailed guidance concerning the Indian Self-Determination and Education Assistance Act. The rule as proposed and as now being adopted as final does not contemplate detailed guidance with respect to any of the miscellaneous provisions not set out in section 207 itself. (As noted below, section 207 now has been amended to add a cross-reference to the provision in the Indian Self-Determination and Education Assistance Act, but the substance of the exception continues to be set out in the latter, rather than in section 207.) Section 2641.301(k) is intended simply to alert readers to the general substance of certain exceptions that would not be apparent from a reading of section 207 alone. Moreover, with respect to the Indian Self-Determination and Education Assistance Act specifically, we have stated that "this statute would normally be interpreted by the Office of the Solicitor of the Department of the Interior," OGE Informal Advisory Letter 82 x 11, and we ordinarily would not address significant legal issues arising under the statute without the benefit of review by that Department. In this connection, we note that the Department of the Interior did not comment on proposed § 2641.301(k)(4).

Finally, subsequent to the publication of the proposed rule and the receipt of comments, Congress amended the exception in the Indian Self-Determination and Education Assistance Act, and also added a cross-reference to this provision in 18 U.S.C. 207(j)(1)(B). *See* Public Law 110–81, section 104, September 14, 2007. The general description of this exception in § 2641.301(k)(4) has been modified accordingly.

Section 2641.301(l)—Guide to Available Exceptions and Waivers

OGE has revised the chart set out at § 2641.301(l) as proposed by adding a new column indicating which exemption or waiver provisions are applicable to the new restriction, 18 U.S.C. 207(l), with regard to private sector assignees under the Information Technology Exchange Program.

Appendix A—Positions Waived Pursuant to 18 U.S.C. 207(c)(2)(C)

Appendix A of part 2641 lists those positions that have been waived by OGE, pursuant to its authority under 18 U.S.C. 207(c)(2)(C). Regulations implementing this provision have been previously codified at 5 CFR 2641.201(d) and will be set forth in § 2641.301(j) of this final rule once it becomes effective on July 25, 2008.

Subsequent to the proposed rule, OGE revised the list of waived positions in appendix A. *See* 72 FR 10339–10342 (March 8, 2007). This final rule therefore reflects the revised list.

Appendix B—Agency Components for Purposes of 18 U.S.C. 207(c)

OGE received comments from one agency concerning appendix B to part 2641, which sets out agency components that have been designated by OGE, pursuant to 18 U.S.C. 207(h), as separate agencies, for purposes of the one-year cooling-off restriction for senior employees. The comments proposed certain amendments to the list of components for this agency. It was not OGE's intent to use this rulemaking as the vehicle to add or delete components in appendix B. OGE requires that agencies submit annual updates verifying the accuracy and appropriateness of the list of components and has made numerous additions and deletions with respect to the list since 1991, as described above and in the preamble to the proposed rule. 68 **Federal Register** 7844. OGE contacted this commenting agency and advised that its proposed amendments to appendix B would be considered separately, in connection with OGE's annual review of agency submissions.

Therefore, Appendix B is revised as proposed, except that the final rule also reflects amendments to Appendix B made by final rules published on November 23, 2004, March 8, 2007, and March 6, 2008, which were issued subsequent to the proposed rule. *See* 69 FR 68053–68056 (November 23, 2004); 72 FR 10339–10342 (March 8, 2007); 73 FR 12007–12009 (March 6, 2008).

III. Matters of Regulatory Procedure

Regulatory Flexibility Act

As Director of OGE, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this rule will not have a significant economic impact on a substantial number of small entities because it affects only current and former Federal employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this rule because it does not contain an information collection requirement that requires the approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this final rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will submit a report thereon to the U.S. Senate, House of Representatives and Government Accountability Office in accordance with that law at the same time this rulemaking document is sent to the Office of the Federal Register for publication in the **Federal Register**.

Executive Order 12866

In promulgating this final rule, OGE has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This rule has also been reviewed by the Office of Management and Budget under that Executive order. Moreover, in accordance with section 6(a)(3)(B) of E.O. 12866, the preamble to this final regulation notes the legal basis and benefits of, as well as the need for, the regulatory action. There should be no appreciable increase in costs to OGE or the executive branch of the Federal Government in administering the final rule because provisions only concern the current post-employment law in effect. Finally, this rulemaking is not economically significant under the Executive Order and will not interfere with State, local or tribal governments.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this final regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Parts 2637 and 2641

Conflict of interests, Government employees.

Approved: June 4, 2008.

Robert I. Cusick,

Director, Office of Government Ethics.

■ Accordingly, for the reasons set forth in the preamble, under the authority of 5 U.S.C. App. (Ethics in Government Act of 1978), 18 U.S.C. 207, and Executive Order 12674, as modified by Executive Order 12731, the Office of Government Ethics is amending 5 CFR chapter XVI as follows.

- 1. Part 2637 is removed; and
- 2. Part 2641 is revised to read as follows:

PART 2641—POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS

Subpart A—General Provisions

Sec.

- 2641.101 Purpose.
- 2641.102 Applicability.
- 2641.103 Enforcement and penalties.
- 2641.104 Definitions.
- 2641.105 Advice.
- 2641.106 Applicability of certain provisions to Vice President.

Subpart B—Prohibitions

- 2641.201 Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially.
- 2641.202 Two-year restriction on any former employee's representations to United States concerning particular matter for which the employee had official responsibility.
- 2641.203 One-year restriction on any former employee's representations, aid, or advice concerning ongoing trade or treaty negotiation.
- 2641.204 One-year restriction on any former senior employee's representations to former agency concerning any matter, regardless of prior involvement.
- 2641.205 Two-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement.
- 2641.206 One-year restriction on any former senior or very senior employee's representations on behalf of, or aid or advice to, foreign entity.
- 2641.207 One-year restriction on any former private sector assignee under the

Information Technology Exchange Program representing, aiding, counseling or assisting in representing in connection with any contract with former agency.

Subpart C—Exceptions, Waivers and Separate Components

- 2641.301 Statutory exceptions and waivers.
- 2641.302 Separate agency components.
- Appendix A to Part 2641—Positions Waived From 18 U.S.C. 207(c) and (f)
- Appendix B to Part 2641—Agency Components for Purposes of 18 U.S.C. 207(c)

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

Subpart A—General Provisions

§ 2641.101 Purpose.

18 U.S.C. 207 prohibits certain acts by former employees (including current employees who formerly served in "senior" or "very senior" employee positions) which involve, or may appear to involve, the unfair use of prior Government employment. None of the restrictions of section 207 prohibits any former employee, regardless of Government rank or position, from accepting employment with any particular private or public employer. Rather, section 207 prohibits a former employee from providing certain services to or on behalf of non-Federal employers or other persons, whether or not done for compensation. These restrictions are personal to the employee and are not imputed to others. (*See, however, the note following § 2641.103 concerning 18 U.S.C. 2.*)

(a) This part 2641 explains the scope and content of 18 U.S.C. 207 as it applies to former employees of the executive branch or of certain independent agencies (including current employees who formerly served in "senior" or "very senior" employee positions). Although certain restrictions in section 207 apply to former employees of the District of Columbia, Members and elected officials of the Congress and certain legislative staff, and employees of independent agencies in the legislative and judicial branches, this part is not intended to provide guidance to those individuals.

(b) Part 2641 does not address post-employment restrictions that may be contained in laws or authorities other than 18 U.S.C. 207. These restrictions include those in 18 U.S.C. 203 and 41 U.S.C. 423(d).

§ 2641.102 Applicability.

Since its enactment in 1962, 18 U.S.C. 207 has been amended several times. As a consequence of these amendments,

former executive branch employees are subject to varying post-employment restrictions depending upon the date they terminated Government service (or service in a "senior" or "very senior" employee position).

(a) *Employees terminating on or after January 1, 1991.* Former employees who terminated or employees terminating Government service (or service in a "senior" or "very senior" employee position) on or after January 1, 1991, are subject to the provisions of 18 U.S.C. 207 as amended by the Ethics Reform Act of 1989, title I, Public Law 101-194, 103 Stat. 1716 (with amendments enacted by Act of May 4, 1990, Pub. L. 101-280, 104 Stat. 149) and by subsequent amendments. This part 2641 provides guidance concerning section 207 to these former employees.

(b) *Employees terminating between July 1, 1979 and December 31, 1990.* Former employees who terminated service between July 1, 1979, and December 31, 1990, are subject to the provisions of section 207 as amended by the Ethics in Government Act of 1978, title V, Public Law 95-521, 92 Stat. 1864 (with amendments enacted by Act of June 22, 1979, Pub. L. 96-28, 93 Stat. 76). Regulations providing guidance concerning 18 U.S.C. 207 to these employees were last published in the 2008 edition of title 5 of the Code of Federal Regulations, revised as of January 1, 2008.

(c) *Employees terminating prior to July 1, 1979.* Former employees who terminated service prior to July 1, 1979, are subject to the provisions of 18 U.S.C. 207 as enacted in 1962 by the Act of October 23, 1962, Public Law 87-849, 76 Stat. 1123.

Note to § 2641.102: The provisions of this part 2641 reflect amendments to 18 U.S.C. 207 enacted subsequent to the Ethics Reform Act of 1989 and before July 25, 2008. An employee who terminated Government service (or service in a "senior" or "very senior" employee position) between January 1, 1991, and July 25, 2008 may have become subject, upon termination, to a version of the statute that existed prior to the effective date of one or more of those amendments. Those amendments concerned (1) changes, effective in 1990, 1996, and 2004 concerning the rate of basic pay triggering "senior employee" status for purposes of section 207(c); (2) the reinstatement and subsequent amendment of the Presidential waiver authority in section 207(k); (3) the length of the restriction set forth in section 207(f) as applied to a former United States Trade Representative or Deputy United States Trade Representative; (4) the addition of section 207(j)(7), an exception to section 207(c) and (d); (5) a change to section 207(j)(2)(B), an exception to section 207(c) and (d); (6) the addition of assignees under the Information Technology Exchange Program to the categories of "senior

employee" for purposes of section 207(c); (7) the addition of section 207(l), applicable to former private sector assignees under the Information Technology Exchange Program; (8) a change to the length of the restriction set forth in section 207(d); and (9) the addition of a cross-reference in section 207(j)(1)(B) to a revised exception in the Indian Self-Determination and Education Assistance Act.

§ 2641.103 Enforcement and penalties.

(a) *Enforcement.* Criminal and civil enforcement of the provisions of 18 U.S.C. 207 is the responsibility of the Department of Justice. An agency is required to report to the Attorney General any information, complaints or allegations of possible criminal conduct in violation of title 18 of the United States Code, including possible violations of section 207 by former officers and employees. See 28 U.S.C. 535. When a possible violation of section 207 is referred to the Attorney General, the referring agency shall concurrently notify the Director of the Office of Government Ethics of the referral in accordance with 5 CFR 2638.603.

(b) *Penalties and injunctions.* 18 U.S.C. 216 provides for the imposition of one or more of the following penalties and injunctions for a violation of section 207:

(1) *Criminal penalties.* 18 U.S.C. 216(a) sets forth the maximum imprisonment terms for felony and misdemeanor violations of section 207. Section 216(a) also provides for the imposition of criminal fines for violations of section 207. For the amount of the criminal fines that may be imposed, see 18 U.S.C. 3571.

(2) *Civil penalties.* 18 U.S.C. 216(b) authorizes the Attorney General to take civil actions to impose civil penalties for violations of section 207 and sets forth the amounts of the civil fines.

(3) *Injunctive relief.* 18 U.S.C. 216(c) authorizes the Attorney General to seek an order from a United States District Court to prohibit a person from engaging in conduct which violates section 207.

(c) *Other relief.* In addition to any other remedies provided by law, the United States may, pursuant to 18 U.S.C. 218, void or rescind contracts, transactions, and other obligations of the United States in the event of a final conviction pursuant to section 207, and recover the amount expended or the thing transferred or its reasonable value.

Note to § 2641.103: A person or entity who aids, abets, counsels, commands, induces, or procures commission of a violation of section 207 is punishable as a principal under 18 U.S.C. 2.

§ 2641.104 Definitions.

For purposes of this part:

Agency means any department, independent establishment, commission, administration, authority, board or bureau of the United States or Government corporation. The term includes any independent agency not in the legislative or judicial branches.

Agency ethics official means the designated agency ethics official (DAEO) or the alternate DAEO, appointed in accordance with 5 CFR 2638.202(b), and any deputy ethics official described in 5 CFR 2638.204.

Department means one of the executive departments listed in 5 U.S.C. 101.

Designated agency ethics official (DAEO) means the official designated under 5 CFR 2638.201 to coordinate and manage an agency's ethics program.

Employee means, for purposes of determining the individuals subject to 18 U.S.C. 207, any officer or employee of the executive branch or any independent agency that is not a part of the legislative or judicial branches. The term does not include the President or the Vice President, an enlisted member of the Armed Forces, or an officer or employee of the District of Columbia. The term includes an individual appointed as an employee or detailed to the Federal Government under the Intergovernmental Personnel Act (5 U.S.C. 3371-3376) or specifically subject to section 207 under the terms of another statute. It encompasses senior employees, very senior employees, special Government employees, and employees serving without compensation. (This term is redefined elsewhere in this part, as necessary, when the term is used for other purposes.)

Executive branch includes an executive department as defined in 5 U.S.C. 101, a Government corporation, an independent establishment (other than the Government Accountability Office), the Postal Service, the Postal Regulatory Commission, and also includes any other entity or administrative unit in the executive branch.

Former employee means an individual who has completed a period of service as an employee. Unless otherwise indicated, the term encompasses a former senior employee and a former very senior employee. An individual becomes a former employee at the termination of Government service, whereas an individual becomes a former senior employee or a former very senior employee at the termination of service in a senior or very senior employee position.

Example 1 to the definition of former employee: An individual served as an employee of the Agency for International Development, an agency within the executive branch. Since he was, therefore, an "employee" as that term is defined in this section by virtue of having served in the executive branch, he became a "former employee" when he terminated Government service to pursue his hobbies.

Example 2 to the definition of former employee: An individual served as an employee of the Tennessee Valley Authority (TVA). Since the TVA is a corporation owned or controlled by the Government of the United States, she served as an employee in the "executive branch" as that term is defined in this section. She became a "former employee," therefore, when she terminated Government service to do some traveling.

Example 3 to the definition of former employee: An individual terminated a GS-14 position in the executive branch to accept a position in the legislative branch. He did not become a "former employee" when he terminated service in the executive branch since he did not terminate "Government service" as that term is defined in this section.

Example 4 to the definition of former employee: An individual is appointed by the President to serve as a special Government employee on the Oncological Drug Advisory Committee at the Department of Health and Human Services. The special Government employee meets with the committee five days per year. She does not terminate Government service at the end of each meeting of the committee and therefore does not at that time become a "former employee." She becomes a "former employee" when her appointment terminates, provided that she is not reappointed without break in service to the same or another Federal Government position.

Example 5 to the definition of former employee: An individual is a Major in the U.S. Army Reserve. The Major earns points toward retirement by participating in weekend drills and performing active duty for training for two weeks each year. The Major is not a special Government employee when he performs weekend drills, but is considered to be one while on active duty for training. The Major is considered to be a "former employee" when he terminates each period of active duty for training.

Example 6 to the definition of former employee: A foreign service officer served as a "senior employee" of the Department of State. After retiring, and with no break in service, he accepted a civil service appointment on a temporary basis, at the GS-15 level. Since he did not terminate Government service, he did not become a "former employee" when he retired from the foreign service. He did, however, become a "former senior employee."

Former senior employee is an individual who terminates service in a senior employee position (without successive Government service in another senior position).

Former very senior employee is an individual who terminates service in a

very senior employee position (without successive Government service in another very senior employee position).

Government corporation means, for purposes of determining the individuals subject to 18 U.S.C. 207, a corporation that is owned or controlled by the Government of the United States. For purposes of identifying or determining individuals with whom post-employment contact is restricted, matters to which the United States is a party or has a direct and substantial interest, decisions which a former senior or very senior employee cannot seek to influence on behalf of a foreign entity, and whether a former employee is acting on behalf of the United States, it means a corporation in which the United States has a proprietary interest as distinguished from a custodial or incidental interest as shown by the functions, financing, control, and management of the corporation.

Government service means a period of time during which an individual is employed by the Federal Government without a break in service. As applied to a special Government employee (SGE), Government service refers to the period of time covered by the individual's appointment or appointments (or other act evidencing employment with the Government), regardless of any interval or intervals between days actually served. See example 4 to the definition of former employee in this section. In the case of Reserve officers of the Armed Forces or officers of the National Guard of the United States who are not otherwise employees of the United States, Government service shall be considered to end upon the termination of a period of active duty or active duty for training during which they served as SGEs. See example 5 to the definition of former employee in this section.

He, his, and him include she, hers, and her, and vice versa.

Judicial branch means the Supreme Court of the United States; the United States courts of appeals; the United States district courts; the Court of International Trade; the United States bankruptcy courts; any court created pursuant to Article I of the United States Constitution, including the United States Court of Appeals for the Armed Forces, the United States Claims Court, and the United States Tax Court, but not including a court of a territory or possession of the United States; the Federal Judicial Center; and any other agency, office, or entity in the judicial branch.

Legislative branch means the Congress; it also means the Office of the Architect of the Capitol, the United

States Botanic Garden, the Government Accountability Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the United States Capitol Police, and any other agency, entity, office, or commission established in the legislative branch.

Person includes an individual, corporation, company, association, firm, partnership, society, joint stock company, or any other organization, institution, or entity, including any officer, employee, or agent of such person or entity. Unless otherwise indicated, the term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State and local governments. The term includes the "United States" as that term is defined in § 2641.301(a)(1).

Senior employee means an employee, other than a very senior employee, who is:

(1) Employed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311-5318 (the Executive Schedule);

(2) Employed in a position for which the employee is paid at a rate of basic pay which is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule; or, for a period of two years following November 24, 2003, was employed on November 23, 2003 in a position for which the rate of basic pay was equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service; for purposes of this paragraph, "rate of basic pay" does not include locality-based adjustments or additional pay such as bonuses, awards and various allowances;

(3) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(B);

(4) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(B);

(5) An active duty commissioned officer of the uniformed services serving in a position for which the pay grade (as specified in 37 U.S.C. 201) is pay grade O-7 or above; or

(6) Assigned from a private sector organization under chapter 37 of 5 U.S.C. (Information Technology Exchange Program).

Example 1 to the definition of senior employee: A former administrative law judge serves on a commission created within the executive branch to adjudicate certain claims arising from a recent military operation. The position is uncompensated but the judge receives travel expenses. The judge is not employed in a position for which the rate of pay is specified in or fixed according to the Executive Schedule, is not serving in a

position to which he was appointed by the President or Vice President under 3 U.S.C. 105(a)(2)(B) or 106(a)(1)(B), and is not employed in a position for which his rate of basic pay is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule. He is not a senior employee.

Example 2 to the definition of senior employee: A doctor is hired to fill a "senior-level" position and is initially compensated pursuant to 5 U.S.C. 5376 at a rate of basic pay slightly less than 86.5 percent of the rate of basic pay payable for level II of the Executive Schedule. If both the annual pay adjustment provided for in 5 CFR 534.504 and the periodic pay adjustment authorized in 5 CFR 534.503 result in a rate of basic pay equal to or above 86.5 percent of the rate of basic pay payable for level II of the Executive Schedule, the doctor will become a senior employee.

Example 3 to the definition of senior employee: A criminal investigator in the Office of the Inspector General at the Department of Housing and Urban Development is a GS-15 employee but also receives Law Enforcement Availability Pay (LEAP), pursuant to 5 U.S.C. 5545a. Even if the sum of the employee's LEAP payment plus the employee's basic pay for GS-15 equaled 86.5 percent of the rate of basic pay for level II of the Executive Schedule, LEAP is not considered part of an employee's "rate of basic pay" for purposes of section 207(c), and therefore the employee would not be a "senior employee."

Special Government employee means an officer or employee of the executive branch or an independent agency, as specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days.

State means one of the fifty States of the United States and the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Very senior employee means an employee who is:

(1) Employed in a position which is either listed in 5 U.S.C. 5312 or for which the rate of pay is equal to the rate of pay payable for level I of the Executive Schedule;

(2) Employed in a position in the Executive Office of the President which is either listed in 5 U.S.C. 5313 or for which the rate of pay is equal to the rate of pay payable for level II of the Executive Schedule;

(3) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(A); or

(4) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(A).

§ 2641.105 Advice.

(a) *Agency ethics officials.* Current or former employees or others who have questions about 18 U.S.C. 207 or about this part 2641 should seek advice from a designated agency ethics official or another agency ethics official. The agency in which an individual formerly served has the primary responsibility to provide oral or written advice concerning a former employee's post-employment activities. An agency ethics official, in turn, may consult with other agencies, such as those before whom a post-employment communication or appearance is contemplated, and with the Office of Government Ethics.

(b) *Office of Government Ethics.* The Office of Government Ethics (OGE) will provide advice to agency ethics officials and others concerning 18 U.S.C. 207 and this part 2641. OGE may provide advice orally or through issuance of a written advisory opinion and shall, as appropriate, consult with the agency or agencies concerned and with the Department of Justice.

(c) *Effect of advice.* Reliance on the oral or written advice of an agency ethics official or the OGE cannot ensure that a former employee will not be prosecuted for a violation of 18 U.S.C. 207. However, good faith reliance on such advice is a factor that may be taken into account by the Department of Justice (DOJ) in the selection of cases for prosecution. In the case in which OGE issues a formal advisory opinion in accordance with subpart C of 5 CFR part 2638, the DOJ will not prosecute an individual who acted in good faith in accordance with that opinion. See 5 CFR 2638.309.

(d) *Contacts to seek advice.* A former employee will not be deemed to act on behalf of any other person in violation of 18 U.S.C. 207 when he contacts an agency ethics official or other employee of the United States for the purpose of seeking guidance concerning the applicability or meaning of section 207 as applied to his own activities.

(e) *No personal attorney-client privilege.* A current or former employee who discloses information to an agency ethics official, to a Government attorney, or to an employee of the Office of Government Ethics does not personally enjoy an attorney-client privilege with respect to such communications.

§ 2641.106 Applicability of certain provisions to Vice President.

Subsections 207(d) (relating to restrictions on very senior personnel) and 207(f) (restrictions with regard to foreign entities) of title 18, United States Code, apply to a Vice President, to the

same extent as they apply to employees and former employees covered by those provisions. See §§ 2641.205 and 2641.206. There are no other restrictions in 18 U.S.C. 207 applicable to a Vice President.

Subpart B—Prohibitions

§ 2641.201 Permanent restriction on any former employee's representations to United States concerning particular matter in which the employee participated personally and substantially.

(a) *Basic prohibition of 18 U.S.C. 207(a)(1).* No former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(a)(1) does not apply to a former employee who is:

(1) Acting on behalf of the United States. See § 2641.301(a).

(2) Acting as an elected State or local government official. See § 2641.301(b).

(3) Communicating scientific or technological information pursuant to procedures or certification. See § 2641.301(e).

(4) Testifying under oath. See § 2641.301(f). (Note that this exception from § 2641.201 is generally not available for expert testimony. See § 2641.301(f)(2).)

(5) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).

(6) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. See § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(a)(1) is a permanent restriction that commences upon an employee's termination from Government service. The restriction lasts for the life of the particular matter involving specific parties in which the employee participated personally and substantially.

(d) *Communication or appearance—*
(1) *Communication.* A former employee makes a communication when he imparts or transmits information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in written correspondence, by electronic media, or by any other means. This includes only those communications

with respect to which the former employee intends that the information conveyed will be attributed to himself, although it is not necessary that any employee of the United States actually recognize the former employee as the source of the information.

(2) *Appearance.* A former employee makes an appearance when he is physically present before an employee of the United States, in either a formal or informal setting. Although an appearance also may be accompanied by certain communications, an appearance need not involve any communication by the former employee.

(3) *Behind-the-scenes assistance.* Nothing in this section prohibits a former employee from providing assistance to another person, provided that the assistance does not involve a communication to or an appearance before an employee of the United States.

Example 1 to paragraph (d): A former employee of the Federal Bureau of Investigation makes a brief telephone call to a colleague in her former office concerning an ongoing investigation. She has made a communication. If she personally attends an informal meeting with agency personnel concerning the matter, she will have made an appearance.

Example 2 to paragraph (d): A former employee of the National Endowment for the Humanities (NEH) accompanies other representatives of an NEH grantee to a meeting with the agency. Even if the former employee does not say anything at the meeting, he has made an appearance (although that appearance may or may not have been made with the intent to influence, depending on the circumstances).

Example 3 to paragraph (d): A Government employee administered a particular contract for agricultural research with Q Company. Upon termination of her Government employment, she is hired by Q Company. She works on the matter covered by the contract, but has no direct contact with the Government. At the request of a company vice president, she prepares a paper describing the persons at her former agency who should be contacted and what should be said to them in an effort to increase the scope of funding of the contract and to resolve favorably a dispute over a contract clause. She may do so.

Example 4 to paragraph (d): A former employee of the National Institutes of Health (NIH) prepares an application for an NIH research grant on behalf of her university employer. The application is signed and submitted by another university officer, but it lists the former employee as the principal investigator who will be responsible for the substantive work under the grant. She has not made a communication. She also may sign an assurance to the agency that she will be personally responsible for the direction and conduct of the research under the grant, pursuant to § 2641.201(e)(2)(iv). Moreover, she may personally communicate scientific or technological information to NIH

concerning the application, provided that she does so under circumstances indicating no intent to influence the Government pursuant to § 2641.201(e)(2) or she makes the communication in accordance with the exception for scientific or technological information in § 2641.301(e).

Example 5 to paragraph (d): A former employee established a small government relations firm with a highly specialized practice in certain environmental compliance issues. She prepared a report for one of her clients, which she knew would be presented to her former agency by the client. The report is not signed by the former employee, but the document does bear the name of her firm. The former employee expects that it is commonly known throughout the industry and the agency that she is the author of the report. If the report were submitted to the agency, the former employee would be making a communication and not merely confining herself to behind-the-scenes assistance, because the circumstances indicate that she intended the information to be attributed to herself.

(e) *With the intent to influence—(1) Basic concept.* The prohibition applies only to communications or appearances made by a former Government employee with the intent to influence the United States. A communication or appearance is made with the intent to influence when made for the purpose of:

- (i) Seeking a Government ruling, benefit, approval, or other discretionary Government action; or
- (ii) Affecting Government action in connection with an issue or aspect of a matter which involves an appreciable element of actual or potential dispute or controversy.

Example 1 to paragraph (e)(1): A former employee of the Administration on Children and Families (ACF) signs a grant application and submits it to ACF on behalf of a nonprofit organization for which she now works. She has made a communication with the intent to influence an employee of the United States because her communication was made for the purpose of seeking a Government benefit.

Example 2 to paragraph (e)(1): A former Government employee calls an agency official to complain about the auditing methods being used by the agency in connection with an audit of a Government contractor for which the former employee serves as a consultant. The former employee has made a communication with the intent to influence because his call was made for the purpose of seeking Government action in connection with an issue involving an appreciable element of dispute.

(2) *Intent to influence not present.* Certain communications to and appearances before employees of the United States are not made with the intent to influence, within the meaning of paragraph (e)(1) of this section, including, but not limited to, communications and appearances made solely for the purpose of:

(i) Making a routine request not involving a potential controversy, such as a request for publicly available documents or an inquiry as to the status of a matter;

(ii) Making factual statements or asking factual questions in a context that involves neither an appreciable element of dispute nor an effort to seek discretionary Government action, such as conveying factual information regarding matters that are not potentially controversial during the regular course of performing a contract;

(iii) Signing and filing the tax return of another person as preparer;

(iv) Signing an assurance that one will be responsible as principal investigator for the direction and conduct of research under a Federal grant (*see* example 4 to paragraph (d) of this section);

(v) Filing a Securities and Exchange Commission (SEC) Form 10-K or similar disclosure forms required by the SEC;

(vi) Making a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract or grant, during a routine Government site visit to premises owned or occupied by a person other than the United States where the work is performed or would be performed, in the ordinary course of evaluation, administration, or performance of an actual or proposed contract or grant; or

(vii) Purely social contacts (*see* example 4 to paragraph (f) of this section).

Example 1 to paragraph (e)(2): A former Government employee calls an agency to ask for the date of a scheduled public hearing on her client's license application. This is a routine request not involving a potential controversy and is not made with the intent to influence.

Example 2 to paragraph (e)(2): In the previous example, the agency's hearing calendar is quite full, as the agency has a significant backlog of license applications. The former employee calls a former colleague at the agency to ask if the hearing date for her client could be moved up on the schedule, so that her client can move forward with its business plans more quickly. This is a communication made with the intent to influence.

Example 3 to paragraph (e)(2): A former employee of the Department of Defense (DOD) now works for a firm that has a DOD contract to produce an operator's manual for a radar device used by DOD. In the course of developing a chapter about certain technical features of the device, the former employee asks a DOD official certain factual questions about the device and its properties. The discussion does not concern any matter that is known to involve a potential controversy between the agency and the contractor. The former employee has not

made a communication with the intent to influence.

Example 4 to paragraph (e)(2): A former medical officer of the Food and Drug Administration (FDA) sends a letter to the agency in which he sets out certain data from safety and efficacy tests on a new drug for which his employer, ABC Drug Co., is seeking FDA approval. Even if the letter is confined to arguably "factual" matters, such as synopses of data from clinical trials, the communication is made for the purpose of obtaining a discretionary Government action, i.e., approval of a new drug. Therefore, this is a communication made with the intent to influence.

Example 5 to paragraph (e)(2): A former Government employee now works for a management consulting firm, which has a Government contract to produce a study on the efficiency of certain agency operations. Among other things, the contract calls for the contractor to develop a range of alternative options for potential restructuring of certain internal Government procedures. The former employee would like to meet with agency representatives to present a tentative list of options developed by the contractor. She may not do so. There is a potential for controversy between the Government and the contractor concerning the extent and adequacy of any options presented, and, moreover, the contractor may have its own interest in emphasizing certain options as opposed to others because some options may be more difficult and expensive for the contractor to develop fully than others.

Example 6 to paragraph (e)(2): A former employee of the Internal Revenue Service (IRS) prepares his client's tax return, signs it as preparer, and mails it to the IRS. He has not made a communication with the intent to influence. In the event that any controversy should arise concerning the return, the former employee may not represent the client in the proceeding, although he may answer direct factual questions about the records he used to compile figures for the return, provided that he does not argue any theories or positions to justify the use of one figure rather than another.

Example 7 to paragraph (e)(2): An agency official visits the premises of a prospective contractor to evaluate the testing procedure being proposed by the contractor for a research contract on which it has bid. A former employee of the agency, now employed by the contractor, is the person most familiar with the technical aspects of the proposed testing procedure. The agency official asks the former employee about certain technical features of the equipment used in connection with the testing procedure. The former employee may provide factual information that is responsive to the questions posed by the agency official, as such information is requested by the Government under circumstances for its convenience in reviewing the bid. However, the former employee may not argue for the appropriateness of the proposed testing procedure or otherwise advocate any position on behalf of the contractor.

(3) *Change in circumstances.* If, at any time during the course of a communication or appearance

otherwise permissible under paragraph (e)(2) of this section, it becomes apparent that circumstances have changed which would indicate that any further communication or appearance would be made with the intent to influence, the former employee must refrain from such further communication or appearance.

Example 1 to paragraph (e)(3): A former Government employee accompanies another employee of a contractor to a routine meeting with agency officials to deliver technical data called for under a Government contract. During the course of the meeting, an unexpected dispute arises concerning certain terms of the contract. The former employee may not participate in any discussion of this issue. Moreover, if the circumstances clearly indicate that even her continued presence during this discussion would be an appearance made with the intent to influence, she should excuse herself from the meeting.

(4) *Mere physical presence intended to influence.* Under some circumstances, a former employee's mere physical presence, without any communication by the employee concerning any material issue or otherwise, may constitute an appearance with the intent to influence an employee of the United States. Relevant considerations include such factors as whether:

- (i) The former employee has been given actual or apparent authority to make any decisions, commitments, or substantive arguments in the course of the appearance;
- (ii) The Government employee before whom the appearance is made has substantive responsibility for the matter and does not simply perform ministerial functions, such as the acceptance of paperwork;
- (iii) The former employee's presence is relatively prominent;
- (iv) The former employee is paid for making the appearance;
- (v) It is anticipated that others present at the meeting will make reference to the views or past or present work of the former employee;
- (vi) Circumstances do not indicate that the former employee is present merely for informational purposes, for example, merely to listen and record information for later use;
- (vii) The former employee has entered a formal appearance in connection with a legal proceeding at which he is present; and
- (viii) The appearance is before former subordinates or others in the same chain of command as the former employee.

Example 1 to paragraph (e)(4): A former Regional Administrator of the Occupational Safety and Health Administration (OSHA) becomes a consultant for a company being

investigated for possible enforcement action by the regional OSHA office. She is hired by the company to coordinate and guide its response to the OSHA investigation. She accompanies company officers to an informal meeting with OSHA, which is held for the purpose of airing the company's explanation of certain findings in an adverse inspection report. The former employee is introduced at the meeting as the company's compliance and governmental affairs adviser, but she does not make any statements during the meeting concerning the investigation. She is paid a fee for attending this meeting. She has made an appearance with the intent to influence.

Example 2 to paragraph (e)(4): A former employee of an agency now works for a manufacturer that seeks agency approval for a new product. The agency convenes a public advisory committee meeting for the purpose of receiving expert advice concerning the product. Representatives of the manufacturer will make an extended presentation of the data supporting the application for approval, and a special table has been reserved for them in the meeting room for this purpose. The former employee does not participate in the manufacturer's presentation to the advisory committee and does not even sit in the section designated for the manufacturer. Rather, he sits in the back of the room in a large area reserved for the public and the media. The manufacturer's speakers make no reference to the involvement or views of the former employee with respect to the matter. Even though the former employee may be recognized in the audience by certain agency employees, he has not made an appearance with the intent to influence because his presence is relatively inconspicuous and there is little to identify him with the manufacturer or the advocacy of its representatives at the meeting.

(f) To or before an employee of the United States—(1) Employee of the United States. For purposes of this paragraph, an "employee of the United States" means the President, the Vice President, and any current Federal employee (including an individual appointed as an employee or detailed to the Federal Government under the Intergovernmental Personnel Act (5 U.S.C. 3371–3376)) who is detailed to or employed by any:

- (i) Agency (including a Government corporation);
 - (ii) Independent agency in the executive, legislative, or judicial branch;
 - (iii) Federal court; or
 - (iv) Court-martial.
- (2) *To or before.* Except as provided in paragraph (f)(3) of this section, a communication "to" or appearance "before" an employee of the United States is one:

(i) Directed to and received by an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section even though not addressed to a particular employee, e.g., as when a former employee mails correspondence to an

agency but not to any named employee; or

(ii) Directed to and received by an employee in his capacity as an employee of an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section, e.g., as when a former employee directs remarks to an employee representing the United States as a party or intervenor in a Federal or non-Federal judicial proceeding. A former employee does not direct his communication or appearance to a bystander who merely happens to overhear the communication or witness the appearance.

(3) *Public commentary.* (i) A former employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to be making a prohibited communication or appearance if the forum:

(A) Is not sponsored or co-sponsored by an entity specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section;

(B) Is attended by a large number of people; and

(C) A significant proportion of those attending are not employees of the United States.

(ii) In the circumstances described in paragraph (f)(3)(i) of this section, a former employee may engage in exchanges with any other speaker or with any member of the audience.

(iii) A former employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely available publication.

Example 1 to paragraph (f): A Federal Trade Commission (FTC) employee participated in the FTC's decision to initiate an enforcement proceeding against a particular company. After terminating Government service, the former employee is hired by the company to lobby key Members of Congress concerning the necessity of the proceeding. He may contact Members of Congress or their staff since a communication to or appearance before such persons is not made to or before an "employee of the United States" as that term is defined in paragraph (f)(1) of this section.

Example 2 to paragraph (f): In the previous example, the former FTC employee arranges to meet with a Congressional staff member to discuss the necessity of the proceeding. A current FTC employee is invited by the staff member to attend and is authorized by the FTC to do so in order to present the agency's views. The former employee may not argue his new employer's position at that meeting since his arguments would unavoidably be directed to the FTC employee in his capacity as an employee of the FTC.

Example 3 to paragraph (f): The Department of State granted a waiver pursuant to 18 U.S.C. 208(b)(1) to permit one

of its employees to serve in his official capacity on the Board of Directors of a private association. The employee participates in a Board meeting to discuss what position the association should take concerning the award of a recent contract by the Department of Energy (DOE). When a former DOE employee addresses the Board to argue that the association should object to the award of the contract, she is directing her communication to a Department of State employee in his capacity as an employee of the Department of State.

Example 4 to paragraph (f): A Federal Communications Commission (FCC) employee participated in a proceeding to review the renewal of a license for a television station. After terminating Government service, he is hired by the company that holds the license. At a cocktail party, the former employee meets his former supervisor who is still employed by the FCC and begins to discuss the specifics of the license renewal case with him. The former employee is directing his communication to an FCC employee in his capacity as an employee of the FCC. Moreover, as the conversation concerns the license renewal matter, it is not a purely social contact and satisfies the element of the intent to influence the Government within the meaning of paragraph (e) of this section.

Example 5 to paragraph (f): A Federal Trade Commission economist participated in her agency's review of a proposed merger between two companies. After terminating Government service, she goes to work for a trade association that is interested in the proposed merger. She would like to speak about the proposed merger at a conference sponsored by the trade association. The conference is attended by 100 individuals, 50 of whom are employees of entities specified in paragraphs (f)(1)(i) through (f)(1)(iv) of this section. The former employee may speak at the conference and may engage in a discussion of the merits of the proposed merger in response to a question posed by a Department of Justice employee in attendance.

Example 6 to paragraph (f): The former employee in the previous example may, on behalf of her employer, write and permit publication of an op-ed piece in a metropolitan newspaper in support of a particular resolution of the merger proposal.

Example 7 to paragraph (f): ABC Company has a contract with the Department of Energy which requires that contractor personnel work closely with agency employees in adjoining offices and work stations in the same building. After leaving the Department, a former employee goes to work for another corporation that has an interest in performing certain work related to the same contract, and he arranges a meeting with certain ABC employees at the building where he previously worked on the project. At the meeting, he asks the ABC employees to mention the interest of his new employer to the project supervisor, who is an agency employee. Moreover, he tells the ABC employees that they can say that he was the source of this information. The ABC employees in turn convey this information to the project supervisor. The former employee

has made a communication to an employee of the Department of Energy. His communication is directed to an agency employee because he intended that the information be conveyed to an agency employee with the intent that it be attributed to himself, and the circumstances indicate such a close working relationship between contractor personnel and agency employees that it was likely that the information conveyed to contractor personnel would be received by the agency.

(g) *On behalf of any other person—(1) On behalf of.* (i) A former employee makes a communication or appearance on behalf of another person if the former employee is acting as the other person's agent or attorney or if:

(A) The former employee is acting with the consent of the other person, whether express or implied; and

(B) The former employee is acting subject to some degree of control or direction by the other person in relation to the communication or appearance.

(ii) A former employee does not act on behalf of another merely because his communication or appearance is consistent with the interests of the other person, is in support of the other person, or may cause the other person to derive a benefit as a consequence of the former employee's activity.

(2) *Any other person.* The term "person" is defined in § 2641.104. For purposes of this paragraph, the term excludes the former employee himself or any sole proprietorship owned by the former employee.

Example 1 to paragraph (g): An employee of the Bureau of Land Management (BLM) participated in the decision to grant a private company the right to explore for minerals on certain Federal lands. After retiring from Federal service to pursue her hobbies, the former employee becomes concerned that BLM is misinterpreting a particular provision of the lease. The former employee may contact a current BLM employee on her own behalf in order to argue that her interpretation is correct.

Example 2 to paragraph (g): The former BLM employee from the previous example later joins an environmental organization as an uncompensated volunteer. The leadership of the organization authorizes the former employee to engage in any activity that she believes will advance the interests of the organization. She makes a communication on behalf of the organization when, pursuant to this authority, she writes to BLM on the organization's letterhead in order to present an additional argument concerning the interpretation of the lease provision. Although the organization did not direct her to send the specific communication to BLM, the circumstances establish that she made the communication with the consent of the organization and subject to a degree of control or direction by the organization.

Example 3 to paragraph (g): An employee of the Administration for Children and

Families wrote the statement of work for a cooperative agreement to be issued to study alternative workplace arrangements. After terminating Government service, the former employee joins a nonprofit group formed to promote family togetherness. He is asked by his former agency to attend a meeting in order to offer his recommendations concerning the ranking of the grant applications he had reviewed while still a Government employee. The management of the nonprofit group agrees to permit him to take leave to attend the meeting in order to present his personal views concerning the ranking of the applications. Although the former employee is a salaried employee of the non-profit group and his recommendations may be consistent with the group's interests, the circumstances establish that he did not make the communication subject to the control of the group.

Example 4 to paragraph (g): An Assistant Secretary of Defense participated in a meeting at which a defense contractor pressed Department of Defense (DOD) officials to continue funding the contractor's sole source contract to develop the prototype of a specialized robot. After terminating Government service, the former Assistant Secretary approaches the contractor and suggests that she can convince her former DOD colleagues to pursue development of the prototype robot. The contractor agrees that the former Assistant Secretary's proposed efforts could be useful and asks her to set up a meeting with key DOD officials for the following week. Although the former Assistant Secretary is not an employee of the contractor, the circumstances establish that she is acting subject to some degree of control or direction by the contractor.

(h) *Particular matter involving a specific party or parties—(1) Basic concept.* The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

Example 1 to paragraph (h)(1): An employee of the Department of Housing and Urban Development approved a specific city's application for Federal assistance for a renewal project. After leaving Government service, she may not represent the city in relation to that application as it is a

particular matter involving specific parties in which she participated personally and substantially as a Government employee.

Example 2 to paragraph (h)(1): An attorney in the Department of Justice drafted provisions of a civil complaint that is filed in Federal court alleging violations of certain environmental laws by ABC Company. The attorney may not subsequently represent ABC before the Government in connection with the lawsuit, which is a particular matter involving specific parties.

(2) *Matters of general applicability not covered.* Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties. International agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests.

Example 1 to paragraph (h)(2): A former employee of the Mine Safety and Health Administration (MSHA) participated personally and substantially in the development of a regulation establishing certain new occupational health and safety standards for mine workers. Because the regulation applies to the entire mining industry, it is a particular matter of general applicability, not a matter involving specific parties, and the former employee would not be prohibited from making post-employment representations to the Government in connection with this regulation.

Example 2 to paragraph (h)(2): The former employee in the previous example also assisted MSHA in its defense of a lawsuit brought by a trade association challenging the same regulation. This lawsuit is a particular matter involving specific parties, and the former MSHA employee would be prohibited from representing the trade association or anyone else in connection with the case.

Example 3 to paragraph (h)(2): An employee of the National Science Foundation formulated policies for a grant program for organizations nationwide to produce science education programs targeting elementary school age children. She is not prohibited from later representing a specific organization in connection with its application for assistance under the program.

Example 4 to paragraph (h)(2): An employee in the legislative affairs office of the Department of Homeland Security (DHS) drafted official comments submitted to Congress with respect to a pending immigration reform bill. After leaving the Government, he contacts DHS on behalf of a private organization seeking to influence the Administration to insist on certain

amendments to the bill. This is not prohibited. Generally, legislation is not a particular matter involving specific parties. However, if the same employee had participated as a DHS employee in formulating the agency's position on proposed private relief legislation granting citizenship to a specific individual, this matter would involve specific parties, and the employee would be prohibited from later making representational contacts in connection with this matter.

Example 5 to paragraph (h)(2): An employee of the Food and Drug Administration (FDA) drafted a proposed rule requiring all manufacturers of a particular type of medical device to obtain pre-market approval for their products. It was known at the time that only three or four manufacturers currently were marketing or developing such products. However, there was nothing to preclude other manufacturers from entering the market in the future. Moreover, the regulation on its face was not limited in application to those companies already known to be involved with this type of product at the time of promulgation. Because the proposed rule would apply to an open-ended class of manufacturers, not just specifically identified companies, it would not be a particular matter involving specific parties. After leaving Government, the former FDA employee would not be prohibited from representing a manufacturer in connection with the final rule or the application of the rule in any specific case.

Example 6 to paragraph (h)(2): A former agency attorney participated in drafting a standard form contract and certain standard terms and clauses for use in all future contracts. The adoption of a standard form and language for all contracts is a matter of general applicability, not a particular matter involving specific parties. Therefore, the attorney would not be prohibited from representing another person in a dispute involving the application of one of the standard terms or clauses in a specific contract in which he did not participate as a Government employee.

Example 7 to paragraph (h)(2): An employee of the Department of State participated in the development of the United States' position with respect to a proposed treaty with a foreign government concerning transfer of ownership with respect to a parcel of real property and certain operations there. After terminating Government employment, this individual seeks to represent the foreign government before the Department with respect to certain issues arising in the final stage of the treaty negotiations. This bilateral treaty is a particular matter involving specific parties, and the former employee had participated personally and substantially in this matter. Note also that certain employees may be subject to additional restrictions with respect to trade and treaty negotiations or representation of a foreign entity, pursuant to 18 U.S.C. 207(b) and (f).

Example 8 to paragraph (h)(2): The employee in the previous example participated for the Department in negotiations with respect to a multilateral trade agreement concerning tariffs and other

trade practices in regard to various industries in 50 countries. The proposed agreement would provide various stages of implementation, with benchmarks for certain legislative enactments by signatory countries. These negotiations do not concern a particular matter involving specific parties. Even though the former employee would not be prohibited under section 207(a)(1) from representing another person in connection with this matter, she must comply with any applicable restrictions in 18 U.S.C. 207(b) and (f).

(3) *Specific parties at all relevant times.* The particular matter must involve specific parties both at the time the individual participated as a Government employee and at the time the former employee makes the communication or appearance, although the parties need not be identical at both times.

Example 1 to paragraph (h)(3): An employee of the Department of Defense (DOD) performed certain feasibility studies and other basic conceptual work for a possible innovation to a missile system. At the time she was involved in the matter, DOD had not identified any prospective contractors who might perform the work on the project. After she left Government, DOD issued a request for proposals to construct the new system, and she now seeks to represent one of the bidders in connection with this procurement. She may do so. Even though the procurement is a particular matter involving specific parties at the time of her proposed representation, no parties to the matter had been identified at the time she participated in the project as a Government employee.

Example 2 to paragraph (h)(3): A former employee in an agency inspector general's office conducted the first investigation of its kind concerning a particular fraudulent accounting practice by a grantee. This investigation resulted in a significant monetary recovery for the Government, as well as a settlement agreement in which the grantee agreed to use only certain specified accounting methods in the future. As a result of this case, the agency decided to issue a proposed rule expressly prohibiting the fraudulent accounting practice and requiring all grantees to use the same accounting methods that had been developed in connection with the settlement agreement. The former employee may represent a group of grantees submitting comments critical of the proposed regulation. Although the proposed regulation in some respects evolved from the earlier fraud case, which did involve specific parties, the subsequent rulemaking proceeding does not involve specific parties.

(4) *Preliminary or informal stages in a matter.* When a particular matter involving specific parties begins depends on the facts. A particular matter may involve specific parties prior to any formal action or filings by the agency or other parties. Much of the work with respect to a particular matter

is accomplished before the matter reaches its final stage, and preliminary or informal action is covered by the prohibition, provided that specific parties to the matter actually have been identified. With matters such as grants, contracts, and other agreements, ordinarily specific parties are first identified when initial proposals or indications of interest, such as responses to requests for proposals (RFP) or earlier expressions of interest, are received by the Government; in unusual circumstances, however, such as a sole source procurement or when there are sufficient indicia that the Government has explicitly identified a specific party in an otherwise ordinary prospective grant, contract, or agreement, specific parties may be identified even prior to the receipt of a proposal or expression of interest.

Example 1 to paragraph (h)(4): A Government employee participated in internal agency deliberations concerning the merits of taking enforcement action against a company for certain trade practices. He left the Government before any charges were filed against the company. He has participated in a particular matter involving specific parties and may not represent another person in connection with the ensuing administrative or judicial proceedings against the company.

Example 2 to paragraph (h)(4): A former special Government employee (SGE) of the Agency for Health Care Policy and Research served, before leaving the agency, on a "peer review" committee that made a recommendation to the agency concerning the technical merits of a specific grant proposal submitted by a university. The committee's recommendations are nonbinding and constitute only the first of several levels of review within the agency. Nevertheless, the SGE participated in a particular matter involving specific parties and may not represent the university in subsequent efforts to obtain the same grant.

Example 3 to paragraph (h)(4): Prior to filing a product approval application with a regulatory agency, a company sought guidance from the agency. The company provided specific information concerning the product, including its composition and intended uses, safety and efficacy data, and the results and designs of prior studies on the product. After a series of meetings, the agency advised the company concerning the design of additional studies that it should perform in order to address those issues that the agency still believed were unresolved. Even though no formal application had been filed, this was a particular matter involving specific parties. The agency guidance was sufficiently specific, and it was clearly intended to address the substance of a prospective application and to guide the prospective applicant in preparing an application that would meet approval requirements. An agency employee who was substantially involved in developing this guidance could not leave the Government

and represent the company when it submits its formal product approval application.

Example 4 to paragraph (h)(4): A Government scientist participated in preliminary, internal deliberations about her agency's need for additional laboratory facilities. After she terminated Government service, the General Services Administration issued a request for proposals (RFP) seeking private architectural services to design the new laboratory space for the agency. The former employee may represent an architectural firm in connection with its response to the RFP. During the preliminary stage in which the former employee participated, no specific architectural firms had been identified for the proposed work.

Example 5 to paragraph (h)(4): In the previous example, the proposed laboratory was to be an extension of a recently completed laboratory designed by XYZ Architectural Associates, and the Government had determined to pursue a sole source contract with that same firm for the new work. Even before the firm was contacted or expressed any interest concerning the sole source contract, the former employee participated in meetings in which specifications for a potential sole source contract with the firm were discussed. The former employee may not represent XYZ before the Government in connection with this matter.

(5) *Same particular matter—(i) General.* The prohibition applies only to communications or appearances in connection with the same particular matter involving specific parties in which the former employee participated as a Government employee. The same particular matter may continue in another form or in part. In determining whether two particular matters involving specific parties are the same, all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed.

(ii) *Considerations in the case of contracts, grants, and other agreements.* With respect to matters such as contracts, grants or other agreements:

(A) A new matter typically does not arise simply because there are amendments, modifications, or extensions of a contract (or other agreement), unless there are fundamental changes in objectives or the nature of the matter;

(B) Generally, successive or otherwise separate contracts (or other agreements) will be viewed as different matters from each other, absent some indication that one contract (or other agreement) contemplated the other or that both are in support of the same specific proceeding;

(C) A contract is almost always a single particular matter involving

specific parties. However, under compelling circumstances, distinct aspects or phases of certain large umbrella-type contracts, involving separate task orders or delivery orders, may be considered separate individual particular matters involving specific parties, if an agency determines that articulated lines of division exist. In making this determination, an agency should consider the relevant factors as described above. No single factor should be determinative, and any divisions must be based on the contract's characteristics, which may include, among other things, performance at different geographical locations, separate and distinct subject matters, the separate negotiation or competition of individual task or delivery orders, and the involvement of different program offices or even different agencies.

Example 1 to paragraph (h)(5): An employee drafted one provision of an agency contract to procure new software. After she left Government, a dispute arose under the same contract concerning a provision that she did not draft. She may not represent the contractor in this dispute. The contract as a whole is the particular matter involving specific parties and may not be fractionalized into separate clauses for purposes of avoiding the prohibition of 18 U.S.C. 207(a)(1).

Example 2 to paragraph (h)(5): In the previous example, a new software contract was awarded to the same contractor through a full and open competition, following the employee's departure from the agency. Although no major changes were made in the contract terms, the new contract is a different particular matter involving specific parties.

Example 3 to paragraph (h)(5): A former special Government employee (SGE) recommended that his agency approve a new food additive made by Good Foods, Inc., on the grounds that it was proven safe for human consumption. The Healthy Food Alliance (HFA) sued the agency in Federal court to challenge the decision to approve the product. After leaving Government service, the former SGE may not serve as an expert witness on behalf of HFA in this litigation because it is a continuation of the same product approval matter in which he participated personally and substantially.

Example 4 to paragraph (h)(5): An employee of the Department of the Army negotiated and supervised a contract with Munitions, Inc. for four million mortar shells meeting certain specifications. After the employee left Government, the Army sought a contract modification to add another one million shells. All specifications and contractual terms except price, quantity and delivery dates were identical to those in the original contract. The former Army employee may not represent Munitions in connection with this modification, because it is part of the same particular matter involving specific parties as the original contract.

Example 5 to the paragraph (h)(5): In the previous example, certain changes in

technology occurred since the date of the original contract, and the proposed contract modifications would require the additional shells to incorporate new design features. Moreover, because of changes in the Army's internal system for storing and distributing shells to various locations, the modifications would require Munitions to deliver its product to several de-centralized destination points, thus requiring Munitions to develop novel delivery and handling systems and incur new transportation costs. The Army considers these modifications to be fundamental changes in the approach and objectives of the contract and may determine that these changes constitute a new particular matter.

Example 6 to paragraph (h)(5): A Government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the original wiretap application. The reason is that the validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.

Example 7 to paragraph (h)(5): The Navy awards an indefinite delivery contract for environmental remediation services in the northeastern U.S. A Navy engineer is assigned as the Navy's technical representative on a task order for remediation of an oil spill at a Navy activity in Maine. The Navy engineer is personally and substantially involved in the task order (e.g., he negotiates the scope of work, the labor hours required, and monitors the contractor's performance). Following successful completion of the remediation of the oil spill in Maine, the Navy engineer leaves Government service and goes to work for the Navy's remediation contractor. In year two of the contract, the Navy issues a task order for the remediation of lead-based paint at a Navy housing complex in Connecticut. The contractor assigns the former Navy engineer to be its project manager for this task order, which will require him to negotiate with the Navy about the scope of work and the labor hours under the task order. Although the task order is placed under the same indefinite delivery contract (the terms of which remain unchanged), the Navy would be justified in determining that the lead-based paint task order is a separate particular matter as it involves a different type of remediation, at a different location, and at a different time. Note, however, that the engineer in this example had not participated personally and substantially in the overall contract. Any former employee who had—for example, by participating personally and substantially in the initial award or subsequent oversight of the umbrella contract—will be deemed to have also participated personally and substantially in any individual particular matters resulting from the agency's determination that such contract is divisible.

Example 8 to paragraph (h)(5): An agency contracts with Company A to install a satellite system connecting the headquarters office to each of its twenty field offices. Although the field offices are located at various locations throughout the country,

each installation is essentially identical, with the terms of each negotiated in the main contract. Therefore, this contract should not be divided into separate particular matters involving specific parties.

(i) *Participated personally and substantially*—(1) *Participate*. To “participate” means to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action, or to purposefully forbear in order to affect the outcome of a matter. An employee can participate in particular matters that are pending other than in his own agency. An employee does not participate in a matter merely because he had knowledge of its existence or because it was pending under his official responsibility. An employee does not participate in a matter within the meaning of this section unless he does so in his official capacity.

(2) *Personally*. To participate “personally” means to participate: (i) Directly, either individually or in combination with other persons; or (ii) Through direct and active supervision of the participation of any person he supervises, including a subordinate.

(3) *Substantially*. To participate “substantially” means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Provided that an employee participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole. Participation in peripheral aspects of a matter or in aspects not directly involving the substantive merits of a matter (such as reviewing budgetary procedures or scheduling meetings) is not substantial.

Example 1 to paragraph (i): A General Services Administration (GSA) attorney drafted a standard form contract and certain standard terms and clauses for use in future contracts. A contracting officer uses one of the standard clauses in a subsequent contract without consulting the GSA attorney. The

attorney did not participate personally in the subsequent contract.

Example 2 to paragraph (i): An Internal Revenue Service (IRS) attorney is neither in charge of nor does she have official responsibility for litigation involving a particular delinquent taxpayer. At the request of a co-worker who is assigned responsibility for the litigation, the lawyer provides advice concerning strategy during the discovery stage of the litigation. The IRS attorney participated personally in the litigation.

Example 3 to paragraph (i): The IRS attorney in the previous example had no further involvement in the litigation. She participated substantially in the litigation notwithstanding that the post-discovery stages of the litigation lasted for ten years after the day she offered her advice.

Example 4 to paragraph (i): The General Counsel of the Office of Government Ethics (OGE) contacts the OGE attorney who is assigned to evaluate all requests for "certificates of divestiture" to check on the status of the attorney's work with respect to all pending requests. The General Counsel makes no comment concerning the merits or relative importance of any particular request. The General Counsel did not participate substantially in any particular request when she checked on the status of all pending requests.

Example 5 to paragraph (i): The OGE attorney in the previous example completes his evaluation of a particular certificate of divestiture request and forwards his recommendation to the General Counsel. The General Counsel forwards the package to the Director of OGE with a note indicating her concurrence with the attorney's recommendation. The General Counsel participated substantially in the request.

Example 6 to paragraph (i): An International Trade Commission (ITC) computer programmer developed software designed to analyze data related to unfair trade practice complaints. At the request of an ITC employee who is considering the merits of a particular complaint, the programmer enters all the data supplied to her, runs the computer program, and forwards the results to the employee who will make a recommendation to an ITC Commissioner concerning the disposition of the complaint. The programmer did not participate substantially in the complaint.

Example 7 to paragraph (i): The director of an agency office must concur in any decision to grant an application for technical assistance to certain nonprofit entities. When a particular application for assistance comes into her office and is presented to her for decision, she intentionally takes no action on it because she believes the application will raise difficult policy questions for her agency at this time. As a consequence of her inaction, the resolution of the application is deferred indefinitely. She has participated personally and substantially in the matter.

(j) *United States is a party or has a direct and substantial interest*—(1) *United States.* For purposes of this paragraph, the "United States" means:

(i) The executive branch (including a Government corporation);

(ii) The legislative branch; or

(iii) The judicial branch.

(2) *Party or direct and substantial interest.* The United States may be a party to or have a direct and substantial interest in a particular matter even though it is pending in a non-Federal forum, such as a State court. The United States is neither a party to nor does it have a direct and substantial interest in a particular matter merely because a Federal statute is at issue or a Federal court is serving as the forum for resolution of the matter. When it is not clear whether the United States is a party to or has a direct and substantial interest in a particular matter, this determination shall be made in accordance with the following procedure:

(i) *Coordination by designated agency ethics official.* The designated agency ethics official (DAEO) for the former employee's agency shall have the primary responsibility for coordinating this determination. When it appears likely that a component of the United States Government other than the former employee's former agency may be a party to or have a direct and substantial interest in the particular matter, the DAEO shall coordinate with agency ethics officials serving in those components.

(ii) *Agency determination.* A component of the United States Government shall determine if it is a party to or has a direct and substantial interest in a matter in accordance with its own internal procedures. It shall consider all relevant factors, including whether:

(A) The component has a financial interest in the matter;

(B) The matter is likely to have an effect on the policies, programs, or operations of the component;

(C) The component is involved in any proceeding associated with the matter, e.g., as by having provided witnesses or documentary evidence; and

(D) The component has more than an academic interest in the outcome of the matter.

Example 1 to paragraph (j): An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. Nor may she represent X Company in that matter. The interest of the United States in preventing both inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if the Government's antitrust investigation or case is closed, the United States no longer

has a direct and substantial interest in the case.

§ 2641.202 Two-year restriction on any former employee's representations to United States concerning particular matter for which the employee had official responsibility.

(a) *Basic prohibition of 18 U.S.C. 207(a)(2).* For two years after his Government service terminates, no former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of his Government service.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(a)(2) does not apply to a former employee who is:

(1) Acting on behalf of the United States. See § 2641.301(a).

(2) Acting as an elected State or local government official. See § 2641.301(b).

(3) Communicating scientific or technological information pursuant to procedures or certification. See § 2641.301(e).

(4) Testifying under oath. See § 2641.301(f).

(5) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).

(6) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. See § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(a)(2) is a two-year restriction that commences upon an employee's termination from Government service. See example 9 to paragraph (j) of this section.

(d) *Communication or appearance.* See § 2641.201(d).

(e) *With the intent to influence.* See § 2641.201(e).

(f) *To or before an employee of the United States.* See § 2641.201(f).

(g) *On behalf of any other person.* See § 2641.201(g).

(h) *Particular matter involving a specific party or parties.* See § 2641.201(h).

(i) *United States is a party or has a direct and substantial interest.* See § 2641.201(j).

(j) *Official responsibility*—(1) *Definition.* "Official responsibility" means the direct administrative or operating authority, whether

intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action. Ordinarily, the scope of an employee's official responsibility is determined by those functions assigned by statute, regulation, Executive order, job description, or delegation of authority. All particular matters under consideration in an agency are under the official responsibility of the agency head and each is under that of any intermediate supervisor who supervises a person, including a subordinate, who actually participates in the matter or who has been assigned to participate in the matter within the scope of his official duties. A nonsupervisory employee does not have official responsibility for his own assignments within the meaning of section 207(a)(2). Authority to direct Government action concerning only ancillary or nonsubstantive aspects of a matter, such as budgeting, equal employment, scheduling, or format requirements does not, ordinarily, constitute official responsibility for the matter as a whole.

(2) *Actually pending.* A matter is actually pending under an employee's official responsibility if it has been referred to the employee for assignment or has been referred to or is under consideration by any person he supervises, including a subordinate. A matter remains pending even when it is not under "active" consideration. There is no requirement that the matter must have been pending under the employee's official responsibility for a certain length of time.

(3) *Temporary duties.* An employee ordinarily acquires official responsibility for all matters within the scope of his position immediately upon assuming the position. However, under certain circumstances, an employee who is on detail (or other temporary assignment) to a position or who is serving in an "acting" status might not be deemed to have official responsibility for any matter by virtue of such temporary duties. Specifically, an employee performing such temporary duties will not thereby acquire official responsibility for matters within the scope of the position where he functions only in a limited "caretaker" capacity, as evidenced by such factors as:

(i) Whether the employee serves in the position for no more than 60 consecutive calendar days;

(ii) Whether there is actually another incumbent for the position, who is temporarily absent, for example, on travel or leave;

(iii) Whether there has been no event triggering the provisions of 5 U.S.C. 3345(a); and

(iv) Whether there are any other circumstances indicating that, given the temporary nature of the detail or acting status, there was no reasonable expectation of the full authority of the position.

(4) *Effect of leave status.* The scope of an employee's official responsibility is not affected by annual leave, terminal leave, sick leave, excused absence, leave without pay, or similar absence from assigned duties.

(5) *Effect of disqualification.* Official responsibility for a matter is not eliminated through self-disqualification or avoidance of personal participation in a matter, as when an employee is disqualified from participating in a matter in accordance with subparts D, E, or F of 5 CFR part 2635 or part 2640. Official responsibility for a matter can be terminated by a formal modification of an employee's responsibilities, such as by a change in the employee's position description.

(6) *One-year period before termination.* 18 U.S.C. 207(a)(2) applies only with respect to a particular matter that was actually pending under the former employee's official responsibility:

(i) At some time when the matter involved a specific party or parties; and

(ii) Within his last year of Government service.

(7) *Knowledge of official responsibility.* A communication or appearance is not prohibited unless, at the time of the proposed post-employment communication or appearance, the former employee knows or reasonably should know that the matter was actually pending under his official responsibility within the one-year period prior to his termination from Government service. It is not necessary that a former employee have known during his Government service that the matter was actually pending under his official responsibility.

Note to paragraph (j): 18 U.S.C. 207(a)(2) requires only that the former employee "reasonably should know" that the matter was pending under his official responsibility. Consequently, when the facts suggest that a particular matter involving specific parties could have been actually pending under his official responsibility, a former employee should seek information from an agency ethics official or other Government official to clarify his role in the matter. See § 2641.105 concerning advice.

Example 1 to paragraph (j): The position description of an Assistant Secretary of Housing and Urban Development specifies that he is responsible for a certain class of

grants. These grants are handled by an office under his supervision. As a practical matter, however, the Assistant Secretary has not become involved with any grants of this type. The Assistant Secretary has official responsibility for all such grants as specified in his position description.

Example 2 to paragraph (j): A budget officer at the National Oceanic and Atmospheric Administration (NOAA) is asked to review NOAA's budget to determine if there are funds still available for the purchase of a new hurricane tracking device. The budget officer does not have official responsibility for the resulting contract even though she is responsible for all budget matters within the agency. The identification of funds for the contract is an ancillary aspect of the contract.

Example 3 to paragraph (j): An Internal Revenue Service (IRS) auditor worked in the office responsible for the tax-exempt status of nonprofit organizations. Subsequently, he was transferred to the IRS office concerned with public relations. When contacted by an employee of his former office for advice concerning a matter involving a certain nonprofit organization, the auditor provides useful suggestions. The auditor's supervisor in the public relations office does not have official responsibility for the nonprofit matter since it does not fall within the scope of the auditor's current duties.

Example 4 to paragraph (j): An information manager at the Central Intelligence Agency (CIA) assigns a nonsupervisory subordinate to research an issue concerning a request from a news organization for information concerning past agency activities. Before she commences any work on the assignment, the subordinate terminates employment with the CIA. The request was not pending under the subordinate's official responsibility since a non-supervisory employee does not have official responsibility for her own assignments. (Once the subordinate commences work on the assignment, she may be participating "personally and substantially" within the meaning of 18 U.S.C. 207(a)(1) and § 2641.201(i).)

Example 5 to paragraph (j): A regional employee of the Federal Emergency Management Agency requests guidance from the General Counsel concerning a contractual dispute with Baker Company. The General Counsel immediately assigns the matter to a staff attorney whose workload can accommodate the assignment, then retires from Government two days later. Although the staff attorney did not retrieve the assignment from his in-box prior to the General Counsel's departure, the Baker matter was actually pending under the General Counsel's official responsibility from the time the General Counsel received the request for guidance.

Example 6 to paragraph (j): A staff attorney in the Federal Emergency Management Agency's Office of General Counsel is consulted by procurement officers concerning the correct resolution of a contractual matter involving Able Company. The attorney renders an opinion resolving the question. The same legal question arises later in several contracts with other companies but none of the disputes with

such companies is referred to the Office of General Counsel. The General Counsel had official responsibility for the determination of the Able Company matter, but the subsequent matters were never actually pending under his official responsibility.

Example 7 to paragraph (j): An employee of the National Endowment for the Humanities becomes "acting" Division Director of the Division of Education Programs when the Division Director is away from the office for three days to attend a conference. During those three days, the employee has authority to direct Government action in connection with many matters with which she ordinarily would have no involvement. However, in view of the brief time period and the fact that there remains an incumbent in the position of Division Director, the agency ethics official properly may determine that the acting official did not acquire official responsibility for all matters then pending in the Division.

Example 8 to paragraph (j): A division director at the Food and Drug Administration disqualified himself from participating in the review of a drug for Alzheimer's disease, in accordance with subpart E of 5 CFR part 2635, because his brother headed the private sector team which developed the drug. The matter was instead assigned to the division director's deputy. The director continues to have official responsibility for review of the drug. The division director also would have retained official responsibility for the matter had he either asked his supervisor or another division director to oversee the matter.

Example 9 to paragraph (j): The Deputy Secretary of a department terminates Government service to stay home with her newborn daughter. Four months later, she returns to the department to serve on an advisory committee as a special Government employee (SGE). After three months, she terminates Government service once again in order to accept a part-time position with a public relations firm. The 18 U.S.C. 207(a)(2) bar commences when she resigns as Deputy Secretary and continues to run for two years. (Any action taken in carrying out official duties as a member of the advisory committee would be undertaken on behalf of the United States and would, therefore, not be restricted by 18 U.S.C. 207(a)(2). See § 2641.301(a).) A second two-year restriction commences when she terminates from her second period of Government service but it applies only with respect to any particular matter actually pending under her official responsibility during her three-month term as an SGE.

§ 2641.203 One-year restriction on any former employee's representations, aid, or advice concerning ongoing trade or treaty negotiation.

(a) *Basic prohibition of 18 U.S.C. 207(b).* For one year after his Government service terminates, no former employee shall, on the basis of "covered information," knowingly represent, aid, or advise any other person concerning an ongoing trade or treaty negotiation in which, during his last year of Government service, he

participated personally and substantially as an employee. "Covered information" refers to agency records which were accessible to the employee which he knew or should have known were designated as exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552).

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(b) does not apply to a former employee who is:

(1) Acting on behalf of the United States. See § 2641.301(a).

(2) Acting as an elected State or local government official. See § 2641.301(b).

(3) Testifying under oath. See § 2641.301(f).

(4) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).

(5) Acting as an employee at a Government-owned, contractor-operated entity pursuant to a waiver. See § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(b) commences upon an employee's termination from Government service. The restriction lasts for one year or until the termination of the negotiation, whichever occurs first.

(d) *Represent, aid, or advise.* [Reserved]

(e) *Any other person.* [Reserved]

(f) *On the basis of.* [Reserved]

(g) *Covered Information.* [Reserved]

(h) *Ongoing trade or treaty negotiation.* [Reserved]

(i) *Participated personally and substantially.* [Reserved]

§ 2641.204 One-year restriction on any former senior employee's representations to former agency concerning any matter, regardless of prior involvement.

(a) Basic prohibition of 18 U.S.C. 207(c). For one year after his service in a senior position terminates, no former senior employee may knowingly, with the intent to influence, make any communication to or appearance before an employee of an agency in which he served in any capacity within the one-year period prior to his termination from a senior position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former senior employee seeks official action by any employee of such agency. An individual who served in a "very senior employee" position is subject to the broader two-year restriction set forth in 18 U.S.C. 207(d) in lieu of that set forth in section 207(c). See § 2641.205.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(c) does not apply to a former senior employee who is:

(1) Acting on behalf of the United States. See § 2641.301(a).

(2) Acting as an elected State or local government official. See § 2641.301(b).

(3) Acting on behalf of specified entities. See § 2641.301(c).

(4) Making uncompensated statements based on special knowledge. See § 2641.301(d).

(5) Communicating scientific or technological information pursuant to procedures or certification. See § 2641.301(e).

(6) Testifying under oath. See § 2641.301(f).

(7) Acting on behalf of a candidate or political party. See § 2641.301(g).

(8) Acting on behalf of an international organization pursuant to a waiver. See § 2641.301(h).

(9) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. See § 2641.301(i).

(10) Subject to a waiver issued for certain positions. See § 2641.301(j).

(c) *Applicability to special Government employees and Intergovernmental Personnel Act appointees or detailees—(1) Special Government employees.* (i) 18 U.S.C. 207(c) applies to an individual as a result of service as a special Government employee (SGE) who:

(A) Served in a senior employee position while serving as an SGE; and
(B) Served 60 or more days as an SGE during the one-year period before terminating service as a senior employee.

(ii) Any day on which work is performed shall count toward the 60-day threshold without regard to the number of hours worked that day or whether the day falls on a weekend or holiday. For purposes of determining whether an SGE's rate of basic pay is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule, within the meaning of the definition of senior employee in § 2641.104, the employee's hourly rate of pay (or daily rate divided by eight) shall be multiplied by 2087, the number of Federal working hours in one year. (In the case of a Reserve officer of the Armed Forces or an officer of the National Guard who is an SGE serving in a senior employee position, 18 U.S.C. 207(c) applies if the officer served 60 or more days as an SGE within the one-year period prior to his termination from a period of active duty or active duty for training.)

(2) *Intergovernmental Personnel Act appointees or detailees.* 18 U.S.C. 207(c) applies to an individual serving as a senior employee pursuant to an appointment or detail under the

Intergovernmental Personnel Act, 5 U.S.C. 3371–3376. An individual is a senior employee if he received total pay from Federal or non-Federal sources equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule (exclusive of any reimbursement for a non-Federal employer's share of benefits not paid to the employee as salary), and:

(i) The individual served in a Federal position ordinarily compensated at a rate equal to or greater than 86.5 percent of level II of the Executive Schedule, regardless of what portion of the pay is derived from Federal expenditures or expenditures by the individual's non-Federal employer;

(ii) The individual received a direct Federal payment, pursuant to 5 U.S.C. 3374(c)(1), that supplemented the salary that he received from his non-Federal employer; or

(iii) The individual's non-Federal employer received Federal reimbursement equal to or greater than 86.5 percent of level II of the Executive Schedule.

Example 1 to paragraph (c): An employee of a private research institution serves on an advisory committee that convenes periodically to discuss United States policy on foreign arms sales. The expert is compensated at a daily rate which is the equivalent of 86.5 percent of the rate of basic pay for a full-time employee at level II of the Executive Schedule. The individual serves two hours per day for 65 days before resigning from the advisory committee nine months later. The individual becomes subject to 18 U.S.C. 207(c) when she resigns from the advisory committee since she served 60 or more days as a special Government employee during the one-year period before terminating service as a senior employee.

Example 2 to paragraph (c): An individual is detailed from a university to a Federal department under the Intergovernmental Personnel Act to do work that had previously been performed by a GS–15 employee. While on detail, the individual continues to receive pay from the university in an amount \$5,000 less than 86.5 percent of the rate of basic pay for level II of the Executive Schedule. In addition, the department pays a \$25,000 supplement directly to the individual, as authorized by 5 U.S.C. 3374(c)(1). Since the employee's total pay is equal to or greater than 86.5 percent of the rate of basic pay for level II of the Executive Schedule, and a portion of that compensation is paid directly to the individual by the department, he becomes subject to 18 U.S.C. 207(c) when his detail ends.

(d) *Commencement and length of restriction.* 18 U.S.C. 207(c) is a one-year restriction. The one-year period is measured from the date when the employee ceases to serve in a senior employee position, not from the termination of Government service, unless the two events occur

simultaneously. (In the case of a Reserve officer of the Armed Forces or an officer of the National Guard who is a special Government employee serving in a senior employee position, section 207(c) is measured from the date when the officer terminates a period of active duty or active duty for training.)

Example 1 to paragraph (d): An employee at the Department of Labor (DOL) serves in a senior employee position. He then accepts a GS–15 position at the Federal Labor Relations Authority (FLRA) but terminates Government service six months later to accept a job with private industry. 18 U.S.C. 207(c) commences when he ceases to be a senior employee at DOL, even though he does not terminate Government service at that time. (Any action taken in carrying out official duties on behalf of FLRA while still employed by that agency would be undertaken on behalf of the United States and would, therefore, not be restricted by section 207(c). See § 2641.301(a).)

Example 2 to paragraph (d): In the previous example, the DOL employee accepts a senior employee position at FLRA rather than a GS–15 position. The bar of section 207(c) commences when, six months later, he terminates service in the second senior employee position to accept a job with private industry. (The bar will apply with respect to both the DOL and FLRA. See paragraph (g) of § 2641.204 and examples 2 and 3 to that paragraph.)

(e) *Communication or appearance.* See § 2641.201(d).

(f) *With the intent to influence.* See § 2641.201(e).

(g) *To or before employee of former agency—(1) Employee.* For purposes of this paragraph, a former senior employee may not contact:

(i) Any current Federal employee of the former senior employee's "former agency" as defined in paragraph (g)(2) of this section;

(ii) An individual detailed under the Intergovernmental Personnel Act (5 U.S.C. 3371–3376) to the former senior employee's former agency;

(iii) An individual detailed to the former senior employee's former agency from another department, agency or other entity, including agencies and entities within the legislative or judicial branches;

(iv) An individual serving with the former senior employee's former agency as a collateral duty pursuant to statute or Executive order; and

(v) In the case of a communication or appearance made by a former senior employee who is barred by 18 U.S.C. 207(c) from communicating to or appearing before the Executive Office of the President, the President and Vice President.

(2) *Former agency.* The term "agency" is defined in § 2641.104. Unless eligible to benefit from the designation of

distinct and separate agency components as described in § 2641.302, a former senior employee's former agency will ordinarily be considered to be the whole of any larger agency of which his former agency was a part on the date he terminated senior service.

(i) *One-year period before termination.* 18 U.S.C. 207(c) applies with respect to agencies in which the former senior employee served within the one-year period prior to his termination from a senior employee position.

(ii) *Served in any capacity.* Once the restriction commences, 18 U.S.C. 207(c) applies with respect to any agency in which the former senior employee served in any capacity during the one-year period, regardless of his position, rate of basic pay, or pay grade.

(iii) *Multiple Assignments.* An employee can simultaneously serve in more than one agency. A former senior employee will be considered to have served in his own employing entity and in any entity to which he was detailed for any length of time or with which he was required to serve as a collateral duty pursuant to statute or Executive order.

(iv) *Effect of organizational changes.* If a former senior employee's former agency has been significantly altered by organizational changes after his termination from senior service, it may be necessary to determine whether a successor entity is the same agency as the former senior employee's former agency. The appropriate designated agency ethics official, in consultation with the Office of Government Ethics, shall identify the entity that is the individual's former agency. Whether a successor entity is the same as the former agency depends upon whether it has substantially the same organizational mission, the extent of the termination or dispersion of the agency's functions, and other factors as may be appropriate.

(A) *Agency abolished or substantially changed.* If a successor entity is not identifiable as substantially the same agency from which the former senior employee terminated, the 18 U.S.C. 207(c) prohibition will not bar communications or appearances by the former senior employee to that successor entity.

(B) *Agency substantially the same.* If a successor entity remains identifiable as substantially the same entity from which the former senior employee terminated, the 18 U.S.C. 207(c) bar will extend to the whole of the successor entity.

(C) *Employing entity is made separate.* If an employing entity is made

separate from an agency of which it was a part, but it remains identifiable as substantially the same entity from which the former senior employee terminated senior service before the entity was made separate, the 18 U.S.C. 207(c) bar will apply to a former senior employee of that entity only with respect to the new separate entity.

(D) *Component designations.* If a former senior employee's former agency was a designated "component" within the meaning of § 2641.302 on the date of his termination as senior employee, see § 2641.302(g).

(3) *To or before.* Except as provided in paragraph (g)(4) of this section, a communication "to" or appearance "before" an employee of a former senior employee's former agency is one:

(i) Directed to and received by the former senior employee's former agency, even though not addressed to a particular employee; or

(ii) Directed to and received by an employee of a former senior employee's former agency in his official capacity, including in his capacity as an employee serving in the agency on detail or, if pursuant to statute or Executive order, as a collateral duty. A former senior employee does not direct his communication or appearance to a bystander who merely happens to overhear the communication or witness the appearance.

(4) *Public commentary.* (i) A former senior employee who addresses a public gathering or a conference, seminar, or similar forum as a speaker or panel participant will not be considered to make a prohibited communication or appearance if the forum:

(A) Is not sponsored or co-sponsored by the former senior employee's former agency;

(B) Is attended by a large number of people; and

(C) A significant proportion of those attending are not employees of the former senior employee's former agency.

(ii) In the circumstances described in paragraph (g)(4)(i) of this section, a former senior employee may engage in exchanges with any other speaker or with any member of the audience.

(iii) A former senior employee also may permit the broadcast or publication of a commentary provided that it is broadcast or appears in a newspaper, periodical, or similar widely-available publication.

Example 1 to paragraph (g): Two months after retiring from a senior employee position at the United States Department of Agriculture (USDA), the former senior employee is asked to represent a poultry producer in a compliance matter involving the producer's storage practices. The former

senior employee may not represent the poultry producer before a USDA employee in connection with the compliance matter or any other matter in which official action is sought from the USDA. He has ten months remaining of the one-year bar which commenced upon his termination as a senior employee with the USDA.

Example 2 to paragraph (g): An individual serves for several years at the Commodity Futures Trading Commission (CFTC) as a GS-15. With no break in service, she then accepts a senior employee position at the Export-Import Bank of the United States (Ex-Im Bank) where she remains for nine months until she leaves Government service in order to accept a position in the private sector. Since the individual served in both the CFTC and the Ex-Im Bank within her last year of senior service, she is barred by 18 U.S.C. 207(c) as to both agencies for one year commencing from her termination from the senior employee position at the Ex-Im Bank.

Example 3 to paragraph (g): An individual serves for several years at the Securities and Exchange Commission (SEC) in a senior employee position. He terminates Government service in order to care for his parent who is recovering from heart surgery. Two months later, he accepts a senior employee position at the Overseas Private Investment Corporation (OPIC) where he remains for nine months until he leaves Government service in order to accept a position in the private sector. The 18 U.S.C. 207(c) bar commences when he resigns from the SEC and continues to run for one year. (Any action taken in carrying out official duties as an employee of OPIC would be undertaken on behalf of the United States and would, therefore, not be restricted by section 207(c). See § 2641.301(a).) A second one-year restriction commences when he resigns from OPIC. The second restriction will apply with respect to OPIC only. Upon his termination from the OPIC position, he will have one remaining month of the section 207(c) restriction arising from his termination of his SEC position. This remaining month of restriction will run concurrently with the first month of the one-year OPIC restriction.

Example 4 to paragraph (g): An architect serves in a senior employee position in the Agency for Affordable Housing. Subsequent to her termination from the position, the agency is abolished and its functions are distributed among three other agencies within three departments, the Department of Housing and Urban Development, the Department of the Interior, and the Department of Justice. None of these successor entities is identifiable as substantially the same entity as the Agency for Affordable Housing, and, accordingly, the 18 U.S.C. 207(c) bar will not apply to the architect.

Example 5 to paragraph (g): A chemist serves in a senior employee position in the Agency for Clean Rivers. Subsequent to his termination from the position, the mission of the Agency for Clean Rivers is expanded and it is renamed the Agency for Clean Water. A number of employees from the Agency for Marine Life are transferred to the reorganized agency. If it is determined that the Agency for Clean Water is substantially the same entity

from which the chemist terminated, the section 207(c) bar will apply with respect to the chemist's contacts with all of the employees of the Agency for Clean Water, including those employees who recently transferred from the Agency for Marine Life. He would not be barred from contacting an employee serving in one of the positions that had been transferred from the Agency for Clean Rivers to the Agency for Clean Land.

(h) *On behalf of any other person.* See § 2641.201(g).

(i) *Matter on which former senior employee seeks official action—(1) Seeks official action.* A former senior employee seeks official action when the circumstances establish that he is making his communication or appearance for the purpose of inducing a current employee, as defined in paragraph (g) of this section, to make a decision or to otherwise act in his official capacity.

(2) *Matter.* The prohibition on seeking official action applies with respect to any matter, including:

(i) Any "particular matter involving a specific party or parties" as defined in § 2641.201(h);

(ii) The consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons;

(iii) A new matter that was not previously pending at or of interest to the former senior employee's former agency; and

(iv) A matter pending at any other agency in the executive branch, an independent agency, the legislative branch, or the judicial branch.

Example 1 to paragraph (i): A former senior employee at the National Capital Planning Commission (NCPC) wishes to contact a friend who still works at the NCPC to solicit a donation for a local charitable organization. The former senior employee may do so since the circumstances establish that he would not be making the communication for the purpose of inducing the NCPC employee to make a decision in his official capacity about the donation.

Example 2 to paragraph (i): A former senior employee at the Department of Defense wishes to contact the Secretary of Defense to ask him if he would be interested in attending a cocktail party. At the party, the former senior employee would introduce the Secretary to several of the former senior employee's current business clients who have sought the introduction. The former senior employee and the Secretary do not have a history of socializing outside the office, the Secretary is in a position to affect the interests of the business clients, and all expenses associated with the party will be paid by the former senior employee's consulting firm. The former senior employee should not contact the Secretary. The circumstances do not establish that the communication would be made other than for the purpose of inducing the Secretary to

make a decision in his official capacity about the invitation.

Example 3 to paragraph (i): A former senior employee at the National Science Foundation (NSF) accepts a position as vice president of a company that was hurt by recent cuts in the defense budget. She contacts the NSF's Director of Legislative and Public Affairs to ask the Director to contact a White House official in order to press the need for a new science policy to benefit her company. The former senior employee made a communication for the purpose of inducing the NSF employee to make a decision in his official capacity about contacting the White House.

§ 2641.205 Two-year restriction on any former very senior employee's representations to former agency or certain officials concerning any matter, regardless of prior involvement.

(a) *Basic prohibition of 18 U.S.C. 207(d).* For two years after his service in a very senior employee position terminates, no former very senior employee shall knowingly, with the intent to influence, make any communication to or appearance before any official appointed to an Executive Schedule position listed in 5 U.S.C. 5312–5316 or before any employee of an agency in which he served as a very senior employee within the one-year period prior to his termination from a very senior employee position, if that communication or appearance is made on behalf of any other person in connection with any matter on which the former very senior employee seeks official action by any official or employee.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(d) does not apply to a former very senior employee who is:

(1) Acting on behalf of the United States. *See* § 2641.301(a).

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

(3) Acting on behalf of specified entities. *See* § 2641.301(c).

(4) Making uncompensated statements based on special knowledge. *See* § 2641.301(d).

(5) Communicating scientific or technological information pursuant to procedures or certification. *See* § 2641.301(e).

(6) Testifying under oath. *See* § 2641.301(f).

(7) Acting on behalf of a candidate or political party. *See* § 2641.301(g).

(8) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(9) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. *See* § 2641.301(i).

(c) *Commencement and length of restriction.* 18 U.S.C. 207(d) is a two-

year restriction. The two-year period is measured from the date when the employee ceases to serve in a very senior employee position, not from the termination of Government service, unless the two events occur simultaneously. *See* examples 1 and 2 to paragraph (d) of § 2641.204.

(d) *Communication or appearance.* *See* § 2641.201(d).

(e) *With the intent to influence.* *See* § 2641.201(e).

(f) *To or before employee of former agency.* *See* § 2641.204(g), except that this section covers only former very senior employees and applies only with respect to the agency or agencies in which a former very senior employee served as a very senior employee, and very senior employees do not benefit from the designation of distinct and separate agency components as referenced in § 2641.204(g)(2).

(g) *To or before an official appointed to an Executive Schedule position.* *See* § 2641.204(g)(3) for “to or before,” except that this section covers only former very senior employees and also extends to a communication or appearance before any official currently appointed to a position that is listed in sections 5 U.S.C. 5312–5316.

Note to paragraph (g): A communication made to an official described in 5 U.S.C. 5312–5316 can include a communication to a subordinate of such official with the intent that the information be conveyed directly to the official and attributed to the former very senior employee.

(h) *On behalf of any other person.* *See* § 2641.201(g).

(i) *Matter on which former very senior employee seeks official action.* *See* § 2641.204(i), except that this section only covers former very senior employees.

Example 1 to § 2641.205: The former Attorney General may not contact the Assistant Attorney General of the Antitrust Division on behalf of a professional sports league in support of a proposed exemption from certain laws, nor may he contact the Secretary of Labor. He may, however, speak directly to the President or Vice President concerning the issue.

Example 2 to § 2641.205: The former Director of the Office of Management and Budget (OMB) is now the Chief Executive Officer of a major computer firm and wishes to convince the new Administration to change its new policy concerning computer chips. The former OMB Director may contact an employee of the Department of Commerce who, although paid at a level fixed according to level III of the Executive Schedule, does not occupy a position actually listed in 5 U.S.C. 5312–5316. She could not contact an employee working in the Office of the United States Trade Representative, an office within the Executive Office of the President (her former agency).

Example 3 to § 2641.205: A senior employee serves in the Department of Agriculture for several years. He is then appointed to serve as the Secretary of Health and Human Services (HHS) but resigns seven months later. Since the individual served as a very senior employee only at HHS, he is barred for two years by 18 U.S.C. 207(d) as to any employee of HHS and any official currently appointed to an Executive Schedule position listed in 5 U.S.C. 5312–5316, including any such official serving in the Department of Agriculture. (In addition, a one-year section 207(c) bar commenced when he terminated service as a senior employee at the Department of Agriculture.)

Example 4 to § 2641.205: The former Secretary of the Department of Labor may not represent another person in a meeting with the current Secretary of Transportation to discuss a proposed regulation on highway safety standards.

Example 5 to § 2641.205: In the previous example, the former very senior employee would like to meet instead with the special assistant to the Secretary of Transportation. The former employee knows that the special assistant has a close working relationship with the Secretary. The former employee expects that the special assistant would brief the Secretary about any discussions at the proposed meeting and refer specifically to the former employee. Because the circumstances indicate that the former employee intends that the information provided at the meeting would be conveyed by the assistant directly to the Secretary and attributed to the former employee, he may not meet with the assistant.

§ 2641.206 One-year restriction on any former senior or very senior employee's representations on behalf of, or aid or advice to, a foreign entity.

(a) *Basic prohibition of 18 U.S.C. 207(f).* For one year after service in a senior or very senior employee position terminates, no former senior employee or former very senior employee shall knowingly represent a foreign government or foreign political party before an officer or employee of an agency or department of the United States, or aid or advise such a foreign entity, with the intent to influence a decision of such officer or employee. For purposes of describing persons who may not be contacted with the intent to influence, under 18 U.S.C. 207(f) and this section, the phrase “officer or employee” includes the President, the Vice President, and Members of Congress, and the term “department” includes the legislative branch of government.

(b) *Exceptions and waivers.* The prohibition of 18 U.S.C. 207(f) does not apply to a former senior or former very senior employee who is:

(1) Acting on behalf of the United States. *See* § 2641.301(a). (Note, however, the limitation in § 2641.301(a)(2)(ii).)

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

(3) Testifying under oath. *See* § 2641.301(f).

(4) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(5) Acting as an employee of a Government-owned, contractor-operated entity pursuant to a waiver. *See* § 2641.301(i).

(6) Subject to a waiver issued for certain positions. *See* § 2641.301(j).

(c) *Commencement and length of restriction*—(1) *Generally*. Except as provided in paragraph (c)(2) of this section, 18 U.S.C. 207(f) is a one-year restriction. The one-year period is measured from the date when an employee ceases to be a senior or very senior employee, not from the termination of Government service, unless the two occur simultaneously. *See* examples 1 and 2 to paragraph (d) of § 2641.204.

(2) *U.S. Trade Representative or Deputy U.S. Trade Representative*. 18 U.S.C. 207(f) is a permanent restriction as applied to a former U.S. Trade Representative or Deputy U.S. Trade Representative.

(d) *Represent, aid, or advise*. [Reserved]

(e) *With the intent to influence*. [Reserved]

(f) *Decision of employee of an agency*. [Reserved]

(g) *Foreign entity*. [Reserved]

§ 2641.207 One-year restriction on any former private sector assignee under the Information Technology Exchange Program representing, aiding, counseling or assisting in representing in connection with any contract with former agency.

(a) *Basic prohibition of 18 U.S.C. 207(l)*. For one year after the termination of his assignment from a private sector organization to an agency under the Information Technology Exchange Program, 5 U.S.C. chapter 37, no former assignee shall knowingly represent, or aid, counsel or assist in representing any other person in connection with any contract with that agency.

(b) *Exceptions and waivers*. The prohibition of 18 U.S.C. 207(l) does not apply to a former employee who is:

(1) Acting on behalf of the United States. *See* § 2641.301(a).

(2) Acting as an elected State or local government official. *See* § 2641.301(b).

(3) Testifying under oath. *See* § 2641.301(f).

(4) Acting on behalf of an international organization pursuant to a waiver. *See* § 2641.301(h).

(5) Acting as an employee of a Government-owned, contractor-operated

entity pursuant to a waiver. *See* § 2641.301(i).

(c) *Commencement and length of restriction*. 18 U.S.C. 207(l) is a one-year restriction. The one-year period is measured from the date when the individual's assignment under the Information Technology Exchange Program terminates.

(d) *Represent, aid, counsel, or assist in representing*. [Reserved]

(e) *In connection with any contract with the former agency*. [Reserved]

Subpart C—Exceptions, Waivers and Separate Components

§ 2641.301 Statutory exceptions and waivers.

(a) *Exception for acting on behalf of United States*. A former employee is not prohibited by any of the prohibitions of 18 U.S.C. 207 from engaging in any activity on behalf of the United States.

(1) *United States*. For purposes of this paragraph, the term “United States” means:

(i) The executive branch (including a Government corporation);

(ii) The legislative branch; or

(iii) The judicial branch.

(2) *On behalf of the United States*. A former employee will be deemed to engage in the activity on behalf of the United States if he acts in accordance with paragraph (a)(2)(i) or (a)(2)(ii) of this section.

(i) *As employee of the United States*. A former employee engages in an activity on behalf of the United States when he carries out official duties as a current employee of the United States.

(ii) *As other than employee of the United States*. (A) Provided that he does not represent, aid, or advise a foreign entity in violation of 18 U.S.C. 207(f), a former employee engages in an activity on behalf of the United States when he serves:

(1) As a representative of the United States pursuant to a specific agreement with the United States to provide representational services to the United States; or

(2) As a witness called by the United States (including a Congressional committee or subcommittee) to testify at a Congressional hearing (even if applicable procedural rules do not require him to declare by oath or affirmation that he will testify truthfully).

(B) A former employee will not be deemed to engage in an activity on behalf of the United States merely because he is performing work funded by the Government, because he is engaging in the activity in response to a contact initiated by the Government,

because the Government will derive some benefit from the activity, or because he or the person on whose behalf he is acting may share the same objective as the Government.

Note to paragraph (a)(2)(ii): *See also* § 2641.301(f) concerning the permissibility of testimony under oath, including testimony as an expert witness, when a former employee is called as a witness by the United States.

Example 1 to paragraph (a): An employee of the Department of Transportation (DOT) transfers to become an employee of the Pension Benefit Guaranty Corporation (PBGC). The PBGC, a wholly owned Government corporation, is a corporation in which the United States has a proprietary interest. The former DOT employee may press the PBGC's point of view in a meeting with DOT employees concerning an airline bankruptcy case in which he was personally and substantially involved while at the DOT. His communications to the DOT on behalf of the PBGC would be made on behalf of the United States.

Example 2 to paragraph (a): A Federal Transit Administration (FTA) employee recommended against the funding of a certain subway project. After terminating Government service, she is hired by a Congressman as a member of his staff to perform a variety of duties, including miscellaneous services for the Congressman's constituents. The former employee may contact the FTA on behalf of a constituent group as part of her official duties in order to argue for the reversal of the subway funding decision in which she participated while still an employee of the FTA. Her communications to the FTA on behalf of the constituent group would be made on behalf of the United States.

Example 3 to paragraph (a): A Postal Service attorney participated in discussions with the Office of Personnel Management (OPM) concerning a dispute over the mailing of health plan brochures. After terminating Government service, the attorney joins a law firm as a partner. He is assigned by the firm's managing partner to represent the Postal Service pursuant to a contract requiring the firm to provide certain legal services. The former senior employee may represent the Postal Service in meetings with OPM concerning the dispute about the health plan brochures. The former senior employee's suggestions to the Postal Service concerning strategy and his arguments to OPM concerning the dispute would be made on behalf of the United States (even though he is also acting on behalf of his law firm when he performs representational services for the United States). A communication to the Postal Service concerning a disagreement about the law firm's fee, however, would not be made on behalf of the United States.

Example 4 to paragraph (a): A former senior employee of the Food and Drug Administration (FDA), now an employee of a drug company, is called by a Congressional committee to give unsworn testimony concerning the desirability of instituting cost controls in the pharmaceutical industry. The former senior employee may address the committee even though her testimony will

unavoidably also be directed to a current employee of the FDA who has also been asked to testify as a member of the same panel of experts. The former employee's communications at the hearing, provided at the request of the United States, would be made on behalf of the United States.

Example 5 to paragraph (a): A National Security Agency (NSA) analyst drafted the specifications for a contract that was awarded to the Secure Data Corporation to develop prototype software for the processing of foreign intelligence information. After terminating Government service, the analyst is hired by the corporation. The former employee may not attempt to persuade NSA officials that the software is in accord with the specifications. Although the development of the software is expected to significantly enhance the processing of foreign intelligence information and the former employee's opinions might be useful to current NSA employees, his communications would not be made on behalf of the United States.

Example 6 to paragraph (a): A senior employee at the Department of the Air Force specialized in issues relating to the effective utilization of personnel.

After terminating Government service, the former senior employee is hired by a contractor operating a Federally Funded Research and Development Center (FFRDC). The FFRDC is not a "Government corporation" as defined in § 2641.104. The former senior employee may not attempt to convince the Air Force of the manner in which Air Force funding should be allocated among projects proposed to be undertaken by the FFRDC. Although the work performed by the FFRDC will be determined by the Air Force, may be accomplished at Government-owned facilities, and will benefit the Government, her communications would not be made on behalf of the United States.

Example 7 to paragraph (a): A Department of Justice (DOJ) attorney represented the United States in a civil enforcement action against a company that had engaged in fraudulent activity. The settlement of the case required that the company correct certain deficiencies in its operating procedures. After terminating Government service, the attorney is hired by the company. When DOJ auditors schedule a meeting with the company's legal staff to review company actions since the settlement, the former employee may not attempt to persuade the auditors that the company is complying with the terms of the settlement. Although the former employee's insights might facilitate the audit, his communications would not be made on behalf of the United States even though the Government's auditors initiated the contact with the former employee.

Note to paragraph (a): See also example 9 to paragraph (j) of § 2641.202 and example 1 to paragraph (d) of § 2641.204.

(b) *Exception for acting on behalf of State or local government as elected official.* A former employee is not prohibited by any of the prohibitions of 18 U.S.C. 207 from engaging in any post-employment activity on behalf of one or more State or local governments,

provided the activity is undertaken in carrying out official duties as an elected official of a State or local government.

Example 1 to paragraph (b): A former employee of the Department of Housing and Urban Development (HUD) participated personally and substantially in the evaluation of a grant application from a certain city. After terminating Government service, he was elected mayor of that city. The former employee may contact an Assistant Secretary at HUD to argue that additional funds are due the city under the terms of the grant.

Example 2 to paragraph (b): A former employee of the Federal Highway Administration (FHWA) participated personally and substantially in the decision to provide funding for a bridge across the White River in Arkansas. After terminating Government service, she accepted the Governor's offer to head the highway department in Arkansas. A communication to or appearance before the FHWA concerning the terms of the construction grant would not be made as an elected official of a State or local government.

(c) *Exception for acting on behalf of specified entities.* A former senior or very senior employee is not prohibited by 18 U.S.C. 207(c) or (d), or §§ 2641.204 or 2641.205, from making a communication or appearance on behalf of one or more entities specified in paragraph (c)(1) of this section, provided the communication or appearance is made in carrying out official duties as an employee of a specified entity.

(1) *Specified entities.* For purposes of this paragraph, a specified entity is:

- (i) An agency or instrumentality of a State or local government;
- (ii) A hospital or medical research organization, if exempted from taxation under 26 U.S.C. 501(c)(3); or
- (iii) An accredited, degree-granting institution of higher education, as defined in 20 U.S.C. 1001.

(2) *Employee.* For purposes of this paragraph, the term "employee" of a specified entity means a person who has an employee-employer relationship with an entity specified in paragraph (c)(1) of this section. It includes a person who is employed to work part-time for a specified entity. The term excludes an individual performing services for a specified entity as a consultant or independent contractor.

Example 1 to paragraph (c): A senior employee leaves her position at the National Institutes of Health (NIH) and takes a full-time position at the Gene Research Foundation, a tax-exempt organization pursuant to 26 U.S.C. 501(c)(3). As an employee of a 501(c)(3) tax-exempt medical research organization, the former senior employee is not barred by 18 U.S.C. 207(c) from representing the Foundation before the NIH.

Example 2 to paragraph (c): A former senior employee of the Environmental Protection Agency (EPA) joins a law firm in Richmond, Virginia. The firm is hired by the Commonwealth of Virginia to represent it in discussions with the EPA about an environmental impact statement concerning the construction of a highway interchange. The former senior employee's arguments concerning the environmental impact statement would not be made as an employee of the Commonwealth of Virginia.

Example 3 to paragraph (c): A former senior employee becomes an employee of the ABC Association. The ABC Association is a nonprofit organization whose membership consists of a broad representation of State health agencies and senior State health officials, and it performs services from which certain State governments benefit, including collecting information from its members and conveying that information and views to the Federal Government. However, the ABC Association has not been delegated authority by any State government to perform any governmental functions, and it does not operate under the regulatory, financial, or management control of any State government. Therefore, the ABC Association is not an agency or instrumentality of a State government, and the former senior employee may not represent the organization before his former agency within one year after terminating his senior employee position.

(d) *Exception for uncompensated statements based on special knowledge.* A former senior or very senior employee is not prohibited by 18 U.S.C. 207(c) or (d), or §§ 2641.204 or 2641.205, from making a statement based on his own special knowledge in the particular area that is the subject of the statement, provided that he receives no compensation for making the statement.

(1) *Special knowledge.* A former employee has special knowledge concerning a subject area if he is familiar with the subject area as a result of education, interaction with experts, or other unique or particularized experience.

(2) *Statement.* A statement for purposes of this paragraph is a communication of facts observed by the former employee.

(3) *Compensation.* Compensation includes any form of remuneration or income that is given in consideration, in whole or in part, for the statement. It does not include the payment of actual and necessary expenses incurred in connection with making the statement.

Example 1 to paragraph (d): A senior employee of the Department of the Treasury was personally and substantially involved in discussions with other Department officials concerning the advisability of a three-phase reduction in the capital gains tax. After Government service, the former senior employee affiliates with a nonprofit group that advocates a position on the three-phase capital gains issue that is similar to his own.

The former senior employee, who receives no salary from the nonprofit organization, may meet with current Department officials on the organization's behalf to state what steps had previously been taken by the Department to address the issue. The statement would be permissible even if the nonprofit organization reimbursed the former senior employee for his actual and necessary travel expenses incurred in connection with making the statement.

Example 2 to paragraph (d): A former senior employee becomes a government relations consultant, and he enters into a \$5,000 per month retainer agreement with XYZ Corporation for government relations services. He would like to meet with his former agency to discuss a regulatory matter involving his client. Even though he would not be paid by XYZ specifically for this particular meeting, he nevertheless would receive compensation for any statements at the meeting, because of the monthly payments under his standing retainer agreement. Therefore he may not rely on the exception for uncompensated statements based on special knowledge.

(e) *Exception for furnishing scientific or technological information.* A former employee is not prohibited by 18 U.S.C. 207(a), (c), or (d), or §§ 2641.201, 2641.202, 2641.204, or 2641.205, from making communications, including appearances, solely for the purpose of furnishing scientific or technological information, provided the communications are made either in accordance with procedures adopted by the agency or agencies to which the communications are directed or the head of such agency or agencies, in consultation with the Director of the Office of Government Ethics, makes a certification published in the **Federal Register**.

(1) *Purpose of information.* A communication made solely for the purpose of furnishing scientific or technological information may be:

- (i) Made in connection with a matter that involves an appreciable element of actual or potential dispute;
- (ii) Made in connection with an effort to seek a discretionary Government ruling, benefit, approval, or other action; or
- (iii) Inherently influential in relation to the matter in dispute or the Government action sought.

(2) *Scientific or technological information.* The former employee must convey information of a scientific or technological character, such as technical or engineering information relating to the natural sciences. The exception does not extend to information associated with a nontechnical discipline such as law, economics, or political science.

(3) *Incidental references or remarks.* Provided the former employee's

communication primarily conveys information of a scientific or technological character, the entirety of the communication will be deemed made solely for the purpose of furnishing such information notwithstanding an incidental reference or remark:

- (i) Unrelated to the matter to which the post-employment restriction applies;
- (ii) Concerning feasibility, risk, cost, speed of implementation, or other considerations when necessary to appreciate the practical significance of the basic scientific or technological information provided; or
- (iii) Intended to facilitate the furnishing of scientific or technological information, such as those references or remarks necessary to determine the kind and form of information required or the adequacy of information already supplied.

Example 1 to paragraph (e)(3): After terminating Government service, a former senior employee at the National Security Agency (NSA) accepts a position as a senior manager at a firm specializing in the development of advanced security systems. The former senior employee and another firm employee place a conference call to a current NSA employee to follow up on an earlier discussion in which the firm had sought funding from the NSA to develop a certain proposed security system. After the other firm employee explains the scientific principles underlying the proposed system, the former employee may not state the system's expected cost. Her communication would not primarily convey information of a scientific or technological character.

Example 2 to paragraph (e)(3): If, in the previous example, the former senior employee explained the scientific principles underlying the proposed system, she could also have stated its expected cost as an incidental reference or remark.

(4) *Communications made under procedures acceptable to the agency.* (i) An agency may adopt such procedures as are acceptable to it, specifying conditions under which former Government employees may make communications solely for the purpose of furnishing scientific or technological information, in light of the agency's particular programs and needs. In promulgating such procedures, an agency may consider, for example, one or more of the following:

- (A) Requiring that the former employee specifically invoke the exception prior to making a communication (or series of communications);
- (B) Requiring that the designated agency ethics official for the agency to which the communication is directed (or other agency designee) be informed when the exception is used;

(C) Limiting communications to certain formats which are least conducive to the use of personal influence;

(D) Segregating, to the extent possible, meetings and presentations involving technical substance from those involving other aspects of the matter; or

(E) Employing more restrictive practices in relation to communications concerning specified categories of matters or specified aspects of a matter, such as in relation to the pre-award as distinguished from the post-award phase of a procurement.

(ii) The Director of the Office of Government Ethics may review any agency implementation of this exception in connection with OGE's executive branch ethics program oversight responsibilities. See 5 CFR part 2638.

Example 1 to paragraph (e)(4): A Marine Corps engineer participates personally and substantially in drafting the specifications for a new assault rifle. After terminating Government service, he accepts a job with the company that was awarded the contract to produce the rifle. Provided he acts in accordance with agency procedures, he may accompany the President of the company to a meeting with Marine Corps employees and report the results of a series of metallurgical tests. These results support the company's argument that it has complied with a particular specification. He may do so even though the meeting was expected to be and is, in fact, a contentious one in which the company's testing methods are at issue. He may not, however, present the company's argument that an advance payment is due the company under the terms of the contract since this would not be a mere incidental reference or remark within the meaning of paragraph (e)(3) of this section.

(5) *Certification for expertise in technical discipline.* A certification issued in accordance with this section shall be effective on the date it is executed (unless a later date is specified), provided that it is transmitted to the **Federal Register** for publication.

(i) *Criteria for issuance.* A certification issued in accordance with this section may not broaden the scope of the exception and may be issued only when:

- (A) The former employee has outstanding qualifications in a scientific, technological, or other technical discipline (involving engineering or other natural sciences as distinguished from a nontechnical discipline such as law, economics, or political science);
- (B) The matter requires the use of such qualifications; and
- (C) The national interest would be served by the former employee's participation.

(ii) *Submission of requests.* The individual wishing to make the communication shall forward a written request to the head of the agency to which the communications would be directed. Any such request shall address the criteria set forth in paragraph (e)(5)(i) of this section.

(iii) *Issuance.* The head of the agency to which the communications would be directed may, upon finding that the criteria specified in paragraph (e)(5)(i) of this section are satisfied, approve the request by executing a certification, which shall be published in the **Federal Register**. A copy of the certification shall be forwarded to the affected individual. The head of the agency shall, prior to execution of the certification, furnish a draft copy of the certification to the Director of the Office of Government Ethics and consider the Director's comments, if any, in relation to the draft. The certification shall specify:

(A) The name of the former employee;

(B) The Government position or positions held by the former employee during his most recent period of Government service;

(C) The identity of the employer or other person on behalf of which the former employee will be acting;

(D) The restriction or restrictions to which the certification shall apply;

(E) Any limitations imposed by the agency head with respect to the scope of the certification; and

(F) The basis for finding that the criteria specified in paragraph (e)(5)(i) of this section are satisfied, specifically including a description of the matter and the communications that will be permissible or, if relevant, a statement that such information is protected from disclosure by statute.

(iv) *Copy to Office of Government Ethics.* Once published, the agency shall provide the Director of the Office of Government Ethics with a copy of the certification as published in the **Federal Register**.

(v) *Revocation.* The agency head may revoke a certification and shall forward a written notice of the revocation to the former employee and to the OGE Director. Revocation of a certification shall be effective on the date specified in the notice revoking the certification.

(f) *Exception for giving testimony under oath or making statements required to be made under penalty of perjury.* Subject to the limitation described in paragraph (f)(2) of this section concerning expert witness testimony, a former employee is not prohibited by any of the prohibitions of 18 U.S.C. 207 from giving testimony under oath or making a statement

required to be made under penalty of perjury.

(1) *Testimony under oath.* Testimony under oath is evidence delivered by a witness either orally or in writing, including deposition testimony and written affidavits, in connection with a judicial, quasi-judicial, administrative, or other legally recognized proceeding in which applicable procedural rules require a witness to declare by oath or affirmation that he will testify truthfully.

(2) *Limitation on exception for service as an expert witness.* The exception described in paragraph (f)(1) of this section does not negate the bar of 18 U.S.C. 207(a)(1), or § 2641.201, to a former employee serving as an expert witness; where the bar of section 207(a)(1) applies, a former employee may not serve as an expert witness except:

(i) If he is called as a witness by the United States; or

(ii) By court order. For this purpose, a subpoena is not a court order, nor is an order merely qualifying an individual to testify as an expert witness.

(3) *Statements made under penalty of perjury.* A former employee may make any statement required to be made under penalty of perjury, except that he may not:

(i) Submit a pleading, application, or other document as an attorney or other representative; or

(ii) Serve as an expert witness where the bar of 18 U.S.C. 207(a)(1) applies, except as provided in paragraph (f)(2) of this section.

Note to paragraph (f): Whether compensation of a witness is appropriate is not addressed by 18 U.S.C. 207. However, 18 U.S.C. 201 may prohibit individuals from receiving compensation for testifying under oath in certain forums except as authorized by 18 U.S.C. 201(d). Note also that there may be statutory or other bars on the disclosure by a current or former employee of information from the agency's files or acquired in connection with the individual's employment with the Government; a former employee's agency may have promulgated procedures to be followed with respect to the production or disclosure of such information.

Example 1 to paragraph (f): A former employee is subpoenaed to testify in a case pending in a United States district court concerning events at the agency she observed while she was performing her official duties with the Government. She is not prohibited by 18 U.S.C. 207 from testifying as a fact witness in the case.

Example 2 to paragraph (f): An employee was removed from service by his agency in connection with a series of incidents where the employee was absent without leave or was unable to perform his duties because he appeared to be intoxicated. The employee's

supervisor, who had assisted the agency in handling the issues associated with the removal, subsequently left Government. In the ensuing case in Federal court between the employee who had been removed and his agency over whether he had been discriminated against because of his disabling alcoholism, his former supervisor was asked whether on certain occasions the employee had been intoxicated on the job and unable to perform his assigned duties. Opposing counsel objected to the question on the basis that the question required expert testimony and the witness had not been qualified as an expert. The judge overruled the objection on the basis that the witness would not be providing expert testimony but opinions or inferences which are rationally based on his perception and helpful to a clear understanding of his testimony or the determination of a fact in issue. The former employee may provide the requested testimony without violating 18 U.S.C. 207.

Example 3 to paragraph (f): A former senior employee of the Environmental Protection Agency (EPA) is a recognized expert concerning compliance with Clean Air Act requirements. Within one year after terminating Government service, she is retained by a utility company that is the defendant in a lawsuit filed against it by the EPA. While the matter had been pending while she was with the agency, she had not worked on the matter. After the court rules that she is qualified to testify as an expert, the former senior employee may offer her sworn opinion that the utility company's practices are in compliance with Clean Air Act requirements. She may do so although she would otherwise have been barred by 18 U.S.C. 207(c) from making the communication to the EPA.

Example 4 to paragraph (f): In the previous example, an EPA scientist served as a member of the EPA investigatory team that compiled a report concerning the utility company's practices during the discovery stage of the lawsuit. She later terminated Government service to join a consulting firm and is hired by the utility company to assist it in its defense. She may not, without a court order, serve as an expert witness for the company in the matter since she is barred by 18 U.S.C. 207(a)(1) from making the communication to the EPA. On application by the utility company for a court order permitting her service as an expert witness, the court found that there were no extraordinary circumstances that would justify overriding the specific statutory bar to such testimony. Such extraordinary circumstances might be where no other equivalent expert testimony can be obtained and an employee's prior involvement in the matter would not cause her testimony to have an undue influence on proceedings. Without such extraordinary circumstances, ordering such expert witness testimony would undermine the bar on such testimony.

(g) *Exception for representing certain candidates or political organizations.* Except as provided in paragraph (g)(2) of this section, a former senior or very senior employee is not prohibited by 18 U.S.C. 207(c) or (d), or §§ 2641.204 or

2641.205, from making a communication or appearance on behalf of a candidate in his capacity as a candidate or an entity specified in paragraphs (g)(1)(ii) through (g)(1)(vi) of this section.

(1) *Specified persons or entities.* For purposes of this paragraph (g), the specified persons or entities are:

(i) A *candidate*. A candidate means any person who seeks nomination for election, or election to, Federal or State office or who has authorized others to explore on his own behalf the possibility of seeking nomination for election, or election to, Federal or State office;

(ii) An *authorized committee*. An authorized committee means any political committee designated in writing by a candidate as authorized to receive contributions or make expenditures to promote the nomination or election of the candidate or to explore the possibility of seeking the nomination or election of the candidate. The term does not include a committee that receives contributions or makes expenditures to promote more than one candidate;

(iii) A *national committee*. A national committee means the organization which, under the bylaws of a political party, is responsible for the day-to-day operation of the political party at the national level;

(iv) A *national Federal campaign committee*. A national Federal campaign committee means an organization which, under the bylaws of a political party, is established primarily to provide assistance at the national level to candidates nominated by the party for election to the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(v) A *State committee*. A State committee means the organization which, under the bylaws of a political party, is responsible for the day-to-day operation of the political party at the State level; or

(vi) A *political party*. A political party means an association, committee, or organization that nominates a candidate for election to any Federal or State elected office whose name appears on the election ballot as the candidate of the association, committee, or organization.

(2) *Limitations.* The exception in this paragraph (g) shall not apply if the communication or appearance:

(i) Is made at a time the former senior or very senior employee is employed by any person or entity other than:

(A) A person or entity specified in paragraph (g)(1) of this section; or

(B) A person or entity who exclusively represents, aids, or advises persons or entities described in paragraph (g)(1) of this section;

(ii) Is made other than solely on behalf of one or more persons or entities specified in paragraph (g)(1) or (g)(2)(i)(B) of this section; or

(iii) Is made to or before the Federal Election Commission by a former senior or very senior employee of the Federal Election Commission.

Example 1 to paragraph (g): The former Deputy Director of the Office of Management and Budget becomes the full-time head of the President's re-election committee. The former Deputy Director may, within two years of terminating his very senior employee position, represent the re-election committee to the White House travel office in discussions regarding the appropriate amounts of reimbursements by the committee of political travel costs of the President.

Example 2 to paragraph (g): The former U.S. Attorney General is asked by a candidate running for Governor of Alabama to contact the Chairman of the Federal Trade Commission (a position listed in 5 U.S.C. 5314) to seek the dismissal of a pending enforcement action involving the candidate's family business. The former very senior employee's communication to the Chairman would not be made on behalf of the candidate in his capacity as a candidate and, thus, would be barred by 18 U.S.C. 207(d).

Example 3 to paragraph (g): In the previous example, the former Attorney General could contact the Commissioner of Internal Revenue (a position listed in 5 U.S.C. 5314) to urge the review of a tax ruling affecting Alabama's Republican Party since the communication would be made on behalf of a State committee.

Example 4 to paragraph (g): The former Assistant Secretary for Legislative and Intergovernmental Affairs at the Department of Commerce is hired as a consultant by a company that provides advisory services to political candidates and senior executives in private industry. Her only client is a candidate for the U.S. Senate. The former senior employee may not contact the Deputy Secretary of Commerce within one year of her termination from the Department to request that the Deputy Secretary give an official speech in which he would express support for legislation proposed by the candidate. The communication would be prohibited by 18 U.S.C. 207(c) because it would be made when the former senior employee was employed by an entity that did not exclusively represent, aid, or advise persons or entities specified in paragraph (g)(1) of this section.

(h) *Waiver for acting on behalf of international organization.* The Secretary of State may grant an individual waiver of one or more of the restrictions in 18 U.S.C. 207 where the former employee would appear or communicate on behalf of, or provide aid or advice to, an international organization in which the United States

participates. The Secretary of State must certify in advance that the proposed activity is in the interest of the United States.

Note to paragraph (h): An employee who is detailed under 5 U.S.C. 3343 to an international organization remains an employee of his agency. In contrast, an employee who transfers under 5 U.S.C. 3581-3584 to an international organization is a former employee of his agency.

(i) *Waiver for re-employment by Government-owned, contractor-operated entity.* The President may grant a waiver of one or more of the restrictions in 18 U.S.C. 207 to eligible employees upon the determination and certification in writing that the waiver is in the public interest and the services of the individual are critically needed for the benefit of the Federal Government. Upon the issuance of a waiver pursuant to this paragraph, the restriction or restrictions waived will not apply to a former employee acting as an employee of the same Government-owned, contractor-operated entity with which he was employed immediately before the period of Government service during which the waiver was granted. If the individual was employed by the Lawrence Livermore National Laboratory, the Los Alamos National Laboratory, or the Sandia National Laboratory immediately before the person's Federal Government employment began, the restriction or restrictions waived shall not apply to a former employee acting as an employee of any one of those three national laboratories after the former employee's Government service has terminated.

(1) *Eligible employees.* Any current civilian employee of the executive branch, other than an employee serving in the Executive Office of the President, who served as an officer or employee at a Government-owned, contractor-operated entity immediately before he became a Government employee. A total of no more than 25 current employees shall hold waivers at any one time.

(2) *Issuance.* The President may not delegate the authority to issue waivers under this paragraph. If the President issues a waiver, a certification shall be published in the **Federal Register** and shall identify:

(i) The employee covered by the waiver by name and position; and

(ii) The reasons for granting the waiver.

(3) *Copy to Office of Government Ethics.* A copy of the certification shall be provided to the Director of the Office of Government Ethics (OGE).

(4) *Effective date.* A waiver issued under this section shall be effective on

the date the certification is published in the **Federal Register**.

(5) *Reports*. Each former employee holding a waiver must submit semiannual reports, for a period of two years after terminating Government service, to the President and the OGE Director.

(i) *Submission*. The reports shall be submitted:

(A) Not later than six months and 60 days after the date of the former employee's termination from the period of Government service during which the waiver was granted; and

(B) Not later than 60 days after the end of any successive six-month period.

(ii) *Content*. Each report shall describe all activities undertaken by the former employee during the six-month period that would have been prohibited by 18 U.S.C. 207 but for the waiver.

(iii) *Public availability*. All reports filed with the OGE Director under this paragraph shall be made available for public inspection and copying.

Note to paragraph (i)(5): 18 U.S.C. 207(k)(5)(D) specifies that an individual who is granted a waiver as described in this paragraph is ineligible for appointment in the civil service unless all reports required by that section have been filed.

(6) *Revocation*. A waiver shall be revoked when the recipient of the waiver fails to file a report required by paragraph (i)(4) of this section, and the recipient of the waiver shall be notified of such revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

(j) *Waiver of restrictions of 18 U.S.C. 207(c) and (f) for certain positions*. The Director of the Office of Government Ethics may waive application of the restriction of section 18 U.S.C. 207(c) and § 2641.204, with respect to certain positions or categories of positions. When the restriction of 18 U.S.C. 207(c) has been waived by the Director pursuant to this paragraph, the one-year restriction of 18 U.S.C. 207(f) and § 2641.206 also will not be triggered upon an employee's termination from the position.

(1) *Eligible senior employee positions*. A position which could be occupied by a senior employee is eligible for a waiver of the 18 U.S.C. 207(c) restriction except:

(i) The following positions are ineligible:

(A) Positions for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311–5318 (the Executive Schedule);

(B) Positions for which occupants are appointed by the President pursuant to 3 U.S.C. 105(a)(2)(B); or

(C) Positions for which occupants are appointed by the Vice President pursuant to 3 U.S.C. 106(a)(1)(B).

(ii) Regardless of the position occupied, private sector assignees under the Information Technology Exchange Program, within the meaning of paragraph (6) of the definition of senior employee in section 2641.104, are not eligible to benefit from a waiver.

Example 1 to paragraph (j)(1): The head of a department has authority to fix the annual salary for a category of positions administratively at a rate of compensation not in excess of the rate of compensation provided for level IV of the Executive Schedule (5 U.S.C. 5315). He sets a salary level that does not reference any Executive Schedule salary. The level of compensation is not "specified in" or "fixed according to" the Executive Schedule. If the authority pursuant to which compensation for a position is set instead stated that the position is to be paid at the rate of level IV of the Executive Schedule, the salary for the position would be fixed according to the Executive Schedule.

(2) *Criteria for waiver*. A waiver of restrictions for a position or category of positions shall be based on findings that:

(i) The agency has experienced or is experiencing undue hardship in obtaining qualified personnel to fill such position or positions as shown by relevant factors which may include, but are not limited to:

(A) Vacancy rates;

(B) The payment of a special rate of pay to the incumbent of the position pursuant to specific statutory authority; or

(C) The requirement that the incumbent of the position have outstanding qualifications in a scientific, technological, technical, or other specialized discipline;

(ii) Waiver of the restriction with respect to the position or positions is expected to ameliorate the recruiting difficulties; and

(iii) The granting of the waiver would not create the potential for the use of undue influence or unfair advantage based on past Government service, including the potential for use of such influence or advantage for the benefit of a foreign entity.

(3) *Procedures*. A waiver shall be granted in accordance with the following procedures:

(i) *Agency recommendation*. An agency's designated agency ethics official (DAEO) may, at any time, recommend the waiver of the 18 U.S.C. 207(c) (and section 207(f)) restriction for a position or category of positions by forwarding a written request to the Director addressing the criteria set forth in paragraph (j)(2) of this section. A

DAEO may, at any time, request that a current waiver be revoked.

(ii) *Action by Office of Government Ethics*. The Director of the Office of Government Ethics shall promptly provide to the designated agency ethics official a written response to each request for waiver or revocation. The Director shall maintain a listing of positions or categories of positions in appendix A to this part for which the 18 U.S.C. 207(c) restriction has been waived. The Director shall publish notice in the **Federal Register** when revoking a waiver.

(4) *Effective dates*. A waiver shall be effective on the date of the written response to the designated agency ethics official indicating that the request for waiver has been granted. A waiver shall inure to the benefit of the individual who holds the position when the waiver takes effect, as well as to his successors, but shall not benefit individuals who terminated senior service prior to the effective date of the waiver. Revocation of a waiver shall be effective 90 days after the date that the OGE Director publishes notice of the revocation in the **Federal Register**. Individuals who formerly served in a position for which a waiver of restrictions was applicable will not become subject to 18 U.S.C. 207(c) (or section 207(f)) if the waiver is revoked after their termination from the position.

(k) *Miscellaneous statutory exceptions*. Several statutory authorities specifically modify the scope of 18 U.S.C. 207 as it would otherwise apply to a former employee or class of former employees. These authorities include:

(1) 22 U.S.C. 3310(c), permitting employees of the American Institute in Taiwan to represent the Institute notwithstanding 18 U.S.C. 207;

(2) 22 U.S.C. 3613(d), permitting the individual who was Administrator of the Panama Canal Commission on the date of its termination to act in carrying out official duties as Administrator of the Panama Canal Authority notwithstanding 18 U.S.C. 207;

(3) 22 U.S.C. 3622(e), permitting an individual who was an employee of the Panama Canal Commission on the date of its termination to act in carrying out official duties on behalf of the Panama Canal Authority;

(4) 25 U.S.C. 450i(j), permitting a former employee who is carrying out official duties as an employee or elected or appointed official of a tribal organization or inter-tribal consortium to act on behalf of the organization or consortium in connection with any matter related to a tribal governmental activity or Federal Indian program or service, if the former employee submits

notice of any personal and substantial involvement in the matter during Government service;

(5) 38 U.S.C. 5902(d), permitting a former employee who is a retired officer, warrant officer, or enlisted member of the Armed Forces, while not on active duty, to act on behalf of certain claimants notwithstanding 18 U.S.C. 207 if the claim arises under laws administered by the Secretary of Veterans Affairs;

(6) 50 U.S.C. 405(b), permitting a former part-time member of an advisory committee appointed by the Federal Emergency Management Agency, the Director of National Intelligence, or the National Security Council to engage in

conduct notwithstanding 18 U.S.C. 207 except with respect to any particular matter directly involving an agency the former member advised or in which such agency is directly interested;

(7) 50 U.S.C. app. 463, permitting former employees appointed to certain positions under 50 U.S.C. app. 451 *et seq.* (Military Selective Service Act) to engage in conduct notwithstanding 18 U.S.C. 207; and

(8) Public Law 97-241, title I, section 120, August 24, 1982 (18 U.S.C. 203 note), providing that 18 U.S.C. 207 shall not apply under certain circumstances to private sector representatives on United States delegations to

international telecommunications meetings and conferences.

Note to paragraph (k): Exceptions from 18 U.S.C. 207 may be included in legislation mandating privatization of Governmental entities. *See, for example,* 42 U.S.C. 2297h-3(c), concerning the privatization of the United States Enrichment Corporation.

(l) *Guide to available exceptions and waivers to the prohibitions of 18 U.S.C. 207.* This chart lists the exceptions and waivers set forth in 18 U.S.C. 207 and for each exception and waiver identifies the prohibitions of section 207 excepted or subject to waiver. Detailed guidance on the applicability of the exceptions and waivers is contained in the cross-referenced paragraphs of this section.

Exception/waiver	Section 207 Prohibitions affected						
	(a)(1)	(a)(2)	(b)	(c)	(d)	(f)	(l)
(1) Acting for the United States, <i>see</i> § 2641.301(a)	•	•	•	•	•	•	•
(2) Elected State or local government official, <i>see</i> § 2641.301(b)	•	•	•	•	•	•	•
(3) Acting for specified entities, <i>see</i> § 2641.301(c)				•	•		
(4) Special knowledge, <i>see</i> § 2641.301(d)				•	•		
(5) Scientific or technological information, <i>see</i> § 2641.301(e)	•	•		•	•		
(6) Testimony, <i>see</i> § 2641.301(f)	•	•	•	•	•	•	•
(7) Acting for a candidate or political party, <i>see</i> § 2641.301(g)				•	•		
(8) Acting for an international organization, <i>see</i> § 2641.301(h)	•	•	•	•	•	•	•
(9) Employee of a Government-owned, contractor-operated entity, <i>see</i> § 2641.301(i)	•	•	•	•	•	•	•
(10) Waiver for certain positions, <i>see</i> § 2641.301(j)				•		•	

§ 2641.302 Separate agency components.

(a) *Designation.* For purposes of 18 U.S.C. 207(c) only, and § 2641.204, the Director of the Office of Government Ethics may designate agency “components” that are distinct and separate from the “parent” agency and from each other. Absent such designation, the representational bar of section 207(c) extends to the whole of the agency in which the former senior employee served. An eligible former senior employee who served in the parent agency is not barred by section 207(c) from making communications to or appearances before any employee of any designated component of the parent, but is barred as to any employee of the parent or of any agency or bureau of the parent that has not been designated. An eligible former senior employee who served in a designated component of the parent agency is barred from communicating to or making an appearance before any

employee of that designated component, but is not barred as to any employee of the parent, of another designated component, or of any other agency or bureau of the parent that has not been designated.

Example 1 to paragraph (a): While employed in the Office of the Secretary of Defense, a former career Senior Executive Service employee was employed in a position for which the rate of basic pay exceeded 86.5 percent of that payable for level II of the Executive Schedule. He is prohibited from contacting the Secretary of Defense and DOD’s Inspector General. However, because eligible under paragraph (b) of this section to benefit from component designation procedures, he is not prohibited by 18 U.S.C. 207(c) from contacting the Secretary of the Army. (The Department of the Army is a designated component of the parent, DOD. The Office of the Secretary of Defense and the Office of the DOD Inspector General are both part of the parent, DOD. *See* the listing of DOD components in appendix B to this part.)

Example 2 to paragraph (a): Because eligible under paragraph (b) of this section to benefit from component designation procedures, a former Navy Admiral who last served as the Vice Chief of Naval Operations is not prohibited by 18 U.S.C. 207(c) from contacting the Secretary of Defense, the Secretary of the Army, or DOD’s Inspector General. He is prohibited from contacting the Secretary of the Navy. (The Department of the Navy is a designated component of the parent, DOD. The Office of the Secretary of Defense and the Office of the DOD Inspector General are both part of the parent. *See* the listing of DOD components in appendix B to this part.)

(b) *Eligible former senior employees.* All former senior employees are eligible to benefit from this procedure except those who were senior employees by virtue of having been:

(1) Employed in a position for which the rate of pay is specified in or fixed according to 5 U.S.C. 5311-5318 (the Executive Schedule) (*see* example 1 to paragraph (j)(1) of § 2641.301);

- (2) Appointed by the President to a position under 3 U.S.C. 105(a)(2)(B); or
- (3) Appointed by the Vice President to a position under 3 U.S.C. 106(a)(1)(B).

Example 1 to paragraph (b): A former senior employee who had served as Deputy Commissioner of the Internal Revenue Service is not eligible to benefit from the designation of components for the Department of the Treasury because the position of Deputy Commissioner is listed in 5 U.S.C. 5316, at a rate of pay payable for level V of the Executive Schedule.

(c) *Criteria for designation.* A component designation must be based on findings that:

(1) The component is an agency or bureau, within a parent agency, that exercises functions which are distinct and separate from the functions of the parent agency and from the functions of other components of that parent as shown by relevant factors which may include, but are not limited to:

(i) The component's creation by statute or a statutory reference indicating that it exercises functions which are distinct and separate;

(ii) The component's exercise of distinct and separate subject matter or geographical jurisdiction;

(iii) The degree of supervision exercised by the parent over the component;

(iv) Whether the component exercises responsibilities that cut across organizational lines within the parent;

(v) The size of the component in absolute terms; and

(vi) The size of the component in relation to other agencies or bureaus within the parent.

(2) There exists no potential for the use of undue influence or unfair advantage based on past Government service.

(d) *Subdivision of components.* The Director will not ordinarily designate agencies that are encompassed by or otherwise supervised by an existing designated component.

(e) *Procedures.* Distinct and separate components shall be designated in accordance with the following procedure:

(1) *Agency recommendation.* A designated agency ethics official may, at any time, recommend the designation of an additional component or the revocation of a current designation by forwarding a written request to the Director of the Office of Government Ethics addressing the criteria set forth in paragraph (c) of this section.

(2) *Agency update.* Designated agency ethics officials shall, by July 1 of each year, forward to the OGE Director a letter stating whether components currently designated should remain

designated in light of the criteria set forth in paragraph (c) of this section.

(3) *Action by the Office of Government Ethics.* The Director of the Office of Government Ethics shall, by rule, make or revoke a component designation after considering the recommendation of the designated agency ethics official. The Director shall maintain a listing of all designated agency components in appendix B to this part.

(f) *Effective dates.* A component designation shall be effective on the date the rule creating the designation is published in the **Federal Register** and shall be effective as to individuals who terminated senior service either before, on or after that date. Revocation of a component designation shall be effective 90 days after the publication in the **Federal Register** of the rule that revokes the designation, but shall not be effective as to individuals who terminated senior service prior to the expiration of such 90-day period.

(g) *Effect of organizational changes.* (1) If a former senior employee served in an agency with component designations and the agency or a designated component that employed the former senior employee has been significantly altered by organizational changes, the appropriate designated agency ethics official shall determine whether any successor entity is substantially the same as the agency or a designated component that employed the former senior employee. Section 2641.204(g)(2)(iv)(A) through (g)(2)(iv)(C) should be used for guidance in determining how the 18 U.S.C. 207(c) bar applies when an agency or a designated component has been significantly altered.

(2) *Consultation with Office of Government Ethics.* When counseling individuals concerning the applicability of 18 U.S.C. 207(c) subsequent to significant organizational changes, the appropriate designated agency ethics official (DAEO) shall consult with the Office of Government Ethics. When it is determined that appendix B to this part no longer reflects the current organization of a parent agency, the DAEO shall promptly forward recommendations for designations or revocations in accordance with paragraph (e) of this section.

Example 1 to paragraph (g): An eligible former senior employee had served as an engineer in the Agency for Transportation Safety, an agency within Department X primarily focusing on safety issues relating to all forms of transportation. The agency had been designated as a distinct and separate component of Department X by the Director of the Office of Government Ethics.

Subsequent to his termination from the position, the functions of the agency are distributed among three other designated components with responsibilities relating to air, sea, and land transportation, respectively. The agency's few remaining programs are absorbed by the parent. As the designated component from which the former senior employee terminated is no longer identifiable as substantially the same entity, the 18 U.S.C. 207(c) bar will not affect him.

Example 2 to paragraph (g): A scientist served in a senior employee position in the Agency for Medical Research, an agency within Department X primarily focusing on cancer research. The agency had been designated as a distinct and separate component of Department X by the Director of the Office of Government Ethics. Subsequent to her termination from the position, the mission of the Agency for Medical Research is narrowed and it is renamed the Agency for Cancer Research. Approximately 20% of the employees of the former agency are transferred to various other parts of the Department to continue their work on medical research unrelated to cancer. The Agency for Cancer Research is determined to be substantially the same entity as the designated component in which she formerly served, and the 18 U.S.C. 207(c) bar applies with respect to the scientist's contacts with employees of the Agency for Cancer Research. She would not be barred from contacting an employee who was among the 20% of employees who were transferred to other parts of the Department.

(h) *Unauthorized designations.* No agency or bureau within the Executive Office of the President may be designated as a separate agency component.

Appendix A to Part 2641—Positions Waived From 18 U.S.C. 207(c) and (f)

Pursuant to the provisions of 18 U.S.C. 207(c)(2)(C) and 5 CFR 2641.301(j), each of the following positions is waived from the provisions of 18 U.S.C. 207(c) and 5 CFR 2641.204, as well as the provisions of 18 U.S.C. 207(f) and 5 CFR 2641.206. All waivers are effective as of the date indicated.

Agency: Department of Justice

Positions:

United States Trustee (21) (effective June 2, 1994).

Agency: Securities and Exchange Commission

Positions:

Solicitor, Office of General Counsel (effective October 29, 1991).

Chief Litigation Counsel, Division of Enforcement (effective October 29, 1991).
Deputy Chief Litigation Counsel, Division of Enforcement (effective November 10, 2003).

SK-17 positions (effective November 10, 2003).

SK-16 and lower-graded SK positions supervised by employees in SK-17 positions (effective November 10, 2003).
SK-16 and lower-graded SK positions not supervised by employees in SK-17 positions (effective December 4, 2003).

Appendix B to Part 2641—Agency Components for Purposes of 18 U.S.C. 207(c)

Pursuant to the provisions of 18 U.S.C. 207(h), each of the following agencies is determined, for purposes of 18 U.S.C. 207(c), and 5 CFR 2641.204, to have within it distinct and separate components as set forth below. Except as otherwise indicated, all designations are effective as of January 1, 1991.

Parent: Department of Commerce

Components:

Bureau of the Census.
Bureau of Industry and Security (formerly Bureau of Export Administration) (effective January 28, 1992).
Economic Development Administration.
International Trade Administration.
Minority Business Development Agency (formerly listed as Minority Business Development Administration).
National Institute of Standards and Technology (effective March 6, 2008).
National Oceanic and Atmospheric Administration.
National Technical Information Service (effective March 6, 2008).
National Telecommunications and Information Administration.
United States Patent and Trademark Office (formerly Patent and Trademark Office).

Parent: Department of Defense

Components:

Department of the Air Force.
Department of the Army.
Department of the Navy.
Defense Information Systems Agency.
Defense Intelligence Agency.
Defense Logistics Agency.
Defense Threat Reduction Agency (effective February 5, 1999).
National Geospatial-Intelligence Agency (formerly National Imagery and Mapping Agency) (effective May 16, 1997).
National Reconnaissance Office (effective January 30, 2003).
National Security Agency.

Parent: Department of Energy

Component:

Federal Energy Regulatory Commission.

Parent: Department of Health and Human Services

Components:

Administration on Aging (effective May 16, 1997).
Administration for Children and Families (effective January 28, 1992).
Agency for Healthcare Research and Quality (formerly Agency for Health Care Policy and Research) (effective May 16, 1997).
Agency for Toxic Substances and Disease Registry (effective May 16, 1997).
Centers for Disease Control and Prevention (effective May 16, 1997).

Centers for Medicare and Medicaid Services (formerly Health Care Financing Administration).
Food and Drug Administration.
Health Resources and Services Administration (effective May 16, 1997).
Indian Health Service (effective May 16, 1997).
National Institutes of Health (effective May 16, 1997).
Substance Abuse and Mental Health Services Administration (effective May 16, 1997).

Parent: Department of the Interior

Components:¹

Bureau of Indian Affairs (effective January 28, 1992).
Bureau of Land Management (effective January 28, 1992).
Bureau of Reclamation (effective January 28, 1992).
Minerals Management Service (effective January 28, 1992).
National Park Service (effective January 28, 1992).
Office of Surface Mining Reclamation and Enforcement (effective January 28, 1992).
U.S. Fish and Wildlife Service (effective January 28, 1992).
U.S. Geological Survey (effective January 28, 1992).

Parent: Department of Justice

Components:

Antitrust Division.
Bureau of Alcohol, Tobacco, Firearms and Explosives (effective November 23, 2004).
Bureau of Prisons (including Federal Prison Industries, Inc.)
Civil Division.
Civil Rights Division.
Community Relations Service.
Criminal Division.
Drug Enforcement Administration.
Environment and Natural Resources Division.
Executive Office for United States Attorneys² (effective January 28, 1992).
Executive Office for United States Trustees³ (effective January 28, 1992).
Federal Bureau of Investigation.
Foreign Claims Settlement Commission.
Independent Counsel appointed by the Attorney General.

¹ All designated components under the jurisdiction of a particular Assistant Secretary shall be considered a single component for purposes of determining the scope of 18 U.S.C. 207(c) as applied to senior employees serving on the immediate staff of that Assistant Secretary.

² The Executive Office for United States Attorneys shall not be considered separate from any Office of the United States Attorney for a judicial district, but only from other designated components of the Department of Justice.

³ The Executive Office for United States Trustees shall not be considered separate from any Office of the United States Trustee for a region, but only from other designated components of the Department of Justice.

Office of Justice Programs.
Office of the Pardon Attorney (effective January 28, 1992).
Offices of the United States Attorney (each of 94 offices).
Offices of the United States Trustee (each of 21 offices).
Office on Violence Against Women⁴ (effective March 8, 2007).
Tax Division.
United States Marshals Service (effective May 16, 1997).
United States Parole Commission.

Parent: Department of Labor

Components:

Bureau of Labor Statistics.
Employee Benefits Security Administration (formerly Pension and Welfare Benefits Administration) (effective May 16, 1997).
Employment and Training Administration.
Employment Standards Administration.
Mine Safety and Health Administration.
Occupational Safety and Health Administration.
Office of Disability Employment Policy (effective January 30, 2003).

Parent: Department of State

Component:

Foreign Service Grievance Board.

Parent: Department of Transportation

Components:

Federal Aviation Administration.
Federal Highway Administration.
Federal Motor Carrier Safety Administration (effective January 30, 2003).
Federal Railroad Administration.
Federal Transit Administration.
Maritime Administration.
National Highway Traffic Safety Administration.
Saint Lawrence Seaway Development Corporation.
Surface Transportation Board (effective May 16, 1997).

Parent: Department of the Treasury

Components:

Alcohol and Tobacco Tax and Trade Bureau (effective November 23, 2004).
Bureau of Engraving and Printing.
Bureau of the Mint.
Bureau of the Public Debt.
Comptroller of the Currency.
Financial Crimes Enforcement Center (FinCEN) (effective January 30, 2003).
Financial Management Service.
Internal Revenue Service.
Office of Thrift Supervision.

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⁴ The Office on Violence Against Women shall not be considered separate from the Office of Justice Programs, but only from other designated components of the Department of Justice.



Federal Register

**Wednesday,
June 25, 2008**

Part III

Securities and Exchange Commission

**17 CFR Parts 240 and 249b
Proposed Rules for Nationally Recognized
Statistical Rating Organizations; Proposed
Rule**

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249b

[Release No. 34-57967; File No. S7-13-08]

RIN 3235-AK14

Proposed Rules for Nationally Recognized Statistical Rating Organizations

AGENCY: Securities and Exchange Commission (“Commission”).

ACTION: Proposed rule.

SUMMARY: In the first of three related actions the Commission is proposing rule amendments that would impose additional requirements on nationally recognized statistical rating organizations (“NRSROs”) in order to address concerns about the integrity of their credit rating procedures and methodologies in the light of the role they played in determining credit ratings for securities collateralized by or linked to subprime residential mortgages. Second, the Commission also makes a proposal related to structured finance products rating symbology. And third, in the near future, the Commission intends to propose rule amendments that would be intended to reduce undue reliance in the Commission’s rules on NRSRO ratings.

DATES: Comments should be received on or before July 25, 2008.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-13-08 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.
- All submissions should refer to File Number S7-13-08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also

available for public 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT:

Michael A. Macchiaroli, Associate Director, at (202) 551-5525; Thomas K. McGowan, Assistant Director, at (202) 551-5521; Randall W. Roy, Branch Chief, at (202) 551-5522; Joseph I. Levinson, Attorney, at (202) 551-5598; Carrie A. O’Brien, Attorney, at (202) 551-5640; Sheila D. Swartz, Special Counsel, at (202) 551-5545; Rose Russo Wells, Special Counsel, at (202) 551-5527; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-6628 or, with respect to questions involving the proposed amendments as they implicate the Securities Act of 1933, Kathy Hsu, Special Counsel, at (202) 551-3306 or Eduardo Aleman, Special Counsel, at (202) 551-3646; Division of Corporation Finance, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

Beginning in the early 2000s, originators started to increasingly make residential mortgage loans based on lower underwriting standards (“subprime loans”).¹ For the first few years there did not appear to be any negative repercussions from this lending practice. However, beginning in mid-2006, home values leveled off and soon began to decline, which, in turn, led to a corresponding increase in delinquencies and, ultimately, defaults in subprime loans.² This marked

¹ There is no standard definition of a subprime loan. However, such a loan can broadly be described as a mortgage loan that does not conform to the underwriting standards required for sale to the government sponsored enterprises (non-conforming loans) and are made to borrowers who: (1) Have weakened credit histories such as payment delinquencies, charge-offs, judgments, and bankruptcies; (2) have reduced repayment capacity as measured by credit scores (e.g., FICO), debt-to-income ratios, loan-to-value ratios, or other criteria; (3) have not provided documentation to verify all or some of the information, particularly financial information, in their loan applications; or (4) have any combination of these factors. Non-conforming loans made to less risky borrowers fall into two other classifications: jumbo and Alt-A.

² See e.g., Testimony of John C. Dugan, Comptroller of the Currency, before the U.S. Senate

increase in subprime loan delinquencies and, ultimately, in defaults has had substantial adverse effects on the markets for, and market values and liquidity of, residential mortgage-backed securities (“RMBS”) backed by subprime loans and on collateralized debt obligations (“CDOs”) linked to such loans (collectively “subprime RMBS and CDOs”).³

Moreover, the impacts from the troubles experienced by subprime loans extended beyond subprime RMBS and CDOs to the broader credit markets and the economy as a whole.⁴ As a result, the parties that participated in various parts of the process of making subprime loans, packaging them into subprime RMBS and CDOs, and selling these debt instruments, including mortgage brokers, loan originators, securities sponsors and underwriters, and NRSROs have come under intense scrutiny. Today, the Commission is proposing a series of new requirements that are designed to address concerns that have been raised about NRSROs in light of the role they played in this process. Additionally, two weeks from today, the Commission will complete its proposal of this series of rule changes. These changes would be intended to reduce undue reliance in the Commission’s rules on NRSRO ratings, thereby promoting increased investor due diligence.

B. The Credit Rating Agency Reform Act of 2006

The purpose of the Credit Rating Agency Reform Act of 2006 (the “Rating Agency Act”), enacted on September 29, 2006, is to “improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.”⁵ The operative provisions of the Rating Agency Act became applicable upon the Commission’s

Committee on Banking, Housing, and Urban Affairs (March 4, 2008) (“Dugan March 4, 2008 Senate Testimony”), pp. 8-12; Statement of Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation, before U.S. Senate Committee on Banking, Housing, and Urban Affairs (March 4, 2008) (“Bair March 4, 2008 Senate Statement”), pp. 5-6.

³ See e.g., Dugan March 4, 2008 Senate Testimony, pp. 12-14; Bair March 4, 2008 Senate Statement, pp. 6-7.

⁴ See e.g., Statement of Ben S. Bernanke, Chairman, Board of Governors of the Federal Reserve System, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (February 28, 2008) (“Bernanke February 28, 2008 Senate Statement”), pp. 1-3; Dugan March 4, 2008 Senate Testimony, pp. 12-15.

⁵ Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 3850, Credit Rating Agency Reform Act of 2006, S. Report No. 109-326, 109th Cong., 2d Sess. (Sept. 6, 2006) (“Senate Report”), p. 1.

adoption in June 2007 of a series of rules implementing a registration and oversight program for credit rating agencies that register as NRSROs.⁶

To date, a total of nine credit rating agencies have been granted registration with the Commission as NRSROs pursuant to the Rating Agency Act and the rules thereunder.⁷ These registrants include the credit rating agencies most active in rating subprime RMBS and CDOs: Fitch Ratings, Inc. ("Fitch"), Moody's Investors Service ("Moody's"), and Standard and Poor's Rating Services ("S&P").⁸ In the fall of 2007, the Commission, exercising the new authority conferred by the Rating Agency Act, began a staff examination of the NRSROs' activities in rating subprime RMBS and CDOs in order to review whether they adhered to their stated and documented procedures and methodologies for rating these debt instruments and the extent, if any, to

⁶ See *Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations*, Securities Exchange Act of 1934 ("Exchange Act") Release No. 55857 (June 5, 2007), 72 FR 33564 (June 18, 2007) ("Adopting Release"). The rules adopted by the Commission prescribe: how a credit rating agency must apply to the Commission for registration as an NRSRO (Rule 17g-1 (17 CFR 240.17g-1)); the form of the application and the information that must be provided in the application (Form NRSRO and the Instructions to Form NRSRO (17 CFR 240.249b.300)); the records an NRSRO must make and maintain (Rule 17g-2 (17 CFR 240.17g-2)); the reports an NRSRO must furnish to the Commission annually (Rule 17g-3 (17 CFR 240.17g-3)); the areas that must be addressed in an NRSRO's procedures to prevent the misuse of material nonpublic information (Rule 17g-4 (17 CFR 240.17g-4)); the types of conflicts of interest an NRSRO must disclose and manage or is prohibited from having (Rule 17g-5 (17 CFR 240.17g-5)); and certain unfair, coercive, or abusive practices an NRSRO is prohibited from engaging in (Rule 17g-6 (17 CFR 240.17g-6)).

⁷ See Commission Orders granting registration of A.M. Best Company, Inc. (34-56507, September 24, 2007), DBRS Ltd. (34-56508, September 24, 2007), Fitch, Inc. (34-56509, September 24, 2007), Japan Credit Rating Agency, Ltd. (34-56510, September 24, 2007), Moody's Investor Services, Inc. (34-56511, September 24, 2007), Rating and Investment Information, Inc. (34-56512, September 24, 2007), Standard & Poor's Rating Services (34-56513, September 24, 2007), Egan-Jones Rating Company (34-57031, December 21, 2007) and LACE Financial Corp. (34-57300, February 11, 2008).

⁸ According to their most recent Annual Certifications on Form NRSRO, S&P rates 197,700 issuers of asset-backed securities, the category that includes RMBS, Moody's rates 110,000 such issuers, and Fitch rates 75,278 such issuers. No other registered NRSRO reports rating more than 1,000 issuers of asset-backed securities. See Standard & Poor's 2007 Annual Certification on Form NRSRO, available at <http://www.standardandpoors.com>; Moody's Investor Services 2007 Annual Certification on Form NRSRO, available at <http://www.moody.com>; Fitch, Inc. 2007 Annual Certification on Form NRSRO, available at <http://www.fitchratings.com>.

which their ratings may have been impaired by conflicts of interest.⁹

In addition to the examination, the Commission has worked closely with other regulators and supervisors of the financial markets in analyzing the credit market turmoil and in developing recommendations and principles for market participants, including NRSROs.¹⁰ For example, the President's Working Group on Financial Markets issued a *Policy Statement on Financial Market Developments* in March 2008.¹¹ Further, as a member of the International Organization of Securities Commissions ("IOSCO"), the Commission played a substantial role in drafting *The Role of Credit Rating Agencies in Structured Finance Markets*, which was issued for consultation by IOSCO in March 2008.¹² Also, the Commission, as part of its participation in the Financial Stability Forum, worked with its counterparts in the U.S. and abroad on *The Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience* released in April 2008, which discussed credit rating agencies.¹³

These and other efforts have assisted the Commission in identifying a number of areas in which its current NRSRO rules could be augmented to address concerns about the role NRSROs played in the credit market turmoil.¹⁴ As a result, the Commission is proposing amendments to its existing NRSRO rules and a new rule with the goal of improving the quality of credit ratings determined by NRSROs generally and, in particular, for structured finance products such as RMBS and CDOs.¹⁵ These proposals and the proposals to be considered in two weeks are designed to:

- Enhance the disclosure and comparability of credit ratings performance statistics;

⁹ See Testimony of Christopher Cox, Chairman, Commission, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (April 22, 2008) ("Cox April 22, 2008 Senate Testimony"), pp. 2-3.

¹⁰ See *Id.*, p. 4.

¹¹ A copy of the policy statement is available at: <http://www.ustreas.gov>.

¹² A copy of the report is available at: <http://www.iosco.org>.

¹³ A copy of the report is available at: <http://www.fsforum.org>.

¹⁴ See Cox April 22, 2008 Senate Testimony, pp. 6-8.

¹⁵ The term "structured finance product" as used throughout this release refers broadly to any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. This broad category of financial instrument includes, but is not limited to, asset-backed securities ("ABS") such as RMBS and to other types of structured debt instruments such as CDOs, including synthetic and hybrid CDOs.

• Increase the disclosure of information about structured finance products;

• Require more information about the procedures and methodologies used to determine credit ratings for structured finance products;

• Strengthen internal control processes through reporting requirements; and

• Address conflicts of interest arising from the process of rating structured finance products; and

• Reduce undue reliance in the Commission's rules on NRSRO ratings, thereby promoting increased investor due diligence.

The Commission believes these proposals would further the purpose of the Rating Agency Act to improve the quality of NRSRO credit ratings by fostering accountability, transparency, and competition in the credit rating industry.¹⁶

C. *The Role of Credit Ratings in the Credit Market Turmoil*

The growth in the origination of subprime loans began in the early 2000s.¹⁷ For example, Moody's reports that subprime loans amounted to \$421 billion of the \$3.038 trillion in mortgages originated in 2002 (14%) and \$640 billion of the \$2.886 trillion in mortgages originated in 2006 (22%).¹⁸ This growth was facilitated by steadily rising home values and a low interest rate environment.¹⁹ In addition, increases in the breadth of the credit risk transfer markets as a result of new investors willing to purchase credit based structured finance products provided an opportunity for lenders to originate subprime loans and then move them off their balance sheets by packaging and selling them through the securitization process to investors as subprime RMBS and CDOs.²⁰ The investors in subprime RMBS and CDOs included domestic and foreign mutual funds, pension funds, hedge funds, banks, insurance companies, special investment vehicles, and state government operated funds.

This "originate to distribute" business model created demand for residential

¹⁶ See Senate Report, p. 2.

¹⁷ See e.g., Statement of Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation, before U.S. Senate Committee on Banking, Housing, and Urban Affairs (January 31, 2008) ("Bair January 31, 2008 Senate Statement"), p. 4.

¹⁸ According to Moody's, subprime mortgage loans represented \$421 billion of \$3.038 trillion total mortgage origination in 2002 and \$640 billion of \$2.886 trillion total mortgage origination in 2006. See *A Short Guide to Subprime*, Moody's, March 25, 2008, p. 1.

¹⁹ See e.g., Dugan March 4, 2008 Senate Testimony, pp. 8-11.

²⁰ *Id.*

mortgage loans, including subprime loans. For example, according to Moody's, of the approximately \$2.5 trillion worth of mortgage loans originated in 2006, \$1.9 trillion were securitized into RMBS and approximately 25%, or \$520 billion worth, of these loans were categorized as subprime.²¹ The demands of the loan securitization markets encouraged lenders to lower underwriting standards to maintain a steady volume of loans and to use less traditional products such as adjustable rate, negative amortization, and closed-end second lien mortgages.²²

1. The Creation of Subprime RMBS and CDOs

The creation of an RMBS begins by packaging a pool of mortgage loans, usually numbering in the thousands, and transferring them to a bankruptcy remote trust. The trust purchases the loan pool and becomes entitled to the interest and principal payments made by the borrowers. The trust finances the purchase of the loan pool through the issuance of RMBS. The monthly interest and principal payments from the loan pool are used to make monthly interest and principal payments to the investors in the RMBS.

The trust typically issues different classes of RMBS (known as "tranches") offering a sliding scale of coupon rates based on the level of credit protection afforded to the security. Credit protection is designed to shield the tranche securities from loss of interest and principal arising from defaults of the loans backing the RMBS. The degree of credit protection afforded a tranche security is known as its "credit enhancement" and is provided through several means. The primary source of credit enhancement is subordination, which creates a hierarchy of loss absorption among the tranche securities. For example, if a trust issued securities in 10 different tranches of securities, the first (or senior) tranche would have nine subordinate tranches, the next highest tranche would have eight subordinate tranches and so on down the capital structure. Losses of interest and principal experienced by the trust from delinquencies and defaults among loans in the pool are allocated first to the lowest tranche until its principal amount is exhausted and then to the next lowest tranche and so on up the capital structure. Consequently, the senior tranche would not incur any loss

until the principal amounts from all the lower tranches have been exhausted through the absorption of losses from the underlying loans.

A second form of credit enhancement is over-collateralization, which is the amount that the principal balance of the mortgage pool underlying the trust exceeds the principal balance of the tranche securities issued by the trust. This excess principal creates an additional "equity" tranche below the lowest tranche security to absorb losses. In the example above, the equity tranche would sit below the 10th tranche security and protect it from the first losses experienced as a result of defaulting loans.

A third form of credit enhancement is excess spread, which consists of the amount by which the interest derived from the underlying loans in the aggregate exceeds interest payments due to investors in the tranche securities in the aggregate plus the administrative expenses of the trust such as fees due the loan servicer as well as premiums due on derivatives contracts and bond insurance. In other words, the excess spread is the amount that the monthly interest income from the pool of loans exceeds the weighted average interest due to the RMBS bondholders. This excess spread can be used to build up loss reserves or pay off delinquent interest payments due to a tranche security.

A fourth form of credit enhancement sometimes employed is bond insurance. When used, bond insurance is typically purchased only for the senior RMBS tranche.

The creation of a typical CDO is similar to that of an RMBS. A bankruptcy remote trust is created to hold the CDO's assets and issue its securities. The underlying assets, however, are generally debt securities rather than mortgage loans. The CDO trust uses the interest and principal payments from the approximately 200 underlying debt securities to make interest and principal payments to investors in the securities issued by the trust. The trust is structured to provide differing levels of credit enhancement to the securities it issues. Similar to RMBS, credit enhancement is provided through subordination, over-collateralization, excess spread, and bond insurance. In addition to the underlying assets, one significant difference between a CDO and an RMBS is that the CDO may be actively managed such that its underlying assets change over time, whereas the mortgage loan pool underlying an RMBS remains static for the most part.

In recent years, CDOs have been some of the largest purchasers of subprime RMBS and the drivers of demand for those securities. For example, according to Fitch, the average percentage of subprime RMBS in the collateral pools of CDOs it rated grew from 43.3% in 2003 to 71.3% in 2006.²³ Generally, the CDOs holding subprime RMBS issued fell into one of two categories: High grade and mezzanine. High grade CDOs are generally defined as those that hold RMBS tranches with AAA, AA, or A credit ratings, whereas mezzanine CDOs are those that hold RMBS tranches rated predominantly BBB. Securities issued by mezzanine CDOs pay higher yields than those issued by high grade CDOs since the BBB-rated RMBS underlying the mezzanine CDOs pay higher yields than the AAA to A rated RMBS underlying high grade CDOs. In addition to CDOs holding subprime RMBS, a market for CDOs holding other CDOs that held subprime RMBS developed in recent years. These debt instruments are known as "CDOs-squared."

As the market for mortgage related CDOs grew, CDO issuers began to use credit default swaps to replicate the performance of subprime RMBS and CDOs. In this case, rather than purchasing subprime RMBS or CDOs, the CDO entered into credit default swaps referencing subprime RMBS or CDOs, or indexes on RMBS. These CDOs, in some cases, are composed entirely of credit default swaps ("synthetic CDOs") or a combination of credit default swaps and cash RMBS ("hybrid CDOs"). The use of credit default swaps allowed the CDO securities to be issued more quickly, since the issuer did not have to wait to accumulate actual RMBS for the underlying collateral pool.

2. Determining Credit Ratings for Subprime RMBS and CDOs

A key step in the process of creating and ultimately selling a subprime RMBS and CDO is the issuance of a credit rating for each of the tranches issued by the trust (with the exception of the most junior "equity" tranche). The credit rating for each rated tranche indicated the credit rating agency's view as to the creditworthiness of the debt instrument in terms of the likelihood that the issuer would default on its obligations to make interest and principal payments on the debt instrument.²⁴ To varying degrees,

²¹ *Subprime Residential Mortgage Securitizations: Frequently Asked Questions*, Moody's, April 19, 2007, p. 1.

²² See e.g., Bernanke February 28, 2008 Senate Testimony, p. 1; Dugan March 4, 2008 Senate Testimony, pp. 8-10.

²³ *Rating Stability of Fitch-Rated Global Cash Mezzanine Structured Finance CDOs with Exposure to U.S. Subprime RMBS*, Fitch, April 2, 2007, p. 1.

²⁴ See, e.g., *Inside the Ratings: What Credit Ratings Mean*, Fitch, August 2007 ("Inside the Ratings"), p. 2; Testimony of Michael Kanef, Group

many investors rely on credit ratings in making the decision to purchase subprime RMBS or CDOs, particularly with respect to the senior AAA rated tranches. Some investors use the credit ratings to assess the risk of the debt instruments. In part, this may be due to the large number of debt instruments in the market and their complexity. Other investors use credit ratings to satisfy client investment mandates regarding the types of securities they can invest in or to satisfy regulatory requirements based on certain levels of credit ratings, or a combination of these conditions. Moreover, investors typically only have looked to ratings issued by Fitch, Moody's, and S&P, which causes the arrangers²⁵ of the subprime RMBS and CDOs to use these three NRSROs to obtain credit ratings for the tranche securities they brought to market.

The procedures followed by these three NRSROs in developing ratings for subprime RMBS are generally similar. The arranger of the RMBS initiates the rating process by sending the credit rating agency a range of data on each of the subprime loans to be held by the trust (e.g., principal amount, geographic location of the property, credit history and FICO score of the borrower, ratio of the loan amount to the value of the property, and type of loan: First lien, second lien, primary residence, secondary residence), the proposed capital structure of the trust, and the proposed levels of credit enhancement to be provided to each RMBS tranche issued by the trust. Upon receipt of the information, the NRSRO assigns a lead analyst who is responsible for analyzing the loan pool, proposed capital structure, and proposed credit enhancement levels and, ultimately, for formulating a ratings recommendation for a rating committee composed of analysts and/or senior-level personnel not involved in the analytic process.

The next step in the ratings process is the development of predictions, based

on a quantitative expected loss model and other qualitative factors, as to how many of the loans in the collateral pool would default under stresses of varying severity. This analysis also includes assumptions as to how much principal would be recovered after a defaulted loan is foreclosed. Each NRSRO generally uses between 40 and 60 specific credit characteristics to analyze each loan in the collateral pool of an RMBS in order to assess the potential future performance of the loan under various possible scenarios. These characteristics include the loan information described above as well as the amount of equity that the borrowers have in their homes, the amount of documentation provided by borrowers to verify their assets and/or income levels, and whether the borrowers intend to rent or occupy the homes.²⁶

The purpose of this loss analysis is to determine how much credit enhancement a given tranche security would need for a particular category of credit rating. The severest stress test (i.e., the one that would result in the greatest number of defaults among the underlying loans) is run to determine the amount of credit enhancement required for an RMBS tranche issued by the trust to receive an AAA rating. For example, this test might result in an output that predicted that under the "worst case" scenario, 40 percent of the loans in the underlying pool would default and that after default the trust would recover only 50 percent of the principal amount of each loan in foreclosure. Consequently, to get an AAA rating, an RMBS tranche security issued by the trust would need credit enhancement sufficient to cover at least 20 percent of the principal amount of all the RMBS tranches issued by the trust. In other words, absent other forms of credit enhancement such as excess spread, at least 20 percent of the principal amount of the RMBS tranches issued by the trust, including the equity tranche, would have to be subordinate to the senior tranche and, therefore, obligated to absorb the losses resulting from 40% of the underlying loans defaulting.²⁷ The next severest stress test is run to determine the amount of credit enhancement required of the AA tranche and so on down the capital structure. The lowest rated tranche (typically BB or B) is analyzed under a more benign market scenario.

Consequently, its required level of credit enhancement—typically provided primarily or exclusively by a subordinate equity tranche—is based on the number of loans expected to default in the normal course given the lowest possible level of macroeconomic stress.

Following the determination of the level of credit enhancement required for each credit rating category, the next step in the ratings process is to check the proposed capital structure of the RMBS against these requirements. For example, if the proposed structure would create a senior RMBS tranche that had 18 percent of the capital structure subordinate to it (the other RMBS tranches, including, as applicable, an equity tranche), the analyst reviewing the transaction might conclude that based on the output of the loss model the senior tranche should be rated AA since it would need 20 percent subordination to receive an AAA credit rating. Additionally, the analyst could take other factors into consideration such as the quality of the loan servicer or the actual performance of similar pools of loans underlying other RMBS trusts to determine that in this case 18 percent subordination would be sufficient to support an AAA rating (to the extent these factors were not covered by the model).

Typically, if the analyst concludes that the capital structure of the RMBS did not support the desired ratings—in the example above, if it determined that 18 percent credit enhancement is insufficient for the desired AAA rating—this preliminary conclusion would be conveyed to the arranger. The arranger could accept that determination and have the trust issue the securities with the proposed capital structure and the lower rating or adjust the structure to provide the requisite credit enhancement for the senior tranche to get the desired AAA rating (e.g., shift 2 percent of the principal amount of the senior tranche to a lower tranche or add or remove certain mortgages from the proposed asset pool). Generally, arrangers aim for the largest possible senior tranche, i.e., to provide the least amount of credit enhancement possible, since the senior tranche—as the highest rated tranche—pays the lowest coupon rate of the RMBS' tranches and, therefore, costs the arranger the least to fund.

The next step in the process is a cash flow analysis on the interest and principal expected to be received by the trust from the pool of subprime loans to determine whether it will be sufficient to pay the interest and principal due on each RMBS tranche issued by the trust. The NRSROs use quantitative cash flow

Managing Director, Moody's Investors Service, Before the United States Senate Committee on Banking, Housing, and Urban Affairs (September 26, 2007) ("Kanef September 26, 2007 Senate Testimony"), p. 2; *Principles-Based Rating Methodology For Global Structured Finance Securities*, S&P, May 29, 2007, p. 3. Since credit ratings are issued for tranches of RMBS and CDOs individually, rather than for the issuers of those tranches, the NRSRO credit ratings are estimates of the probability of default of each RMBS or CDO tranche as an independent instrument.

²⁵ As bankruptcy remote stand-alone legal entities, RMBS and CDO trusts had no employees. Consequently, they relied on third-parties to create and manage them. The term "arranger" is used herein to refer to the party that oversees the creation of the RMBS and CDO, which would include the process of obtaining credit ratings for the various tranches. Frequently, the arranger also served as the underwriter of the securities.

²⁶ See, e.g., Kanef September 26, 2007, Senate Testimony, p. 7.

²⁷ To the extent that the RMBS included other forms of credit enhancement besides the subordination and over-collateralization provided in this example, e.g., excess spread, this 20 percent subordination figure would be reduced accordingly.

models that analyze the amount of principal and interest payments expected to be generated from the loan pool each month over the terms of the RMBS tranche securities under various stress scenarios. The outputs of this model are compared against the priority of payments (the “waterfall”) to the RMBS tranches specified in the trust legal documents. The waterfall documentation could specify over-collateralization and excess spread triggers that, if breached, would reallocate principal and interest payments from lower tranches to higher tranches until the minimum levels of over-collateralization and excess spread were reestablished. Ultimately, the monthly principal and interest payments derived from the loan pool need to be enough to satisfy the monthly payments of principal and interest due by the trust to the investors in the RMBS tranches as well as to cover the administrative expenses of the trust.

In addition to expected loss and cash flow analysis, the analysts review the legal documentation of the trust to evaluate whether it is bankruptcy remote, *i.e.*, isolated from the effects of any potential bankruptcy or insolvency of the arranger. They also review operational and administrative risk associated with the trust, using the results of periodic examinations of the principal parties involved in the issuance of the security, including the mortgage originators, the issuer of the security, the servicer of the mortgages in the loan pool, and the trustee.²⁸ In assessing the servicer, for example, an NRSRO might review its past performance with respect to loan collection, billing, recordkeeping, and the treatment of delinquent loans.

Following these steps, the analyst develops a rating recommendation for each RMBS tranche, which then is presented to a rating committee composed of analysts and/or senior-level personnel not involved in the analytic process. The rating committee votes on the ratings for each tranche and usually approaches the arranger privately to notify it of the ratings decisions. In most cases, an arranger can appeal a rating decision, although the appeal is not always granted (and, if granted, may not necessarily result in any change in the rating decision). Final ratings decisions are published and subsequently monitored through surveillance processes. The NRSRO

²⁸ Principal parties are not rated *de novo* in each RMBS transaction; rather, each NRSRO has its own procedures and schedules for reviewing those parties on a periodic basis in order to incorporate its assessment of those entities into the rating process.

typically is paid only if the credit rating is issued, though sometimes it receives a breakup fee for the analytic work undertaken even if the credit rating is not issued.

The process for assigning ratings to subprime CDOs also involves a review of the creditworthiness of each tranche of the CDO. As with RMBS, the process centers on an examination of the pool of assets held by the trust and analysis of how they would perform individually and in correlation during various stress scenarios. However, this analysis is based primarily on the credit rating of each RMBS or CDO in the underlying pool or referenced through a credit default swap entered into by the CDO. In other words, the credit rating is the primary characteristic of the underlying debt instruments that the NRSROs take into consideration when performing their loss analysis. Hence, this review of the debt instruments in the collateral pool and the potential correlations among those securities does not “look through” those securities to their underlying asset pools. The analysis, consequently, generally only goes one level down to the credit ratings of the underlying instruments or reference securities.

CDOs collateralized by RMBS or by other CDOs often are actively managed. Consequently, there can be frequent changes to the composition of the cash assets (RMBS or CDOs), synthetic assets (credit default swaps), or combinations of cash and synthetic assets in the underlying pool. As a result, NRSRO ratings for managed CDOs are based not on the closing date composition of the pool but instead on covenanted limits for each potential type of asset that could be put in the pool. Typically, following a post-closing period in which no adjustments can be made to a CDO’s collateral pool, the CDO’s manager has a predetermined period of several years in which to adjust that asset pool through various sales and purchases pursuant to covenants set forth in the CDO’s indenture. These covenants set limitations and requirements for the collateral pools of CDOs, often by establishing minimum and maximum concentrations for certain types of securities or certain ratings.

NRSROs use a CDO’s indenture guidelines to run “worst-case” scenarios based on the various permutations of collateral permitted under the indenture. For example, an indenture might specify that a CDO’s collateral pool must include between 10 and 20 percent AAA-rated subprime RMBS, with the remaining 80 to 90 percent composed of investment-grade, but not AAA, subprime RMBS. In preparing a

rating for that CDO, an NRSRO will run its models based on all possible collateral pools permissible under the indenture guidelines, placing the most weight on the results from the weakest potential pools (*i.e.*, the minimum permissible amount, 10 percent, of AAA-rated securities and the lowest-rated investment grade securities for the remaining 90 percent). As with RMBS ratings, the model results are then compared against the capital structure of the proposed CDO to confirm that the level of subordination, over-collateralization and excess spread available to each tranche provides the necessary amount of credit enhancement to sustain a particular rating.

3. The Downgrades in Credit Ratings of Subprime RMBS and CDOs

As noted above, the development of the credit risk transfer markets gave rise to an “originate to distribute” model whereby mortgage loans are originated with the intent to securitize them. Under this model, arrangers earn fees from originating, structuring, and underwriting RMBS and servicing the loans underlying the RMBS, as well as frequently a third set of fees from structuring, underwriting, and managing CDOs composed of RMBS. Moreover, the yields offered by subprime RMBS and CDO tranches (as compared to other types of similarly rated debt instruments) led to increased investor demand for these debt instruments. The originate to distribute model creates incentives for originating high volumes of mortgage loans while simultaneously reducing the incentives to maintain high underwriting standards for making such loans. The continued growth of the housing market through 2006, which led to increased competition among lenders, also contributed to looser subprime loan underwriting standards.²⁹

By mid-2006, however, the steady rise in home prices that had fueled this growth in subprime lending came to an end as prices began to decline.³⁰ Moreover, widespread areas of the country began to experience declines whereas, in the past, poor housing markets generally had been confined to distinct geographic areas.³¹ The downturn in the housing market has been accompanied by a marked increase

²⁹ See *e.g.*, Dugan March 4, 2008 Senate Testimony, p. 10; Bernanke February 28, 2008 Senate Testimony, p. 1.

³⁰ See *e.g.*, *Id.*; Bair March 4, 2008 Senate Statement, pp. 5–8; Bair January 31, 2008 Senate Statement, p. 3.

³¹ See *e.g.*, Bair January 31, 2008 Senate Statement, p. 3.

in delinquencies and defaults of subprime loans.³²

The increases in delinquency and default rates have been concentrated in loans made in 2006 and 2007, which indicates that borrowers have been falling behind within months of the loans being made.³³ For example, by the fourth quarter of 2006, the percentage of subprime loans underlying RMBS rated by Moody's that were in default within six months of the loans being made stood at 3.54 percent, nearly four times the average six month default rate of 0.90 percent between the first quarter of 2002 and the second quarter of 2005. Similarly, default rates for subprime loans within 12 months of the loans being made rose to 7.39 percent as compared to 2.00 percent for the period from the first quarter of 2002 through the second quarter of 2005.³⁴ Figures released by S&P show similar deterioration in the performance of recent subprime loans.³⁵ According to S&P, the serious delinquency rate³⁶ for subprime loans underlying RMBS rated by S&P within twelve months of the initial rating was 4.97 percent of the current aggregate pool balance for subprime RMBS issued in 2005, 10.55 percent for subprime RMBS issued in 2006, and 15.19 percent for subprime RMBS issued in 2007.³⁷

Along with the deterioration in the performance of subprime loans, there has been an increase in the losses incurred after the loans are foreclosed. According to S&P, the actual realized losses on loans underlying 2007 subprime RMBS after 12 months of seasoning were 65 percent higher than the losses recorded for RMBS issued in 2006 at the same level of seasoning.³⁸

The rising delinquencies and defaults in subprime loans backing the RMBS rated by the NRSROs has exceeded the projections on which they based their initial ratings. Furthermore, the defaults and foreclosures on subprime loans have resulted in realizable losses to the lower RMBS tranches backed by the loans and, correspondingly, to the lower CDO tranches backed by those RMBS.

As discussed above, the reduction in the amount of monthly principal and interest payments coming from the underlying pool of subprime loans or, in the case of a CDO, RMBS tranches or other CDO tranches is allocated to the tranches in ascending order. In addition to directly impairing the affected tranche, the losses—by reducing the principal amount of these tranches—decreased the level of subordination protecting the more senior tranches. In other words, losses suffered by the junior tranches of an RMBS or CDO directly reduced the level of credit enhancement—the primary factor considered by NRSROs in rating tranching securities—protecting the senior tranches of the instrument. These factors have caused the NRSROs to reevaluate, and in many cases downgrade, their ratings for these instruments.

- As of February 2008, Moody's had downgraded at least one tranche of 94.2 percent of the subprime RMBS deals it rated in 2006 (including 100 percent of 2006 RMBS deals backed by subprime second-lien mortgage loans) and 76.9 percent of all subprime RMBS deals it rated in 2007. Overall, 53.7 percent and 39.2 percent of 2006 and 2007 tranches, respectively, had been downgraded by that time. RMBS tranches backed by first lien loans issued in 2006 were downgraded an average of 6.0 notches from their original ratings, while RMBS tranches backed by second-lien loans issued that year were downgraded 9.7 notches on average. The respective figures for 2007 first- and second-lien backed tranches were 5.6 and 7.8 notches.³⁹

- As of March 2008, S&P had downgraded 44.3 percent of the subprime RMBS tranches it had rated between the first quarter of 2005 and the third quarter of 2007, including 87.2 percent of second-lien backed securities. Downgrades to subprime RMBS issued in 2005 averaged four to six notches, while the average for those issued in 2006 and 2007 was 6.0 to 11 notches.⁴⁰

- As of December 7, 2007, Fitch had issued downgrades to 1,229 of the 3,666 tranches of subprime RMBS issued in 2006 and the first quarter of 2007, representing a par value of \$23.8 billion out of a total of \$193 billion.⁴¹ Subsequently, on February 1, 2008, Fitch placed all subprime first-lien

RMBS issued in 2006 and the first half of 2007, representing a total outstanding balance of approximately \$139 billion, on Rating Watch Negative.⁴²

The extensive use of subprime RMBS in the collateral pools of CDOs has led to similar levels of downgrade rates for those securities as well. Moreover, the use of subprime RMBS as reference securities for synthetic CDOs magnified the effect of RMBS downgrades on CDO ratings. Surveillance of CDO credit ratings has been complicated by the fact that the methodologies used by the NRSROs to rate them relied heavily on the credit rating of the underlying RMBS or CDOs. Consequently, to adjust the CDO rating, the NRSROs first have needed to complete their reviews of the ratings for the underlying RMBS or adjust their methodologies to sufficiently account for the anticipated poor performance of the RMBS.⁴³ Ultimately, the NRSROs have downgraded a substantial number of CDO ratings.

- Over the course of 2007, Moody's issued 1,655 discrete downgrade actions (including multiple rating actions on the same tranche), which constituted roughly ten times the number of downgrade actions in 2006 and twice as many as in 2002, previously the most volatile year for CDOs. Further, the magnitude of the downgrades (number of notches) was striking. The average downgrade was roughly seven notches as compared to a previous average of three to four notches prior to 2007. In the words of a March 2008 report by Moody's, "[T]he scope and degree of CDO downgrades in 2007 was unprecedented."⁴⁴

- As of April 1, 2008, S&P had downgraded 3,068 tranches from 705 CDO transactions, totaling \$321.9 billion in issuance, and placed 443 ratings from 119 transactions, with a value of \$33.8 billion, on CreditWatch negative, "as a result of stress in the

³² *Id.*

³³ See e.g., Bair March 24, 2008 Senate Statement, p. 6 ("Serious delinquency rates on subprime mortgages securitized in 2006 are significantly higher than those for any of the previous three years.").

³⁴ *Early Defaults Rise in Mortgage Securitizations: Updated Data Show Continued Deterioration*, Moody's, September 19, 2007, pp. 3-4.

³⁵ *U.S. Subprime RMBS Performance Update: January 2008 Distribution Date*, S&P, February 25, 2008, p. 1.

³⁶ Defined as 90-plus day delinquencies, foreclosures, and real estate owned. *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *U.S. Subprime RMBS 2005-2007 Vintage Rating Actions Update: January 2008*, Moody's, February 1, 2008, pp. 2-4.

⁴⁰ *Transition Study: Structured Finance Rating Transition And Default Update as of March 21, 2008*, S&P, March 28, 2008, pp. 2-3.

⁴¹ *U.S. RMBS Update*, Fitch, February 20, 2008 p. 5.

⁴² *Update on U.S. Subprime and Alt-A: Performance And Rating Reviews*, Fitch, March 20, 2008, p. 13.

⁴³ For example, in November 2007, Fitch announced that in rating CDOs with asset pools which included subprime RMBS, it would adjust all subprime RMBS securities on Rating Watch Negative downwards by three categories—or notches—(six in the case of 2007 subprime RMBS rated BBB+ or lower) before factoring them into a re-assessment of the CDO's rating. See *Global Criteria for the Review of Structured Finance CDOs With Exposure to U.S. Subprime RMBS*, Fitch, November 15, 2007, p. 4.

⁴⁴ *2008 U.S. CDO Outlook and 2007 Review*, Moody's, March 3, 2008, p. 6.

U.S. residential mortgage market and credit deterioration of U.S. RMBS.”⁴⁵

• By mid-December, 2007, Fitch had issued downgrades to 158 of the 431 CDOs it had rated with exposure to RMBS.⁴⁶ Among the 30 CDOs with exposure to the subprime RMBS which “suffered the greatest extent and magnitude of negative rating migration,” all but \$82.7 million of the \$20.7 billion in balance was downgraded.⁴⁷

The scope and magnitude of these downgrades has caused a loss of confidence among investors in the reliability of RMBS and CDO credit ratings issued by the NRSROs.⁴⁸ This lack of confidence in the accuracy of NRSRO ratings has been a factor in the broader dislocation in the credit markets.⁴⁹ For example, the complexity of assessing the risk of structured finance products and the lack of commonly accepted methods for measuring the risk has caused investors to leave the market, including the market for AAA instruments, particularly investors that had relied primarily on NRSRO credit ratings in assessing whether to purchase these instruments.⁵⁰ This has had a significant impact on the liquidity of the market for these instruments.⁵¹

In the wake of these events, the NRSROs that rated subprime RMBS and CDOs have come under intense criticism and scrutiny. It has been suggested that changes may be needed to address the conflicts of interest inherent in the process of rating RMBS and CDOs.⁵² The NRSROs that have been the primary ratings providers for subprime RMBS and related CDOs each operate under an “issuer-pays” model in which they are paid by the arranger to rate a proposed RMBS or CDO. The arranger has an economic interest in obtaining the highest credit rating possible for each security issued by the trust and the NRSRO has an economic interest in having the arranger select it to rate the next RMBS or CDO brought by the arranger to market. Observers

have questioned whether, given the incentives created by this arrangement, the NRSROs are able to issue unbiased ratings, particularly as the volume of deals brought by certain arrangers increased in the mid-2000s.⁵³ The above concerns are compounded by the arrangers’ ability to “ratings shop.” Ratings shopping is the process by which an arranger will bring its proposed RMBS and CDO transaction to multiple NRSROs and choose, on a deal-wide or tranche-by-tranche basis, which two (or in some cases one) to use based on the preliminary ratings of the NRSROs.

In addition, the interaction between the NRSRO and the arranger during the RMBS and CDO rating process has raised concerns that the NRSROs are rating products they designed (*i.e.*, evaluating their own work).⁵⁴ A corporate issuer is more constrained in how it can adjust in response to an NRSRO to improve its creditworthiness in order to obtain a higher rating. In the context of structured finance products, the arranger has much more flexibility to make adjustments to obtain a desired credit rating by, for example, changing the composition of the assets in the pool held by the trust or the subordination levels of the tranche securities issued by the trust. In fact, an arranger frequently will inform the NRSRO of the rating it wishes to obtain for each tranche and will choose an asset pool, trust structure, and credit enhancement levels based on its understanding of the NRSRO’s quantitative and qualitative models. The credit analyst will use the expected loss and cash flow models to, in effect, check whether the proposed assets, trust structure and credit enhancement levels are sufficient to support the credit ratings desired by the arranger.

The NRSRO rules adopted by the Commission in June of 2007 preceded the full emergence of the credit market turmoil. The Commission, in light of its experience since the final rules became effective, is proposing amendments to those rules and a new rule with the goal of further enhancing the utility of NRSRO disclosure to investors, strengthening the integrity of the ratings process, and more effectively addressing the potential for conflicts of interest

inherent in the ratings process for structured finance products.

II. Proposed Amendments

A. Amendments to Rule 17g-5

The Commission adopted Rule 17g-5, in part, pursuant to authority “to prohibit, or require the management and disclosure of, any conflicts of interest relating to the issuance of credit ratings by an [NRSRO].”⁵⁵ The rule identifies a series of conflicts arising from the business of determining credit ratings. Under the rule, some of these conflicts must be disclosed and managed, while other specified conflicts are prohibited outright.

Paragraph (a) of Rule 17g-5 prohibits an NRSRO from having a conflict identified in paragraph (b) of the rule unless the NRSRO discloses the type of conflict on Form NRSRO and establishes, maintains, and enforces procedures to manage it.⁵⁶ Paragraph (b) identifies eight types of conflicts, which include being paid by issuers or underwriters to determine credit ratings with respect to securities or money market instruments they issue or underwrite⁵⁷ or being paid by persons for subscriptions to receive or access credit ratings where such persons also may own investments or have entered into transactions that could be favorably or adversely impacted by a credit rating.⁵⁸

Paragraph (c) of Rule 17g-5 prohibits outright four types of conflicts of interest. Consequently, an NRSRO would violate the rule if it has the type of conflict described in paragraph (c) even if it disclosed the conflict and established procedures to manage it. In the Adopting Release, the Commission explained that these conflicts were prohibited because they would be difficult to manage given their potential to cause undue influence.⁵⁹

The Commission is proposing to amend Rule 17g-5 to require the disclosure and establishment of procedures to manage an additional conflict and to prohibit certain other conflicts outright, as described below.

⁴⁵ *86 Ratings Lowered On 20 U.S. CDOs Of ABS Deals; \$9.107 Billion In Issuance Affected*, S&P, April 1, 2008, p. 1.

⁴⁶ *Summary of Global Structured Finance CDO Rating Actions*, Fitch, December 14, 2007, p. 1.

⁴⁷ *Id.*, p. 6.

⁴⁸ *See, e.g.*, Dugan March 4, 2008 Senate Testimony, p. 13.

⁴⁹ *Id.*, Bair March 4, 2008 Senate Statement, p. 7.

⁵⁰ *Id.*, Bernanke February 28, 2008 Senate Testimony, p. 3.

⁵¹ *See, e.g.*, Dugan March 4, 2008 Senate Testimony, p. 13; Bair January 31, 2008 Senate Testimony, pp. 3-4.

⁵² *See, e.g.*, Opening Statement of Senator Richard C. Shelby for the Hearing of the U.S. Senate Committee on Banking, Housing, and Urban Affairs (September 26, 2007), pp. 1-2.

⁵³ *See, e.g.*, Testimony of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (September 26, 2007), pp. 4-5.

⁵⁴ *See, e.g.*, Opening Statement of Senator Jack Reed for the Hearing of the U.S. Senate Committee on Banking, Housing, and Urban Affairs (September 26, 2007), pp. 1-2.

⁵⁵ *See* Section 15E(h)(2) of the Exchange Act (15 U.S.C. 78o-7(h)(2)).

⁵⁶ 17 CFR 240.17g-5(a).

⁵⁷ 17 CFR 240.17g-5(b)(1).

⁵⁸ 17 CFR 240.17g-5(b)(5).

⁵⁹ Adopting Release, 72 FR at 33598.

1. Addressing the Particular Conflict Arising From Rating Structured Finance Products by Enhancing the Disclosure of Information Used in the Rating Process

a. The Proposed Amendment

The Commission is proposing to amend Rule 17g-5⁶⁰ to add to the list of conflicts that must be disclosed and managed the additional conflict of repeatedly being paid by certain arrangers to rate structured finance products. This conflict is a subset of the broader conflict already identified in paragraph (b)(1) of Rule 17g-5; namely, “being paid by issuers and underwriters to determine credit ratings with respect to securities or money market instruments they issue or underwrite.”⁶¹ In the case of structured finance products, the Commission preliminarily believes this “issuer/underwriter-pay” conflict is particularly acute because certain arrangers of structured finance products repeatedly bring ratings business to the NRSROs.⁶² As sources of constant deal based revenue, some arrangers have the potential to exert greater undue influence on an NRSRO than, for example, a corporate issuer that may bring far less ratings business to the NRSRO.⁶³ Consequently, the Commission is proposing amendments to Rule 17g-5 that would require additional measures to address this particular type of “issuer/underwriter-pay” conflict.

Specifically, the proposed amendment would re-designate paragraph (b)(9) of Rule 17g-5 as paragraph (b)(10) and in new paragraph (b)(9) identify the following conflict: issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument. To address this conflict, proposed new paragraph (a)(3) would require that as a condition to the NRSRO rating a structured finance product the information provided to the

NRSRO and used by the NRSRO in determining the credit rating would need to be disclosed through a means designed to provide reasonably broad dissemination of the information.⁶⁴ The intent behind this disclosure is to create the opportunity for other NRSROs to use the information to rate the instrument as well. Any resulting “unsolicited ratings” could be used by market participants to evaluate the ratings issued by the NRSRO hired to rate the product and, in turn, potentially expose an NRSRO whose ratings were influenced by the desire to gain favor with the arranger in order to obtain more business.⁶⁵

The proposed amendment would require the disclosure of information provided to an NRSRO by the “issuer, underwriter, sponsor, depositor, or trustee.” The Commission preliminarily believes that, taken together, these are the parties that provide all relevant information to the NRSRO to be used in the initial rating and rating monitoring processes. The Commission is not proposing to specify the party—NRSRO, arranger, issuer, depositor, or trustee—that would need to disclose the information. It may be that the issuer through the arranger and trustee would be in the best positions to disclose the information. In this case, in contracting with these parties to provide a rating for a structured finance product, the NRSRO could require a representation from them that the necessary information would be disclosed as required by the proposed rule. The Commission notes, however, that the proposed rule does not provide a safe harbor for an NRSRO arising from such a representation. Consequently, an NRSRO would violate the proposed rule if it issued a credit rating for a structured finance product where the information is not disclosed notwithstanding any representations from the arranger.

The goal of this proposed amendment is to promote the effective management of this conflict of interest, increase the transparency of the process for rating structured finance products, and foster competition by making it feasible for more market participants, in particular NRSROs that are not contracted by the

arranger to issue a rating but still wish to do so, to perform credit analysis on the instrument and to monitor the instrument’s creditworthiness. As noted above, by providing the opportunity for more NRSROs to determine credit ratings for structured finance products, this proposal is designed to increase the number of ratings extant for a given instrument and, in particular, promote the issuance of ratings by NRSROs that are not hired by the arranger. The goal would be to expose an NRSRO that was unduly influenced by the “arranger-pay” conflict into issuing higher than warranted ratings.⁶⁶ An ancillary benefit would be that the proposal could make it easier for users of credit ratings to identify potentially inaccurate credit ratings and incompetent NRSROs. The proposal also is designed to make it more difficult for arrangers to exert influence on the NRSROs that they hire to determine ratings for structured finance products. Specifically, by opening up the rating process to greater scrutiny, the proposal is designed to make it easier for the hired NRSRO to resist pressure from the arranger by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market. Further, as noted above, an ancillary benefit of the proposal is that it could operate as a check on inaccuracy and incompetence.

To further these goals, the proposal would require the disclosure of the following information:

- All information provided to the nationally recognized statistical rating organization by the issuer, underwriter, sponsor, depositor, or trustee that is used in determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument;⁶⁷

- All information provided to the nationally recognized statistical rating organization by the issuer, underwriter, sponsor, depositor, or trustee that is used by the nationally recognized statistical rating organization in undertaking credit rating surveillance on the security or money market

⁶⁰ 17 CFR 240.17g-5.

⁶¹ 17 CFR 240.17g-5(b)(1). As the Commission noted when adopting Rule 17g-5, the concern with conflict identified in paragraph (b)(1) “is that an NRSRO may be influenced to issue a more favorable credit rating than warranted in order to obtain or retain the business of the issuer or underwriter.” Adopting Release, 72 FR at 33595.

⁶² See e.g., Testimony of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (April 22, 2008) (“Coffee April 22, 2008 Senate Testimony”), pp. 4-6.

⁶³ *Id.*

⁶⁴ This proposed requirement would be in addition to the current requirements of paragraph (a) that an NRSRO disclose the type of conflict of interest in Exhibit 6 to Form NRSRO; and establish, maintain and enforce written policies and procedures to address and manage the conflict of interest. 17 CFR 240.17g-5(a)(1) and (2).

⁶⁵ As used herein, an “unsolicited rating” is one that is determined without the consent and/or payment of the obligor being rated or issuer, underwriter, or arranger of the securities being rated.

⁶⁶ The Commission notes that “unsolicited” ratings could be used to obtain business with arrangers by creating a track record of favorable ratings. The Commission believes the potential to expose such conduct would be equal to that of exposing an NRSRO influenced by the “arranger-pay” conflict inasmuch as the paid for ratings (usually at least two) would be consistently lower than the “unsolicited” ratings.

⁶⁷ See proposed paragraph (a)(3)(i)(A) and (B) of Rule 17g-5.

instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument.⁶⁸

For the purposes of the proposed amendment, the Commission would consider only information that is taken into account in generating the credit rating or in performing surveillance to be “used” by the NRSRO in those contexts. This would exclude information about collateral pools (*i.e.*, “loan tapes”) provided by the arranger containing a mix of assets that is different than the composition of the final collateral pool upon which the credit rating is based. The proposed rule also would exclude from disclosure most, if not all, communications between the NRSRO and the issuer, underwriter, sponsor, depositor, or trustee to the extent the communications do not contain information necessary for the NRSRO to determine an initial credit rating or perform surveillance on an existing credit rating.

The Commission recognizes that the NRSRO would define the information that it uses for purposes of generating credit ratings and, likely, would obtain representations from the arranger that the information is being disclosed as required under the rule. There is a potential that an NRSRO that uses relatively little information to generate credit ratings would be favored by arrangers to minimize the amount of information subject to the disclosure requirement. The Commission preliminarily believes that there is some degree of standardization as to the information used by NRSROs to rate structured finance products (*e.g.*, loan level information, payment priorities among the issued tranches securities, and legal structure of the issuer). An NRSRO that requires less than the standard level of information would need to convince users of credit ratings, most notably investors, that its ratings process was credible. Otherwise, arrangers ultimately would not use the NRSRO since it would be more difficult to sell the structured finance products if they carried ratings that were not accepted by the marketplace. Nonetheless, the Commission, if this proposal is adopted, intends to monitor whether it results in a significant reduction in the information provided to NRSROs.

The timing and scope of the disclosures of the first set information described above—information used in

determining the initial credit rating—would depend on the nature of the offering: public, private, or offshore.⁶⁹ In an offering registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the information would need to be disclosed on the date the underwriter and the issuer or depositor set the offering price of the securities being rated (the “pricing date”).⁷⁰ In offerings that are not registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the information would need to be disclosed to investors in the offering and entities meeting the definition of “credit rating agency” in Section 3(a)(61) of the Exchange Act (which would include credit rating agencies registered, and not registered, as NRSROs)⁷¹ and on the pricing date and disclosed publicly on the first business day after the transaction closes.

The Commission is proposing the pricing date as the time of the first disclosures because it preliminarily believes that this is the earliest date upon which the asset pool and legal structure of the trust are settled on. Thus, the information that would be disclosed would reflect the actual characteristics of the securities to be issued and not, for example, preliminary assets pools with different compositions of loans. At the same time, the disclosure of the information before the securities are sold is designed to provide the opportunity for other credit rating agencies to use the information to develop “unsolicited ratings” for the tranche securities before they are purchased by investors. To the extent unsolicited ratings are issued, they would provide investors with a greater range of credit assessments and, in particular, assessments from credit rating agencies that are not subject to the “arranger-pay” conflict.

The Commission anticipates that the information that would need to be disclosed (*i.e.*, the information used by the hired NRSRO to determine the initial rating) generally would include the characteristics of the assets in the pool underlying the structured finance product and the legal documentation setting forth the capital structure of the trust, payment priorities with respect to the tranche securities issued by the trust (the waterfall), and all applicable covenants regarding the activities of the trust. For example, for an initial rating for an RMBS, this information generally

would include the “loan tape” (frequently a spreadsheet) that identifies each loan in the pool and its characteristics such as type of loan, principal amount, loan-to-value ratio, borrower’s FICO score, and geographic location of the property. In addition, the disclosed information also would include a description of the structure of the trust, the credit enhancement levels for the tranche securities to be issued by the trust, and the waterfall cash flow priorities. With respect to the loan pool information, the Commission does not intend that the proposed disclosure would include any personal identifying information on individual borrowers or properties (such as names, phone numbers, addresses or tax identification numbers).

After the disclosure of the information used by the NRSRO to perform the initial rating, the proposed amendment would require the disclosure of information about the underlying assets that is provided to, and used by, the NRSRO to perform any ratings surveillance.⁷² The Commission anticipates that generally this information would consist of reports from the trustee describing how the assets in the pool underlying the structured finance product are performing. For an RMBS credit rating, this information likely would include the “trustee report” customarily generated to reflect the performance of the loans constituting the collateral pool. For example, an RMBS trustee may generate reports describing the percentage of loans that are 30, 60, and 90 days in arrears, the percentage that have defaulted, the recovery of principal from defaulted loans, and information regarding any modifications to the loans in the asset pool. The disclosure of this information would allow NRSROs that were not hired to rate the deal, including ones that determined unsolicited initial ratings, to monitor on a continuing basis the creditworthiness of the tranche securities issued by the trust. The proposed amendment provides that this information would need to be disclosed at the time it is provided to the NRSRO. This is designed to put other NRSROs and other interested parties on an equal footing with the NRSRO hired by the arranger inasmuch as they would all obtain the information at the same time. Consequently, they all could begin any surveillance processes simultaneously.

The goal of this aspect of the proposal again would be to expose an NRSRO that was allowing business considerations to impact its judgment.

⁶⁸ See proposed paragraph (a)(3)(ii) of Rule 17g-5.

⁶⁹ See Sections II.A.1.b.i–iii below for a broader discussion of the scope of the disclosures that would be required under the proposed amendments.

⁷⁰ See proposed paragraph (a)(3)(i)(A) of Rule 17g-5.

⁷¹ 15 U.S.C. 78c(a)(61).

⁷² Proposed paragraph (a)(3)(ii) of Rule 17g-5.

For example, in order to maintain favor with a particular arranger, an NRSRO may be reluctant to downgrade a credit rating for a structured finance product to its appropriate category even where a downgrade is implied by its surveillance procedures and methodologies. Increasing the number of credit ratings extant for the instrument, including ratings not paid for by the arranger, would make it more difficult to conceal the fact that a particular NRSRO was being unduly influenced by an arranger as to its surveillance process.

As discussed below, the manner and breadth of the disclosures, including how widely the information could be disseminated, would depend on the nature of the offering for the rated structured finance product: public, private, or offshore. The proposed amendment's requirement that the information be "disclosed through a means designed to provide reasonably broad dissemination" would be interpreted by the Commission to mean in the manner described in sections II.A.1.b.i—iii below that discuss the proposed amendment in the context of public, private, and offshore offerings.

The Commission is proposing these amendments to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.⁷³ The provisions in this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.⁷⁴ The Commission preliminarily believes the proposed amendments are necessary and appropriate in the public interest and for the protection of investors because they are designed to address conflicts of interest and improve the quality of credit ratings for structured finance products by: (1) Increasing the transparency of the ratings process and thereby making it more apparent when an NRSRO may be allowing business considerations to impair its objectivity and (2) enhancing competition by creating the opportunity for NRSROs that are not hired to rate structured products to nonetheless determine credit ratings and establish track records for rating these products.

The Commission preliminarily believes that it is appropriate to require an NRSRO to address and manage the conflict of interest raised by the NRSRO's recurring relationships with structured finance product arrangers by making the rating process more

transparent in terms of the information used to determine the ratings. This would create an opportunity for other NRSROs (including subscriber based NRSROs), unregistered credit rating agencies, and other interested parties to assess the creditworthiness of these products and issue their own credit ratings or credit assessments.⁷⁵ Market participants and observers would be able to compare the ratings of the NRSROs hired by the arrangers against the ratings of NRSROs and others not hired by the arrangers. As discussed above, the Commission preliminarily believes that this would enhance the integrity of the ratings process by making it easier for users of credit ratings to compare NRSROs and evaluate whether an NRSRO's objectivity had been compromised by the undue influence of an arranger. It also could make it easier for the NRSROs hired to determine credit ratings for structured finance products to resist pressure from arrangers insofar as the parties would be aware that the potential for exposing a compromised NRSRO had been increased through the proposed amendment's disclosure requirements.

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following questions related to the proposal.

- Would the information proposed to be required to be disclosed sufficient to permit the determination of an unsolicited credit rating? Conversely, would the proposed amendment require the disclosure of more information than would be necessary to permit the determination of an unsolicited credit rating? Commenters believing more information should be disclosed should specifically describe the additional information and the practicality of requiring its disclosure, while commenters believing that less information should be disclosed should specifically describe what information would be unnecessary and explain why it would be unnecessary to disclose.

- The proposed amendment would require the disclosure of information provided to an NRSRO by the "issuer, underwriter, sponsor, depositor, or trustee" based on the Commission's

preliminary belief that these would be the parties relevant to an NRSRO's performance of the ratings process, *i.e.*, that taken together, these are the parties that would provide all relevant information to the NRSRO. Are there other entities that should be included in this category?

- Should the Commission provide a "safe harbor" so that an NRSRO that obtained a representation from one or more parties to a transaction to disclose the required information would not be held in violation of the rule if the party did not fulfill its disclosure obligations under the representation?

- Should the Commission also require the disclosure of information about the steps, if any, that were taken by the NRSRO, issuer, underwriter, sponsor, depositor, or trustee to verify information about the assets underlying or referenced by the security or money market instrument, or, if no such steps were taken, a disclosure of that fact?

- Would the disclosure of the initial information on the pricing date provide enough time for other NRSROs to determine unsolicited ratings before the securities were sold to investors? If not, would it be appropriate to require that this information be disclosed prior to the pricing date? Alternatively, would it be more appropriate to require NRSROs hired by the arranger to wait a period of calendar or business days (*e.g.*, 2, 4, 10 days) after the asset pool is settled upon by the arranger before issuing the initial credit rating in order to provide other NRSROs with sufficient time to determine an unsolicited rating?

- Should the Commission also require the disclosure of the results of any steps taken by the NRSRO, issuer, underwriter, sponsor, depositor, or trustee to verify information about the assets underlying or referenced by a structured finance product? Alternatively, should the Commission require a general disclosure of whether any steps were taken to verify the information and, if so, a description of those steps?

- Do NRSROs obtain information about the underlying assets of structured products—particularly in the surveillance process—from third-parties such as vendors rather than from issuers, underwriters, sponsors, or trustees? If so, would it be necessary to require the disclosure of this information as proposed or can the goals of the proposed amendments in promoting unsolicited ratings be achieved under current practices insofar as the information necessary for surveillance can be obtained from third-party vendors, albeit for a fee?

⁷³ As discussed below, for private offerings and offshore offerings, this information would not be disclosed publicly before the offering closes but instead would be provided via a password-protected Internet Web site to credit rating agencies and accredited investors. After the offering closes, the information would be required to be disclosed publicly and, therefore, made available to market observers such as academics.

⁷³ 15 U.S.C. 78o-7(h)(2).

⁷⁴ *Id.*

• Does the information provided to NRSROs by issuers, underwriters, sponsors, depositors, or trustees about assets underlying structured products (e.g., mortgage loans, home equity loans, consumer loans, credit card receivables) commonly include personal identifying information about individuals such as names, social security numbers, addresses, and telephone numbers? If so, are there practical ways to ensure that this information is not disclosed?

• Does any of the information provided to NRSROs by issuers, underwriters, sponsors, depositors, or trustees about assets underlying structured products contain proprietary information? Commenters that believe this is the case should specifically identify any such information.

b. Proposed Guidance for Compliance With Provisions of the Securities Act of 1933

As noted above, the proposed amendments to Rule 17g-5 that would require the disclosure of information about the underlying assets of a structured finance product implicate the Securities Act.⁷⁶ As explained below, the means by which information would be disclosed for the purposes of the proposed amendments to Rule 17g-5 would be governed by the nature of the offering. The Securities Act restricts the types of offering communications that issuers or other parties subject to the Securities Act's provisions (such as underwriters) may use during a registered public offering and, for private offerings, restricts the methods by which communications may be made so as to avoid general solicitation or general advertising of the private offering to potential purchasers. Communications that may be considered offers⁷⁷ are subject to these restrictions.⁷⁸ Likewise, with respect to

unregistered offshore offerings that are intended to comply with the safe harbor provisions of Regulation S, communications that are deemed to be offers in the United States or directed selling efforts in the United States are prohibited. Information about securities that are the subject of an offering that has been provided to NRSROs and is required to be disclosed pursuant to the proposed rules would be considered offers or directed selling efforts and therefore subject to these restrictions relating to offering communications.⁷⁹

In the following three sections, the Commission provides guidance on how the information that would be required to be disclosed under proposed new paragraph (a)(3) of Rule 17g-5 ("Paragraph (a)(3) Information") would need to be disclosed under the proposed amendment and consistent with the Securities Act. As discussed below, the manner and breadth of the disclosures under the proposed amendment would depend on whether the structured finance product was issued under a public, private, or offshore offering.

i. Public Offerings

With respect to registered offerings at the time the Paragraph (a)(3) Information would be required to be disclosed (the pricing date), the information would be written communications and the issuer, underwriter, or other offering participant also would have to comply with the Securities Act with regard to the disclosure of such written communications.⁸⁰ In addition, such written communications would be

limited to a "statutory prospectus" that conforms to the information requirements of Securities Act Section 10. See Securities Act Section 5(b)(1) (15 U.S.C. 77e(b)(1)) and Securities Act Section 10 (15 U.S.C. 77j). After the registration statement is declared effective, offering participants may make written offers only through a statutory prospectus, except that they may use additional offering materials if a final prospectus that meets the requirements of Securities Act Section 10(a) is sent or given prior to or with those materials. See Securities Act Section 2(a)(10) (15 U.S.C. 77b(a)(10)) and Section 5(b)(1).

⁷⁹ This may be the case even if the information relates to pools backing prior issuances. In an offering of securities backed by the same class of assets, the information provided for surveillance and required to be disclosed pursuant to proposed Rule 17g-5(a)(3)(iii) may be static pool data as described in Item 1105 of Regulation AB (17 CFR 229.1105).

⁸⁰ See *Securities Offering Reform*, Securities Act Release 33-8591 (July 19, 2005), 70 FR 44722 (August 3, 2005) (the "Securities Offering Reform Release") for a discussion of the definition of written communications and rules relating to permitted communications in registered offerings. See also *Asset-Backed Securities*, Securities Act Release No. 8518 (December 22, 2004) 70 FR 1506 (January 7, 2005) (the "Asset-Backed Securities Release") for rules applicable to offerings of asset-backed securities.

subject to the civil liability and antifraud provisions of the Securities Act.⁸¹

As discussed in the Commission's Securities Offering Reform Release adopting several reforms to the securities offering process,⁸² issuers of structured finance products have potentially two sets of rules under the Securities Act on which they may rely in using written offering materials. If the offering is registered on Securities Act Form S-3,⁸³ then the written materials may constitute ABS informational and computational materials, as defined in Item 1101 of Regulation AB,⁸⁴ and

⁸¹ Under the Securities Act, purchasers of an issuer's securities in a registered offering have private rights of action for materially deficient disclosure in registration statements under Section 11 and in prospectuses and oral communications under Section 12(a)(2). Under Securities Act Section 12(a)(2) and Securities Act Rule 159, the liability determination as to an oral communication, prospectus, or statement, as the case may be, does not take into account information conveyed to a purchaser only after the time of sale (including the contract of sale), including information contained in a final prospectus, prospectus supplement, or Exchange Act filing that is filed or delivered subsequent to the time of sale (including the contract of sale) where the information is not otherwise conveyed at or prior to that time. The time of sale under the Securities Act includes the time of the contract of sale—the time at which an investor has taken the action the investor must take to become committed to purchase the securities and therefore entered into a contract of sale.

⁸² See Section III.D.3.b.iii(C)(3)(a)(iii) of the Securities Offering Reform Release, 70 FR 44722, 44751.

⁸³ 17 CFR 239.13. An ABS issuer is eligible to use Form S-3 if the conditions of General Instruction V are met.

⁸⁴ 17 CFR 229.1101. Item 1101 of Regulation AB provides the following definition:

(a) *ABS informational and computational material* means a written communication consisting solely of one or some combination of the following:

(1) Factual information regarding the asset-backed securities being offered and the structure and basic parameters of the securities, such as the number of classes, seniority, payment priorities, terms of payment, the tax, Employment Retirement Income Security Act of 1974, as amended, (29 U.S.C. 1001 *et seq.*) ("ERISA") or other legal conclusions of counsel, and descriptive information relating to each class (e.g., principal amount, coupon, minimum denomination, anticipated price, yield, weighted average life, credit enhancements, anticipated ratings, and other similar information relating to the proposed structure of the offering);

(2) Factual information regarding the pool assets underlying the asset-backed securities, including origination, acquisition and pool selection criteria, information regarding any prefunding or revolving period applicable to the offering, information regarding significant obligors, data regarding the contractual and related characteristics of the underlying pool assets (e.g., weighted average coupon, weighted average maturity, delinquency and loss information and geographic distribution) and other factual information concerning the parameters of the asset pool appropriate to the nature of the underlying assets, such as the type of assets comprising the pool and the programs under which the loans were originated;

(3) Identification of key parties to the transaction, such as servicers, trustees, depositors, sponsors,

⁷⁶ 15 U.S.C. 77a *et seq.*

⁷⁷ Securities Act Section 2(a)(3) (15 U.S.C. 77b(a)(3)) defines an "offer" as any attempt to offer to dispose of, or solicitation of any offer to buy, a security or interest in a security for value. The term "offer" has been interpreted broadly and goes beyond the common law concept of an offer. See *Diskin v. Lomasney & Co.*, 452 F. 2d 871 (2d Cir. 1971); *SEC v. Cavanaugh*, 1 F. Supp. 2d 337 (S.D.N.Y. 1998). The Commission has explained that "the publication of information and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer in its securities constitutes an offer * * *." *Guidelines for the Release of Information by Issuers Whose Securities are in Registration*, Securities Act Release No. 5180 (August 16, 1971), 36 FR 16506.

⁷⁸ Before the registration statement is filed, all offers, in whatever form, are prohibited. See Securities Act Section 5(c) (15 U.S.C. 77e(c)). Between the filing of the registration statement and its effectiveness, offers made in writing (including by e-mail or Internet), by radio, or by television are

should be filed on Exchange Act Form 8-K⁸⁵ in accordance with Rules 167 and 426 of the Securities Act.⁸⁶ The written materials may constitute a free writing prospectus, as defined in Rule 405 of the Securities Act.⁸⁷ In that case, the information that is disclosed must be filed in accordance with Rules 164 and 433 of the Securities Act.⁸⁸ Given that the Paragraph (a)(3) Information could constitute offering materials, the Commission believes it is important to explain how the rules under the Securities Act may be relied upon when Paragraph (a)(3) Information is made publicly available.⁸⁹

originators and providers of credit enhancement or other support, including a brief description of each such party's roles, responsibilities, background and experience;

(4) Static pool data, as referenced in Item 1105 of this Regulation AB, such as for the sponsor's and/or servicer's portfolio, prior transactions or the asset pool itself;

(5) Statistical information displaying for a particular class of asset-backed securities the yield, average life, expected maturity, interest rate sensitivity, cash flow characteristics, total rate of return, option adjusted spread or other financial or statistical information relating to the class or classes under specified prepayment, interest rate, loss or other hypothetical scenarios. Examples of such information under the definition include:

(i) Statistical results of interest rate sensitivity analyses regarding the impact on yield or other financial characteristics of a class of securities from changes in interest rates at one or more assumed prepayment speeds;

(ii) Statistical information showing the cash flows that would be associated with a particular class of asset-backed securities at a specified prepayment speed; and

(iii) Statistical information reflecting the financial impact of losses based on a variety of loss or default experience, prepayment, interest rate and related assumptions.

(6) The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;

(7) The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them); and

(8) A description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with an underwriter or participating dealer (including procedures regarding account-opening and submitting indications of interest and conditional offers to buy). The Commission confirmed in the Asset-Backed Securities Release that loan level information could be included in ABS information and computational materials.

⁸⁵ 17 CFR 249.308.

⁸⁶ 17 CFR 230.167 and 17 CFR 230.426.

⁸⁷ 17 CFR 230.405. The contents of free writing prospectuses are not limited to ABS informational and computational materials.

⁸⁸ 17 CFR 230.164 and 17 CFR 230.433. Rule 433 also provides that a free writing prospectus or portion thereof required to be filed under Rule 433 containing only ABS informational and computational materials may be filed under Rule 433 but within the time frame required for satisfaction of the conditions of Rule 426, and that such filing will satisfy the conditions of Rule 433.

⁸⁹ Depending on whether the materials constitute a free writing prospectus or ABS informational and

Most elements of the Paragraph (a)(3) Information would need to be filed in accordance with the rules governing free writing prospectuses or ABS informational and computational materials pursuant to Rules 433 and 426.⁹⁰ Currently, the timing or filing requirements under these rules is tied to when the information is provided to specific investors. However, unlike other free writing prospectuses and ABS informational and computational materials that may be provided to specific investors, in a public offering, the Paragraph (a)(3) Information would be required to be disclosed publicly. Therefore, the Commission believes that it is appropriate to clarify when the materials should be filed with the Commission.

Under Rule 426, ABS informational and computational materials are required to be filed by the later of the due date for filing the final prospectus under Rule 424(b) or two days after the date of first use. Under Rule 433, a free writing prospectus must be filed with the Commission no later than the date of first use. However, in order to conform certain asset-backed free writing prospectuses with the filing requirements for ABS informational and computational materials in Rule 426, Rule 433(d)(6) provides that a free writing prospectus containing only ABS informational and computational materials may be filed in the time provided by Rule 426(b). Thus, under both rules the information must be filed by the later of the due date for filing the final prospectus under Rule 424(b) or two days after the date of first use.

In addition, Rule 433 requires filing by issuers of free writing prospectuses prepared by or on behalf of, or used or referred to by, issuers or, depositors, sponsors, servicers, or affiliated depositors, whether or not the issuer, but not by underwriters or dealers, unless they contain issuer information or are distributed in a manner reasonably designed to lead to its broad dissemination. The Paragraph (a)(3) Information that would be required to

computational materials, the liability provisions governing the disclosure may differ. Free writing prospectuses are subject to liability under Section 12(a)(2) and Section 17(a) of the Securities Act, 15 U.S.C. 77j(a)(2) and 15 U.S.C. 77q(a). A free writing prospectus will not be part of a registration statement subject to liability under Securities Act Section 11 unless the issuer elects to file it as part of the registration statement. See also Asset-Backed Securities Release at footnote 335. On the other hand, ABS informational and computational materials also are subject to Section 12(a)(2) and Section 17(a) liability, but they must be filed on Form 8-K and therefore, by virtue of incorporation by reference into a registration statement, are subject to Section 11 liability.

⁹⁰ 17 CFR 230.433 and 17 CFR 230.426.

be disclosed would not be considered underwriter or dealer information, even if prepared by the underwriter or dealer, given the broad dissemination and thus would need to be filed.

Rules 164 and 167 provide the exemption from Section 5(b)(1) of the Securities Act for the use of free writing prospectuses and ABS informational and computational materials, respectively. For the most part, Rule 164 should be available for the use of the Paragraph (a)(3) Information, even where the issuer is an ineligible issuer,⁹¹ given that the rule provides that ineligible issuers that are asset-backed issuers may use a free writing prospectus as long as the free writing prospectus contains only specified information.⁹² Much of the Paragraph

⁹¹ An "ineligible issuer," as the term is defined in Rule 405 of the Securities Act, includes, in the case of asset-backed issuers, the depositor or any issuing entities previously established, directly or indirectly by the depositor, who are not current in their Exchange Act reports and other materials required to be filed during the prior 12 months (or such shorter period that the issuer was required to file such reports and materials), other than reports on Form 8-K required solely pursuant to an item specified in General Instruction I.A.4 of Form S-3.

⁹² In asset-backed offerings by ineligible issuers, free writing prospectuses used by ineligible issuers are limited to the following information:

(1) Factual information regarding the asset-backed securities being offered and the structure and basic parameters of the securities, such as the number of classes, seniority, payment priorities, terms of payment, the tax, ERISA or other legal conclusions of counsel, and descriptive information relating to each class (e.g., principal amount, coupon, minimum denomination, anticipated price, yield, weighted average life, credit enhancements, anticipated ratings, and other similar information relating to the proposed structure of the offering);

(2) Factual information regarding the pool assets underlying the asset-backed securities, including origination, acquisition and pool selection criteria, information regarding any prefunding or revolving period applicable to the offering, information regarding significant obligors, data regarding the contractual and related characteristics of the underlying pool assets (e.g., weighted average coupon, weighted average maturity, delinquency and loss information and geographic distribution) and other factual information concerning the parameters of the asset pool appropriate to the nature of the underlying assets, such as the type of assets comprising the pool and the programs under which the loans were originated;

(3) Identification of key parties to the transaction, such as servicers, trustees, depositors, sponsors, originators and providers of credit enhancement or other support, including a brief description of each such party's roles, responsibilities, background and experience;

(4) Static pool data;

(5) The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;

(6) The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them); and

(7) A description of the procedures by which the underwriters will conduct the offering and the

Continued

(a)(3) Information should contain information that can be included in a free writing prospectus used by an asset-backed issuer pursuant to Rule 164. To the extent that Rule 167 is not available because the offering is registered on Form S-1 rather than Form S-3, and Rule 164 is not available, the information should be filed in an amendment to the registration statement.

In addition, the Commission understands that currently at least some of the information that would constitute Paragraph (a)(3) Information, if not included in a free writing prospectus, is often included as a schedule to pooling and servicing agreements. Those agreements, along with their schedules and exhibits, should be filed by the time of the offering of securities. Therefore they should be filed at the time of the takedown as exhibits to a Form 8-K incorporating them by reference into the Form S-3 registration statement.⁹³

The Commission generally requests comment on all aspects of this proposed guidance. In addition, the Commission requests comment on the following questions related to the proposal.

- Do we need to give more guidance on the relationship between the proposed disclosure requirements regarding information about the underlying assets provided to, and used by, the NRSRO to perform ratings surveillance and the requirements of Regulation FD?⁹⁴ If commenters believe that the proposed requirements are not consistent with Regulation FD, they should provide a detailed explanation as to why not.

- The proposed disclosure requirements regarding information about the underlying assets provided to, and used by, the NRSRO to perform ratings surveillance may be the same as the information required to be disclosed on Form 10-D for so long as the issuer has an Exchange Act reporting obligation. Given that the Form 10-D reporting obligation is typically suspended for most asset-backed issuers after the first year of reporting, does the proposed disclosure requirement raise any issues regarding Exchange Act reporting?

- ABS informational and computation materials, as defined in Item 1101 of Regulation AB, can

procedures for transactions in connection with the offering with an underwriter or participating dealer (including procedures regarding account opening and submitting indications of interest and conditional offers to buy).

⁹³ See Form S-3 (17 CFR 239.13), Form 8-K (17 CFR 249.308) and Item 601(b)(4) of Regulation S-3 (17 CFR 229.601).

⁹⁴ 17 CFR 243.100 to 103.

include, among other things, factual information regarding the pool assets underlying the asset-backed securities, including origination, acquisition and pool selection criteria, information regarding any prefunding or revolving period applicable to the offering, information regarding significant obligors, data regarding the contractual and related characteristics of the underlying pool assets (e.g., weighted average coupon, weighted average maturity, delinquency and loss information and geographic distribution) and other factual information concerning the parameters of the asset pool appropriate to the nature of the underlying assets, such as the type of assets comprising the pool and the programs under which the loans were originated.⁹⁵ As noted above, the Commission believes that at least some of the proposed Paragraph (a)(3) Information could fall within this category and therefore constitute ABS informational and computational materials. Since there may be a wide variety of information that is provided to an NRSRO, it is not clear that all information provided would fit within the definition of ABS informational and computation materials, or in the various categories of free writing prospectus. Should the Commission provide additional interpretation regarding what types of material that could be provided and would be required to be disclosed to fit within this category? Is there information that is likely to be provided and disclosed that does not appear to fit within these definitions? Should the Commission instead revise the definitions to specifically include the information required to be disclosed?

- Is there any need for the Commission to revise Securities Act Rules 426 or 433 to clarify when the materials need to be filed?

- Are there any additional requirements in Regulation AB or under the Securities Act that are implicated by the proposed amendments? Is there any information that would typically need to be disclosed under this proposed amendment that is not already generally disclosed in filings with the Commission?

- Should the Commission amend Regulation AB to require that the Paragraph (a)(3) Information be disclosed?

ii. Private Offerings

The proposed amendments also would implicate the Securities Act restrictions affecting private offerings. Offerings of securities made in reliance

on an exemption from registration contained in Securities Act Section 4(2),⁹⁶ the rules promulgated thereunder or pursuant to Regulation D,⁹⁷ are offerings that are not made to the public. As a result, general solicitation or advertising is prohibited in these offerings under Securities Act Section 4(2) and the applicable Securities Act rules.⁹⁸ As a result of the application of the general solicitation and advertising restrictions, public disclosure of offering or security information pursuant to the proposed rules could cause the private offering exemptions to be unavailable to securities offerings to which the proposed rules apply.

As discussed above, the Commission believes it is likely that much of the information that would need to be disclosed under the proposed amendment would contain extensive loan level data, and thus anticipates that a common medium for disclosure of this information would be an Internet Web site. The Commission has indicated that the placement of private offering materials on an Internet Web site, without sufficient procedures to limit access only to accredited investors, is inconsistent with the prohibition against general solicitation or advertising in Securities Act Rule 502(c).⁹⁹ However, as discussed above, the Commission also believes that to address the conflict of interest inherent in the structured finance product arranger-pay business model it would be beneficial to make this information available to investors and entities meeting the definition of "credit rating agency" in Section 3(a)(61) of the Exchange Act (which would include NRSROs)¹⁰⁰ on the date the placement agent and the issuer or depositor set the offering price of the securities being

⁹⁶ 15 U.S.C. 77d(2).

⁹⁷ 17 CFR 230.501 through 230.508.

⁹⁸ See Securities Act Section 4(2) (15 U.S.C. 77d(2)) and Securities Act Rules 504, 505 and 506 of Regulation D (17 CFR 230.504, 230.505 and 230.506). An exception to the prohibition against general solicitation applies to some limited offerings under Rule 504(b)(1) (17 CFR 230.504(b)(1)) when an issuer has satisfied state securities laws of specified types. See *Revision of Rule 504 of Regulation D, the "Seed Capital" Exemption*, Securities Act Release No. 7644 (February 25, 1999), 64 FR 11090. The restriction on general solicitation or advertising applies to all methods by which the communication can be made, including electronic, paper, mail, radio, television, or in newspapers or magazines.

⁹⁹ See *Use of Electronic Media*, Securities Act Release No. 7856 (April 28, 2000), 65 FR 25843 (the "Electronic Media Release"). The Commission noted in the Electronic Media Release that the federal securities laws apply equally to information contained on an issuer's Web site as they do to other communications made by or attributed to the issuer.

¹⁰⁰ 15 U.S.C. 78c(a)(61).

⁹⁵ See Asset-Backed Securities Release.

rated, and to the general public on the first business day after the offering closes.

The Commission believes, therefore, that in a private offering, Paragraph (a)(3) Information would need to be provided to investors, NRSROs, and credit rating agencies by posting the information on a password-protected Internet Web site.¹⁰¹ On the first business day after the offering closes, however, the Paragraph (a)(3) Information would need to be disclosed publicly. The Commission believes that removing the password protection from the Internet Web site where the Paragraph (a)(3) Information is posted after the offering closes is consistent with the Securities Act restrictions on private offerings while satisfying the requirements of proposed Rule 17g-5(a)(3).

As discussed above, the Commission believes it would be appropriate to allow early access to credit rating agencies other than those hired to issue a rating to provide them with an opportunity to perform independent assessments of the validity of ratings and identify flaws, opportunities for improvement, or compromised procedures in the hired NRSRO's approach. While permitting access to this information to credit rating agencies in addition to accredited investors extends beyond the Commission's previous interpretations on what constitutes a general solicitation or advertising, the Commission believes it balances those issues with the benefits of having other credit rating agencies able to assess the quality of, or provide additional, ratings.¹⁰² This approach is designed to promote competition among NRSROs by providing credit rating agencies that were not paid by the issuer to rate the issuer's products with information they need to issue unsolicited ratings and allowing other market participants to also have access to the information to allow them to evaluate the ratings. In a private offering, disclosure of this information is undertaken in two steps in order to avoid issues of general solicitation. The Commission is providing the above guidance only in the context of the proposed amendments. Moreover, the guidance expressed in this release is

¹⁰¹ A password-protected Web site would meet the requirements of an amended Rule 17g-5 in the context of private offerings.

¹⁰² The Commission noted in *Interpretative Release on Regulation D*, Securities Act Release No. 6455 (March 3, 1983), 17 CFR 231, that Rule 502(c) relates to the nature of the offering, not the nature of the offerees.

applicable only if the proposed amendments are adopted.

The Commission generally requests comment on all aspects of this proposed guidance. In addition, the Commission requests comment on the following questions related to the proposal.

- Are there other parties besides credit rating agencies and investors that should be eligible to access Paragraph (a)(3) Information in the context of a private offering without raising issues of general solicitation?

- Should any of the foregoing guidance regarding the use of Paragraph (a)(3) Information be codified?

- Is expanding the categories of parties who can access the information that would be contained in the proposed Paragraph (a)(3) Information consistent with the purposes of the Securities Act?

- Is there any Paragraph (a)(3) Information that should remain accessible only to credit rating agencies and investors, rather than, as proposed, disclosed to the public on the business day after the offering has closed?

- Should the requirement to publicly disclose the Paragraph (a)(3) Information on the first business day after the offering has closed also permit the NRSRO, depositor, etc. to omit deal-specific information relating to the transaction such that only "generic" information is provided to the public?

- Does disclosure of information provided for purposes of credit rating surveillance raise issues of general solicitation in the context of subsequent offerings of the same asset class? If so, does this vary by asset class?

iii. Offshore Offerings

Similar to private offerings, the proposed amendments would implicate restrictions under Regulation S. Under the General Statement of Regulation S,¹⁰³ the provisions of Section 5 of the Securities Act apply to offers and sales of securities that occur in the United States and do not apply to those that occur outside the United States. Regulation S contains various safe harbor procedures that issuers, offering participants and others can follow for unregistered offerings outside the United States. These procedures include restrictions against offers being made to persons in the United States¹⁰⁴ and restrictions against directed selling efforts in the United States by the issuer, distributor, any of their respective affiliates, or persons acting on their behalf.¹⁰⁵

¹⁰³ Rule 901 of Regulation S, 17 CFR 230.901.

¹⁰⁴ Rule 903(a)(1).

¹⁰⁵ Rule 903(a)(2).

As noted above, the Commission believes that it is likely that much of the information that would be required to be disclosed would contain extensive loan level data and thus anticipates that a common medium for disclosure of this information would be an Internet Web site. The Commission has provided guidance with respect to the use of Internet Web sites for securities offerings outside the United States.¹⁰⁶ This guidance sets out a general approach that when adequate measures are implemented to prevent U.S. persons from participating in an offshore offer, the Commission would not view the offer as occurring in the United States for registration purposes. The Commission believes that this guidance can be equally applied to the proposed disclosure of the proposed Paragraph (a)(3) Information.

Under this guidance, what constitutes adequate measures would depend on all of the facts and circumstances of a particular transaction. As the Commission noted previously:

"We generally would not consider an offshore Internet offer made by a non-U.S. offeror as targeted at the United States, however, if: (1) the Web site contains a prominent disclaimer making it clear that the offer is directed only to countries other than the United States; * * * and (2) the Web site offeror implements procedures that are reasonably designed to guard against sales to U.S. persons in the offshore offering."¹⁰⁷

These procedures are not exclusive.

The Commission's prior guidance distinguishes among foreign issuers and U.S. issuers each conducting offshore offerings under Regulation S and U.S. offerings conducted on an exempt basis. The Commission believes it is appropriate to continue this treatment with respect to the proposed disclosure of the Paragraph (a)(3) Information. Under this guidance, a foreign issuer making an offshore offering with no concurrent U.S. private offering is not required to password-protect Internet-based offering communications so long as adequate measures are put in place. Thus, credit rating agencies and other market participants should be able to have ready access to any Paragraph (a)(3) Information that is posted by a foreign issuer. A foreign issuer making an offshore offering concurrently with private offerings in the United States could implement additional other procedures to prevent its offshore Internet communications from being

¹⁰⁶ See *Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore*, Securities Act Release No. 7516 (March 23, 1998).

¹⁰⁷ *Id.*

used to solicit participants for its U.S.-based exempt offering, and U.S. issuers conducting an offshore offering should implement procedures similar to those for private placements, such as password-type procedures, under which only non-U.S. persons can obtain access to the materials. Consistent with the procedures for private offerings, there could be pricing date disclosure to credit rating agencies that are not purchasers in the offering through a password-protected Internet Web site. As a result, when a foreign issuer is conducting a U.S. private offering under Section 4(2), and when a U.S. issuer is conducting an offshore offering under Regulation S or a private offering under Section 4(2), it would follow the procedures outlined in Section II.A.1.b.ii above with respect to private offerings, including procedures calling for public disclosure of Paragraph (a)(3) Information on the business day after the closing date.

The Commission generally requests comment on all aspects of this proposed guidance. In addition, the Commission requests comment on the following questions related to the proposal.

- Are there other parties besides credit rating agencies that should be eligible to access Paragraph (a)(3) Information in the context of an offshore offering without raising issues of directed selling efforts or offers of securities in the United States?

- Should any of the foregoing guidance regarding the use of Paragraph (a)(3) Information be codified?

- Is expanding the categories of parties who can access the information that would be contained in the proposed Paragraph (a)(3) Information consistent with the purposes of the Securities Act?

- Is there any Paragraph (a)(3) Information that should remain accessible only to credit rating agencies and investors, rather than, as proposed, be disclosed to the public on the business day after the offering has closed?

- Should the requirement to publicly disclose the Paragraph (a)(3) Information on the first business day after the offering has closed also permit the NRSRO, depositor, etc. to omit deal-specific information relating to the transaction such that only "generic" information is provided to the public?

2. Rule 17g-5 Prohibition on Conflict of Interest Related to Rating an Obligor or Debt Security Where Obligor or Issuer Received Ratings Recommendations From the NRSRO or Person Associated With the NRSRO

The Commission is proposing to amend Rule 17g-5(c) to add a new

paragraph (5) that would prohibit an NRSRO from issuing a credit rating with respect to an obligor or security where the NRSRO or a person associated with the NRSRO, as defined in Section 3(a)(63) of the Exchange Act,¹⁰⁸ made recommendations to the obligor or the issuer, underwriter, or sponsor of the security (that is, the parties responsible for structuring the security) about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security. This proposal would prohibit the NRSRO and, in particular, its credit analysts from making recommendations to obligors, issuers, underwriters, and sponsors such as arrangers of structured finance products about how to obtain a desired credit rating during the rating process. It also would prohibit an NRSRO from issuing a credit rating where a person associated with the NRSRO, such as an affiliate, made such recommendations.

The Commission is proposing this amendment to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.¹⁰⁹ The provisions of this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.¹¹⁰ The Commission preliminarily believes the proposed amendment is necessary and appropriate in the public interest and for the protection of investors because it would address a potential practice that could impair the objectivity, and, correspondingly, the quality, of a credit rating. It has been suggested that during the process of rating structured finance products the NRSROs have recommended to arrangers how to structure a trust or complete an asset pool to receive a desired credit rating and then rated the securities issued by the trust—in effect, rating their own work.¹¹¹ This proposal would prohibit this conduct based on the Commission's preliminary belief that it creates a conflict that cannot be effectively managed inasmuch as it would be very difficult for an NRSRO to remain objective when assessing the creditworthiness of an obligor or debt security where the NRSRO or person associated with the NRSRO made recommendations about steps the obligor or issuer of the security could take to obtain a desired credit rating.

¹⁰⁸ 15 U.S.C. 78c(a)(63).

¹⁰⁹ 15 U.S.C. 78o-7(h)(2).

¹¹⁰ *Id.*

¹¹¹ See e.g., Coffee April 22, 2008 Senate Testimony, pp. 2-3.

The proposal is not intended to prohibit all interaction between the NRSRO and the obligor, issuer, underwriter, or sponsor during the rating process. The Commission preliminarily believes that the transparency of an NRSRO's procedures and methodologies for determining credit ratings is enhanced when the NRSRO explains to obligors and issuers the bases, assumptions, and rationales behind rating decisions. For example, the Commission understands that in the structured finance area, NRSROs may provide information to arrangers about the output of expected loss and cash flow models. The information provided by the NRSRO during the rating process allows the arranger to better understand the relationship between model outputs and the NRSRO's decisions with respect to necessary credit enhancement levels to support a particular rating. The arranger then can consider the feedback and determine independently the steps it will take, if any, to adjust the structure, credit enhancement levels, or asset pool. However, if the feedback process turns into recommendations by the NRSRO about changes the arranger could make to the structure or asset pool that would result in a desired credit rating, the NRSRO's role would transition from an objective credit analyst to subjective consultant. In this case, the Commission believes it would be difficult for the NRSRO to remain impartial since the expectation would be that the changes suggested by the NRSRO would result in the credit ratings sought by the arranger.

The prohibition would extend to recommendations by persons associated with the NRSRO to address affiliates. For example, an NRSRO's holding company could establish an affiliate to provide consulting services to issuers about how to obtain desired credit ratings from the NRSRO subsidiary. The Commission believes it would be difficult for the NRSRO to remain objective in this situation since the financial success of the affiliate would depend on issuers getting the ratings they desired after taking any steps recommended by the affiliate. This would create undue pressure on the NRSRO's credit analysts to determine credit ratings that favored the affiliate.

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following questions related to the proposal.

- Is this type of conflict one that could be addressed through disclosure and procedures to manage it instead of prohibiting it? Should the Commission,

rather than prohibiting it, add this type of conflict to the list of conflicts in paragraph (b) of Rule 17g-5, which, under paragraph (a) of the rule, must be addressed through disclosure and procedures to manage them?

- Would there be practical difficulties for an NRSRO that is part of a large conglomerate in monitoring the business activities of persons associated with the NRSRO such as affiliates located in other countries to comply with the proposed requirement? If so, given the greater separation between the NRSRO and these types of persons associated with the NRSRO, should the Commission require instead that, for these types of persons associated with the NRSRO only, the NRSRO disclose this conflict and manage it through information barriers rather than prohibit it?

- The Commission recognizes that the line between providing feedback during the rating process and making recommendations about how to obtain a desired rating may be hard to draw in some cases. Consequently, should the Commission specify the type of interactions between an NRSRO and the person seeking the rating that would and would not constitute recommendations for the purposes of this rule? Commenters that believe the Commission should provide more guidance on this issue should provide suggested definitions.

3. Rule 17g-5 Prohibition on Conflict of Interest Related to the Participation of Certain Personnel in Fee Discussions

The Commission is proposing to amend Rule 17g-5¹¹² by adding a new paragraph (c)(6) of Rule 17g-5 to address the conflict of interest that arises when a fee paid for a rating is discussed or arranged by a person within the NRSRO who has responsibility for participating in determining credit ratings (including analysts and rating committee members) or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models.

The Commission is proposing this amendment to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.¹¹³ The provisions of this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO.¹¹⁴ The

Commission preliminarily believes the proposed amendment is necessary and appropriate in the public interest or for the protection of investors because it would address a potential practice that could impair the objectivity, and, correspondingly, the quality, of a credit rating. This amendment is designed to effectuate the separation within the NRSRO of persons involved in fee discussions from persons involved in the credit rating analytical process. While the incentives of the persons discussing fees could be based primarily on generating revenues for the NRSRO; the incentives of the persons involved in the analytical process should be based on determining accurate credit ratings. There is a significant potential for these distinct incentive structures to conflict with one another where persons within the NRSRO are engaged in both activities.

The potential consequences are that a credit analyst or person responsible for approving credit ratings or credit rating methodologies could, in the context of negotiating fees, let business considerations undermine the objectivity of rating process. For example, an individual involved in a fee negotiation with an issuer might not be impartial when it comes to rating the issuer's securities. In addition, persons involved in approving the methodologies and processes used to determine credit ratings could be reluctant to adjust a model to make it more conservative if doing so would make it more difficult to negotiate fees with issuers. For these reasons, the Commission preliminarily believes that this conflict should be prohibited.

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following items related to the proposal.

- Should the proposed prohibition also be extended to cover participation in fee negotiations by NRSRO personnel with supervisory authority over the NRSRO personnel participating in determining credit ratings or developing or approving procedures or methodologies used for determining credit ratings?

- Instead of prohibiting this conflict outright, would disclosure and procedures to manage the conflict adequately address the conflict? If so, what specific disclosures should be required? What other measures should be required in addition to disclosures?

- Would there be practical difficulties in separating analytic and fee discussions for a small NRSRO, including one that has limited staff, that are significant enough that the

Commission should consider a different mechanism to address the conflict? If so, what sort of mechanism and with what conditions? Should the Commission adopt an exemption from the prohibition for small NRSROs and, instead, require them to disclose the conflict and establish procedures to manage it? For example, the exemption could apply to NRSROs that have less than 10, 20, or 50 associated persons. Commenters that endorse an exemption for small NRSROs should provide specific details as to how the Commission should define an NRSRO as "small" for purposes of the exemption. For example, for purposes of the Final Regulatory Flexibility Analysis for the Adopting Release the Commission concluded that an NRSRO with total assets of \$5 million or less was a "small" entity for purposes of the Regulatory Flexibility Act.¹¹⁵ Would that be an appropriate way to define a small NRSRO for purposes of this exemption?

4. Rule 17g-5 Prohibition of Conflict of Interest Related to Receipt of Gifts

The Commission is proposing to amend Rule 17g-5¹¹⁶ by adding a new paragraph (c)(7) that would prohibit an NRSRO from having a conflict of interest relating to the issuance or maintenance of a credit rating where a credit analyst who participated in determining or monitoring the credit rating, or a person responsible for approving the credit rating, received gifts, including entertainment, from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than \$25. Thus, this proposed prohibition would prohibit any gifts to credit analysts and persons on credit rating committees from the obligors, issuers, underwriters, or sponsors with respect to whom they had determined, monitored or approved credit ratings. It also would create an exception for items provided during normal business activities such as meetings to the extent they do not in the aggregate exceed \$25 per meeting. For example, the provision of pens, notepads, or minor refreshments, such as soft drinks or coffee, generally are incidental to meetings and other normal course business interactions and not treated as gifts *per se*. The proposed \$25 exception is designed to be high enough

¹¹² 17 CFR 240.17g-5.

¹¹³ 15 U.S.C. 78o-7(h)(2).

¹¹⁴ *Id.*

¹¹⁵ See Adopting Release, 72 FR at 33618.

¹¹⁶ 17 CFR 240.17g-5.

to permit these types of exchanges without implicating the prohibition.

The Commission is proposing these amendments to Rule 17g-5, in part, pursuant to the authority in Section 15E(h)(2) of the Exchange Act.¹¹⁷ The provisions in this section of the statute provide the Commission with authority to prohibit, or require the management and disclosure of, any potential conflict of interest relating to the issuance of credit ratings by an NRSRO as the Commission deems necessary or appropriate in the public interest or for the protection of investors.¹¹⁸ The Commission preliminarily believes the proposed amendment is necessary and appropriate in the public interest or for the protection of investors because it would address a potential practice that could impair the objectivity, and, correspondingly, the quality, of a credit rating.

Persons seeking credit ratings for an obligor or debt security could use gifts to gain favor with the analyst responsible for determining the credit ratings and cause the analyst to be less objective during the rating process. In the case of a substantial gift, the potential to impact the analyst's objectivity could be immediate. With smaller gifts, the danger is that over time the cumulative effect of repeated gifts can impact the analyst's objectivity. Therefore, the proposal would establish an absolute prohibition on gifts with the exception of minor incidentals provided in business meetings.

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission request comment on the following questions related to the proposal.

- Instead of prohibiting this conflict outright, should the Commission require that NRSROs disclose it and establish procedures to manage it? If so, what specific disclosures should be required?

- Instead of prohibiting gifts outright, should the Commission establish a yearly limit on the aggregate value of gifts that would be permitted under the prohibition? For example, the Commission could provide in the rule that the prohibition would not be triggered until the aggregate value of all gifts received from a particular person in a twelve month period exceeded \$100, \$500 or \$1,000 or some other amount.

- Is the proposed \$25 aggregate value an appropriate threshold for incidentals provided at meetings, or should a higher or lower threshold be applied?

- Should the Commission adopt a recordkeeping requirement with respect to the receipt of gifts by analysts and persons responsible for approving credit ratings in addition to the prohibition? For example, the Commission could require an NRSRO to document for each gift the identity of the person providing the gift, the recipient, and the nature of the gift.

B. Amendments to Rule 17g-2

The Commission adopted Rule 17g-2, in part, pursuant to authority in Section 17(a)(1) of the Exchange Act requiring NRSROs to make and keep such records, and make and disseminate such reports, as the Commission prescribes by rule as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the Exchange Act.¹¹⁹ Rule 17g-2 requires an NRSRO to make and retain certain records relating to its business and to retain certain other business records made in the normal course of business operations. The rule also prescribes the time periods and manner in which all these records are required to be retained. The Commission is proposing to amend this rule to require NRSROs to make and retain certain additional records and to require that some of these proposed new records be made publicly available.

1. A Record of Rating Actions and the Requirement That They Be Made Publicly Available

The Commission is proposing to amend Exchange Act Rule 17g-2¹²⁰ to add a new paragraph (8) to Rule 17g-2 that would require a registered NRSRO to make and retain a record showing all rating actions (initial rating, upgrades, downgrades, and placements on watch for upgrade or downgrade) and the date of such actions identified by the name of the security or obligor and, if applicable, the CUSIP for the rated security or the Central Index Key (CIK) number for the rated obligor. Furthermore, the Commission is proposing to amend Rule 17g-2(d) to require that this record be made publicly available on the NRSRO's corporate Internet Web site in an interactive data file that uses a machine-readable computer code that presents information in eXtensible Business Reporting Language ("XBRL") in electronic format ("XBRL Interactive Data File"). The purpose of this disclosure is to provide users of credit ratings, investors, and other market

participants and observers the raw data with which to compare how the NRSROs initially rated an obligor or security and, subsequently, adjusted those ratings, including the timing of the adjustments. In order to expedite the establishment of a pool of data sufficient to provide a useful basis of comparison, this requirement would apply to all currently rated securities or obligors as well as to all future credit ratings.

The goal of this proposal is to foster greater accountability of the NRSROs with respect to their credit ratings as well as competition among the NRSROs by making it easier for persons to analyze the actual performance of the credit ratings the NRSROs issue in terms of accuracy in assessing creditworthiness. The disclosure of this information on the history of each credit rating would create the opportunity for the marketplace to use the information to develop performance measurement statistics that would supplement those required to be published by the NRSROs themselves in Exhibit 1 to Form NRSRO. The intent is to tap into the expertise and flexibility of credit market observers and participants to create better and more useful means to compare credit ratings. This goal is to make NRSROs more accountable for their ratings by enhancing the transparency of the results of their rating processes for particular securities and obligors and classes of securities and obligors and encourage competition within the industry by making it easier for users of credit ratings to judge the output of the NRSROs.

As noted above, the proposed amendments would require that the record be made publicly available on the NRSRO's corporate Internet Web site in an XBRL Interactive Data File that uses a machine-readable computer code that presents information in XBRL. The Commission is proposing to require that an NRSRO use this format to publicly disclose the ratings action data because it would allow users to dynamically search and analyze the information, thereby facilitating the comparison of information across different NRSROs. In addition, an XBRL Interactive Data File would enable investors, analysts, and the Commission staff to capture and analyze the ratings action data more quickly and at less of a cost than is possible using another format. The Commission further believes that the XBRL Interactive Data File would be compatible with a wide range of open source and proprietary XBRL software applications and that as the ratings action data becomes more widely available, advances in interactive data software, online viewers, search

¹¹⁷ 15 U.S.C. 78o-7(h)(2).

¹¹⁸ *Id.*

¹¹⁹ See Section 5 of the Rating Agency Act and 15 U.S.C. 78q(a)(1).

¹²⁰ 17 CFR 240.17g-2.

engines, and other Web-based tools may further enhance the accessibility and usability of the data.

The Commission's experience in having certain issuers use XBRL for EDGAR filings has demonstrated the benefits of this format to investors, filers, and Commission staff.¹²¹ Expanding its use to NRSRO ratings history data would be consistent with Commission policy to utilize this format where practical.

The proposed amendment to Rule 17g-2(d) also would provide that the records be made publicly available no later than six months after the date of the rating action. The Commission anticipates that the record required under this amendment would need to be updated frequently as new credit ratings are issued and existing credit ratings are upgraded, downgraded and put on ratings watch. For purposes of the internal record, the NRSRO would need to keep the record current to reflect the complete ratings history of each extant credit rating. However, for purposes of the requirement to make the record publicly available, the NRSRO would be permitted to disclose the record on its Internet Web site six months after the record is updated to reflect a new ratings action. The proposed six-month time lag for publicly disclosing the updated record is designed to accommodate NRSROs that operate using the subscriber-pay model because they are paid for access to their current credit ratings. It also is designed to preserve the revenues that NRSROs operating using the issuer-pay model derive from selling download access to their current credit ratings.¹²² The Commission preliminarily believes the six-month time lag would not have any negative effect on the goal of this proposed amendment because the information on credit ratings actions that would be disclosed—perhaps many years' worth for some credit ratings—should be sufficient to develop meaningful performance metrics for comparing NRSROs.

Finally, the proposed amendments also would amend the instructions to Exhibit 1 to Form NRSRO to require the disclosure of the Web address where the XBRL Interactive Data File could be accessed. This is designed to inform

persons who use credit ratings where the ratings histories can be obtained.

The Commission is proposing these amendments, in part, under authority to require NRSROs to make and keep for prescribed periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.¹²³ The Commission preliminarily believes the proposed new recordkeeping and disclosure requirements are necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. Specifically, by proposing to require NRSROs to make ratings actions publicly available in an XBRL Interactive Data File, market participants would be able to create their own performance measurement metrics, including default and transition matrices, by which to judge the accuracy of NRSRO ratings. In addition, users of credit ratings would be able to compare side-by-side how each NRSRO initially rated a particular security, when the NRSRO took actions to adjust the rating upward or downward, and the degree of those adjustments.

Furthermore, users of credit ratings, academics and information vendors could use the raw data to perform analyses comparing how the NRSROs differ in their initial ratings and their monitoring for different types of asset classes. This could identify an NRSRO that is an outlier in terms of issuing high or low credit ratings or consistently reassesses ratings on a delayed basis for some or all asset classes when compared to other NRSROs. It also could help identify NRSROs that are consistently more or less accurate than others. This information also may identify NRSROs whose objectivity may be impaired because of conflicts of interest.

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following questions related to the proposal.

- Is the six-month delay before publicly disclosing a rating action sufficiently long to address the business concerns of the subscriber-based NRSROs and the issuer-paid NRSROs? Should the delay be for a longer period such as one or two years or even longer? Alternatively, is six months too long and should it be a shorter period of time such as three months or even shorter?

- Should the rule require that a notice be published along with the XBRL Interactive Data File warning that because of the permitted delay in updating the record some of the credit ratings in the record may no longer reflect the NRSRO's current assessment of the creditworthiness of the obligor or debt security? For example, the notice could explain that the information in the record is six months old and state that the credit ratings contained in record may not be up-to-date.

- Are there ways in which the NRSROs should be required to sort the credit ratings contained on the record such as by asset class or type of ratings?

- What mechanisms are appropriate for identifying rated securities? Are there other identifiers in addition, or as an alternative, to CUSIP or CIK number that could be used in the rule?

- Should the Commission allow the ratings action data to be provided in a format other than XBRL, such as pipe delimited text data ("PDTD") or eXtensible Markup Language ("XML")? Is there another format that is more widely used or would be more appropriate than XBRL for NRSRO data? What are the advantages/disadvantages of requiring the XBRL format?

- Should the Commission require that the information on the assets underlying a structured finance products discussed in Section II.A.1.a above be provided in a specific format such as PDTD, XML, or XBRL? Again, is there another format that is more widely used or would be more appropriate for such data? What are the advantages/disadvantages of requiring a specific format?

- Should the Commission take the lead in creating the new tags that are needed for the XBRL format or should it allow the tags to be created by another group and then review the tags? How long would it take to create new tags?

- The Commission anticipates that the data provided by NRSROs would be simple and repetitive (*i.e.*, the data would be name, CUSIP, date, rating, date, rating, etc.). Is there a need for more detailed categories of data?

- What would be the costs to an NRSRO to provide data in the XBRL format? Would there be a cost burden on smaller NRSROs? Is there another format that would cost less but still allow investors and analysts to easily download and analyze the data?

- Should the Commission institute a test phase for providing this information in an XBRL format (such as a voluntary pilot program, similar to what it is currently doing for EDGAR filings)? How long should this test phase last?

- Where is the best place to store the data provided by NRSROs? Currently,

¹²¹ See *Extension of Interactive Data Voluntarily Reporting Program in the EDGAR System to Include Mutual Fund Risk/Return Summary Information*, Securities Act Release No. 8823 (August 20, 2007).

¹²² The accommodation of subscriber-pay models acknowledges the Rating Agency Act's intent to encourage the subscriber-pays model (*see* Senate Report, p. 7) while simultaneously ensuring equal treatment for NRSROs operating under an issuer-pays model.

¹²³ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

information that needs to be made publicly available is stored on each NRSRO's Web site. Should the Commission create a central database to store the information? If so, should it use the EDGAR database or should it create a new database?

2. A Record of Material Deviation From Model Output

The Commission is proposing to amend paragraph (a)(2) of Rule 17g-2 to add an additional record that would be required to be made for each current credit rating, namely, if a quantitative model is a substantial component in the process of determining the credit rating, a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued. The NRSRO issuing the rating would be responsible for making the determination of what constituted a "substantial component" of the rating process as well as what constituted a "material" difference between the rating issued and the rating implied by the model.¹²⁴ This proposal is designed to enhance the recordkeeping processes of the NRSROs so that Commission examiners (and any internal auditors of the NRSRO) could reconstruct the analytical process by which a credit rating was determined. This would facilitate their review of whether the NRSRO followed its disclosed and internally documented procedures for determining credit ratings.

The requirement to make the record would be triggered in cases where a quantitative model is a substantial component of the credit ratings process for the type of obligor or security being rated and the output of the model would result in a materially different conclusion if the NRSRO relied on it without making an out-of-model adjustment. For example, the Commission preliminarily believes the expected loss and cash flow models used by the NRSROs to rate RMBS and CDOs are substantial components of the rating process. The following hypothetical scenario is intended as an illustrative example of an instance when an out-of-model adjustment would be material to the RMBS rating process thereby triggering the requirement to document the rationale for the adjustment under the proposed rule. A credit analyst uses the NRSRO's expected loss model to analyze a \$1 billion (aggregate principal amount)

¹²⁴ The Commission notes that it would consider the RMBS and CDO rating process described above in Section I.C.2 as using a quantitative model as a substantial component in the ratings process.

loan pool received from an arranger that is proposed to collateralize an RMBS. The results of the model imply that the senior RMBS tranche would need to have at least 20% subordination in order to receive an AAA rating. However, the NRSRO's methodologies and procedures for rating RMBS allow for the subordination level suggested by the model output to be adjusted based on certain qualitative factors such as the experience and competence of the loan servicer or the recent performance of similar loan pools. Based on the superior competence of the loan servicer, the analyst concludes that the senior tranche only needs 19% subordination and, ultimately, the ratings committee agrees. Consequently, the RMBS is issued with a senior tranche having 19% subordination and receiving an AAA rating from the NRSRO. In this case, under the proposed amendment, the NRSRO would be required to make a record that identified the rationale—the servicer's superior competence—for determining a credit rating that was different from the rating implied by the model.

As the above scenario demonstrates, the failure to make such a record could hamper the ability of the Commission to review whether an NRSRO was following its stated procedures for determining credit ratings. In the above scenario, the analyst could adjust the rating requirements implied by the model by applying qualitative factors with respect to the loan servicer or the performance of similar pools. A record indicating which rationale was applied would make it easier for the Commission to review whether the procedures were followed.

The Commission is proposing this amendment, in part, under authority to require NRSROs to make and keep for prescribed periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.¹²⁵ The Commission preliminarily believes this proposed new recordkeeping requirement is necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. Specifically, as explained above, the Commission preliminarily believes that maintaining records identifying the rationale for material divergences from the ratings implied by qualitative models used as a substantial component in the ratings process would assist the

¹²⁵ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

Commission in evaluating whether an NRSRO is adhering to its disclosed procedures for determining ratings. Further, as the Commission noted in the Adopting Release, "books and records rules have proven integral to the Commission's investor protection function because the preserved records are the primary means of monitoring compliance with applicable securities laws." In the absence of such a recordkeeping requirement, there may be no way to determine whether an analyst modified the requirements for obtaining a certain category of credit rating (e.g. AAA) as indicated by the model results by applying appropriate qualitative factors permitted under the NRSRO's documented procedures or because of undue influence from the person seeking the credit rating or other inappropriate reasons such as those prohibited by Rule 17g-6.¹²⁶

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following questions related to the proposal.

- Would this proposal have the impermissible effect of regulating the substance of credit ratings in any way?
- Should the Commission define in the rule when the use of a model would be a "substantial component" in the process of determining a credit rating? Commenters endorsing the adoption of such a definition should provide specific proposals.
- Are there certain types of rated products (e.g., corporate debt, municipal bonds) which generally employ a quantitative model as a substantial component of the ratings process? Commenters should identify the types of bonds and a general description of the models used to rate them.
- Should the Commission define in the rule when the divergence from a model would be "material"? Commenters endorsing the adoption of such a definition should provide specific proposals.
- Is the hypothetical scenario of the RMBS rating process used to illustrate when a divergence would be material for purposes of the proposed amendment reasonable? For example, is the adjustment of the subordination level from 20% to 19% for a \$1 billion loan pool a material divergence? Would

¹²⁶ 17 CFR 240.17g-6. Rule 17g-6 prohibits an NRSRO from engaging in certain unfair, abusive or coercive practices such as issuing a credit rating that is not determined in accordance with the NRSRO's established procedures and methodologies for determining credit ratings based on whether the rated person will purchase the credit rating. See 17 CFR 240.17g-6(a)(2).

a lesser adjustment of the subordination level (e.g., 20% to 19.5%) also be material?

- Are there alternative types of records that may be created or retained by an NRSRO that would allow the Commission to understand when and why an NRSRO's final rating differed materially from the rating implied by the model?
- Should the Commission require that the information about material deviations from the rating implied by the model be publicly disclosed by the NRSRO in the presale report or when the rating is issued?

3. Records Concerning Third-Party Analyst Complaints

The Commission is proposing an amendment to Exchange Act Rule 17g-2¹²⁷ to add a requirement that an NRSRO retain records of any complaints regarding the performance of a credit analyst in determining credit ratings. Specifically, the proposed amendment would add a new paragraph (b)(8) to Rule 17g-2 to require an NRSRO to retain any communications that contain complaints about the performance of a credit analyst in initiating, determining, maintaining, monitoring, changing, or withdrawing a credit rating.

The Commission is proposing these amendments, in part, under authority to require NRSROs to make and keep for prescribed periods such records as the Commission prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the Exchange Act.¹²⁸ The Commission preliminarily believes the proposed new recordkeeping requirements are necessary and appropriate in the public interest and for the protection of investors, or otherwise in furtherance of the Exchange Act, because they would assist the Commission in reviewing how NRSROs address conflicts of interest that could impair the integrity of their credit rating processes. For example, an NRSRO might respond to complaints from issuers that an analyst is too conservative by removing the analyst from the responsibility of rating the securities of those issuers and assigning a new analyst that is more willing to determine credit ratings desired by the issuers. As discussed above with respect to the proposed amendments to Rule 17g-5, the potential for this type of response to complaints about analysts is particularly acute in the structured finance area given that certain arrangers

of structured finance products repeatedly bring ratings business to the NRSROs.¹²⁹ The pressure to maintain the business relationship with these arrangers could cause an NRSRO to remove an analyst responsible for rating the structured finance products these arrangers bring to market if they complained about how the analyst was determining credit ratings and implied that they might take their business to other NRSROs.

The records proposed under these amendments would allow the Commission, in evaluating the integrity of the NRSRO's ratings process, to better assess whether analyst reassignments or terminations were for reasons unconnected to a conflict of interest (e.g., the analyst's poor performance) or as a result of the "arranger-pay" conflict of interest described above. For example, the examiners could review the complaint file that would be established by this proposed amendment and follow-up with the relevant persons within the NRSRO as to how the complaint was addressed. The potential for such a review by Commission examiners could reduce the willingness of an NRSRO to reassign or terminate a credit analyst for inappropriate business considerations.

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following questions related to the proposal.

- In addition to the proposed recordkeeping requirement, should the Commission require the NRSROs to publicly disclose when an analyst has been re-assigned from the responsibility to rate an obligor or the securities of an issuer, underwriter, or sponsor?

- Should the Commission require NRSROs to retain any communications containing a request from an obligor, issuer, underwriter, or sponsor that the NRSRO assign a specific analyst to a transaction in addition to the proposed requirement to retain complaints about analysts?

4. Clarifying Amendment to Rule 17g-2(b)(7)

Paragraph (b)(7) of Rule 17g-2 currently requires an NRSRO to retain all internal and external communications that relate to "initiating, determining, maintaining, changing, or withdrawing a credit rating." The Commission is proposing to add the word "monitoring" to this list. The intent is to clarify that NRSRO

recordkeeping rules extend to all aspects of the credit rating surveillance process as well as the initial rating process. This was the intent when the Commission originally adopted the rule as indicated by the use of the term "maintaining." The Commission believes that adding the term "monitoring"—a term of art in the credit rating industry—would better clarify this requirement.

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following question related to the proposal.

- Should the Commission delete the term "maintaining" from paragraph (b)(7) and proposed new paragraph (b)(8) of Rule 17g-2 as it has the same meaning as "monitoring?"

C. Amendments to the Instructions for Form NRSRO

Form NRSRO is the means by which credit rating agencies apply to be registered with the Commission and registered NRSROs update information they must publicly disclose. Much of the information elicited in Form NRSRO is required to be submitted to the Commission pursuant to the statutory requirements of Section 15E(a)(1)(B) of the Exchange Act.¹³⁰ The Commission added certain additional information to be submitted in the Form.¹³¹ As discussed below, the Commission, in part, under its authority pursuant to Section 15E(a)(1)(B)(x), is now proposing to amend Form NRSRO to further enhance the quality and usefulness of the information to be furnished and disclosed by registered NRSROs by requiring specified information in addition to that which is statutorily defined in the Section 15E of the Exchange Act.

1. Enhanced Ratings Performance Measurement Statistics on Form NRSRO

As discussed above, the Commission is proposing to require the disclosure of the historical rating actions relating to each current credit rating of an NRSRO through amendments to Rule 17g-2. The intent is to make available the raw data necessary for the marketplace to develop and apply credit ratings performance metrics. At the same time, the Commission is proposing to amend the instructions to Exhibit 1 to Form NRSRO to enhance the comparability of the performance measurement statistics the NRSROs are required to publicly disclose in the Form. Currently, the

¹²⁷ 17 CFR 240.17g-2.

¹²⁸ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

¹²⁹ See e.g., Coffee April 22, 2008 Senate Testimony, pp. 4-6.

¹³⁰ 15 U.S.C. 78o-7(a)(1)(B).

¹³¹ 15 U.S.C. 78o-7(a)(1)(B)(x).

instructions require the disclosure of “performance measurement statistics of the credit ratings of the Applicant/NRSRO over short-term, mid-term, and long-term periods (as applicable) through the most recent calendar year-end.” The Commission, in adopting this requirement, did not require disclosure of performance statistics in Form NRSRO beyond those specified in Section 15E(a)(1)(B)(i) of the Exchange Act.¹³² In the Adopting Release, the Commission explained that it was not prepared to prescribe standard metrics at that time in light of the varying approaches suggested by some commenters and the opposition of other commenters to having the Commission impose any standards.¹³³ The Commission also stated that it would continue to consider the issue to determine the feasibility, as well as the potential benefits and limitations, of devising measurements that would allow reliable comparisons of the accuracy of the NRSROs’ credit ratings.¹³⁴

The Commission, with the benefit of further consideration of the issue, now preliminarily believes that the instructions to Exhibit 1 can prescribe greater specificity about how the performance statistics must be generated without intruding into the processes and methodologies by which NRSROs determine credit ratings. For example, through the examination process, the Commission has become more familiar with the procedures and methodologies used by the NRSROs to determine credit ratings. Through this experience, the Commission preliminarily believes it can prescribe generic requirements for the performance statistics that would accommodate the different procedures and methodologies used by the NRSROs.

The first proposed amendment would augment the instructions to Exhibit 1 by requiring the disclosure of separate sets of default and transition statistics for each asset class of credit rating for which an applicant is seeking registration as an NRSRO or an NRSRO is registered and any other broad class of credit ratings issued by the NRSRO. This would result in the generation of performance statistics that are specific to each class of credit ratings for which the NRSRO is registered (or an applicant is seeking registration). This proposal is designed to make it easier for users of credit ratings to compare the accuracy of NRSRO credit ratings on a class-by-class basis.

The proposed amendment also would require an NRSRO registered in the class of credit ratings described in Section 3(a)(62)(B)(iv) of the Rating Agency Act¹³⁵ (or an applicant seeking registration in that class) when generating the performance statistics for that class to include credit ratings of any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. This is designed to ensure the inclusion of ratings actions for credit ratings of structured finance products that do not meet the narrower statutory definition of “issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations).”¹³⁶

The second proposed amendment would require that these class-by-class disclosures be broken out over 1, 3 and 10-year periods. Section 15E(a)(1)(B)(i) of the Exchange Act requires that the performance statistics be over short, mid, and long-term periods.¹³⁷ The proposed amendment would define those statutorily prescribed periods in specific years so that the performance statistics generated by the NRSROs cover comparable time periods. The Commission preliminarily believes that 1, 3, and 10 year periods are reasonable definitions of the terms “short-term, mid-term, and long-term periods” as used in Section 15E(a)(1)(B)(i) of the Exchange Act.¹³⁸ For example, the 1 year period would provide users with information about how the credit ratings are currently performing. In effect, it could serve as an early warning mechanism if a problem developed in an NRSRO’s rating processes due to flaws or conflicts. Similarly, the 3 year period would provide information about the how the ratings were currently performing but, by including more historical data, smooth out spikes in the 1 year statistics to give a better sense of how the ratings perform over time. The 3 year statistics also would serve as a bridge to the longer term 10 year statistics. The 10 year statistics would show users how the ratings in a particular class of securities perform over the long range.

The third proposed amendment would modify what ratings actions are required to be included in these performance measurement statistics by replacing the term “down-grade and default rates” with “ratings transition and default rates.” The proposed switch

to “ratings transition” rates from “downgrade” rates is designed to clarify that upgrades (as well as downgrades) should be included in the statistics. The fact that an NRSRO upgrades a substantial amount of credit ratings may be just as indicative of a flaw in the initial rating as a large number of downgrades. For example, an NRSRO could try to manipulate its performance statistics by issuing overly conservative ratings.

The final proposed amendment would specify that the default statistics required under the exhibit must show defaults relative to the initial rating and incorporate defaults that occur after a credit rating is withdrawn. This amendment is designed to prevent an NRSRO from manipulating the performance statistics by not including defaults when generating statistics for a category of credit ratings (e.g., AA) because the defaults occur after the rating is downgraded to a lower category (e.g., CC) or withdrawn.

The Commission is proposing these amendments, in part, under authority to require such additional information in the application as it finds necessary or appropriate in the public interest or for the protection of investors.¹³⁹ The Commission preliminarily believes the proposed new disclosure requirements for Exhibit 1 are necessary and appropriate and in the public interest or for the protection of investors. Specifically, the information that would be required under the proposed amendments would aid investors by allowing them to evaluate how the credit ratings of an NRSRO perform (*i.e.*, the percentage of credit ratings that migrate to another category of credit rating and the percentage of rated obligors and securities that default) on a class-by-class basis. This would provide better information on how an NRSRO’s ratings have performed within the field of financial products relevant to any given user of credit ratings and investor. For example, an investor contemplating the purchase of a highly-rated subprime RMBS would be able to consider the performance of an NRSRO’s ratings of structured finance products, which would be more useful than the NRSRO’s general performance statistics across all classes of credit ratings. Specifically, an NRSRO may be much better at assessing the creditworthiness of corporate debt securities than of structured finance products. Consequently, performance statistics of such an NRSRO that incorporate all classes of credit ratings

¹³² See 15 U.S.C. 78o-7(a)(1)(B)(i).

¹³³ See Adopting Release, 72 FR at 33574.

¹³⁴ *Id.*

¹³⁵ 15 U.S.C. 78c(a)(62)(B)(iv).

¹³⁶ *See Id.*

¹³⁷ 15 U.S.C. 78o-7(a)(1)(B)(i).

¹³⁸ 15 U.S.C. 78o-7(a)(1)(B)(i).

¹³⁹ See Section 15E(a)(1)(B)(x) of the Exchange Act (15 U.S.C. 78o-7(a)(1)(B)(x)).

(e.g., corporate debt and structured finance products) would be less precise in terms of evaluating the performance of the NRSRO's credit ratings for structured finance products.

Furthermore, by defining "short-term, mid-term, and long-term" periods as 1, 3, and 10-year timeframes, the proposed amendment would provide a better basis for comparing the performance of different NRSROs as the statistics for each NRSRO would cover the same periods. Finally, the replacement of the "down-grade" requirement with a "ratings transition" requirement and the clarification of what default statistics would need to be incorporated into the ratings performance statistics would further enhance investor understanding of NRSRO performance by requiring that similar information be captured in the NRSROs' performance rating statistics and eliminating certain ways that could be used to "pad" statistics.

The Commission generally requests comment on all aspects of these proposed amendments. In addition, the Commission requests comment on the following questions related to the proposals.

- Should the Commission prescribe specific standards for the performance statistics, such as requiring an NRSRO to disclose how its credit ratings performed relative to metrics such as credit spreads? Commenters endorsing such an approach should provide specific details as to how it could be implemented; taking into consideration factors such as the issues related to the difficulty of obtaining timely and consistent pricing information for many debt instruments and the volatility of credit spreads.

- Should the Commission require performance statistics in a more granular form than by class of credit ratings? For example, should the Commission require for structured finance products statistics by more narrowly defined asset classes such as CDOs and RMBS or types of asset-backed securities such as those backed by home loans, credit cards, or commercial real estate? Commenters endorsing greater granularity should provide specific details, including definitions of the credit rating classes.

- Should the Commission prescribe different time periods for the short, medium, and long term statistics than 1, 3, and 10 years, respectively. For example, should the periods be 6 months, 2 years and 7 years or 2, 5, and 15 years or some other set of time periods?

2. Enhanced Disclosure of Ratings Methodologies

The Commission is proposing to amend the instructions for Exhibit 2 to Form NRSRO to require enhanced disclosures about the procedures and methodologies an NRSRO uses to determine credit ratings. Section 15E(a)(1)(B)(ii) of the Exchange Act requires that an application for registration as an NRSRO contain information regarding the procedures and methodologies used by the firm to determine credit ratings.¹⁴⁰ The Commission implemented this requirement by prescribing through the instructions to Form NRSRO that an applicant and NRSRO must provide general descriptions of their procedures and methodologies for determining credit ratings and that the descriptions must be sufficiently detailed to provide users of credit ratings with an understanding of the procedures and methodologies. The instructions also identified various areas that are required to be addressed in Exhibit 2, including, as applicable, descriptions of the NRSRO's policies for determining whether to initiate a credit rating; the public and non-public sources of information used in determining credit ratings, including information and analysis provided by third-party vendors; and the quantitative and qualitative models and metrics used to determine credit ratings.

The Commission is proposing to add three additional areas that an applicant and a registered NRSRO would be required to address in the descriptions of its procedures and methodologies in Exhibit 2. The inclusion of these would serve to better disclose the actions an applicant and NRSRO is, or is not taking, in determining credit ratings. The additional areas required to be addressed in the exhibit would be:

- Whether and, if so, how information about verification performed on assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction is relied on in determining credit ratings;
- Whether and, if so, how assessments of the quality of originators of assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction play a part in the determination of credit ratings; and

- How frequently credit ratings are reviewed, whether different models or criteria are used for ratings surveillance than for determining initial ratings, whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings, and whether changes made to models and criteria for performing ratings surveillance are incorporated into the models and criteria for determining initial ratings.

The Commission is proposing these amendments, in part, under authority to require such additional information in the application as it finds necessary or appropriate in the public interest or for the protection of investors.¹⁴¹ The Commission preliminarily believes the proposed new disclosure requirements for Exhibit 2 are necessary and appropriate and in the public interest or for the protection of investors.

Specifically, they are designed to provide greater clarity around three areas of the NRSROs' rating processes, particularly for structured finance products, where questions have been raised in the context of the credit market turmoil: Namely, the verification performed on information provided in loan documents; the quality of loan originators; and the surveillance of existing ratings and how changes to models are applied to existing ratings. The amendments are designed to enhance the disclosures NRSROs make in these areas and, thereby, allow users of credit ratings to better evaluate the quality of their ratings processes.

The first proposed amendment would require an NRSRO to disclose whether it considers in its rating process for structured finance product steps taken to verify information about the assets in the pool backing the structured finance product. Underwriters and sponsors of structured finance products frequently take some steps to verify information provided by borrowers in loan documentation. Generally, they have been reluctant to provide this information to NRSROs for proprietary reasons. The proposed amendment would not require that the NRSROs incorporate verification (or the lack of verification) into their ratings processes. Rather, it would require an NRSRO to disclose whether and, if so, how information about verification performed on the assets is relied on in determining credit ratings for structured finance products. For example, an NRSRO would need to disclose, as applicable: If it does not consider steps taken to verify the information; if it

¹⁴⁰ 15 U.S.C. 78o-7(a)(1)(B)(ii).

¹⁴¹ See Section 15E(a)(1)(B)(x) of the Exchange Act (15 U.S.C. 78o-7(a)(1)(B)(x)).

requires some minimum level of verification to be performed before it will determine a credit rating for a structured finance product; and how it incorporates the level of verification performed into its procedures and methodologies for determining credit ratings (e.g., if it compensates for the lack of verification by requiring greater levels of credit enhancement for the tranche securities).

The Commission preliminarily believes this disclosure would benefit users of credit ratings by providing information about the potential accuracy of an NRSRO's credit ratings. As noted above, the NRSROs determine credit ratings for structured finance products based on assumptions in their models as to how the assets underlying the instruments will perform under varying levels of stress. These assumptions are based on the characteristics of the assets (e.g., value of the property, income of the borrower) as reported by the arranger of the structured finance product. If this information is inaccurate, the capacity of the model to predict the potential future performance of the assets may be significantly impaired. Consequently, information about whether an NRSRO requires that some level of verification be performed or takes other steps to account for the lack of verification or a low level of verification would be useful to users of credit ratings in assessing the potential for an NRSRO's credit ratings to be adversely impacted by bad information about the assets underlying a rated structured finance product.

The second proposed amendment would require an NRSRO to disclose whether it considers qualitative assessments of the originator of assets underlying a structured finance product in the rating process for such products. Certain qualities of an asset originator, such as its experience and underwriting standards, may impact the quality of the loans it originates and the accuracy of the associated loan documentation. This, in turn, could influence how the assets ultimately perform and the ability of the NRSRO's models to predict their performance. Consequently, the failure to perform any assessment of the loan originators could increase the risk that an NRSRO's credit ratings may not be accurate. Therefore, disclosures as to whether the NRSRO performs any qualitative assessments of the originators would be useful in comparing the efficacy of the NRSRO's procedures and methodologies.

The third proposed amendment would require an NRSRO to disclose the frequency of its surveillance efforts and how changes to its quantitative and

qualitative ratings models are incorporated into the surveillance process. The Commission believes that users of credit ratings would find information about these matters useful in comparing the ratings methodologies of different NRSROs. For example, how often and with what models an NRSRO monitors its credit ratings would be relevant to assessing the accuracy of the ratings inasmuch as ratings based on stale information and outdated models may not be as accurate as ratings of like products determined using newer data and models. Moreover, with respect to new types of rated obligors and debt securities, the NRSROs refine their models as more information about the performance of these obligors and debt securities is observed and incorporated into their assumptions. Consequently, as the models evolve based on more robust performance data, credit ratings of obligors or debt securities determined using older models may be at greater risk for being inaccurate than the newer ratings. Therefore, whether the NRSRO verifies the older ratings using the newer methodologies would be useful to users of credit ratings in assessing the accuracy of the credit ratings.

The Commission generally requests comment on all aspects of the proposed amendments. In addition, the Commission requests comment on the following question related to the proposals.

- Are there other areas of the ratings process where enhanced disclosure on Form NRSRO would benefit investors and other users of credit ratings? Commenters endorsing further disclosures should specifically identify them.

D. Amendment to Rule 17g-3 (Report of Credit Rating Actions)

The Commission adopted Rule 17g-3 pursuant to authority in Section 15E(k) ¹⁴² of the Exchange Act, which requires an NRSRO to furnish to the Commission, on a confidential basis ¹⁴³ and at intervals determined by the Commission, such financial statements and information concerning its financial condition as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. The statute also provides that the Commission may, by rule, require that the financial statements be certified by an independent public accountant. ¹⁴⁴ In

¹⁴² 15 U.S.C. 78o-7(k).

¹⁴³ An applicant can request that the Commission keep this information confidential. See Section 24 of the Exchange Act (15 U.S.C. 78x), 17 CFR 240.24b-2, 17 CFR 200.80 and 17 CFR 200.83.

¹⁴⁴ *Id.*

addition, Section 17(a)(1) of the Exchange Act ¹⁴⁵ requires an NRSRO to make and keep such records, and make and disseminate such reports, as the Commission prescribes by rule as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the Exchange Act. ¹⁴⁶

Rule 17g-3 requires an NRSRO to furnish the Commission on an annual basis the following reports: Audited financial statements; unaudited consolidated financial statements of the parent of the NRSRO, if applicable; an unaudited report concerning revenue categories of the NRSRO; an unaudited report concerning compensation of the NRSRO's credit analysts; and an unaudited report listing the largest customers of the NRSRO. The rule further requires an NRSRO to furnish the Commission these reports within 90 days of the end of its fiscal year.

The Commission is proposing to amend Rule 17g-3 to require an NRSRO to furnish the Commission with an additional annual report of the number of credit rating actions during the fiscal year in each class of security for which the NRSRO is registered. Specifically, the amendment would add a new paragraph (a)(6) to Rule 17g-3, which would require an NRSRO to provide the Commission with a report of the number of credit rating actions (upgrades, downgrades, and placements on watch for an upgrade or downgrade) during the fiscal year in each class of credit ratings for which the NRSRO is registered with the Commission. A note to paragraph (a)(6) would clarify that for the purposes of reporting credit rating actions in the asset-backed security class of credit ratings described in Section 3(a)(62)(B)(iv) of the Rating Agency Act ¹⁴⁷ an NRSRO would need to include credit rating actions on *any* security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction. This is designed to ensure the inclusion of information about ratings actions for credit ratings of structured finance products that do not meet the narrower statutory definition of "issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations)." ¹⁴⁸

The Commission is proposing this amendment, in part, under authority to require an NRSRO to "make and

¹⁴⁵ 15 U.S.C. 78q(a)(1).

¹⁴⁶ See Section 5 of the Rating Agency Act and 15 U.S.C. 78q(a)(1).

¹⁴⁷ 15 U.S.C. 78c(a)(62)(B)(iv).

¹⁴⁸ See *Id.*

disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act].”¹⁴⁹ The Commission preliminarily believes this proposed amendment is necessary and appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act because it would assist the Commission in its examination function of NRSROs. Large spikes in ratings actions within a class of credit ratings could indicate the processes for determining the ratings may be compromised by inappropriate factors. For example, a substantial increase in the number of downgrades in a particular class of credit ratings may be indicative of the fact that the initial ratings were higher than the NRSRO’s procedures and methodologies would have implied because the NRSRO sought to gain favor with issuers and underwriters by issuing higher ratings. A substantial increase in upgrades also could be the result of the NRSRO attempting to gain favor with issuers and underwriters.

The Commission recognizes that an increase in the number of ratings actions in a particular class of credit ratings may be the result of macroeconomic factors broadly impacting the rated obligors or securities. In this case, the ratings actions would be the result of appropriate credit analysis and not inappropriate extraneous factors. On the other hand, large numbers of actions could be a signal that the process for rating and monitoring ratings in the impacted class has been compromised by improper practices such as failing to adhere to disclosed and internally documented ratings procedures and methodologies, having prohibited conflicts, failing to establish reasonable procedures to manage conflicts, or engaging in unfair, coercive, or abusive conduct. Consequently, the report would be a valuable tool to improve the focus of examination resources.

The Commission generally requests comment on all aspects of this proposed amendment. In addition, the Commission requests comment on the following questions related to the proposal.

- Could the performance statistics currently required in Exhibit 1 to Form NRSRO, as well as the proposed enhancements to those statistics, be used to target potential problem areas in an NRSRO’s credit rating processes in

the same manner as this proposed report thereby making the report redundant?

- Should the Commission also require NRSROs to furnish an “early warning” report to the Commission when the number of downgrades in a class of credit ratings passes a certain percentage threshold (e.g., 5%, 10%, 15%, or 20%) within a number of calendar or business days (e.g., 2, 5, 10, or 15 days) after the threshold is passed, similar to the broker-dealer notification rule (See 17 CFR 240.17a–11)?

III. Proposed New Rule 17g–7 (Special Reporting or Use of Symbols to Differentiate Credit Ratings for Structured Finance Products)

The Commission is proposing a new rule, Rule 17g–7, to address concerns that certain investors assumed the risk characteristics for structured finance products, particularly highly rated instruments, were the same as for other types of similarly rated instruments. This proposal also is designed to address concerns that some investors may not have performed internal risk analysis on structured finance products before purchasing them, although at least one survey indicates that many institutional investors asserted that this was not a widespread problem.¹⁵⁰ Specifically, under proposed Rule 17g–7, each time an NRSRO published a credit rating for a structured finance product it also would be required to publish a report describing how the credit ratings procedures and methodologies and credit risk characteristics for structured finance products differ from those of other types of rated instruments such as corporate and municipal debt securities. The objective of this proposal is to alert investors that there are different rating methodologies and risk characteristics associated with structured finance products. As an alternative to publishing the report, an NRSRO would be allowed to use ratings symbols for structured finance products that differentiated them from the credit ratings for other types of debt securities.

More specifically, paragraph (a) of proposed Rule 17g–7 would require an NRSRO to publish a report accompanying every credit rating it publishes for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that describes the rating methodology used to determine the credit rating and how it differs from a rating for any other

type of obligor or debt security and how the risks associated with a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction are different from other types of rated obligors and debt securities. A possible risk associated with this approach is that investors would come to view such reports as “boilerplate” and therefore would not review them.

However, the Commission preliminarily believes that requiring an NRSRO to publish such a report along with each publication of a credit rating for a structured finance product likely would provide certain investors with useful information about structured finance products. The goal of the proposal is to spur investors to perform more rigorous internal risk analysis on structured finance products so that they do not overly rely on NRSRO credit ratings in making investment decisions. A possible ancillary benefit of such reports is that they could cause certain investors to seek to better understand risks that are not necessarily addressed in credit ratings of structured products, such as market and liquidity risk.

Because the goal of the rule is to foster greater independent analysis by investors, the Commission preliminarily believes that permitting an NRSRO to comply with the rule by differentiating its structured finance product rating symbols would be an equally effective alternative. The differentiated symbol would alert investors that a structured product was being rated and, therefore, raise the question of how it differs from other types of debt instruments.

The Commission is not proposing to require that specific rating symbols be used to distinguish credit ratings for structured finance products. An NRSRO would be permitted to choose the appropriate symbol. The Commission preliminarily believes that methods for identifying credit ratings for structured finance products could include using a different rating symbol altogether, such as a numerical symbol, or appending identifying characters to existing ratings scales, e.g., “AAA.sf” or “AAAsf.”

The Commission is proposing these amendments under authority to require an NRSRO to “make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act].”¹⁵¹ The Commission preliminarily believes these proposed amendments are

¹⁴⁹ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

¹⁵⁰ See *Introducing Assumption Volatility Scores and Loss Sensitivities for Structured Finance Securities*, Moody’s, May 14, 2007, p. 3.

¹⁵¹ See Section 17(a)(1) of the Exchange Act (15 U.S.C. 78q(a)(1)).

necessary and appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act because they are designed to encourage investors to perform greater levels of internal risk assessment of structured finance products by putting them on notice that these products have different characteristics than other types of rated debt instruments. The Commission does acknowledge the risks related to these proposals as outlined above.

The Commission generally requests comment on all aspects of this proposed rule. In addition, the Commission requests comment on the following questions related to the proposal.

- Would the use of different rating symbols for structured products impact automated securities trading, routing, settlement, clearance, trade confirmation, reporting, processing, and risk management systems and any other systems that are programmed to use standard credit rating symbols across all product classes? Commenters should describe how these systems may be impacted and associated costs to address the impacts on the firm such as costs to change or update the systems. Commenters also should describe how the impacts to these systems could impact trading activity in the markets for structured finance products.

- Is the proposed rule sufficiently clear about the types of securities and money market instruments to which it applies? Are there securities to which the proposal applies that should not be subject to the requirement of a report or a differentiated symbol?

- Would the use of different rating symbols have consequences for investment guidelines and covenants in legal documents that use credit ratings to distinguish finance instruments? Commenters should describe the potential consequences and associated costs to market participants and to the finance markets more broadly.

- Would the use of different rating symbols or reports dissuade purchases of structured finance products?

- Would the reports or differentiated symbols achieve the Commission's stated goal of encouraging investors to perform more internal risk assessments of structured finance products? Could the reports cause investors to ignore other relevant disclosures or lead to confusion?

- Should the rule be expanded to require reports or different ratings symbols for each class of credit ratings identified in Section 3(a)(62)(B) of the Exchange Act (15 U.S.C. 78c(a)(62)(B)); namely: (1) Financial institutions, brokers, or dealers; (2) insurance

companies; (3) corporate issuers; (4) issuers of asset-backed securities; and (5) issuers of government securities, municipal securities or securities issued by a foreign government? Alternatively, should the rule be expanded to require reports or different ratings symbols for only certain of these classes or subclasses such as for municipal securities?

- Should the rule prohibit an NRSRO from using a common set of symbols (e.g., AAA, AA, A, BBB, BB, B, CCC, CC, C) to rate different types of obligors and debt securities (e.g., corporate debt and municipal debt) where the NRSRO uses different methodologies for determining such ratings? Would such a proposal raise any questions relating to the scope of the Commission's legal authority in this area?

- Should the rule allow the use of a common set of symbols only if the NRSRO determines additional types of ratings to distinguish the different risk characteristics of the different types of obligors and debt securities? For example, the rule could require the determination of ratings to distinguish the potential volatility of the credit ratings of different classes of obligors and debt securities or the differing levels of market and liquidity risk associated with different classes of debt securities. Would such disclosures raise any concerns regarding liability if they were found to be deficient?

IV. Paperwork Reduction Act

Certain provisions of the proposed rule amendments contain a "collection of information" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").¹⁵² The Commission is submitting these proposed amendments and proposed rule to the Office of Management and Budget ("OMB") for review in accordance with the PRA. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:

(1) Rule 17g-1, Application for registration as a nationally recognized statistical rating agency; Form NRSRO and the Instructions for Form NRSRO (OMB Control Number 3235-0625);

(2) Rule 17g-2, Records to be made and retained by nationally recognized statistical rating organizations (OMB Control Number 3235-0628);

(3) Rule 17g-3, Annual reports to be furnished by nationally recognized statistical rating organizations (OMB Control Number 3235-0626);

(4) Rule 17g-5, Conflicts of interest (a proposed new collection of information); and

(5) Rule 17g-7, Credit rating reports to be furnished by nationally recognized statistical rating organizations (a proposed new collection of information).

A. Collections of Information Under the Proposed Amendments

The Commission is proposing for comment rule amendments to prescribe additional requirements for NRSROs to address concerns that have arisen with respect to their role in the credit market turmoil. These proposed amendments would modify rules the Commission adopted in 2007 to implement registration, recordkeeping, financial reporting, and oversight rules under the Rating Agency Act. Additionally, the Commission is proposing a new rule under authority provided in the Rating Agency Act.¹⁵³ Certain of the proposed amendments and the proposed new rule would contain recordkeeping and disclosure requirements that would be subject to the PRA. The collection of information obligations imposed by the proposed amendments and proposed new rule would be mandatory. The proposed amendments and proposed new rule, however, would apply only to credit rating agencies that are registered with the Commission as NRSROs. Such registration is voluntary.¹⁵⁴

In summary, the proposed rule amendments and proposed new rule would require: (1) An NRSRO to provide enhanced disclosure of performance measurements statistics and the procedures and methodologies used by the NRSRO in determining credit ratings for structured finance products and other debt securities on Form NRSRO; (2) an NRSRO to make, keep and preserve additional records under Rule 17g-2;¹⁵⁵ (3) an NRSRO to make its rating actions and the date of such actions from the initial credit rating to the current credit rating publicly available in an XBRL Interactive Data File no later than six months after the date of the rating action;¹⁵⁶ (4) an NRSRO to furnish the Commission with an additional annual report;¹⁵⁷ (5) disclosure of certain information about securities being rated beginning on the date the issuer or depositor sets the offering price of the securities being rated;¹⁵⁸ and (6) an

¹⁵³ Proposed Rule 17g-7.

¹⁵⁴ See section 15E of the Exchange Act (15 U.S.C. 78o-7).

¹⁵⁵ 17 CFR 240.17g-2.

¹⁵⁶ See proposed Rule 17g-2(a)(2)(iv) and (d).

¹⁵⁷ See proposed Rule 17g-3(a)(6).

¹⁵⁸ See proposed Rule 17g-5(a)(3) and (b)(9).

¹⁵² 44 U.S.C. 3501 *et seq.*; 5 CFR 1320.11.

NRSRO to attach a report to its credit ratings for structured finance products describing the rating methodology used and how it differs from the determination of ratings for other types of securities or use a symbol that identifies the rated security as a structured finance product.¹⁵⁹

B. Proposed Use of Information

The proposed amendments and new rule would enhance the framework for Commission oversight of NRSROs in response to the recent credit market turmoil.¹⁶⁰ The collections of information in the proposed amendments and new rule are designed to assist the Commission in effectively monitoring, through its examination function, whether an NRSRO is conducting its activities in accordance with section 15E of the Exchange Act¹⁶¹ and the rules thereunder. In addition, these proposed amendments and the new rule are designed to assist users of credit ratings by proposing to require the disclosure of additional information with respect to an NRSRO that could be used to compare the credit ratings quality of different NRSROs, particularly with respect to structured finance products. The Commission believes that the information that NRSROs would have to make public as a result of the proposed amendments would advance one of the primary objectives of the Rating Agency Act, as noted in the accompanying Senate Report, to “facilitate informed decisions by giving investors the opportunity to compare ratings quality of different firms.”¹⁶²

C. Respondents

In adopting the final rules under the Rating Agency Act, the Commission estimated that approximately 30 credit rating agencies would be registered as NRSROs.¹⁶³ The Commission believes that this estimate continues to be appropriate for identifying the number of respondents for purposes of the proposed amendments and for proposed new Rule 17g-7. Since the initial set of rules under the Rating Agency Act became effective in June 2007, nine credit rating agencies have registered with the Commission as NRSROs.¹⁶⁴ The registration program has been in

effect for less than a year; consequently, the Commission expects additional entities will register. While 20 more entities may not ultimately register, the Commission believes the estimate is within reasonable bounds and appropriate given that it adds an element of conservatism as it increases paperwork burden estimates as well as cost estimates.

In addition, proposed Rule 17g-5(a)(3)¹⁶⁵ would require the disclosure of certain information provided to, and used by, an NRSRO in determining an initial rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction and for monitoring those ratings. The rule would not specify which party would disclose such information: The NRSRO, sponsor, issuer, depositor, trustee or some other person. The Commission believes that the most likely persons to disclose this information would be structured finance product arrangers, managers, or trustees as they are the entities that generate the information and provide it to the NRSROs. For purposes of the PRA estimate for proposed Rule 17g-5(a)(3), based on staff information gained from the NRSRO examination process, the Commission estimates that there would be approximately 200 respondents. As noted throughout the release, the number of arrangers bringing structured finance products to market is small relative to the number of deals.

The Commission generally requests comment on all aspects of these proposed estimates for the number of respondents. In addition, the Commission requests specific comment on the following items related to these estimates.

- Should the Commission use the number of credit rating agencies currently registered as NRSROs rather than the estimated number of 30 ultimate registrants? Alternatively, is there a basis to estimate a different number of likely registrants?
- Is the Commission correct in believing that structured product arrangers, managers, and trustees would be the entities that disclose the information required under the proposed amendments to Rule 17g-5(a)?
- Are there sources that could provide credible information that could be used to determine the number of credit rating agencies and other NRSROs that would be subject to the proposed paperwork burdens? Commenters should identify any such sources and explain how a given source could be

used to either support the Commission’s estimate or arrive at a different estimate.

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

D. Total Annual Recordkeeping and Reporting Burden

As discussed in further detail below, the Commission estimates the total recordkeeping burden resulting from the proposed amendments and proposed new rule would be approximately 1,434,690 hours on an annual basis¹⁶⁶ and 64,500 hours on a one-time basis.¹⁶⁷

The total annual and one-time hour burden estimates described below are averages across all types of NRSROs expected to be affected by the proposed amendment and new rule. The size and complexity of NRSROs range from small entities to entities that are part of complex global organizations employing thousands of credit analysts. Consequently, the burden hour estimates represent the average time across all NRSROs. The Commission further notes that, given the significant variance in size between the largest NRSROs and the smallest NRSROs, the burden estimates, as averages across all NRSROs, are skewed higher because the largest firms currently predominate in the industry.

1. Amendments to Form NRSRO

The proposed amendments to Form NRSRO would change the instructions for the Form to require that NRSROs provide more detailed credit ratings performance statistics in Exhibit 1 and disclose with greater specificity information about the procedures and methodologies used to determine structured finance and other credit ratings in Exhibit 2.¹⁶⁸ The Commission expects these proposed amendments would not have a material effect on the respondents’ hour burden. The Commission believes that the total annual burden hours of 2,100 currently approved by OMB would not change for Rule 17g-1 and Form NRSRO materially because the additional disclosures would be included within the overall preparation of the initial Form NRSRO for new applicants. Additionally, the Commission believes that the nine currently registered NRSROs could be

¹⁶⁶ This total is derived from the total annual hours set forth in the order that the totals appear in the text: 390 + 300 + 4,000 + 150,000 + 1,280,000 = 1,434,690.

¹⁶⁷ This total is derived from the total one-time hours set forth in the order that the totals appear in the text: 900 + 900 + 60,000 + 1,500 + 300 + 900 = 64,500.

¹⁶⁸ 17 CFR 240.17g-1 and Form NRSRO.

¹⁵⁹ See proposed Rule 17g-7.

¹⁶⁰ See 17 CFR 17g-1 through 17g-6, and Form NRSRO.

¹⁶¹ 15 U.S.C. 78o-7.

¹⁶² See Senate Report, p. 8.

¹⁶³ See Adopting Release, 72 FR at 33606-33607.

¹⁶⁴ A.M. Best Company, Inc.; DBRS Ltd.; Fitch.; Japan Credit Rating Agency, Ltd.; Moody’s; Rating and Investment Information, Inc.; S&P; LACE Financial Corp.; and Egan-Jones Rating Company.

¹⁶⁵ See proposed Rule 17g-5(a)(3)(i) and (iii).

required to prepare and furnish an amended Form NRSRO to update their registration applications if the Commission were to adopt the proposed amendments (*i.e.*, nine amended Form NRSROs). However, the Commission believes these potential nine furnishings of Form NRSRO are accounted for in the currently approved PRA collection for Rule 17g-1, which includes an estimate that each NRSRO would file two amendments to Form NRSRO per year.¹⁶⁹

The Commission generally requests comment on all aspects of these proposed burden estimates for Rule 17g-1 and Form NRSRO, proposed to be amended. In addition, the Commission requests specific comment on the following items related to these estimates:

- Would the proposed additional disclosure requirements increase the burden hours from the amount currently budgeted for Rule 17g-1 and Form NRSRO? Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

2. Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and keep current certain records relating to its business and requires an NRSRO to preserve those and other records for certain prescribed time periods.¹⁷⁰ The Commission's current estimate for the average one-time burden of implementing a recordkeeping system to comply with Rule 17g-2 is 300 hours.¹⁷¹ Additionally, the total annual burden currently approved by OMB for Rule 17g-2 is 7,620 hours, which represents the average annual amount of time an NRSRO will spend to make and maintain these records (254 hours per year) multiplied by 30 respondents.¹⁷²

The proposed amendments to Rule 17g-2 would require an NRSRO to make and retain two additional records and retain a third type of record. The records to be made and retained would be: (1) A record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of

determining a credit rating;¹⁷³ and (2) a record showing the history and dates of all previous rating actions with respect to each current credit rating.¹⁷⁴ The proposed amendments to Rule 17g-2 would require an NRSRO to make the second set of records—rating actions related to current ratings—publicly available in an XBRL Interactive Data File.¹⁷⁵ In addition, the proposed amendments would require an NRSRO to retain communications that contain any complaints by an obligor, issuer, underwriter, or sponsor about the performance of a credit analyst.¹⁷⁶

With respect to the proposed amendments to Rule 17g-2, the Commission estimates, based on staff information gained from the NRSRO examination process, that the total one-time and annual record recordkeeping burdens would increase approximately 10% and 5%, respectively.¹⁷⁷ Thus, the Commission estimates that the one-time burden that each NRSRO would spend implementing a recordkeeping system to comply with Rule 17g-2 as proposed to be amended would be approximately 330 hours,¹⁷⁸ for a total one-time burden of 9,900 hours for 30 NRSROs.¹⁷⁹ The Commission estimates that an NRSRO would spend an average of 267 hours per year¹⁸⁰ to make and retain records under Rule 17g-2 as proposed to be amended, for a total annual hour burden under Rule 17g-2 of 8,010 hours.¹⁸¹ This estimate would result in an increase in the currently approved PRA burden under Rule 17g-2 of 390 annual burden hours.¹⁸² As discussed above, the increase in annual burden hours would result from the increase in the number of records an NRSRO would be required to make and retain under the proposed amendments to Rule 17g-2.

In addition, the proposed amendments to Rule 17g-2 would

require an NRSRO to make the records of its rating actions publicly available in an XBRL Interactive Data File.¹⁸³

The Commission believes that an NRSRO would choose to make this information available through its Internet Web site and that each NRSRO already has, or would have, an Internet Web site. Therefore, based on staff information gained from the NRSRO examination process, the Commission estimates that, on average, an NRSRO would spend approximately 30 hours to publicly disclose the history of its rating actions for each credit rating in an XBRL Interactive Data File and, thereafter, 10 hours per year to update this information.¹⁸⁴ Accordingly, the total aggregate one-time burden to the industry to make the history of rating actions publicly available in an XBRL Interactive Data File would be 900 hours,¹⁸⁵ and the total aggregate annual burden hours would be 300 hours.¹⁸⁶

Under the currently approved PRA collection for Rule 17g-2, the Commission estimated that an NRSRO may need to purchase recordkeeping system software to establish a recordkeeping system in conformance with Rule 17g-2.¹⁸⁷ The Commission estimated that the cost of the software would vary based on the size and complexity of the NRSRO. Also, the Commission estimated that some NRSROs would not need such software because they already have adequate recordkeeping systems or, given their small size, such software would not be necessary. Based on these estimates, the Commission estimated that the average cost for recordkeeping software across all NRSROs would be approximately \$1,000 per firm, with an aggregate one-time cost to the industry of \$30,000. The Commission estimates that the proposed amendments to Rule 17g-2 would not alter this estimate or that any increases in the cost would be *de minimis*.

The Commission generally requests comment on all aspects of these proposed burden estimates for Rule 17g-2. In addition, the Commission requests specific comment on the following items related to these burden estimates:

- Are there publicly available reports or other data sources the Commission

¹⁷³ Proposed paragraph (a)(2)(iii) of Rule 17g-2.

¹⁷⁴ Proposed paragraph (a)(8) of Rule 17g-2.

¹⁷⁵ Proposed amendment to Rule 17g-2(d).

¹⁷⁶ Proposed paragraph (b)(8) of Rule 17g-2.

¹⁷⁷ The Commission believes that the one-time burden to set up and/or modify a recordkeeping system to comply with the proposed amendments would be greater than the ongoing annual burden. Once an NRSRO has set up or modified its recordkeeping system to comply with the proposed amendments, its annual hour burden would be increased only to the extent it would be required to make and retain additional records.

¹⁷⁸ 300 hours \times 1.10 = 330 hours. This would result in an increase of approximately 30 hours per NRSRO for the one-time hour burden.

¹⁷⁹ 330 hours \times 30 respondents = 9,900 hours. The proposed amendments would result in an increase of 900 total one-time burden hours.

¹⁸⁰ 254 hours \times 1.05 = 267 hours. The proposed amendments would result in an increase of approximately 13 annual burden hours per NRSRO for Rule 17g-2.

¹⁸¹ 267 hours \times 30 respondents = 8,010 hours.

¹⁸² 8,010 hours - 7,620 hours = 390 hours.

¹⁸³ See proposed amendment to Rule 17g-2(d).

¹⁸⁴ The Commission also bases this estimate on the current one-time and annual burden hours for an NRSRO to publicly disclose its Form NRSRO. No alternatives to these estimates as proposed were suggested by commenters. See Adopting Release, 72 FR at 33609.

¹⁸⁵ 30 hours \times 30 NRSROs = 900 hours.

¹⁸⁶ 10 hours \times 30 NRSROs = 300 hours.

¹⁸⁷ See Adopting Release, 72 FR at 33609, 33610.

¹⁶⁹ See Adopting Release, 72 FR at 33609. To date, only one of the seven NRSROs that have been registered with the Commission since September 2007 has furnished the Commission with an amended Form NRSRO since registering with the Commission.

¹⁷⁰ 17 CFR 240.17g-2.

¹⁷¹ See Adopting Release, 72 FR at 33608.

¹⁷² See Adopting Release, 72 FR at 33610.

should consider in arriving at these burden estimates?

- Are the estimates that these amendments would result in an increase to the current total one-time and annual recordkeeping burdens of approximately 10% and 5% accurate? If not, should they be higher or lower?

- Are the estimates that the requirement to make records of rating actions publicly available in an XBRL Interactive Data File would result in an increased one-time burden for each NRSRO of approximately 30 hours to publicly disclose the history of its rating actions for each credit rating in an XBRL Interactive Data File and, thereafter, 10 hours per year to update this information accurate? If not, should they be higher or lower?

- Is the estimate that the NRSROs would incur no additional costs (or that any additional costs would be *de minimis*) to update recordkeeping systems to comply with the proposed new recordkeeping requirements accurate? If not, what would the additional costs be? Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

3. Proposed Amendment to Rule 17g-3

Rule 17g-3 requires an NRSRO to furnish certain financial reports to the Commission on an annual basis, including audited financial statements as well as other financial reports.¹⁸⁸ The Commission is proposing to amend Rule 17g-3 to require an NRSRO to furnish the Commission with an additional report: an unaudited report of the number of credit ratings that were changed during the fiscal year in each class of credit ratings for which the NRSRO is registered with the Commission.¹⁸⁹

The total annual burden currently approved by OMB for Rule 17g-3 is 6,000 hours, based on the fact that it would take an NRSRO, on average, approximately 200 hours to prepare for and file the annual reports.¹⁹⁰ In addition, the total annual cost burden currently approved by OMB is \$450,000 to engage the services of an independent public accountant to conduct the annual audit as part of the preparation of the first report required by Rule 17g-3.¹⁹¹

This estimate is based on 30 NRSROs hiring an independent public accountant on an annual basis for an average of \$15,000.¹⁹²

The Commission believes that the proposed amendment to Rule 17g-3 that would require a report on an NRSRO's rating changes during a fiscal year would have a *de minimis* effect on the annual hour burden for the current PRA collection for Rule 17g-3. The Commission preliminarily believes that an NRSRO already would have this information with respect to each class of credit ratings for which it is registered. In addition, the proposed amendment does not prescribe a format for the report. Consequently, the Commission estimates that proposed Rule 17g-3(a)(6) would not have a significant effect on the total annual hour burden currently approved for the PRA for Rule 17g-3.

The Commission generally requests comment on all aspects of these proposed burden estimates for Rule 17g-3. In addition, the Commission requests specific comment on the following items related to these burden estimates:

- Are there publicly available reports or other data sources the Commission should consider in arriving at these burden estimates?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

4. Amendments to Rule 17g-5

Rules 17g-5 requires an NRSRO to manage and disclose certain conflicts of interest.¹⁹³ The rule also prohibits specific types of conflicts of interest.¹⁹⁴ The proposed amendments to Rule 17g-5 would add an additional conflict to paragraph (b) of Rule 17g-5. This proposed conflict of interest would be issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.¹⁹⁵ Under the proposal, an NRSRO would be prohibited from issuing a credit rating for a structured finance product, unless certain information about the transaction and the assets underlying the structured finance product are disclosed.¹⁹⁶ Specifically, the following information

would need to be made publicly available beginning on the date the underwriter, issuer or depositor set the offering price of the securities being rated: (1) All information provided to the NRSRO that is used in determining the initial credit rating, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure; and (2) all information provided to the NRSRO by the issuer, underwriter, sponsor, depositor or trustee that is used by the NRSRO in undertaking credit rating surveillance on the security or money market instrument.¹⁹⁷ In a private offering, the above information would need to be made available on the date the underwriter and the issuer or depositor set the offering price of the securities being rated only to credit rating agencies and investors; it would need to be made publicly available, however, no later than one business day after the offering closes.

The proposed rule would not specify which party would disclose the information: the NRSRO, sponsor, issuer, depositor or trustee. The Commission preliminarily believes that in order to avoid conflicts with Securities Act prohibitions on general solicitations as well as to avoid making the NRSRO liable for the accuracy of information that would originally be supplied by the arrangers and trustees of structured products, this information would likely be disclosed by those arrangers and trustees. The Commission estimates that there would be approximately 200 such entities. For purposes of this PRA, the Commission estimates that it would take a respondent approximately 300 hours to develop a system, as well as policies and procedures, for the disclosures required by the proposed rule. This estimate is based on the Commission's experience with, and burden estimates for, the recordkeeping requirements for NRSROs.¹⁹⁸ Accordingly, the Commission believes, based on staff experience, that a respondent would take approximately 300 hours on a one-time basis to implement a disclosure system to comply with the proposal in that a respondent would need a set of policies and procedures for disclosing the information, as well as a system for making the information publicly available. This would result in a total one-time hour burden of 60,000 hours for 200 respondents.¹⁹⁹

¹⁸⁸ 17 CFR 240.17g-3.

¹⁸⁹ See proposed Rule 17g-3(a)(6).

¹⁹⁰ 200 hours × 30 NRSROs = 6,000 hours. See Adopting Release, 72 FR at 33610.

¹⁹¹ Rule 17g-3 currently requires five reports. Only the first report—financial statements—need be audited. The two new reports proposed to be required by the amendments would not need to be audited.

¹⁹² \$15,000 × 30 NRSROs = \$450,000. See Adopting Release, 72 FR at 33610.

¹⁹³ 17 CFR 240.17g-5.

¹⁹⁴ 17 CFR 240.17g-5(c).

¹⁹⁵ See proposed Rule 17g-5(b)(9). The current paragraph (b)(9) would be renumbered as (b)(10).

¹⁹⁶ See proposed Rule 17g-5(a)(3).

¹⁹⁷ See proposed Rule 17g-5(a)(3)(i)-(iii).

¹⁹⁸ See Adopting Release, 72 FR at 33609.

¹⁹⁹ 300 hours × 200 respondents = 60,000 hours.

In addition to the one-time hour burden, disclosure would also be required under the proposed rule on a transaction by transaction basis when an initial rating is determined. Based on staff experience, the Commission estimates that each respondent would disclose information with respect to approximately 20 new transactions per year and that it would take approximately 1 hour per transaction to make the information publicly available. This estimate is based on the Commission's expectation that the respondent will have already implemented the system and policies and procedures for disclosure. The Commission estimates that a large NRSRO would have rated approximately 2,000 new RMBS and CDO transactions in a given year. The Commission is basing this estimate on the number of new RMBS and CDO deals rated in 2006 by two of the largest NRSROs which rated structured finance transactions. The Commission adjusted this number to approximately 4,000 transactions in order to include other types of structured finance products, including commercial MBS and other consumer assets. Therefore, the Commission estimates for purposes of the PRA that each respondent would arrange approximately 20 new transactions per year: 4,000 new transactions/200 arrangers = 20 new transactions. The Commission notes that the number of new transactions arranged per year would vary by the size of arranger and that this estimate would be an average across all respondents. Larger respondents may arrange in excess of 20 new deals per year, while a smaller entity may only arrange one or two new deals on an annual basis. Based on this analysis, the Commission estimates that it would take a respondent approximately 20 hours²⁰⁰ to disclose this information under the proposed rule, on an annual basis, for a total aggregate annual hour burden of 4,000 hours.²⁰¹

In addition, proposed Rule 17g-5(a)(ii) would require disclosure of information provided to an NRSRO that is used by an NRSRO in undertaking credit rating surveillance on a security or money market instrument. Because surveillance would cover more than just initial ratings, the Commission estimates based on staff information gained from the NRSRO examination process that monthly disclosure would be required with respect to approximately 125 transactions on an ongoing basis. Also based on staff

information gained from the NRSRO examination process, the Commission estimates that it would take a respondent approximately 0.5 hours per transaction to disclose the information. Therefore, the Commission estimates that each respondent would spend approximately 750 hours²⁰² on an annual basis disclosing information under proposed Rule 17g-5, for a total aggregate annual burden hours of 150,000 hours.²⁰³

The Commission generally requests comment on all aspects of these proposed burden estimates for Rule 17g-5. In addition, the Commission requests specific comment on the following items related to these estimates:

- Are there publicly available reports or other data sources the Commission should consider in arriving at these burden estimates?
- Are the estimates of the one-time and recurring burdens of the proposed additional disclosures accurate? If not, should they be higher or lower? Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

5. Proposed Rule 17g-7

The Commission is proposing a new rule—Rule 17g-7—which would address concerns that investors believe that the risk characteristics for a structured finance product are the same as for other types of obligors or debt securities. Proposed Rule 17g-7 would require an NRSRO to attach a report each time it publishes a credit rating for a structured finance product describing how the ratings procedures and methodologies differ from those for other types of obligors or debt securities.²⁰⁴ Proposed Rule 17g-7 would include an exemption to this requirement, however, if the NRSRO used credit rating symbols for structured finance products that identify the product as such as distinct from any other type of obligor or debt security. The Commission believes that proposed Rule 17g-7²⁰⁵ would provide users of credit ratings with useful information either through the report or the differentiated symbol upon which to base their investment decisions.

The Commission expects that most NRSROs already have documented their methodologies and procedures in place to determine credit ratings for

structured finance products and corporate debt securities, and have disclosed such policies and procedures if they have registered with the Commission as an NRSRO. The Commission expects, however, that an NRSRO would have to compile and/or modify these documents to comply with the specific reporting requirements that would be mandated by the proposed rule. Based on staff information gained from the NRSRO examination process, the Commission estimates that it would take an NRSRO approximately 50 hours²⁰⁶ to draft the report required under the proposed rule for a total one-time hour burden of 1,500 hours.²⁰⁷

The Commission also estimates that it would take an NRSRO additional time to publish the report each time a credit rating for a structured finance product is published and to monitor the publications of structured finance credit ratings to ensure compliance with the proposed rule. Based on the average number of credit ratings of asset-backed securities outstanding as of the latest fiscal year of the three largest NRSROs, the Commission estimates that an NRSRO would publish approximately 128,000 asset-backed credit ratings per year.²⁰⁸ The Commission notes that this number may not include all structured finance ratings, since some may not fit within the statutory definition of asset-backed security. However, the Commission also notes that the issuance of RMBS has dropped dramatically off recent highs. Accordingly, the Commission believes the number of asset-backed ratings reported in Form NRSRO is a reasonable proxy for the number of structured finance ratings. The Commission also notes that, as discussed below, the burden estimate identifies 30 respondents. However, most of the structured finance ratings are concentrated in the largest 3 or 4 NRSROs. Accordingly, the average number of structured finance ratings issued per NRSRO each year may be considerably lower than 128,000. For these reasons, the Commission believes the estimate is fairly conservative.

The Commission estimates that an NRSRO would publish a rating action

²⁰⁶ The Commission based this estimate on the estimated number of hours it would take an NRSRO to comply with Rule 17g-4 to develop policies and procedures to prevent the misuse of material nonpublic information. See Adopting Release, 72 FR at 33611.

²⁰⁷ 50 hours × 30 NRSROs = 1,500 hours.

²⁰⁸ This estimate uses the average of the approximate number of credit ratings for asset-based securities as defined in 17 CFR 229.1101(c) that S&P, Moody's and Fitch had outstanding as of the most recent calendar year end as reported in their annual certifications. (S&P: 197,700; Moody's: 110,000; and Fitch: 75,278).

²⁰² 125 transactions × 30 minutes × 12 months = 45,000 minutes/60 minutes = 750 hours.

²⁰³ 750 hours × 200 respondents = 150,000 hours.

²⁰⁴ See proposed Rule 17g-7.

²⁰⁵ See proposed Rule 17g-7.

²⁰⁰ 20 transactions × 1 hour = 20 hours.

²⁰¹ 20 hours × 200 respondents = 4,000 hours.

with respect to a particular structured finance rating approximately 4 times per year for a total of 512,000 publications.²⁰⁹ The Commission notes that this estimate would include publication of an initial rating, upgrades, downgrades and any affirmations published in a given year. Based on staff experience, the Commission estimates that an NRSRO would spend approximately 5 minutes ensuring that the required report was published along with the credit rating, for a total of 42,667 annual burden hours²¹⁰ per respondent, and a total of 1,280,000 hours²¹¹ across 30 NRSROs. Finally, the Commission estimates, based on staff experience, that it would take an NRSRO approximately 10 hours per year to review and update the report to ensure that the disclosure was accurate and up-to-date for a total aggregate annual hour burden to the industry of 300 hours.²¹² The Commission believes, therefore, that the aggregate one-time and annual burden hours under proposed Rule 17g-7(a) would be 1,280,000 and 1,800 hours,²¹³ respectively.

The Commission believes, however, that most, if not all, NRSROs would opt to differentiate their ratings under paragraph (b) of proposed Rule 17g-7,²¹⁴ rather than publish a report. The Commission believes that an NRSRO would likely choose to use a specific credit rating symbol to indicate that the particular credit rating relates to structured product as distinct from a credit rating for any other category of security or issuer. The Commission believes that an NRSRO would choose to employ this symbology approach because it would be more efficient and less burdensome than ensuring that the appropriate report was published along with the credit rating. The Commission believes that the implementation of a different rating symbol would entail a one-time burden of approximately 30 hours to develop the symbol for a total aggregate one-time burden to the industry of 900 hours.²¹⁵

Because the Commission believes that NRSROs will choose to differentiate their ratings under paragraph (b) of proposed Rule 17g-7 rather than

publish a report under paragraph (a) of the proposed new rule, the Commission believes that the appropriate estimate for the aggregate one-time burden to the industry under proposed Rule 17g-7 is 900 hours. The Commission generally requests comment on all aspects of these proposed burden estimates for Rule 17g-7. In addition, the Commission requests specific comment on the following items related to these burden estimates:

- Is the Commission incorrect in its belief that NRSROs would opt to use a different rating symbol rather than to publish a report with each structured product rating? If so, what percentage of NRSROs would be likely to opt to publish a report?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

E. Collection of Information Is Mandatory

The recordkeeping and notice requirements for the proposed amendment and the proposed new rule would be mandatory.

F. Confidentiality

The disclosures proposed to be required under the amendments to Rule 17g-1 and Form NRSRO would be made publicly available on Form NRSRO. The books and records information proposed to be collected under the proposed amendments to Rule 17g-2 would be stored by the NRSRO and made available to the Commission and its representatives as required in connection with examinations, investigations, and enforcement proceedings. However, an NRSRO would be required to make the record of rating actions under proposed Rule 17g-2(a)(8) publicly available in an XBRL Interactive Data File no later than six months after the date of the rating action.²¹⁶ The information proposed to be collected under the proposed amendment to Rule 17g-3 would be generated from the internal records of the NRSRO and would be furnished to the Commission on a confidential basis, to the extent permitted by law.²¹⁷ The information under Rule 17g-5(a)(3) would be made publicly available or available to certain permitted persons. The information proposed to be required under proposed new Rule 17g-7 would be made publicly available.

G. Record Retention Period

The records required under the proposed amendments to Rule 17g-1 and Form NRSRO, Rule 17g-2, and 17g-3 would need to be retained by the NRSRO for at least three years.²¹⁸

H. Request for Comment

The Commission requests comment on the proposed collections of information in order to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (2) evaluate the accuracy of the Commission's estimates of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (4) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and (5) evaluate whether the proposed rules would have any effects on any other collection of information not previously identified in this section.

Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090, and refer to File No. S7-13-08. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this document in the **Federal Register**; therefore, comments to OMB are best assured of having full effect if OMB receives them within 30 days of this publication. Requests for the materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-13-08, and be submitted to the Securities and Exchange Commission, Records Management Office, 100 F Street, NE., Washington, DC 20549-1110.

V. Costs and Benefits of the Proposed Rules

The Commission is sensitive to the costs and benefits that result from its rules. The Commission has identified

²⁰⁹ 128,000 × 4 = 512,000 ratings publications.

²¹⁰ 512,000 × 5 minutes per report = 2,560,000 minutes/60 minutes per hour = 42,667 hours.

²¹¹ 42,667 hours × 30 NRSROs = 1,280,000 hours.

²¹² This estimate is based on the number of hours it would take an NRSRO to complete an annual certification on Form NRSRO. See Adopting Release, 72 FR at 33609. 10 hours × 30 NRSROs = 300 hours.

²¹³ 1,500 + 300 hours.

²¹⁴ See proposed Rule 17g-7(b).

²¹⁵ 30 hours × 30 NRSROs.

²¹⁶ See proposed Rule 17g-2(a)(8) and (d).

²¹⁷ 15 U.S.C. 78o-7(k).

²¹⁸ 17 CFR 240.17g-2(c).

certain costs and benefits of the proposed amendments and the proposed new rule and requests comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in the analysis.²¹⁹ The Commission seeks comment and data on the value of the benefits identified. The Commission also welcomes comments on the accuracy of its cost estimates in each section of this cost-benefit analysis, and requests those commenters to provide data so the Commission can improve the cost estimates, including identification of statistics relied on by commenters to reach conclusions on cost estimates. Finally, the Commission seeks estimates and views regarding these costs and benefits for particular types of market participants, as well as any other costs or benefits that may result from the adoption of these proposed rule amendments.

A. Benefits

The purposes of the Rating Agency Act, as stated in the accompanying Senate Report, are to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.²²⁰ As the Senate Report states, the Rating Agency Act establishes “fundamental reform and improvement of the designation process” to further the belief that “eliminating the artificial barrier to entry will enhance competition and provide investors with more choices, higher quality ratings, and lower costs.”²²¹

The proposed amendments and new rule would be issued pursuant to specific grants of rulemaking authority in the Rating Agency Act as well as the

²¹⁹ For the purposes of this cost/benefit analysis, the Commission is using salary data from the Securities Industry and Financial Markets Association (“SIFMA”) Report on Management and Professional Earnings in the Securities Industry 2007, which provides base salary and bonus information for middle-management and professional positions within the securities industry. The Commission believes that the salaries for these securities industry positions would be comparable to the salaries of similar positions in the credit rating industry. Finally, the salary costs derived from the report and referenced in this cost benefit section, are modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The Commission used comparable assumptions in adopting the final rules implementing the Rating Agency Act in 2007, requested comments on such assumptions, and received no comments in response to its request. See Adopting Release, 72 FR at 33611, note 576. Hereinafter, references to data derived from the report as modified in the manner described above will be cited as “SIFMA 2007 Report as Modified.”

²²⁰ Senate Report, p. 2.

²²¹ *Id.*, p. 7.

Commission’s authority under the Exchange Act. The amendments are designed to further the goals of the Rating Agency Act and to enhance the Commission’s oversight of NRSROs, in light of the recent credit market turmoil. Since the adoption of the final rules implementing the Rating Agency Act in 2007,²²² and in response to the recent concerns about the role of credit rating agencies in the credit market turmoil, the Commission has identified a number of areas where it would be appropriate to enhance the current regulatory program for NRSROs.

Consequently, the Commission is proposing amendments and a new rule that are designed to address concerns raised about the role NRSROs played in the credit turmoil by proposing to enhance the disclosure of credit ratings performance measurement statistics; increase the disclosure of information about the assets underlying structured finance products; require more information about the procedures and methodologies used to determine structured finance ratings; and address conflicts of interest arising from the structured finance rating process. As discussed below, the Commission believes that these proposed amendments and proposed new rule would further the purpose of the Rating Agency Act to improve the quality of credit ratings by fostering accountability, transparency, and competition in the credit rating industry, particularly with respect to credit ratings for structured finance products.²²³

Rule 17g-1 prescribes a process for a credit rating agency to register with the Commission as an NRSRO using Form NRSRO,²²⁴ and requires that a credit rating agency provide information required under Section 15E(a)(1)(B) of the Exchange Act and certain additional information.²²⁵ Form NRSRO is also the means by which NRSROs update the information they must publicly disclose. The proposed amendments to the instructions to Exhibit 1 to Form NRSRO would require NRSROs to provide more detailed performance statistics and, thereby, make it easier for users of credit ratings to compare the ratings performance of the NRSROs.²²⁶ In addition, these proposed amendments could make it easier for an NRSRO to demonstrate that it has a

²²² See Adopting Release.

²²³ See Senate Report, p. 2.

²²⁴ See Rule 17g-1.

²²⁵ See Section 15E(a)(1)(B) of the Exchange Act, 15 U.S.C. 78o-7(a)(1)(B).

²²⁶ 17 CFR 240.17g-1 and Form NRSRO.

superior ratings methodology or competence and, thereby, attract clients.

The proposed amendments to the instructions to Exhibit 2 of Form NRSRO are designed to provide greater clarity around three areas of the NRSROs’ rating processes for structured finance products that have raised concerns in the context of the recent credit market turmoil: the level of verification performed on information provided in loan documents; the quality of loan originators; and the on-going surveillance of existing ratings and how changes made to a model used for initial ratings are applied to existing ratings. The additional information provided by the proposed amendments would assist users of credit ratings in making more informed decisions about the quality of an NRSRO’s ratings processes, particularly with regard to structured finance products.

The Commission preliminarily believes that these proposed enhanced disclosures in the Exhibits to Form NRSRO could make it easier for market participants to select the NRSROs that are performing best and have the highest quality processes for determining credit ratings. The potential result could be increased competition and the promotion of capital formation through a restoration of confidence in credit ratings.

The proposed amendments to Rule 17g-2 are designed to assist the Commission in its examination function and provide greater information to users of credit ratings about the performance of an NRSRO’s credit ratings. The additional records would be: (1) A record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of determining a credit rating;²²⁷ (2) a record showing the history and dates of all previous rating actions with respect to each current credit rating;²²⁸ and (3) any complaints regarding the performance of a credit analyst in determining credit ratings.²²⁹ These proposed records would assist the Commission in monitoring whether an NRSRO is complying with provisions of Section 15E of the Exchange Act and the rules thereunder. This would include monitoring whether an NRSRO is operating consistently with the methodologies and procedures it establishes (and discloses) to determine credit ratings and its policies and procedures designed to ensure the

²²⁷ Proposed paragraph (a)(2)(iii) of Rule 17g-2.

²²⁸ Proposed paragraph (a)(8) of Rule 17g-2.

²²⁹ Proposed paragraph (b)(8) of Rule 17g-2.

impartiality of its credit ratings, including its ratings of structured finance products.

In addition, the proposed amendments to Rule 17g-2, which would require an NRSRO to make its rating actions history publicly available in an XBRL Interactive Data File, would allow the marketplace to develop performance measurement statistics that would supplement those already required to be published by NRSROs in Exhibit 1 to Form NRSRO. This proposed amendment is designed to leverage the expertise of the marketplace and, thereby, provide users of credit ratings with innovative and potentially more useful metrics with which to compare NRSROs. This could make NRSROs more accountable for their ratings by enhancing the transparency of their ratings performance. By proposing to require an XBRL Interactive Data File the Commission also believes the proposed amendment would allow investors, analysts, and the Commission staff to capture and analyze the ratings action data more quickly and at less of a cost than is possible using another format.

The Commission preliminarily believes that the proposed amendments to Rule 17g-2 would enhance the Commission's oversight of NRSROs and, with respect to the public disclosure of ratings history, provide the marketplace with the raw materials to develop metrics for comparing the ratings performance of NRSROs. This could, in turn, help in restoring confidence in credit ratings and, thereby, promote capital formation. Increased disclosure of ratings history could make the ratings performance of the NRSROs more transparent to the marketplace and, thereby, highlight those firms that do a better job analyzing credit risk. This could benefit smaller NRSROs to the extent they have performed better than others by alerting the market to their superior competence.

The proposed amendment to Rule 17g-3 would require an NRSRO to furnish an additional annual report to the Commission: An unaudited report of the number of credit ratings that were changed during the fiscal year in each class of credit ratings for which the NRSRO is registered with the Commission.²³⁰ The proposed new report is designed to enhance the Commission's oversight of NRSROs by providing the Commission with additional information to assist in the monitoring of NRSROs for compliance with their stated policies and procedures. For example, the proposed

new report would allow examiners to target potential problem areas in an NRSRO's rating processes by highlighting spikes in rating actions within a particular class of credit rating.

The proposed amendments to Rule 17g-5 would prohibit an NRSRO from issuing a rating for a structured product unless information about the assets underlying the rated security is made available to certain persons.²³¹ These proposed rule amendments would prohibit an NRSRO from issuing or maintaining a credit rating where the NRSRO or an affiliate provided recommendations on the structure of the transaction being rated; a credit analyst or person involved in the ratings process participated in fee negotiations; or a credit analyst or a person responsible for approving a credit rating received gifts from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than \$25.²³² The Commission believes that the proposed amendments to Rule 17g-5 would promote the disclosure and management of conflicts of interest and mitigate potential undue influences on an NRSRO's credit rating process, particularly with respect to credit ratings for structured finance products.²³³ This would in turn increase confidence in the integrity of NRSRO ratings and, thereby, promote capital formation. In addition, the proposed disclosure of additional information regarding the assets underlying a structured finance transaction²³⁴ would allow for unsolicited ratings that could help address ratings shopping by exposing an NRSRO whose ratings methodologies are less conservative in order to gain business. It also could mitigate the impact of rating shopping, since NRSROs not hired to rate a deal could nonetheless issue a credit rating. These potential impacts of the rule proposal could help to restore confidence in credit ratings and, thereby, promote capital formation. Also, by creating a mechanism for determining unsolicited ratings, they could increase competition by allowing smaller NRSROs to demonstrate proficiency in rating structured products.

Proposed Rule 17g-7 would address concerns that investors may believe that the risk characteristics for a structured finance product are the same as for

other types of obligors or debt securities by requiring an NRSRO to attach a report each time it publishes a credit rating for a structured finance product describing how the ratings procedures and methodologies differ from those ratings for other types of obligors or debt securities.²³⁵ Alternatively, an NRSRO would be permitted to use rating symbols for structured finance products that differentiate them from its other credit ratings. The Commission believes this proposed rule would address potential confusion by investors as to the different characteristics of structured finance products when compared to other types of obligors or debt securities and help them in assessing the risks involved with different types of securities and promote better informed investment decisions.

The Commission generally requests comment on all aspects of these proposed benefits. In addition, the Commission requests specific comment on the following items related to these benefits.

- Are there metrics available to quantify these benefits and any other benefits the commenter may identify, including the identification of sources of empirical data that could be used for such metrics.

Commenters should provide specific data and analysis to support any comments they submit with respect to these benefit estimates.

B. Costs

The cost of compliance with the proposed amendments and new rule to a given NRSRO would depend on its size and the complexity of its business activities. The size and complexity of NRSROs vary significantly. Therefore, the cost could vary significantly across NRSROs. Instead, the Commission is providing estimates of the average cost per NRSRO, as a result of the proposed amendments, taking into consideration the range in size and complexity of NRSROs and the fact that many already may have established policies, procedures and recordkeeping systems and processes that would comply substantially with the proposed amendments. Additionally, the Commission notes that nine credit rating agencies are currently registered with the Commission as NRSROs and subject to the Act and its implementing regulations. The cost of compliance would also vary depending on which classes of credit ratings an NRSRO issues. NRSROs which issue credit ratings for structured finance products would incur higher compliance costs

²³¹ See proposed Rule 17g-5(a)(3) and (b)(9).

²³² See proposed Rule 17 CFR 240.17g-5(c)(5)-(7).

²³³ See 15 U.S.C. 78o-7(a)(1)(B)(vi) and (h).

²³⁴ See proposed Rule 17 CFR 240.17g-5(a)(3).

²³⁵ See proposed Rule 17g-7.

²³⁰ See proposed Rule 17g-3(a)(6).

than those NRSROs which do not issue such credit ratings or issue very few credit ratings in that class.

For these reasons, the cost estimates represent the average cost across all NRSROs and take into account that some firms would only need to augment existing policies, procedures and recordkeeping systems and processes to come into compliance with the proposed amendments.

1. Proposed Amendments to Form NRSRO

As discussed above, the Commission is proposing to amend the instructions to Exhibit 1 to Form NRSRO to provide more detailed performance statistics. Currently, the instructions require the disclosure of performance measurement statistics of the credit ratings of the "Applicant/NRSRO over the short-term, mid-term and long-term periods (as applicable) through the most recent calendar year end." The proposed amendments would augment these instructions to require the disclosure of separate sets of default and transition statistics for each class of credit ratings. In addition, the class-by-class disclosures would need to be broken out over 1, 3 and 10 year periods.²³⁶

The proposed amendments would also amend the instructions to Exhibit 2 to Form NRSRO to require enhanced disclosures about the procedures and methodologies an NRSRO uses to determine credit ratings, including whether and, if so, how information about verification performed on assets underlying a structured finance transaction is relied on in determining credit ratings; whether and, if so, how assessments of the quality of originators of assets underlying a structured finance transaction factor into the determination of credit ratings; and how frequently credit ratings are reviewed, whether different models are used for ratings surveillance than for determining credit ratings, and whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings. As discussed above, the Commission estimates that for PRA purposes the total one-time and annual hour burdens and the cost would have a neutral effect, resulting in no overall change in hours or cost for the currently approved PRA collection.

The Commission preliminarily believes, however, NRSROs may incur a cost of compliance in updating their performance metric statistics to conform to the new requirements set forth in the proposed rule amendments. Under the

²³⁶ See proposed instructions to Exhibit 1, Form NRSRO.

current instructions to Exhibit 1 to Form NRSRO, an NRSRO must disclose its performance metrics over short, mid, and long-term periods. Thus, the current Form NRSRO instructions to Exhibit 1 allow an NRSRO to use its own definitions of "short, mid, and long-term periods" and to include all credit ratings, regardless of class of rating, in one set of metrics. Under the proposed amendments, an NRSRO would be required to break out on a class-by-class basis performance statistics over 1, 3 and 10-year periods. The Commission believes that existing NRSROs would incur costs to conform their current performance statistics with the requirements of this proposed amendment to Exhibit 1.

The Commission estimates that it would take each NRSRO currently registered with the Commission approximately 50 hours to review its performance measurement statistics and to develop and implement any changes necessary to comply with the proposed amendment. The Commission is basing this estimate on the amount of time the Commission estimated that it would take an NRSRO to establish procedures in conformance with Rule 17g-4 and on information gained from the NRSRO examination process.²³⁷ For these reasons, the Commission estimates that the average one-time cost to an NRSRO would be \$12,740²³⁸ and the total aggregate cost to the currently registered NRSROs would be \$114,660.²³⁹

The Commission generally requests comment on all aspects of these proposed cost estimates for the proposed amendments to Form NRSRO. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

²³⁷ See 17 CFR 240.17g-4; Adopting Release, 72 FR at 33616.

²³⁸ The Commission estimates that a Compliance Attorney (40 hours) and a Programmer Analyst (10 hours) would perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly rates for a Compliance Attorney and a Programmer Analyst are \$270 and \$194 per hour, respectively. Therefore, the average one-time cost to an NRSRO would be \$12,740 [(40 hours × \$270) + (10 hours × \$194)].

²³⁹ \$12,740 × 9 NRSROs = \$114,660.

2. Proposed Amendments to Rule 17g-2

Rule 17g-2 requires an NRSRO to make and preserve specified records related to its credit rating business.²⁴⁰ As discussed above, the proposed amendments to Rule 17g-2 would require an NRSRO to make and retain two additional records and retain a third type of record. The records to be made and retained would be: (1) A record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of determining a credit rating;²⁴¹ and (2) a record showing the history and dates of all previous rating actions with respect to each current credit rating.²⁴² The proposed amendments to Rule 17g-2 would require an NRSRO to make the second record-rating actions related to current ratings publicly available in an XBRL Interactive Data File.²⁴³ In addition, the proposed amendments would require an NRSRO to retain communications that contain any complaints by an obligor, issuer, underwriter, or sponsor about the performance of a credit analyst.²⁴⁴

As discussed with respect to the PRA, the Commission estimates that, based on staff experience, the total one-time and annual recordkeeping burdens would increase approximately 10% and 5%, respectively. Thus, the Commission estimates that the one-time hour burden that each NRSRO would spend implementing a recordkeeping system to comply with Rule 17g-2 would be approximately 330 hours (an increase of 30 hours)²⁴⁵ for a total one-time burden of 9,900 hours (an increase of 900 hours).²⁴⁶

The Commission estimates that an NRSRO would spend an average of 267 hours per year (an increase of 13 hours)²⁴⁷ to make and maintain records under Rule 17g-2, for a total annual hour burden of 8,010 hours.²⁴⁸ This estimate would increase the currently approved PRA burden under Rule 17g-2 by 390 hours.²⁴⁹ For these reasons, the Commission estimates that an NRSRO would incur an average one-time cost of \$7,350 and the average annual cost of \$3,185, as a result of the proposed

²⁴⁰ 17 CFR 240.17g-2.

²⁴¹ Proposed paragraph (a)(2)(iii) of Rule 17g-2.

²⁴² Proposed paragraph (a)(8) of Rule 17g-2.

²⁴³ Proposed amendment to Rule 17g-2(d).

²⁴⁴ Proposed paragraph (b)(8) of Rule 17g-2.

²⁴⁵ 300 hours × 1.10 = 330 hours.

²⁴⁶ 330 hours × 30 respondents = 9,900 hours.

²⁴⁷ 254 hours × 1.05 = 267 hours.

²⁴⁸ 267 hours × 30 respondents = 8,010 hours.

²⁴⁹ 8,010 hours - 7,620 hours = 390 hours.

amendments.²⁵⁰ Consequently, the total aggregate one-time cost attributable to the proposed amendments would be \$220,500²⁵¹ and the total aggregate annual cost to the industry would be \$95,550.²⁵²

In addition, the proposed amendments to Rule 17g-2 would require an NRSRO to make the records of its rating actions publicly available in an XBRL Interactive Data File.²⁵³ As discussed with respect to the PRA, the Commission estimates that, on average, an NRSRO would spend approximately 30 hours to publicly disclose this ratings history information in an XBRL Interactive Data File and, thereafter, 10 hours per year to update its rating action history.²⁵⁴ Accordingly, the total aggregate one-time burden to the industry to make the history of its rating actions publicly available in an XBRL Interactive Data File would be 900 hours²⁵⁵ and the total aggregate annual burden hours would be 300 hours.²⁵⁶ Furthermore, as discussed in the PRA the Commission estimates there will be 30 NRSROs. For these reasons, the Commission estimates that an NRSRO would incur an average one-time cost of \$8,670 and an average annual cost of \$2,890, as a result of the proposed amendment.²⁵⁷ Consequently, the total aggregate one-time cost to the industry would be \$260,100²⁵⁸ and the total aggregate annual cost to the industry would be \$86,700.²⁵⁹

As discussed with respect to the PRA, the Commission estimated that an NRSRO may have to purchase recordkeeping software to establish a recordkeeping system in conformance with Rule 17g-2. The Commission estimated that the cost of the software

will vary based on the size and complexity of the NRSRO. Also, the Commission estimated that some NRSROs would not need such software because they already have adequate recordkeeping systems or, given their small size, such software would not be necessary. Based on these estimates, the Commission estimated that the average cost for recordkeeping software across all NRSROs would be approximately \$1,000 per firm. Therefore, the estimated one-time cost to the industry would be \$30,000. The Commission estimates that the proposed amendments to Rule 17g-2 would not alter this estimate or that any increases in the cost would be *de minimis*.

Finally, proposed paragraph (a)(8) to Rule 17g-2 would require an NRSRO to create and maintain a record showing all rating actions and the date of such actions from the initial rating to the current rating identified by the name or rated security or obligor, and, if applicable, the CUSIP of the rated security or the Central Index Key (CIK) number of the rated obligor.²⁶⁰ The Commission estimates that an NRSRO could be required to purchase a license from the CUSIP Service Bureau in order to access CUSIP numbers for the securities it rates. The CUSIP Service Bureau's operations are covered by fees paid by issuers and licensees of the CUSIP Service Bureau's data. Issuers pay a one-time fee for each new CUSIP assigned, and licensees pay a renewable subscription or a license fee for access and use of the CUSIP Service Bureau's various database services. The CUSIP Service Bureau's license fees vary based on usage, *i.e.*, how many securities or by type of security or business line.²⁶¹ The Commission estimates that the license fees incurred by an NRSRO would vary depending on the size of the NRSRO and the number of credit ratings it issues. For purposes of this cost estimate, the Commission estimates that

an NRSRO would incur a fee of \$100,000 to obtain access to the CUSIP numbers for the securities it rates. Consequently, the estimated total one-time cost to the industry would be \$3,000,000.²⁶²

The Commission generally requests comment on all aspects of these cost estimates for the proposed amendments to Rule 17g-2. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs? Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

3. Proposed Amendment to Rule 17g-3

Rule 17g-3 requires an NRSRO to furnish audited annual financial statements to the Commission, including certain specified schedules.²⁶³ The proposed amendment to Rule 17g-3 would require an NRSRO to furnish the Commission with an additional annual report: An unaudited report of the number of credit ratings that were changed during the fiscal year in each class of credit ratings for which the NRSRO is registered with the Commission. The Commission believes that the annual costs to NRSROs to comply with the proposed amendment to Rule 17g-3 would be *de minimis*, as the Commission preliminarily believes that a credit rating agency already would have this information with respect to each class of credit ratings for which it is registered. In addition, the proposed amendment does not prescribe a format for the report. Consequently, the Commission estimates that proposed Rule 17g-3(a)(6) would not have a significant effect on the total average annual cost burden currently estimated for Rule 17g-3.

The Commission generally requests comment on all aspects of these cost estimates for the proposed amendment to Rule 17g-3. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Would this proposal impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory

²⁵⁰ The Commission estimates that an NRSRO will have a Compliance Manager perform these responsibilities. Based on the average hourly rate for a Compliance Manager of \$245, the average one-time cost will be \$7,350 (30 hours × \$245 per hour) and the average annual cost will be \$3,185 (13 hours × \$245 per hour).

²⁵¹ $7,350 \times 30$ NRSROs = \$220,500.

²⁵² $3,185 \times 30$ NRSROs = \$95,550.

²⁵³ See proposed amendment to Rule 17g-2(d).

²⁵⁴ The Commission also bases this estimate on the estimated one-time and annual burden hours it would take an NRSRO to publicly disclose its Form NRSRO on its Web site. No comments were received on these estimates in the final rule release. See Adopting Release, 72 FR at 33609.

²⁵⁵ 30 hours × 30 NRSROs = 900 hours.

²⁵⁶ 10 hours × 30 NRSROs = 300 hours.

²⁵⁷ The Commission estimates that an NRSRO would have a Senior Programmer perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Senior Programmer is \$289. Therefore, the average one-time cost would be \$8,670 [(30 hours) × (\$289 per hour)] and the average annual cost would be \$2,890 [(10 hours per year) × (\$289 per hour)].

²⁵⁸ 900 hours × 289 per hour.

²⁵⁹ 300 hours × 289 per hour.

²⁶⁰ See proposed Rule 17g-2(a)(8). The Central Index Key (CIK) is used on the Commission's computer systems to identify corporations and individual people who have filed disclosure with the Commission. Anyone may search <http://www.edgarcompany.sec.gov> for a company, fund, or individual CIK. There is no fee for this service. CUSIP stands for Committee on Uniform Securities Identification Procedures. A CUSIP number identifies most securities, including: Stocks of all registered U.S. and Canadian companies, U.S. government and municipal bonds, as well as structured finance issuances. The CUSIP system—owned by the American Bankers Association and operated by Standard & Poor's—facilitates the clearing and settlement process of securities. The CUSIP number consists of nine characters (including letters and numbers) that uniquely identify a company or issuer and the type of security.

²⁶¹ See https://www.cusip.com/static/html/webpage/service_fees.html#lic_fees.

²⁶² $100,000 \times 30$ NRSROs = \$3,000,000.

²⁶³ 17 CFR 240.17g-3.

purposes, and persons who purchase services and products from NRSROs?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

4. Proposed Amendments to Rule 17g-5

Rule 17g-5 requires an NRSRO to manage and disclose certain conflicts of interest.²⁶⁴ The proposed amendments would add an additional conflict to paragraph (b) of Rule 17g-5. This proposed conflict of interest would be issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of an asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.²⁶⁵ Unlike the other conflicts of interest in paragraph (b) of Rule 17g-5, NRSROs would be prohibited from issuing a rating, unless certain information about the transaction and the assets underlying the structured product being rated were disclosed, pursuant to proposed Rule 17g-5(a)(3)(i) and (ii).²⁶⁶

Specifically, proposed Rule 17g-5(a)(3)(i) and (ii) would require the disclosure of certain information about the assets underlying a structured product that is provided to an NRSRO and used in determining an initial rating and monitoring the rating. While the proposed rule would require disclosure of certain information, the rule would not specify which party would disclose the information. For purposes of this PRA, the Commission estimates that it would take a respondent approximately 300 hours to develop a system, as well as policies and procedures to disclose the information as required under the proposed rule. This would result in a total one-time hour burden of 60,000 hours for 200 respondents.²⁶⁷ For these reasons, the Commission estimates that the average one-time cost to each respondent would be \$65,850²⁶⁸ and

the total aggregate one-time cost to the industry would be \$13,116,000.²⁶⁹

As discussed with respect to the PRA, in addition to the one-time hour burden, respondents also would be required to disclose the required information under proposed Rule 17g-5(a)(3)(i) on a transaction by transaction basis. Based on staff information gained from the NRSRO examination process, the Commission estimates that the proposed amendments would require each respondent to disclose information with respect to approximately 20 new transactions per year and that it would take approximately 1 hour per transaction to make the information publicly available.²⁷⁰ Therefore, as discussed with respect to the PRA, the Commission estimates that it would take a respondent approximately 20 hours²⁷¹ to disclose this information under proposed Rule 17g-5(a)(i) and (ii), on an annual basis, for a total aggregate annual hour burden of 4,000.²⁷² For these reasons, the Commission estimates that the average annual cost to a respondent would be \$4,100²⁷³ and the total annual cost to the industry would be \$820,000.²⁷⁴

Proposed Rule 17g-5(a)(ii) would require respondents to disclose information provided to an NRSRO that is used by an NRSRO in undertaking credit rating surveillance on a structured product. Because surveillance would cover more than just initial ratings, the Commission estimates that a respondent would be required to disclose information with respect to approximately 125 transactions on an ongoing basis and that the information would be provided to the NRSRO on a monthly basis. As discussed with respect to the PRA, the Commission estimates that each respondent would spend approximately 750 hours²⁷⁵ on an annual basis

disclosing the information for a total aggregate annual burden hours of 150,000 hours.²⁷⁶ For these reasons, the Commission estimates that the average annual cost to a respondent would be \$153,750²⁷⁷ and the total annual cost to the industry would be \$30,750,000.²⁷⁸

The Commission is also proposing to amend paragraph (c) to Rule 17g-5 to add three additional prohibited conflicts of interest.²⁷⁹ The Commission estimates that the amendments to paragraph (c) to Rule 17g-5 generally would impose *de minimis* costs on an NRSRO. However, the Commission recognizes that an NRSRO may incur costs related to training employees about the requirements with respect to these proposed amendments. It also is possible that the proposed amendments could require some NRSROs to restructure their business models or activities, in particular with respect to their consulting services.

The Commission generally requests comment on all aspects of these cost estimates for the proposed amendments to Rule 17g-5. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Would the proposals for additional disclosure impose costs on issuers, underwriters, sponsors, depositors, or trustees?
- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory purposes, and persons who purchase services and products from NRSROs?
- Would there be costs in addition to those identified above, such as costs arising from systems changes and restructuring business practices to account for the new reporting requirement?
- Would the proposed amendments to paragraph (c) of Rule 17g-5 impose training and restructuring costs?
- Would the proposed amendments to paragraph (c) of Rule 17g-5 impose personnel costs?
- Would the proposed amendments to paragraph (c) of Rule 17g-5 impose any additional costs on an NRSRO that is part of a large conglomerate related to monitoring the business activities of persons associated with the NRSRO, such as affiliates located in other

²⁶⁴ 17 CFR 240.17g-5.

²⁶⁵ See proposed Rule 17g-5(b)(9). The current paragraph (b)(9) would be renumbered as (b)(10).

²⁶⁶ See proposed Rule 17g-5(a)(3).

²⁶⁷ 300 hours × 200 respondents = 60,000 hours.

²⁶⁸ The Commission estimates an NRSRO would have a Compliance Manager and a Programmer Analyst perform these responsibilities, and that each would spend 50% of the estimated hours performing these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Compliance Manager is \$245 and the average hourly cost for a Programmer Analyst is 194. Therefore, the average one-time cost to an NRSRO would be $[(150 \text{ hours} \times \$245) + (150 \text{ hours} \times \$194)] = \$65,850$.

²⁶⁹ $\$65,850 \times 200 \text{ respondents} = \$13,116,000$.

²⁷⁰ This estimate assumes the respondent has already implemented the system and policies and procedures for disclosure. The Commission cannot estimate the number of initial transactions per year with certainty. The Commission believes that the number of deals that each respondent will disclose information on will vary widely based on the size of the entity. In addition, the Commission preliminarily believes that the number of asset-backed or mortgaged-backed issuances being rated by NRSROs in the next few years would be difficult to predict given the recent credit market turmoil.

²⁷¹ 20 transactions × 1 hour = 20 hours.

²⁷² 20 hours × 200 respondents = 4,000 hours.

²⁷³ The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is \$205. Therefore, the average one-time cost to a respondent would be 20 hours × \$205 = \$4,100.

²⁷⁴ $\$4,100 \times 200 \text{ respondents} = \$820,000$.

²⁷⁵ $125 \text{ transactions} \times 30 \text{ minutes} \times 12 \text{ months} = 45,000 \text{ minutes} / 60 \text{ minutes} = 750 \text{ hours}$.

²⁷⁶ $750 \text{ hours} \times 200 \text{ respondents} = 150,000 \text{ hours}$.

²⁷⁷ The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is \$205. Therefore, the average one-time cost to a respondent would be 750 hours × \$205 = \$153,750.

²⁷⁸ $\$153,750 \times 200 \text{ respondents} = \$30,750,000$.

²⁷⁹ See proposed Rule 17g-5(c)(5)-(7).

countries, to comply with the proposed requirement?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

5. Proposed Rule 17g-7

The Commission is proposing a new rule—proposed Rule 17g-7—which would require an NRSRO to attach a report each time it publishes a credit rating for a structured finance product describing how the ratings procedures and methodologies differ from those for corporate debt.²⁸⁰ Alternatively, an NRSRO would be permitted to use rating symbols for structured finance products that differentiate them from its other credit ratings. The Commission expects that most NRSROs already have methodologies in place to determine credit ratings for structured finance products and corporate debt securities, and disclosed such policies and procedures if they have registered as an NRSRO. The Commission expects, however, that an NRSRO would have to conform these disclosures into a report to comply with the specific requirements in the proposed rule. As discussed above with respect to PRA, the Commission estimates that it would take approximately 50 hours for an NRSRO to compile and write disclosures to comply with the proposed rule and that there would be 30 NRSROs. For these reasons, the Commission estimates that the average one-time cost to an NRSRO would be \$12,250²⁸¹ and the total aggregate one-time cost to the industry would be \$367,500.²⁸²

As discussed above with respect to the PRA, the Commission also estimates that it would take an NRSRO additional time to attach the report to each credit rating for a structured finance product and to monitor the report on an ongoing basis to ensure that the disclosure was accurate. Based on staff experience staff information gained from the NRSRO examination process, the Commission estimates that an NRSRO would spend approximately 5 minutes to attach each proposed report to the estimated 128,000 asset-backed credit ratings per NRSRO, four times per year, as discussed above, for a total of 42,667

annual burden hours²⁸³ per respondent, and a total of 1,280,010 annual burden hours²⁸⁴ for 30 NRSROs. For these reasons, the Commission estimates that the average annual cost to an NRSRO would be \$4,373,265²⁸⁵ and the total aggregate annual cost to the industry would be \$131,197,950.²⁸⁶

Finally, as discussed with respect to the PRA, the Commission estimates, based on staff experience, that it would take an NRSRO approximately 10 hours per year to review and update the report to ensure the disclosure was accurate and up-to-date for a total aggregate annual hour burden to the industry of 300 hours.²⁸⁷ For these reasons, the Commission estimates that the average annual cost to an NRSRO would be \$2,700²⁸⁸ and the total aggregate annual cost to the industry would be \$81,000.²⁸⁹

The Commission generally requests comment on all aspects of these cost estimates for the proposed amendments to Rule 17g-7. In addition, the Commission requests specific comment on the following items related to these cost estimates:

- Would the use of different rating symbols for structured products impact automated securities trading, routing, settlement, clearance, trade confirmation, reporting, processing, and risk management systems and any other systems that are programmed to use standard credit rating symbols across all product classes?
- Would the use of different rating symbols have consequences for investment guidelines and covenants in legal documents that use credit ratings to distinguish finance instruments?
- Would these proposals impose costs on other market participants, including persons who use credit ratings to make investment decisions or for regulatory

²⁸³ $128,000 \times 4 = 512,000$ reports \times 5 minutes per report = 2,560,000 minutes/60 minutes per hour = 42,667 hours.

²⁸⁴ $42,667$ hours \times 30 NRSROs = 1,280,010 hours.

²⁸⁵ The Commission estimates an NRSRO would have a Webmaster perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Webmaster is \$205. Therefore, the average one-time cost to an NRSRO would be \$4,373,265 (21,333 hours \times \$205).

²⁸⁶ $\$4,373,265 \times 30$ NRSROs = \$131,197,950.

²⁸⁷ This estimate is based on the number of hours it would take an NRSRO to complete an annual certification on Form NRSRO. See Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564, 33609 (June 18, 2007). 10 hours \times 30 NRSROs = 300 hours.

²⁸⁸ The Commission estimates an NRSRO would have a Compliance Attorney perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Compliance Attorney is \$270. Therefore, the average one-time cost to an NRSRO would be \$2,700 (10 hours \times \$270).

²⁸⁹ $\$2,700 \times 30$ NRSROs = \$81,000.

purposes, and persons who purchase services and products from NRSROs?

- Would there be costs in addition to those identified above, such as costs arising from systems changes and restructuring business practices to account for the new reporting requirement?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

C. Total Estimated Costs and Benefits of This Rulemaking

As discussed above, the proposed amendments and new rules are expected to have both benefits and costs for investors and the credit rating industry as a whole. The Commission believes the benefits to investors and other users of credit ratings, especially with respect to investments in structured finance products would be quite substantial, but are difficult to quantify. Similarly difficult to quantify are the expected benefits to the Commission's oversight over NRSROs due to the enhanced recordkeeping, disclosure and reporting requirements. Moreover, not all the costs the Commission anticipates would result from this rulemaking are quantifiable. Based on the figures discussed above, however, the Commission estimates that the first year quantifiable costs related to this proposed rulemaking would be approximately \$180,175,810.²⁹⁰

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Under Section 3(f) of the Exchange Act,²⁹¹ the Commission shall, when engaging in rulemaking that requires the Commission to consider or determine if an action is necessary or appropriate in the public interest, consider whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act²⁹² requires the Commission to consider the anticompetitive effects of any rules the Commission adopts under the Exchange Act. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. As discussed below, the Commission's preliminary view is that the proposed amendments and new

²⁹⁰ $\$17,078,760$ (total one-time costs) + $\$163,097,810$ (total annual costs) = \$180,175,810.

²⁹¹ 15 U.S.C. 78c(f).

²⁹² 15 U.S.C. 78w(a)(2).

²⁸⁰ See proposed Rule 17g-3A.

²⁸¹ The Commission estimates an NRSRO would have a Compliance Manager perform these responsibilities. The SIFMA 2007 Report as Modified indicates that the average hourly cost for a Compliance Manager is \$245. Therefore, the average one-time cost to an NRSRO would be \$12,250 (50 hours \times \$245).

²⁸² 30 NRSROs \times $\$12,250$ = \$367,500.

rules should promote efficiency, competition, and capital formation.

The proposed amendments to the Instructions to Exhibit 1 to Form NRSRO would require NRSROs to make more comparable disclosures about the performance of their credit ratings. These could make it easier for an NRSRO to demonstrate that it has a superior ratings methodology or competence and, thereby, attract clients. In addition, the proposed amendments to the instructions to Exhibit 2 are designed to enhance the disclosures NRSROs make with respect to their methodologies for determining credit ratings. The Commission believes these enhanced disclosures would make it easier for users of credit ratings to compare the quality of the NRSRO's procedures and methodologies for determining credit ratings. The greater transparency that would result from all these enhanced disclosures could make it easier for market participants to select the NRSROs that are performing best and have the highest quality processes for determining credit ratings. This could increase competition and promote capital formation by restoring confidence in the credit ratings, which are an integral part of the capital formation process.

The proposed amendments to Rule 17g-2 are designed to enhance the Commission's oversight of NRSROs and, with respect to the public disclosure of ratings history, provide the marketplace with the raw materials to develop metrics for comparing the ratings performance of NRSROs. Enhancing the Commission's oversight could help in restoring confidence in credit ratings and, thereby, promote capital formation. Increased disclosure of ratings history could make the ratings performance of the NRSROs more transparent to the marketplace and, thereby, highlight those firms that do a better job analyzing credit risk. This could benefit smaller NRSROs to the extent they have performed better than others by alerting the market to their superior competence.

The proposed amendment to Rule 17g-3 is designed to enhance the Commission's oversight of NRSROs. Enhancing the Commission's oversight could help in restoring confidence in credit ratings and, thereby, promote capital formation.

The proposed amendments to paragraphs (a) and (b) of Rule 17g-5 would enhance the disclosures made about assets underlying structured finance products. The goal of these proposals is to provide a mechanism for NRSROs to determine unsolicited credit ratings and other market participants and observers to independently assess

the creditworthiness of structured finance products. This could expose NRSROs whose procedures and methodologies for determining credit ratings are less conservative in order to gain business. It also could mitigate the impact of rating shopping, since NRSROs not hired to rate a deal could nonetheless issue a credit rating. These potential impacts of the rule proposal could help to restore confidence in credit ratings and, thereby, promote capital formation. Also, by creating a mechanism for determining unsolicited ratings, they could increase competition by allowing smaller NRSROs to demonstrate proficiency in rating structured products.

The proposed amendments to paragraph (c) of Rule 17g-5 would prohibit NRSROs and their affiliates from providing consulting or advisory services, prohibit analysts from participating in fee negotiations, and prohibit credit analysts or persons responsible for approving a credit rating receiving gifts from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than \$25. These proposals could increase confidence in the integrity of NRSROs and the credit ratings they issue. This could help to restore confidence in credit ratings and, thereby, promote capital formation.

Proposed new Rule 17g-7 would provide users of credit ratings with useful information about structured product ratings. This could help them in assessing the risk of securities and promote better informed investment decisions. This could increase the efficiency of the capital markets by making structured finance ratings more transparent.

The Commission generally requests comment on all aspects of this analysis of the burden on competition and promotion of efficiency, competition, and capital formation. In addition, the Commission requests specific comment on the following items related to this analysis:

- Would the proposed amendments have an adverse effect on efficiency, competition, and capital formation that is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act?

Commenters should provide specific data and analysis to support any comments they submit with respect to these burden estimates.

VII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"²⁹³ the Commission must advise OMB whether a proposed regulation constitutes a major rule. Under SBREFA, a rule is "major" if it has resulted in, or is likely to result in:

- An annual effect on the economy of \$100 million or more;
 - A major increase in costs or prices for consumers or individual industries;
- or
- A significant adverse effect on competition, investment, or innovation.

If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review. The Commission requests comment on the potential impact of each of the proposed amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

VIII. Initial Regulatory Flexibility Analysis

The Commission has prepared the following Initial Regulatory Flexibility Analysis ("IRFA"), in accordance with the provisions of the Regulatory Flexibility Act,²⁹⁴ regarding proposed amendments to Form NRSRO, Rule 17g-2, Rule 17g-3, and Rule 17g-5 and regarding proposed Rule 17g-7 under the Exchange Act.

The Commission encourages comments with respect to any aspect of this IRFA, including comments with respect to the number of small entities that may be affected by the proposed amendments. Comments should specify the costs of compliance with the proposed amendments and suggest alternatives that would accomplish the goals of the amendments. Comments will be considered in determining whether a Final Regulatory Flexibility Analysis is required and will be placed in the same public file as comments on the proposed amendments. Comments should be submitted to the Commission at the addresses previously indicated.

A. Reasons for the Proposed Action

The proposed amendments would prescribe additional requirements for NRSROs to address concerns raised about the role of credit rating agencies in the recent credit market turmoil. The proposed amendments are designed to enhance and strengthen the rules the

²⁹³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

²⁹⁴ 5 U.S.C. 603.

Commission adopted in 2007 to implement specific provisions of the Rating Agency Act.²⁹⁵ The Rating Agency Act defines the term “nationally recognized statistical rating organization” as a credit rating agency registered with the Commission, provides authority for the Commission to implement registration, recordkeeping, financial reporting, and oversight rules with respect to registered NRSROs.

B. Objectives

The proposed amendments and new rules would enhance and strengthen the rules the Commission adopted in 2007 to implement specific provisions of the Rating Agency Act. The objectives of the Rating Agency Act are “to improve ratings quality for the protection of investors and in the public interest by fostering accountability, transparency, and competition in the credit rating industry.”²⁹⁶ The proposed amendments and new rules are designed to further enhance these objectives and assist the Commission in monitoring whether an NRSRO complies with the provisions of the Rating Agency Act and rules thereunder, consistent with the Commission’s statutory mandate to adopt rules to implement the NRSRO regulatory program, and provide information regarding NRSROs to the public and to users of credit ratings. These proposed amendments would also prescribe additional requirements for NRSROs to address concerns raised about the role of credit rating agencies in the recent credit market turmoil, including concerns with respect to the determination of credit ratings for structured finance products.

C. Legal Basis

Pursuant to the Sections 3(b), 15E, 17(a), 23(a) and 36 of the Exchange Act.²⁹⁷

D. Small Entities Subject to the Rule

Paragraph (a) of Rule 0–10 provides that for purposes of the Regulatory Flexibility Act, a small entity “[w]hen used with reference to an ‘issuer’ or a ‘person’ other than an investment company” means “an ‘issuer’ or ‘person’ that, on the last day of its most recent fiscal year, had total assets of \$5 million or less.”²⁹⁸ The Commission believes that an NRSRO with total assets of \$5 million or less would qualify as a

“small” entity for purposes of the Regulatory Flexibility Act.

As noted in the Adopting Release,²⁹⁹ the Commission believes that approximately 30 credit rating agencies ultimately would be registered as an NRSRO. Of the approximately 30 credit rating agencies estimated to be registered with the Commission, the Commission estimates that approximately 20 may be “small” entities for purposes of the Regulatory Flexibility Act.³⁰⁰

E. Reporting, Recordkeeping, and Other Compliance Requirements

The proposals would amend Form NRSRO to elicit certain additional information regarding the performance data for the credit ratings and the methods used by a credit rating agency for issuing credit ratings.³⁰¹

The proposals would amend Rule 17g–2 to establish additional recordkeeping requirements.³⁰² The proposed amendments would require an NRSRO to make and retain two additional records and retain a third type of record. The records would be: (1) A record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued, if a quantitative model is a substantial component in the process of determining a credit rating;³⁰³ (2) a record showing the history and dates of all previous rating actions with respect to each current credit rating;³⁰⁴ and (3) any complaints about the performance of a credit analyst.³⁰⁵ These records would assist the Commission, through its examination process, in monitoring whether the NRSRO continues to maintain adequate financial and managerial resources to consistently produce credit ratings with integrity (as required under the Rating Agency Act) and whether the NRSRO was complying with the provisions of the Exchange Act including the provisions of the Rating Agency Act, the rules adopted thereunder, and the NRSRO’s disclosed policies and procedures.

The proposals would amend Rule 17g–3 to require an NRSRO to furnish the Commission with an additional annual report: the number of downgrades in each class of credit ratings for which it is registered and the description of the findings from an

independent review.³⁰⁶ This requirement is designed to assist the Commission in its examination function and to require an NRSRO to assess the integrity of its rating process. It also is designed to assist the Commission in monitoring whether the NRSRO is complying with provisions of the Rating Agency Act and the rules adopted thereunder.

The proposals would amend paragraphs (a) and (b) of Rule 17g–5 to prohibit an NRSRO from issuing a credit rating for a structured product unless certain information about the assets underlying the product are disclosed. The proposals would amend paragraph (c) of Rule 17g–5 to prohibit NRSROs and their affiliates from providing consulting or advisory services, prohibit analysts from participating in fee negotiations, and prohibit credit analysts or persons responsible for approving a credit rating received gifts from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than \$25.³⁰⁷

The proposals would amend Rule 17g–7 to require an NRSRO to attach a report each time it publishes a credit rating for a structured finance product describing how the ratings procedures and methodologies and credit risk characteristics for structured products differ from those for other types of obligors and debt securities. An NRSRO could avoid having to attach the report if it used ratings symbols for structured products that differentiate them from its other types of credit ratings.³⁰⁸

F. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no federal rules that duplicate, overlap, or conflict with the proposed amendments or new rule.

G. Significant Alternatives

Pursuant to Section 3(a) of the RFA,³⁰⁹ the Commission must consider certain types of alternatives, including: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of

²⁹⁵ Pub. L. 109–291 (2006); see also Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564, 33609 (June 18, 2007).

²⁹⁶ See Senate Report.

²⁹⁷ 15 U.S.C. 78c(b), 78o–7, 78q(a), and 78w.

²⁹⁸ 17 CFR 240.0–10(a).

²⁹⁹ Adopting Release, 72 FR at 33618.

³⁰⁰ See 17 CFR 240.0–10(a).

³⁰¹ See proposed amendments to Form NRSRO.

³⁰² See proposed amendments to Rule 17g–2.

³⁰³ Proposed paragraph (a)(2)(iii) of Rule 17g–2.

³⁰⁴ Proposed paragraph (a)(8) of Rule 17g–2.

³⁰⁵ Proposed paragraph (b)(8) of Rule 17g–2.

³⁰⁶ See proposed amendment to Rule 17g–3.

³⁰⁷ See proposed amendment to Rule 17g–5.

³⁰⁸ See proposed Rule 17g–7.

³⁰⁹ 5 U.S.C. 603(c).

performance rather than design standards; and (4) an exemption from coverage of the rule, or any part of the rule, for small entities.

The Commission is considering whether it is necessary or appropriate to establish different compliance or reporting requirements or timetables; or clarify, consolidate, or simplify compliance and reporting requirements under the rule for small entities. Because the proposed amendments and proposed new rule are designed to improve the overall quality of ratings and enhance the Commission's oversight, the Commission is not proposing to exempt small entities from coverage of the rule, or any part of the rule. The proposed amendments and new rules allow NRSROs the flexibility to develop procedures tailored to their specific organizational structure and business models. The Commission also does not believe that it is necessary at this time to consider whether small entities should be permitted to use performance rather than design standards to comply with the proposed amendments as the amendments already propose performance standards and do not dictate for entities of any size any particular design standards that must be employed to achieve the Act's objectives.

H. Request for Comments

The Commission encourages the submission of comments to any aspect of this portion of the IRFA. Comments should specify costs of compliance with the proposed amendments and suggest alternatives that would accomplish the objective of the proposed amendments

IX. Statutory Authority

The Commission is proposing amendments to Form NRSRO and Rules 17g-2, 17g-3, and 17g-5 and is proposing new rule 17g-7 pursuant to the authority conferred by the Exchange Act, including Sections 3(b), 15E, 17, 23(a) and 36.³¹⁰

Text of Proposed Rules

List of Subjects in 17 CFR Parts 240 and 249b

Brokers, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Commission proposes to amend Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

- 2. Section 240.17g-2 is amended by:
a. Removing paragraph (a)(2)(iv);
b. Redesignating paragraph (a)(2)(iii) as paragraph (a)(2)(iv);
c. In newly redesignated paragraph (a)(2)(iv), removing “; and” and in its place adding a period;
d. Adding new paragraph (a)(2)(iii);
e. Adding paragraph (a)(8);
f. In paragraph (b)(7), revising the phrase “maintaining, changing,” to read “maintaining, monitoring, changing.”;
g. Redesignating paragraphs (b)(8), (b)(9), and (b)(10) as paragraphs (b)(9), (b)(10), and (b)(11), respectively;
h. Adding new paragraph (b)(8); and
i. In paragraph (d), adding a sentence to the end of the paragraph.

The additions read as follows:

§ 240.17g-2 Records to be made and retained by nationally recognized statistical rating organizations.

- (a) * * *
(2) * * *

(iii) If a quantitative model was a substantial component in the process of determining the credit rating, a record of the rationale for any material difference between the credit rating implied by the model and the final credit rating issued; and

* * * * *

(8) A record showing all rating actions and the date of such actions from the initial credit rating to the current credit rating identified by the name of the rated security or obligor and, if applicable, the CUSIP of the rated security or the Central Index Key (CIK) number of the rated obligor.

(b) * * *

(8) Any communications that contain complaints about the performance of a credit analyst in initiating, determining, maintaining, monitoring, changing, or withdrawing a credit rating.

* * * * *

(d) * * * In addition, the records required to be retained pursuant to paragraph (a)(8) of this section must be made publicly available on the corporate Web site of the NRSRO in an XBRL Interactive Data File that uses a

machine-readable computer code that presents information in eXtensible Business Reporting Language in electronic format no later than six months after the date of the rating action.

* * * * *

- 3. Section 240.17g-3 is amended by:
a. Adding paragraph (a)(6); and
b. Revising paragraph (b).

The additions and revision read as follows:

§ 240.17g-3 Annual financial reports to be furnished by nationally recognized statistical rating organizations.

(a) * * *

(6) The number of credit ratings actions taken during the fiscal year in each class of credit ratings identified in section 3(a)(62)(B) of the Act (15 U.S.C. 78c(a)(62)(B)) for which the nationally recognized statistical rating organization is registered with the Commission.

Note to paragraph (a)(6): A nationally recognized statistical rating organization registered in the class of credit ratings described in section 3(a)(62)(B)(iv) of the Act (15 U.S.C. 78c(a)(62)(B)(iv)) must include credit ratings actions taken on credit ratings of any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction for purposes of reporting the number of credit ratings actions in this class.

(b) The nationally recognized statistical rating organization must attach to the financial reports furnished pursuant to paragraphs (a)(1) through (a)(6) of this section a signed statement by a duly authorized person associated with the nationally recognized statistical rating organization stating that the person has responsibility for the financial reports and, to the best knowledge of the person, the financial reports fairly present, in all material respects, the financial condition, results of operations, cash flows, revenues, analyst compensation, and credit rating actions of the nationally recognized statistical rating organization for the period presented.

* * * * *

- 4. Section 240.17g-5 is amended by:
a. Removing the word “and” at the end of paragraph (a)(1);
b. Removing the period at the end of paragraph (a)(2) and in its place adding “; and”;

- c. Adding paragraph (a)(3);
d. Redesignating paragraph (b)(9) as paragraph (b)(10);
e. Adding new paragraph (b)(9);
f. Removing the word “or” at the end of paragraph (c)(3);
g. Removing the period at the end of paragraph (c)(4) and in its place adding a semi-colon; and

³¹⁰ 15 U.S.C. 78c(b), 78o-7, 78q, 78w, and 78mm.

h. Adding paragraphs (c)(5), (c)(6), and (c)(7).

The additions read as follows:

§ 240.17g-5 Conflicts of interest.

(a) * * *

(3) In the case of the conflict of interest identified in paragraph (b)(9) of this section, the following information is disclosed through a means designed to provide reasonably broad dissemination:

(i) (A) All information provided to the nationally recognized statistical rating organization by the issuer, underwriter, sponsor, depositor, or trustee that is used in determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, with such information to be disclosed publicly in an offering registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) on the date the underwriter and the issuer or depositor set the offering price of the securities being rated;

(B) In offerings that are not registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the information in paragraph (a)(3)(i)(A) of this section must be disclosed to investors and credit rating agencies on the date the underwriter and the issuer or depositor set the offering price of the securities being rated, and disclosed publicly on the first business day after the transaction closes; and

(ii) All information provided to the nationally recognized statistical rating organization by the issuer, underwriter, sponsor, depositor, or trustee that is used by the nationally recognized statistical rating organization in undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument, with such information to be disclosed publicly at the time such information is provided to the nationally recognized statistical rating organization.

(b) * * *

(9) Issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument.

* * * * *

(c) * * *

(5) The nationally recognized statistical rating organization issues or maintains a credit rating with respect to an obligor or security where the nationally recognized statistical rating organization or a person associated with the nationally recognized statistical rating organization made recommendations to the obligor or the issuer, underwriter, or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security;

(6) The nationally recognized statistical rating organization issues or maintains a credit rating where the fee paid for the rating was negotiated, discussed, or arranged by a person within the nationally recognized statistical rating organization who has responsibility for participating in determining credit ratings or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models; or

(7) The nationally recognized statistical rating organization issues or maintains a credit rating where a credit analyst who participated in determining or monitoring the credit rating, or a person responsible for approving the credit rating received gifts, including entertainment, from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value of no more than \$25.

* * * * *

5. Section 240.17g-7 is added to read as follows:

§ 240.17g-7 Credit rating reports to be furnished by nationally recognized statistical rating organizations.

(a) A nationally recognized statistical rating organization must attach a report each time it publishes a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that describes the rating methodology used to determine such credit rating and how it differs from the determination of ratings for any other type of obligor or debt security and how the credit risk characteristics associated with a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction differ from those of any other type of obligor or debt security.

(b) *Exemption from attaching report.* A nationally recognized statistical rating organization is not required to attach the

report each time it publishes a credit rating as prescribed by paragraph (a) of this section if the credit rating symbol used by the nationally recognized statistical rating organization to indicate the credit rating identifies the credit rating as relating to a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction as distinct from a credit rating for any other type of obligor or debt security.

PART 249b—FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934

6. The authority citation for part 249b continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.*, unless otherwise noted;

* * * * *

7. Form NRSRO (referenced in § 249b.300) is amended by revising Exhibits 1 and 2 in section H, Item 9 of the Form NRSRO Instructions to read as follows:

Note: The text of Form NRSRO and this amendment does not appear in the Code of Federal Regulations.

Form NRSRO

* * * * *

Form NRSRO Instructions

* * * * *

H. Instructions for Specific Line Items

* * * * *

Item 9. Exhibits. * * *

Exhibit 1. Provide in this Exhibit performance measurement statistics of the credit ratings of the Applicant/NRSRO, including performance measurement statistics of the credit ratings separately for each class of credit rating for which the Applicant/NRSRO is seeking registration or is registered (as indicated in Item 6 and/or 7 of Form NRSRO) and any other broad class of credit rating issued by the Applicant/NRSRO. For the purposes of this Exhibit, an Applicant/NRSRO registered in the class of credit ratings described in Section 3(a)(62)(B)(iv) of the Act (15 U.S.C. 78c(a)(62)(B)(iv)) must include credit ratings of any security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction for purposes of reporting the performance measurement statistics for this class. The performance measurement statistics must at a minimum show the performance of credit ratings in each class over 1 year, 3 year, and 10 year periods (as applicable) through the most recent calendar year-end, including, as applicable: historical ratings transition

and default rates within each of the credit rating categories, notches, grades, or rankings used by the Applicant/NRSRO as an indicator of the assessment of the creditworthiness of an obligor, security, or money market instrument in each class of credit rating. The default statistics must include defaults relative to the initial rating and must incorporate defaults that occur after a credit rating is withdrawn. As part of this Exhibit, define the credit rating categories, notches, grades, and rankings used by the Applicant/NRSRO and explain the performance measurement statistics, including the inputs, time horizons, and metrics used to determine the statistics. Also provide in this Exhibit the Web site address where the records of credit rating actions required under 17 CFR 240.17g-2(a)(8) are, or will be, made publicly available in an XBRL Interactive Data File pursuant to the requirements of 17 CFR 240.17g-2(d).

Exhibit 2. Provide in this Exhibit a general description of the procedures and methodologies used by the Applicant/NRSRO to determine credit ratings, including unsolicited credit ratings within the classes of credit ratings for which the Applicant/NRSRO is seeking registration or is registered. The description must be sufficiently detailed to provide users of credit ratings with an understanding of the processes employed by the Applicant/

NRSRO in determining credit ratings, including, as applicable, descriptions of: policies for determining whether to initiate a credit rating; a description of the public and non-public sources of information used in determining credit ratings, including information and analysis provided by third-party vendors; whether and, if so, how information about verification performed on assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction is relied on in determining credit ratings; the quantitative and qualitative models and metrics used to determine credit ratings, including whether and, if so, how assessments of the quality of originators of assets underlying or referenced by a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction factor into the determination of credit ratings; the methodologies by which credit ratings of other credit rating agencies are treated to determine credit ratings for securities or money market instruments issued by an asset pool or as part of any asset-backed or mortgaged-backed securities transaction; the procedures for interacting with the management of a rated obligor or issuer of rated securities or money market instruments; the structure and voting

process of committees that review or approve credit ratings; procedures for informing rated obligors or issuers of rated securities or money market instruments about credit rating decisions and for appeals of final or pending credit rating decisions; procedures for monitoring, reviewing, and updating credit ratings, including how frequently credit ratings are reviewed, whether different models or criteria are used for ratings surveillance than for determining initial ratings, whether changes made to models and criteria for determining initial ratings are applied retroactively to existing ratings, and whether changes made to models and criteria for performing ratings surveillance are incorporated into the models and criteria for determining initial ratings; and procedures to withdraw, or suspend the maintenance of, a credit rating. An Applicant/NRSRO may provide in Exhibit 2 the location on its Web site where additional information about the procedures and methodologies is located.

* * * * *

Dated: June 16, 2008.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E8-13887 Filed 6-24-08; 8:45 am]

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Federal Register

**Wednesday,
June 25, 2008**

Part IV

The President

**Notice of June 24, 2008—Continuation of
the National Emergency With Respect to
the Western Balkans**

Presidential Documents

Title 3—

Notice of June 24, 2008

The President**Continuation of the National Emergency With Respect to the Western Balkans**

On June 26, 2001, by Executive Order 13219, I declared a national emergency with respect to the Western Balkans pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions of persons engaged in, or assisting, sponsoring, or supporting (i) extremist violence in the Republic of Macedonia and elsewhere in the Western Balkans region, or (ii) acts obstructing implementation of the Dayton Accords in Bosnia or United Nations Security Council Resolution 1244 of June 10, 1999, in Kosovo. I subsequently amended that order in Executive Order 13304 of May 28, 2003.

Because the actions of persons threatening the peace and international stabilization efforts in the Western Balkans continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States, the national emergency declared on June 26, 2001, and the measures adopted on that date and thereafter to deal with that emergency, must continue in effect beyond June 26, 2008. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to the Western Balkans.

This notice shall be published in the **Federal Register** and transmitted to the Congress.



THE WHITE HOUSE,
June 24, 2008.

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Wednesday, June 25, 2008

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REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT JUNE 25, 2008**AGRICULTURE DEPARTMENT****Natural Resources Conservation Service**

Regulations for Complying with the National Environmental Policy Act; published 6-25-08

COMMERCE DEPARTMENT**National Institute of Standards and Technology**

Technology Innovation Program; published 6-25-08

GENERAL SERVICES ADMINISTRATION

Federal Travel Regulation; Relocation Allowances; Relocation Income Tax Allowance Tax Tables; published 6-25-08

HOUSING AND URBAN DEVELOPMENT DEPARTMENT**Federal Housing Enterprise Oversight Office**

Risk-Based Capital Regulation; Loss Severity Amendments; published 6-25-08

TRANSPORTATION DEPARTMENT**Federal Aviation Administration**

Airworthiness Directives:

Airbus Model A310 and A300-600 Series Airplanes; published 5-21-08

Boeing Model 737-100 Series Airplanes et al.; published 5-21-08

Boeing Model 737 100, 200, 200C, 300, 400, and 500 Series Airplanes; published 5-21-08

Boeing Model 767 200 Series Airplanes et al.; published 5-21-08

Lockheed Model L 1011 Series Airplanes; published 5-21-08

Rolls-Royce Deutschland Ltd. & Co. KG. (RRD) TAY 650-15 Turbofan Engines; published 5-21-08

COMMENTS DUE NEXT WEEK**AGRICULTURE DEPARTMENT****Forest Service**

Subsistence Management Regulations for Public Lands in Alaska; (2009 and 2010 and 2010-2011):

Subsistence Taking of Fish and Shellfish Regulations; comments due by 6-30-08; published 4-17-08 [FR E8-07841]

COMMERCE DEPARTMENT**National Oceanic and Atmospheric Administration**

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic:

Shrimp Fishery of the Gulf of Mexico; Revisions to Allowable Bycatch Reduction Devices; comments due by 7-3-08; published 6-3-08 [FR E8-12324]

Fisheries of the Exclusive Economic Zone Off Alaska:

Recordkeeping and Reporting; comments due by 6-30-08; published 5-29-08 [FR E8-12009]

Marine Mammals:

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Revision of Patent Fees for Fiscal Year (2009); comments due by 7-3-08; published 6-3-08 [FR E8-12364]

DEFENSE DEPARTMENT

Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 7-1-08; published 5-2-08 [FR E8-09715]

ENVIRONMENTAL PROTECTION AGENCY

Approval and Promulgation of Air Quality Implementation Plans:

Minnesota; Interstate Transport of Pollution; comments due by 7-2-08; published 6-2-08 [FR E8-12222]

Minnesota; Maintenance Plan Update for Dakota County Lead Area; comments due by 7-3-08;

published 6-3-08 [FR E8-12240]

Approval and Promulgation of Air Quality Implementation Plans; Delaware:

Reasonably Available Control Technology Under the 8-Hour Ozone National Ambient Air Quality Standard; comments due by 6-30-08; published 5-30-08 [FR E8-12122]

Approval and Promulgation of Implementation Plans:

Variance Determination for Particulate Matter from a Specific Source in the State of New Jersey; comments due by 6-30-08; published 5-29-08 [FR E8-11979]

Environmental Statements; Notice of Intent:

Coastal Nonpoint Pollution Control Programs; States and Territories—

Florida and South Carolina; Open for comments until further notice; published 2-11-08 [FR 08-00596]

Method 207 - Pre-Survey Procedure for Corn Wet-Milling Facility Emission Sources; comments due by 6-30-08; published 5-29-08 [FR E8-11882]

Standards of Performance for Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry, etc.; comments due by 7-2-08; published 6-2-08 [FR E8-11400]

Standards of Performance for Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry and Petroleum Refineries; comments due by 7-2-08; published 6-2-08 [FR E8-11384]

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Promoting Diversification of Ownership in the Broadcasting Services; Correction; comments due by 6-30-08; published 5-29-08 [FR E8-11776]

FEDERAL TRADE COMMISSION

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HEALTH AND HUMAN SERVICES DEPARTMENT

Designation of Medically Underserved Populations

and Health Professional Shortage Areas; comments due by 6-30-08; published 6-2-08 [FR 08-01314]

HOMELAND SECURITY DEPARTMENT**Coast Guard**

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Smith Creek at Wilmington, NC; comments due by 6-30-08; published 5-15-08 [FR E8-10801]

Safety Zone; Gulf of Mexico - Johns Pass, FL; comments due by 6-30-08; published 5-29-08 [FR E8-11866]

Special Local Regulations for Marine Events; Patapsco River, Inner Harbor, Baltimore, MD; comments due by 7-2-08; published 6-2-08 [FR E8-12151]

HOMELAND SECURITY DEPARTMENT**Federal Emergency Management Agency**

Proposed Flood Elevation Determinations; comments due by 7-2-08; published 4-3-08 [FR E8-06913]

INTERIOR DEPARTMENT**Fish and Wildlife Service**

Endangered and Threatened Wildlife and Plants:

Initiation of 5-Year Status Reviews for 70 Species in Idaho, Montana, Oregon, Washington, and the Pacific Islands; comments due by 6-30-08; published 4-29-08 [FR E8-09198]

Environmental Statements; Availability, Etc.:

Sheldon National Wildlife Refuge; Lakeview, OR; comments due by 6-30-08; published 5-12-08 [FR E8-10480]

General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service; comments due by 6-30-08; published 4-30-08 [FR E8-09606]

Subsistence Management Regulations for Public Lands in Alaska; (2009 and 2010 and 2010-2011):

Subsistence Taking of Fish and Shellfish Regulations; comments due by 6-30-08; published 4-17-08 [FR E8-07841]

INTERIOR DEPARTMENT**National Park Service**

General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife

Service; comments due by 6-30-08; published 4-30-08 [FR E8-09606]

**INTERIOR DEPARTMENT
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and Enforcement Office**

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Hawker Beechcraft Corporation Model 390 Airplanes; comments due by 6-30-08; published 5-1-08 [FR E8-09566]

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**National Highway Traffic
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Average Fuel Economy Standards:

Passenger Cars and Light Trucks, Model Years 2011-2015; comments due by 7-1-08; published 5-2-08 [FR 08-01186]

Passenger Car Average Fuel Economy Standards:

Model Years 2008-2020 and Light Truck Average Fuel Economy Standards — Model Years 2008-2020; Request for Product Plan Information; comments due by 7-1-08; published 5-2-08 [FR 08-01185]

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 "PLUS" (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. 2420/P.L. 110-247

Federal Food Donation Act of 2008 (June 20, 2008; 122 Stat. 2314)

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