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# Presidential Documents

**Title 3—**

## The President

**Executive Order 13469 of July 25, 2008**

## Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code,

I, GEORGE W. BUSH, President of the United States of America, find that the continued actions and policies of the Government of Zimbabwe and other persons to undermine Zimbabwe's democratic processes or institutions, manifested most recently in the fundamentally undemocratic election held on June 27, 2008, to commit acts of violence and other human rights abuses against political opponents, and to engage in public corruption, including by misusing public authority, constitute an unusual and extraor- dinary threat to the foreign policy of the United States, and to deal with that threat, hereby expand the scope of the national emergency declared in Executive Order 13288 of March 6, 2003, and relied upon for additional steps taken in Executive Order 13391 of November 22, 2005, and hereby order:

**Section 1.** (a) Except to the extent provided by statutes, or provided in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order, all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

Any person determined by the Secretary of the Treasury, after consultation with the Secretary of State:

(i) to be a senior official of the Government of Zimbabwe;

(ii) to be owned or controlled by, directly or indirectly, the Government of Zimbabwe or an official or officials of the Government of Zimbabwe;

(iii) to have engaged in actions or policies to undermine Zimbabwe's democratic processes or institutions;

(iv) to be responsible for, or to have participated in, human rights abuses related to political repression in Zimbabwe;

(v) to be engaged in, or to have engaged in, activities facilitating public corruption by senior officials of the Government of Zimbabwe;

(vi) to be a spouse or dependent child of any person whose property and interests in property are blocked pursuant to Executive Order 13288, Executive Order 13391, or this order;

(vii) to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, the Government of Zimbabwe, any senior official thereof, or any person whose property and interests in property are blocked pursuant to Executive Order 13288, Executive Order 13391, or this order; or (viii) to be owned or controlled by, or to have acted or purported to act for or on behalf

of, directly or indirectly, any person whose property and interests in property are blocked pursuant to Executive Order 13288, Executive Order 13391, or this order.

(b) I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to paragraph (a) of this section would seriously impair my ability to deal with the national emergency declared in Executive Order 13288, as amended, and I hereby prohibit such donations as provided by paragraph (a) of this section.

(c) The prohibitions of this section include but are not limited to (i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to Executive Order 13288, Executive Order 13391, or this order, and (ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(d) The provisions of Executive Orders 13288 and 13391 remain in effect, and this order does not affect any action taken pursuant to those orders.

**Sec. 2.** (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b)Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

**Sec. 3.** For the purposes of this order:

(a) the term ''person'' means an individual or entity;

(b) the term ''entity'' means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term ''United States person'' means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States; and

(d) the term ''Government of Zimbabwe'' means the Government of Zimbabwe, its agencies, instrumentalities, and controlled entities.

**Sec. 4.** For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that, because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that, for these measures to be effective in addressing the national emergency declared in Executive Order 13288, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

**Sec. 5.** The Secretary of the Treasury, after consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government consistent with applicable law. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

**Sec. 6**. The Secretary of the Treasury, after consultation with the Secretary of State, is hereby authorized to submit the recurring and final reports to the Congress on the national emergency declared in Executive Order 13288, as amended, and 5 expanded in this order, consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703).

**Sec. 7.** This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

THE WHITE HOUSE,
*July 25, 2008.*

[FR Doc. 08–1480
Filed 7–25–08; 8:45 am]
Billing code 3195–W8–P

# Rules and Regulations

Federal Register
Vol. 73, No. 146
Tuesday, July 29, 2008

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

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2007–29240; Directorate Identifier 2007–CE–076–AD; Amendment 39–15618; AD 2008–15–06]**

**RIN 2120–AA64**

## Airworthiness Directives; Cessna Aircraft Company Models 175 and 175A Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain Cessna Aircraft Company (Cessna) Models 175 and 175A airplanes. This AD requires you to check the airplane logbook to determine if the original engine mounting brackets have been replaced. If the original engine mounting brackets are still installed, this AD requires you to repetitively inspect those brackets for cracks and replace any cracked engine mounting bracket. After replacing all four original engine mounting brackets, no further action will be required by this AD. This AD was prompted by a report that the engine became detached from the firewall during landing on one of the affected airplanes. We are issuing this AD to detect and correct cracks in the engine mounting brackets, which could result in failure of the engine mounting bracket. This failure could lead to the engine detaching from the firewall.

**DATES:** This AD becomes effective on September 2, 2008.

On September 2, 2008, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

**ADDRESSES:** For service information identified in this AD, contact Cessna Aircraft Company, Product Support, P.O. Box 7706, Wichita, Kansas 67277; 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–2007–29240; Directorate Identifier 2007–CE–076–AD.

**FOR FURTHER INFORMATION CONTACT:** Gary Park, Aerospace Engineer, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4123; fax: (316) 946–4107.

**SUPPLEMENTARY INFORMATION:**

### Discussion

On March 31, 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 Models 175 and 175A airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on April 8, 2008 (73 FR 19017). The NPRM proposed to require you to check the airplane logbook to determine if the original engine mounting brackets have been replaced. If the original engine mounting brackets are still installed, the NPRM proposed to require you to repetitively inspect those brackets for cracks and replace any cracked engine mounting bracket. After replacing all four original engine mounting brackets, no further action would be required by the NPRM.

### Comments

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

### 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 1,218 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 |
|---|---|---|---|
| 7.5 work-hours × $80 per hour = $600 | Not applicable | $600 | $730,800 |

We estimate the following costs to do any necessary replacements:

| Labor cost | Parts cost | Total cost per airplane |
|---|---|---|
| 3 work-hours per bracket × $80 per hour = $240 per bracket. 4 brackets per airplane × $240 per bracket = $960. | $200 per bracket. 4 × $200 = $800 for all 4 brackets. | $440 per bracket. $1,760 to replace all 4 brackets. |

### 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–2007–29240; Directorate Identifier 2007–CE–076–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 the following new AD:

**2008–15–06 Cessna Aircraft Company:** Amendment 39–15618; Docket No. FAA–2007–29240; Directorate Identifier 2007–CE–076–AD.

**Effective Date**

(a) This AD becomes effective on September 2, 2008.

**Affected ADs**

(b) None.

**Applicability**

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

| Model | Serial Nos. | Year manufactured |
|---|---|---|
| (1) 175 | 55001 through 55703 | 1958. |
| (2) 175 | 55704 through 56238 | 1959. |
| (3) 175 | 28700A, 626, and 640 | 1958 and 1959. |
| (4) 175A | 691, and 56239 through 56777 | 1960. |

**Unsafe Condition**

(d) A report that the engine became unattached from the firewall during landing on one of the affected airplanes prompts this AD. We are issuing this AD to detect and correct cracks in the engine mounting brackets, which could result in failure of the engine mounting bracket. This failure could lead to the engine detaching from the firewall.

**Compliance**

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

| Actions | Compliance | Procedures |
|---|---|---|
| (1) Check the airplane logbook to determine if all four of the original engine mounting brackets have been replaced. | Within the next 30 days after September 2, 2008 (the effective date of this AD). | The owner/operator holding at least a private pilot certificate as authorized by section 43.7 may do this action. |
| (2) If you can positively determine that all four of the original engine mounting brackets have been replaced, no further action is required. | Not applicable | Make an entry into the aircraft logbook showing compliance with this portion of the AD in accordance with 14 CFR 43.9. The owner/operator holding at least a private pilot certificate as authorized by section 43.7 may do this action. |
| (3) If you cannot positively determine that all four of the original engine mounting brackets have been replaced, inspect each of the upper and lower engine mounting brackets on both the left and right sides for cracks as specified in the service bulletin. | Initially inspect within the next 12 months after September 2, 2008 (the effective date of this AD). If no cracks are found, repetitively inspect thereafter at intervals not to exceed 500 hours time-in-service (TIS) until all four of the original engine mounting brackets are replaced. | Follow Cessna Single Engine Service Bulletin SEB07–2, Revision 2, dated June 18, 2007. |
| (4) If cracks are found in any of the engine mounting brackets during any inspection required in paragraph (e)(3) of this AD, replace the cracked engine mounting bracket(s). | Before further flight after the inspection in which cracks are found. Replacing the cracked engine mounting bracket terminates the repetitive inspection required in paragraph (e)(3) of this AD only for the replaced engine mounting bracket. | Follow Cessna Single Engine Service Bulletin SEB07–2, Revision 2, dated June 18, 2007. |

| Actions | Compliance | Procedures |
|---|---|---|
| (5) To terminate the repetitive inspections required in paragraph (e)(3) of this AD, you may replace all four original engine mounting brackets. | At any time before or after the initial inspection required in paragraph (e)(3) of this AD. | Follow Cessna Single Engine Service Bulletin SEB07–2, Revision 2, dated June 18, 2007. |
| (6) Dispose of every replaced bracket following 14 CFR 43.10, paragraph (c)(6), which states the following: "Mutilation. The part may be mutilated to deter its installation in a type certificated product. The mutilation must render the part beyond repair and incapable of being reworked to appear to be airworthy". | Before further flight after the engine mounting bracket is removed for replacement. | Not applicable. |

**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: Gary Park, Aerospace Engineer, FAA, Wichita ACO, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: 316–946–4123; fax: 316–946–4107; e-mail address: *gary.park@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 Single Engine Service Bulletin SEB07–2, Revision 2, dated June 18, 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 Cessna Aircraft Company, Product Support, P.O. Box 7706, Wichita, Kansas 67277.

(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 July 15, 2008.

**Kim Smith,**

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

[FR Doc. E8–16583 Filed 7–28–08; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2008–0460; Airspace Docket No. 08–AAL–18]**

## Establishment of Class E Airspace; Venetie, AK

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action establishes Class E airspace at Venetie, AK to provide adequate controlled airspace to contain aircraft executing Standard Instrument Approach Procedures (SIAPs) and Obstacle Departure Procedures (ODPs). Two SIAPs and an ODP are being developed for the Venetie Airport at Venetie Alaska. This action establishes Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at the Venetie Airport, Venetie, AK.

**DATES:** *Effective Date:* 0901 UTC, September 25, 2008. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Gary Rolf, AAL–538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov.* Internet address: *http://www.alaska.faa.gov/at.*

**SUPPLEMENTARY INFORMATION:**

### History

On Thursday, May 29, 2008, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace upward from 700 ft. and 1,200 ft. above the surface at Venetie, AK (73 FR 30820). The action was proposed in order to create Class E airspace sufficient in size to contain aircraft while executing instrument procedures for the Venetie Airport. Class E controlled airspace extending upward from 700 ft. and 1,200 ft. above the surface in the Venetie Airport area is established by this action.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

### The Rule

This amendment to 14 CFR part 71 establishes Class E airspace at the Venetie Airport, Alaska. This Class E airspace is established to accommodate aircraft executing instrument procedures, and will be depicted on aeronautical charts for pilot reference. The intended effect of this rule is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at the Venetie Airport, Venetie, Alaska.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated

impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Venetie Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**Adoption of the Amendment**

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

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

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

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

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9R, *Airspace Designations and Reporting Points,* signed August 15, 2007, and effective September 15, 2007, is amended as follows:

*Paragraph 6005 Class E Airspace Extending Upward From 700 Feet or More Above the Surface of the Earth.*

* * * * *

**AAL AK E5 Venetie, AK [New]**

Venetie, Venetie Airport, AK
(Lat. 67°00′31″ N., long. 146°21′59″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Venetie Airport, AK, and within 3.9 miles either side of the 062° bearing from the Venetie Airport, AK, extending from the 6.4-mile radius to 10.1 miles northeast of the Venetie Airport, AK; and that airspace extending upward from 1,200 feet above the surface within a 70-mile radius of the Venetie Airport, AK.

* * * * *

Issued in Anchorage, AK, on July 17, 2008.

**Anthony M. Wylie,**

*Manager, Alaska Flight Services Information Area Group.*

[FR Doc. E8–17075 Filed 7–28–08; 8:45 am]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

## 18 CFR Part 38

**[Docket No. RM05–5–005; Order No. 676–C]**

## Standards for Business Practices and Communication Protocols for Public Utilities

Issued July 21, 2008.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Final rule.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is revising its regulations to incorporate by reference the latest version (Version 001) of certain standards adopted by the Wholesale Electric Quadrant (WEQ) of the North American Energy Standards Board (NAESB). NAESB's standards revise its Open Access Same-Time Information Systems (OASIS) business practice standards, revise four business practice standards relating to reliability issues, add new standards on transmission loading relief for the Eastern Interconnection, add new standards for public key infrastructure, and add a new OASIS implementation guide. Incorporating these revised standards will provide customers with information that will enable them to obtain transmission service on a non-discriminatory basis and will assist the Commission in supporting needed infrastructure and the reliability of the interstate transmission grid.

**DATES:** *Effective Date:* This Final Rule will become effective on August 28, 2008. Dates for implementation of the standards are provided in the Final Rule. The Director of the Federal Register has approved the Incorporation by reference of the standards addressed in the Final Rule effective August 28, 2008.

**FOR FURTHER INFORMATION CONTACT:** Ryan M. Irwin (technical issues), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6454.

Kay Morice (technical issues), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6507.

Gary D. Cohen (legal issues), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8321.

**SUPPLEMENTARY INFORMATION:**

Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

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1. The Federal Energy Regulatory Commission (Commission) is amending its regulations under the Federal Power Act (FPA) [1] to incorporate by reference the latest version (Version 001) of certain business practice standards concerning the Open Access Same-Time Information Systems (OASIS) and gas/electric coordination and four business practice standards relating to reliability issues adopted by the Wholesale Electric Quadrant (WEQ) of the North American Energy Standards Board (NAESB). These revised standards update earlier versions of these standards that the Commission previously incorporated by reference into its regulations at 18 CFR 38.2 in Order Nos. 676, 676–B, and 698.[2] In addition, in this Final Rule, the Commission is amending its regulations under the FPA to incorporate by reference NAESB's new standards on transmission loading relief (TLR) for the Eastern Interconnection and on public key infrastructure (PKI) and to add a new OASIS implementation guide.

## I. Background

2. NAESB is a non-profit standards development organization established in January 2002 that serves as an industry forum for the development of business practice standards that promote a seamless marketplace for wholesale and retail natural gas and electricity.[3] Since 1995, NAESB and its predecessor, the Gas Industry Standards Board, have been accredited members of the American National Standards Institute (ANSI), complying with ANSI's requirements that its standards reflect a consensus of the affected industries.[4]

3. NAESB's standards include business practices that streamline the transactional processes of the natural gas and electric industries, as well as communication protocols and related standards designed to improve the efficiency of communication within each industry. NAESB supports all four quadrants of the gas and electric industries—wholesale gas, wholesale electric, retail gas, and retail electric. All participants in the gas and electric industries are eligible to join NAESB and participate in standards development.[5]

4. NAESB's procedures are designed to ensure that all industry members can have input into the development of a standard, whether or not they are members of NAESB, and each standard NAESB adopts is supported by a consensus of the relevant industry segments.[6]

5. On December 26, 2007, NAESB submitted a report detailing its new and revised Version 001 business practice standards dated October 31, 2007 with minor corrections applied on November 16, 2007.[7] These standards update the standards that we incorporated by reference into our regulations in Order Nos. 676, 676–B and 698, add a new OASIS implementation guide, and add new standards to: (1) Provide additional functionality for OASIS transactions; (2) provide business practice standards for TLR in the Eastern Interconnection; and (3) provide business practice standards governing PKI.

6. On April 21, 2008, the Commission issued a Notice of Proposed Rulemaking, wherein we proposed to incorporate by reference into the Commission's regulations the WEQ Version 001 Standards (with certain exceptions) including NAESB's new standards on TLR, PKI, and the new OASIS implementation guide.[8] In response to the WEQ Version 001 NOPR, ten comments were filed.[9]

## II. Discussion

### A. Overview

7. In this Final Rule, the Commission is amending its regulations under the FPA to incorporate by reference the NAESB WEQ Version 001 standards that the Commission proposed to incorporate in the WEQ Version 001

[1] 16 U.S.C. 791a, *et seq.*

[2] *Standards for Business Practices and Communication Protocols for Public Utilities,* Order No. 676, 71 FR 26,199 (May 4, 2006), FERC Stats. & Regs., ¶ 31,216 (Apr. 25, 2006), *reh'g denied,* Order No. 676–A, 116 FERC ¶ 61,255 (2006), Order No. 676–B, 72 FR 21,095 (Apr. 30, 2007), FERC Stats. & Regs. ¶ 31,246 (Apr. 19, 2007), *Standards for Business Practices for Interstate Natural Gas Pipelines; Standards for Business Practices for Public Utilities,* Order No. 698, 72 FR 38757 (July 16, 2007), FERC Stats. & Regs., ¶ 31,251 (June 25, 2007), *order on clarification and reh'g,* Order No. 698–A, 121 FERC ¶ 61,264 (2007).

[3] *See Standards for Business Practices and Communication Protocols for Public Utilities,* Notice of Proposed Rulemaking, 72 FR 8318 (Feb. 26, 2007), FERC Stats. & Regs. ¶ 32,612, at P 3 (Feb. 20, 2007).

[4] *Id.*

[5] *Id.* P 4.

[6] *Id.* P 5.

[7] The Version 001 standards do not include modifications of existing standards or new standards to support Order No. 890, the Commission's Final Rule amending the Commission's *pro forma* Open Access Transmission Tariff, *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, 72 FR 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (Feb. 16, 2007), *order on reh'g,* Order No. 890–A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (Dec. 28, 2007), *reh'g pending,* with the exception of modifications to resales and transfers to address the Commission's rules for resales described in Order No. 890 at P 815 and n. 496.

[8] *Standards for Business Practices and Communication Protocols for Public Utilities,* Notice of Proposed Rulemaking, 73 FR 22,849 (Apr. 28, 2008), FERC Stats. & Regs. ¶ 32,633 (2008) (WEQ Version 001 NOPR).

[9] Commenters on the WEQ Version 001 NOPR, and the abbreviations used in this Final Rule to identify them are listed in the Appendix.

NOPR.[10] While many of the standards simply revise or update existing standards, some of the standards address new business practices. For example, NAESB adopted new business practice standards for resales and transfers to standardize secondary transmission service on the OASIS. These standards also standardize how resales and transfers are conducted off the OASIS. NAESB also adopted PKI standards to create greater security for business transactions taking place over the Internet. In addition, NAESB has revised and added standards establishing business practices related to the North American Electric Reliability Corporation (NERC) reliability standards.[11] For example, NAESB has adopted standards governing TLR that specify business practices for cutting transmission services in the event of a TLR, consistent with the NERC reliability standards.

8. In the NOPR, we asked for comment on differences in definitions in a few of the NERC's and NAESB's TLR standards. The comments indicate that NERC and NAESB have formed a subcommittee to ensure that their definitions are complementary in the future. We are very pleased that NERC and NAESB have taken active steps to ensure that their respective definitions are harmonized so as to ensure that these standards will operate efficiently in the future.

9. The specific NAESB standards that we are incorporating by reference in this Final Rule are:

- Business Practices for Open Access Same-Time Information Systems (OASIS), Version 1.4 (WEQ–001, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Standards 001–0.2 through 001–0.8, 001–0.14 through 001–0.20, 001–2.0 through 001–9.6.2, 001–9.8 through 001–12.5.2, and 001–A and 001–B;[12]
- Business Practices for Open Access Same-Time Information Systems (OASIS) Standards & Communication Protocols, Version 1.4 (WEQ–002, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Standards 002–0.1 through 002–5.10;
- Open Access Same-Time Information Systems (OASIS) Data Dictionary, Version 1.4 (WEQ–003, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Standard 003–0;
- Coordinate Interchange (WEQ–004, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Purpose, Applicability, and Standards 004–0.1 through 004–17.2, and 004–A through 004–D;[13]
- Area Control Error (ACE) Equation Special Cases Standards (WEQ–005, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Purpose, Applicability, and Standards 005–0.1 through 005–3.1.3, and 005–A;
- Manual Time Error Correction (WEQ–006, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Purpose, Applicability, and Standards 006–0.1 through 006–12;
- Inadvertent Interchange Payback (WEQ–007, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Purpose, Applicability, and Standards 007–0.1 through 007–2, and 007–A;
- Transmission Loading Relief—Eastern Interconnection (WEQ–008, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Purpose, Applicability, and Standards 008–0.1 through 008–3.11.2.8, and 008–A through 008–D;[14]
- Gas/Electric Coordination (WEQ–011, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Standards 011–0.1 through 011–1.6;[15]
- Public Key Infrastructure (PKI) (WEQ–012, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Recommended Standard, Certification, Scope, Commitment to Open Standards, and Standards 012–0.1 through 012–1.26.5; and
- Business Practices for Open Access Same-Time Information Systems (OASIS) Implementation Guide, Version 1.4 (WEQ–013, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Introduction and Standards 013–0.1 through 013–4.2.

10. The Commission will also require public utilities to modify their open access transmission tariffs (OATTs) to include the WEQ standards that we are incorporating by reference the next time they make any unrelated filing to revise their OATTs.[16] As we did in Order No. 676,[17] we clarify that, to the extent a public utility's OASIS obligations are administered by an independent system operator or regional transmission operator (RTO) and are not covered in the public utility's OATT, the public utility will not need to modify its OATT to include the OASIS standards.

11. NAESB approved the standards under its consensus procedures.[18] Adoption of consensus standards is appropriate because the consensus process helps ensure the reasonableness of the standards by requiring that the standards draw support from a broad spectrum of all segments of the industry. Moreover, since the industry itself has to conduct business under these standards, the Commission's regulations should reflect those

[10] Consistent with our proposal in the WEQ Version 001 NOPR, we are not revising our regulations to incorporate by reference the following standards: Standards of Conduct for Electric Transmission Providers (WEQ–009) and Contracts Related Standards (WEQ–010). In addition, consistent with our discussion in the WEQ Version 001 NOPR, we are not incorporating by reference the following WEQ–001 standards: WEQ–001–0.1, 001–0.9 through WEQ–001–0.13, WEQ–001–1.0 through WEQ–001–1.8 and WEQ–001–9.7.

[11] In Docket No. RM08–7–000, the Commission is issuing a Final Rule (being issued simultaneously with this rule) approving six modified Reliability Standards submitted to the Commission for approval by the North American Electric Reliability Corporation (NERC). The rule being issued in Docket No. RM08–7–000 is also approving NERC's proposed interpretation of five specific Requirements of Commission-approved Reliability Standards. While the Final Rule being issued in Docket No. RM08–7–000 addresses modified Reliability Standards, the Final Rule being issued in the instant proceeding (i.e., in Docket No. RM05–5–005), is addressing, among other matters, the business practice standards related to these Reliability Standards.

[12] The WEQ Version 001 package of standards includes Version 1.4 of the OASIS Standards. The reference to Version 1.4 is based on the fact that this is the fourth set of revisions to the Version 1.0 OASIS Standards that the Commission adopted in Order No. 889. Open Access Same-Time Information System and Standards of Conduct, 61 FR 21,737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 (April 24, 1996). The Version 1.4 reference appears in Standards WEQ–001, WEQ–002, WEQ–003, and WEQ–013.

[13] *See supra* note 11.

[14] *Id.*

[15] These standards are identical to the standards the Commission incorporated by reference into its regulations at 18 CFR 38.2 in Order No. 698.

[16] *See* Order No. 676, FERC Stats. & Regs. ¶ 31,216 at P 100. If the public utility makes no unrelated tariff filing by January 31, 2009, it must make a separate tariff filing incorporating these standards by that date. They are to use the language specified later in this order, *see infra* P 83. We also note that, as discussed in P 82, once the standards have become effective, utilities must abide by the standards even before they make their tariff filings incorporating the standards into their tariffs.

[17] Order No. 676, FERC Stats. & Regs. ¶ 31,216 at P 20.

[18] The WEQ's procedures ensure that all industry members can have input into the development of a business practice standard, whether or not they are members of NAESB, and each standard it adopts is supported by a consensus of the five industry segments: Transmission, generation, marketer/brokers, distribution/load serving entities, and end users. Under the WEQ process, for a standard to be approved, it must receive a super-majority vote of 67 percent of the members of the WEQ's Executive Committee with support from at least 40 percent of each of the five industry segments. For final approval, 67 percent of the WEQ's general membership must ratify the standards.

standards that have the widest possible support. In section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTT&AA), Congress affirmatively requires federal agencies to use technical standards developed by voluntary consensus standards organizations, like NAESB, as a means to carry out policy objectives or activities.[19]

*B. Issues Raised by Commenters*

12. Comments in response to the WEQ Version 001 NOPR were filed by ten commenters. While some of these comments raise concerns about specific standards, none of the ten comments filed raise any general objection to the Commission's proposal to incorporate by reference the WEQ standards into the Commission's regulations.

1. Cost of Obtaining NAESB Standards

a. Comments

13. Lafayette and LEPA are concerned that the cost of obtaining the NAESB standards impedes dissemination and understanding of the applicable requirements. Lafayette and LEPA claim that incorporating by reference standards necessarily purchased at not insubstantial costs imposes a burden on small entities, particularly where issues of interpretation of the standards arise.

b. Commission Determination

14. In Order No. 676, the Commission explained that standards organizations are permitted to charge for standards incorporated by reference into federal government regulations.[20] Under the Freedom of Information Act, to be eligible for incorporation by reference, standards must be reasonably available to the class of persons affected by their publication.[21] The NAESB standards are reasonably available to all industry members. The cost for obtaining the NAESB standards for non-members is $100 for the printed standards booklet and $300 for the CD–ROM of the standards. NAESB members can obtain the standards on-line at no cost.

15. The arguments raised here by Lafayette and LEPA are identical to those that the Commission considered and rejected in Order No. 676, which became a final determination when no party filed a request for rehearing of Order No. 676 objecting to the Commission's finding on this issue. None of the arguments raised here by Lafayette and LEPA lead us to reverse the determination that the Commission previously reached on this issue in Order No. 676, i.e., that the standards are reasonably available to all industry members. Furthermore, the Commission finds that the benefits to both the industry and the public that have resulted from the adoption of an industry-driven approach to standards development outweigh the cost of the fees required to obtain the NAESB standards. If industry participants remain concerned about the accessibility of the standards, these concerns should be addressed through the NAESB process.

2. Interpretation of NAESB Standards and OATT Principles

a. Comments

16. LEPA requests that the Commission clarify that it will interpret NAESB standards in accordance with the principles underlying the OATT. In particular, LEPA requests that the Commission clarify that it is not, by incorporating the NAESB standards, intending to override settled matters of contract law or the Commission policies underlying open access transmission service.

b. Commission Determination

17. The NAESB standards are incorporated by reference in the regulations and therefore must be followed to the same extent as other regulations and policies of the Commission. The Commission's regulations require compliance with both the *pro forma* OATT (18 CFR 35.28) and the NAESB standards that the Commission has incorporated by reference (18 CFR 38.2) and that must be included in the utility's OATT. If LEPA is concerned that there are inconsistencies between specific NAESB standards and the Commission's open access transmission service regulations, it can seek an interpretation of the standards from NAESB and can make appropriate filings with the Commission.

3. Weighing Costs and Benefits of Proposed Standards

a. Comments

18. The Midwest ISO is concerned that the cost of complying with and implementing some of the WEQ–001 NAESB standards (for example, standards WEQ–001–9.4.3 [22] and WEQ–001–12[23]) will be greater than the benefits that will result. The Midwest ISO believes it would be unreasonable and unduly discriminatory to adopt a business practice that results in substantial compliance costs while producing only negligible benefits for a particular NAESB segment or a group of industry participants and states that the Commission has the authority to determine what costs are considered just and reasonable through rulemaking. Thus, Midwest ISO is not, at this time, requesting a waiver of specific standards (such as WEQ–001–9.4.3 and WEQ–001–12) but is asking that the Commission provide a waiver option and that NAESB be directed to review this entire topic. The Midwest ISO wants consideration to be given to the relative costs and benefits of the standards for entities such as the Midwest ISO or to allow affected entities to seek waivers.[24]

b. Commission Determination

19. NAESB's stakeholder process for adopting standards ensures that an industry consensus is necessary before any standard is approved. This process helps to ensure that all approved standards are beneficial to the industry. However, as we explained in order No. 676, each public utility that wants a waiver of any standard we are incorporating by reference in this Final Rule may file a request for waiver, supported by the reasons it believes a waiver is warranted.[25] To the extent that implementation of certain standards will result in substantial compliance costs for small industry participants, we have in the past considered waivers of extensions of compliance obligations where granting such requests would not noticeably diminish the expected benefits to the rest of the industry that would derive from compliance with the standard. Any such waiver requests should specifically detail the expected compliance costs and the reasons why a waiver would not diminish the overall expected benefits from compliance with the standard. Therefore, we will incorporate these standards in our regulations, as proposed in the WEQ Version 001 NOPR.

4. Implementation Date for WEQ–001

a. Comments

20. PJM argues that in order to implement the Resale and Transfer functionality required by WEQ–001,

[19] Pub. L. No. 104–113, 12(d), 110 Stat. 775 (1996), 15 U.S.C. 272 note (1997).

[20] Order No. 676, FERC Stats. & Regs. ¶ 31,216 at P 97.

[21] 1 CFR 51.7(a)(2)–(4).

[22] WEQ–001–9.4.3 provides that "[I]f the TP determines that only a portion of the requested capacity can be accommodated, the TP shall extend to the TC that portion of the capacity (i.e. , partial service) that can be accommodated through a COUNTEROFFER. An example is shown in Appendix B."

[23] WEQ–001–12 is the set of standards for transfers.

[24] Midwest ISO Comments at 5–9.

[25] Order No. 676, FERC Stats. & Regs. ¶ 31,216 at P 79.

PJM will have to develop the internal business documentation, develop the software modifications, and test those modifications. To provide sufficient time to implement the necessary scheduling and settlements application changes, PJM requests an implementation date of January 31, 2009 or later for WEQ–001. NYISO agrees with PJM's comment and requests that the Commission institute an effective date of January 31, 2009 or later for compliance with WEQ–001.

b. Commission Determination

21. In order to allow adequate time to implement the new Resale and Transfer standards in WEQ–001, the Commission will provide for an implementation date for the WEQ–001 standards of January 31, 2009, as requested.

5. WEQ–001–0.5

22. WEQ–001–0.5 defines identical service requests as ''those OASIS transmission service requests that have exactly the same values'' for certain OASIS template Data Elements. The standard also states, ''Service requests where any combination of PATH, POR and/or POD represent exactly the same commercial transmission elements shall be considered as 'having the exact same value.' ''

a. Comments

23. Bonneville is concerned that no other OASIS template Data Elements are subject to the qualifying language ''having the exact same value'' included in the Data Elements of PATH, POR, and POD. Bonneville seeks clarification that ''identical service requests'' includes multiple transmission service requests that have substantially similar start times and stop times even if those elements are not exactly the same.

b. Commission Determination

24. Bonneville's requested clarification would change the meaning of this standard. The standard as adopted by NAESB requires that ''identical service requests'' must have ''exactly the same values'' for start time and stop time, not ''substantially similar start times and stop times.'' Bonneville has not provided us with sufficient evidence that the standard needs to be modified as it suggests. If Bonneville believes the standard should be modified, it should, as we stated in Order No. 676, seek such a change through NAESB.[26]

6. WEQ–001–1.5(d)

25. WEQ–001–1.5(d) provides, in part:

In the event that an OASIS user's grossly inefficient method of accessing an OASIS node or obtaining information from the node seriously degrades the performance of the node, a Responsible Party may limit a user's access to an OASIS node without prior Commission approval.

a. Comments

26. Bonneville asserts that the Responsible Party should have the right to determine whether the inefficient access of an OASIS node ''seriously degrades'' the performance of the node and recommends that WEQ–001–1.5(d) be revised.

b. Commission Determination

27. We are not incorporating WEQ–001–1.5(d) by reference in our regulations, because the standard is one of several that restate the Commission's regulations, in this case § 37.5(d) of the Commission's regulations. As we stated in Order No. 676, the proper function of the NAESB business practice standards is to provide business practice standards that implement the Commission's regulations, not merely restate them.[27]

7. WEQ–001–11 (Resales)

28. WEQ–001–11 states:

Any Transmission Customer (Reseller) shall have the right to offer for sale the scheduling rights associated with the points of delivery and receipt of a Firm or Non-Firm Point-To-Point Transmission Service reservation (*i.e.* Parent Reservation). Any Eligible Customer (Assignee) may request to purchase scheduling rights from the Reseller.

a. Comments

29. Duke argues for the modification of WEQ–001–11, which establishes a two-party transaction on OASIS between the reseller and the assignee for resale transactions. Duke claims that, because the transmission provider is permitted to annul the transaction if the assignee does not execute the required service agreement, an inappropriate burden is placed on the transmission provider to intervene in a transaction to which it is not a party. Duke recommends that this standard be revised to provide for a three-party transaction, similar to the one presented in WEQ 001–12.1.2.

30. In addition, Duke asserts that, although WEQ–001–11 provides for the resale of both Firm Point-to-Point and Non-Firm Point-to-Point scheduling rights and permits the use of a blanket service agreement, the form of Service Agreement for resales that appears in the pro forma OATT refers only to firm sales. Duke suggests that this form may require revision to include non-firm sales.

31. Duke also requests guidance, in the form of examples of an Electric Quarterly Report (EQR) filing, of multiple resale transactions under a blanket agreement. Alternatively, Duke suggests that the Commission could rescind its requirement that the transmission provider report resale transactions in its EQR filings and substitute a requirement that summary reports showing a compilation of OASIS Resale reservations be posted quarterly on OASIS.

b. Commission Determination

32. The standard Duke refers to as a model for revising the standards for resales to provide for a three-party transaction[28] specifies that a transfer must be agreed to by the reseller, the assignee and the transmission provider. Transfers are distinct from resales because transfers result in a full conveyance of rights and obligations from the original transmission customer to the assignee. In the case of both a resale and transfer, however, the assignee must first execute a service agreement with the transmission provider.[29] In both instances, the transmission provider therefore has an opportunity to ensure that the assignee meets the transmission provider's credit requirements and is otherwise committed to abide by the terms and conditions of the transmission provider's OATT governing the reassignment of transmission service.

33. The Commission considers it reasonable for the industry to reach consensus through the NAESB process to require transaction-specific approval by the transmission provider for transfers, but not for resales. In a resale, the original transmission customer's service agreement remains in place and any default by the assignee does not relieve the original customer of its obligation to pay for service.[30] That may not be the case in a transfer[31] and, therefore, it is reasonable to provide transmission providers with additional protection in the form of the right to review and approve the transfer. Therefore, we see no need to modify the standards for resales as suggested by Duke and will incorporate these

[26] *E.g.,* Order No. 676, FERC Stats. & Regs. ¶ 31,216 at P 67.

[27] *E.g., id.* P 72 and 74.

[28] WEQ–001–12.1.2 states that ''[t]he Transfer must be agreed to by the FOTC [Financially Obligated Transmission Customer], the Assignee, and the TP. The Conveyance of Transfer rights is not complete until the TP approves the transfer. The Transmission Provider shall not unduly withhold such approval.''

[29] See Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 425.

[30] *See id.*

[31] *See id.* P 425, n.165.

standards by reference as we proposed in the WEQ Version 001 NOPR.

34. In addition, Duke's concern regarding the reference to firm sales in the title of the Form of Service Agreement in Attachment A–1 of the *pro forma* OATT has been resolved by the Commission in Order No. 890–A. There the Commission revised Attachment A–1 to the *pro forma* OATT to clarify that the use of a blanket service agreement for resales is similar to the use of a blanket service agreement for primary capacity.[32] The specification sheet for long-term reassignments was retained, consistent with the use of a specification sheet for long-term sales of primary capacity.[33]

35. Finally, Duke's comments on the transmission provider's EQR obligations are beyond the scope of this rulemaking. The Commission adopted the EQR reporting requirement for reassigned capacity in the Order No. 890 proceeding, in which Duke actively participated, and Duke has failed to justify here rescission of that reporting requirement.[34] Should Duke or any other transmission provider have particular concerns regarding how to comply with its reporting obligation, it should bring the matter to the Commission's attention for resolution.[35]

8. WEQ–001–11.2.1

36. WEQ–001–11.2.1 states:

The Assignee shall be obligated directly to the TP for any usage-based charges and overuse penalties resulting from its subsequent use of the Resale.

a. Comments

37. The Midwest ISO is concerned that WEQ–001–11.2.1 introduces a high risk of financial exposure to the transmission provider in the event that the assignee defaults on payment. The Midwest ISO believes that the RTO should not have to bear the financial risk associated with an assignee defaulting on usage-based market charges. Furthermore, the Midwest ISO is concerned that this standard does not address the allocation and ownership of Financial Transmission Rights/Auction Revenue Rights. To address these concerns, the Midwest ISO recommends that WEQ–001–11 be revised to include prior validation requirements, similar to those mandated by the Commission in Order Nos. 890 and 890–A in the context of service agreements. Alternatively, the Midwest ISO requests clarification and assurance that those standards are to be interpreted such that transmission providers will not be held liable in the event of nonperformance of a resale obligation.

b. Commission Determination

38. The Commission does not interpret WEQ–001–11.2.1 to expose a transmission provider to high financial risks in an event an assignee defaults on usage-based charges. At least 24 hours prior to any resale an Assignee must execute a service agreement with the Transmission Provider under WEQ–001–11.1.7. The Commission has held that this service agreement is a requirement meant to commit the Assignee to abide by the terms and conditions of the Transmission Provider's OATT governing the reassignment of transmission service.[36] The assignee therefore must comply with all creditworthiness requirements required for signing a service agreement. If an Assignee were to default on its usage-based charges or overuse penalties, it would still be subject to its service agreement with the Transmission Provider, and the Transmission Provider would have access to any collateral or other assurances required under its OATT. Furthermore, Midwest ISO itself points out the Commission's policy in Order No. 890–A that allows a transmission provider to take action against the Assignee as it would any other default under the *pro forma* OATT, as well as transfer to the reseller its legal rights to enforce the Assignee's payment obligations.[37] We find that these procedural protections, coupled with NAESB standard WEQ–001–11.2.1.1, which grants the Transmission Provider the right to nullify the Resale in the event the service agreement is not executed, address the concerns of Midwest ISO regarding its comments on financial exposure and the request for prior validation. The Commission will therefore incorporate this standard into the Commission's regulations by reference as we proposed in the WEQ Version 001 NOPR.

9. WEQ–001–11.3 Through WEQ–001–11.3.3

39. Standards WEQ–001–11.3 through WEQ–001–11.3.3 describe the service attributes and timing of resales. These standards read as follows:

WEQ–001–11.3:

A Resale shall retain all the same transmission service attributes, transmission service priority, and points of delivery and receipt of the Parent Reservation. For example, if one hour of a Monthly Firm reservation is Resold, the Resale reservation shall be a Monthly Firm Resale reservation lasting one hour.

WEQ–001–11.3.1:

The TP's OASIS shall not impose any restrictions regarding the timing of a Resale, either submission times or service duration, except that the start and stop times of the Resale must be within the bounds of the Parent Reservation(s) that are designated as supporting the Resale.

WEQ–001–11.3.2:

The Reseller shall have the right to aggregate multiple reservations into a single Resale provided that each reservation being aggregated is of exactly the same service attribute, priority, product and point of receipt/point of delivery.

WEQ–001–11.3.3:

A Resale must be in whole hours, beginning at the top of the hour, and within the start and stop time(s) of the Parent Reservation(s).

a. Comments

40. Southern Companies recommends that the Commission reject the portions of WEQ–001–11.3 through WEQ–001–11.3.3 that seem to require transmission providers to provide hourly firm service to assignees. Southern Companies argues that these provisions are inconsistent with the provisions of Order No. 890, the *pro forma* OATT, and the Commission's regulations.

41. First, Southern Companies states that, in Order No. 890, the Commission determined that transmission providers are not required to provide hourly firm service; it argues, therefore, that portions of WEQ–001–11.3 through WEQ–001–11.3.3 are in conflict with Order No. 890 and therefore should be rejected. Second, Southern Companies states that, in the *pro forma* OATT, the minimum term of firm point-to-point transmission service that is required to be offered is one day.

42. Lastly, Southern Companies points out that the Commission's regulations mandate that a reseller choosing to use OASIS to offer for resale transmission capacity must post relevant information on the same OASIS as used by the transmission provider from whom the reseller purchased the

[32] *Id.* P 424.

[33] *See id.,* n.164.

[34] *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 817; Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 423 and n.162; Order No. 890–B, 123 FERC ¶ 61,299 at P 84 (2008).

[35] The Commission recently clarified and expanded the opportunities for regulated entities and others to obtain guidance regarding compliance with the rules and regulations administered by the Commission. *See Obtaining Guidance on Regulatory Requirements,* 123 FERC ¶ 61,157 (2008).

[36] Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 423.

[37] *Id.* n.166.

transmission capacity and in the same manner that the transmission provider posts its own information. Southern Companies argues that, if a reseller is allowed to sell hourly firm service when the transmission provider does not offer it, then the reseller will be unable to comply with the Commission's regulations regarding the posting of relevant information because the transmission provider will not have display pages, tables, etc., that are designed for hourly firm service.

43. Duke recommends against the adoption of WEQ–001–11.3.2 due to the administrative difficulties that the aggregation of multiple resale reservations could create. Duke argues that the value of this practice to its customers is nominal relative to the billing complexities that could be involved.

b. Commission Determination

44. A consensus of the electric industry has found that allowing customers the ability to resell scheduling rights on less than daily basis will increase the flexibility of resales and better serve the needs of customers. We agree that providing such enhanced flexibility is desirable.

45. We also find no inconsistency between these standards and Order No. 890, the *pro forma* OATT, or the Commission's regulations. Southern Companies appears to be confusing its obligation to offer transmission service with the resale of scheduling rights by customers that have previously reserved service. When a customer reserves daily transmission service, it is given the right to schedule the use of transmission capacity up to the amount reserved in every hour of that day (subject to OATT scheduling deadlines). The customer is not required to schedule use in each hour of the day and, in fact, could use as little as a single hour of the reserved service.

46. The assumption of a customer's scheduling rights by an assignee for one or more hours does not mean the transmission provider is offering hourly service to the assignee. As the Commission explained in Order No. 890–A, the reassignment of transmission capacity simply results in the reseller obtaining the right to schedule the reserved capacity during the period of the reassignment, consistent with the original customer's reservation.[38] Indeed, permitting such resales is consistent with the Commission's determination in Order No. 888 that ''a public utility's tariff must explicitly permit voluntary reassignment of all *or a part of* a holder's firm transmission capacity rights to any eligible customer.'' [39] We therefore find that WEQ–001–11.3.1 and WEQ–001–11.3.3 are not inconsistent with Order Nos. 888 and 890 and provide customers with additional flexibility to obtain capacity in competition with the transmission provider.[40]

10. WEQ–001–11.5.3

47. WEQ–001–11.5.3 states:

All resales must include the price of the Resale. Price units shall always be $/MW–Hour reserved.

a. Comments

48. Southern Companies recommends that the Commission reject WEQ–001–11.5.3. Southern Companies claims that forcing resales to be converted to an hourly price is meaningless, particularly when transmission providers are not required to provide hourly firm service. Furthermore, Southern Companies claims that this provision is inconsistent with both the pro forma OATT and the Commission's regulations. Reassigned service is governed by the transmission provider's OATT, and Southern Companies claims that in order to be consistent with the transmission provider's OATT, the price of a resale should be based upon the increments of service that are set forth in that OATT and agreed to by the reseller and assignee. Furthermore, Southern Companies cites section 23.1 of the *pro forma* OATT, which mandates that assignees receive the same services and priority of service as did the reseller, and that the assignee is subject to all the terms and conditions of the tariff. Lastly, the Commission's regulations state that the transmission provider must post OASIS information for third parties in the same way that it posts its own information. Southern Companies argues that the transmission provider would be unable to comply with this regulation if WEQ–001–11.5.3 is adopted and the transmission provider does not offer hourly firm service because the transmission provider would be required to post prices in units different from the units in which it reports its own prices if they are based on the increments of service provided. Southern Companies notes that they raised these concerns throughout the NAESB process of developing the standards.

49. Bonneville argues that because resales may be of different increments of service, the pricing for the different increments must be permitted to vary to reflect these increments. Furthermore, Bonneville claims that the term ''Price units'' in proposed WEQ–001–11.5.3 is inconsistent with the definition of ''PRICE_UNITS'' in the OASIS Data Dictionary, WEQ–003–0. Bonneville recommends that WEQ–001–11.5.3 read as follows:

All resales must include the price of the Resale. *PRICE_UNITS* shall *be specified (e.g., $/MWhr, $/MWmonth, etc.).*

50. Duke supports the adoption of WEQ–001–11.5.3. Duke claims that this requirement both simplifies the calculation of bills and provides the Commission with a consistent price format for the comparison of resale transactions. If the pricing methodology prepared by NAESB is not acceptable, then Duke would support a requirement that the total resale price be included in the reservation, with the Transmission Provider billing the total amount to the Assignee in one bill and crediting the total amount to the Reseller in a single credit, regardless of the duration of the resale reservation.

b. Commission Determination

51. The Commission in Order No. 890 did not address whether the price for resales must be stated in a particular unit of measure, such as $/MW–Hour. Instead, the Commission left to negotiating parties the determination of the price for a particular reassignment of transmission capacity. It is not unreasonable for the industry to have reached consensus that the price of resales should be stated in $/MW–Hour. The Commission agrees with Duke that having a consistent price format for all

[38] Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 425.

[39] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 at 31,696 (1996), *order on reh'g*, Order No. 888–A, 62 FR 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F. 3d 667 (D.C. Cir. 2000) *(TAPS* v. *FERC)*, *aff'd sub nom. New York* v. *FERC*, 535 U.S. 1 (2002) (emphasis in original; footnotes omitted).

[40] In the event of an hourly assignment of scheduling rights, the assignee would be subject to the same scheduling deadlines stated in the transmission provider's OATT as applicable to the reseller, *e.g.*, 10 a.m. of the day prior to commencement of service if the transmission provider does not otherwise offer hourly firm service. Recently, in Order No. 890–B, the Commission directed transmission providers to include in their EQRs the rate that would have been charged under their OATTs had the assignee purchased primary service from the transmission provider for the term of the reassignment. *See* Order No. 890–B at P 84. If the transmission provider does not offer hourly firm service, the tariff rate that would be reported for an assignee receiving hourly scheduling rights would be the rate for daily service.

resale transactions will make it easier for the Commission to compare such transactions to each other. This requirement also will improve the transparency and openness of resales of transmission service, allowing potential reassignment customers to better understand the comparative value of assigned transmission service. Therefore, we will incorporate this standard by reference as we proposed in the WEQ Version 001 NOPR.

52. Neither Southern Companies nor Bonneville stated a compelling reason as to why the Commission should not accept the proposed NAESB standard. It is the obligation of the parties negotiating the reassignment to state the price for the transaction and, pursuant to this standard, all such prices will be in a consistent format. We recognize that this may result in the posting of Resale prices that are not in the same unit of measure as the original reservation under which the Resale is accomplished. Nothing in Order No. 890 or our regulations prohibits this approach, which we conclude will permit customers to better compare prices for different transactions on the same transmission system, as well as transactions across transmission providers.

11. Resales of Conditional Long Term Firm Reservations

53. WEQ–001–11.1.7 states that ''[t]he Assignee must execute a service agreement with the Transmission Provider that will govern the provision of reassigned service no later than twenty-four hours prior to the scheduling deadline applicable for the commencement of the reassigned service. The Transmission Provider may establish a blanket service agreement to include Resale transactions.''

54. WEQ–001–11.7 states that ''[i]n the event a Transmission Provider requires that a higher priority, competing transmission service request must displace all or a portion of a confirmed lower priority reservation, the TP shall have the right to nullify any Resales that reference the displaced reservation as their Parent.''

55. WEQ–001–11.7.1 states that ''[o]nce the conditional window on the Parent Reservation has closed, Resales for firm service are not subject to displacement in accordance with Standard WEQ–001–11.''

a. Comments

56. Duke strongly recommends that the resale of Conditional Long Term Firm reservations be prohibited so that transmission providers can effectively manage these reservations and assure the reliable operation of the transmission grid. In the event that the resale of these reservations is permitted, Duke argues that they should only be permitted during periods in which the reservations are unconditionally firm and such resales should be restricted to the remaining portion of the biennial reassessment period, where applicable.

57. Furthermore, Duke argues that although WEQ–001–11.1.7 permits the use of blanket service agreements, if the resale of Conditional Long Term Firm reservations is allowed, then the use of a blanket service agreement as specified in WEQ–001–11.1.7 would not be permitted under Order No. 890. Duke states that, pursuant to Order No. 890, transmission providers and assignees are to execute a non-conforming Service Agreement for resales that specifies either specific system conditions during which conditional curtailment may occur or annual number of curtailment hours during which conditional curtailment may occur.[41]

58. Bonneville also recommends that the Commission adopt a provision at WEQ–001–11.7 preventing transmission customers from initiating any resale during the conditional window because permitting this practice could allow resales initiated prematurely to impose risks on all parties involved in the transaction and could lead to inefficiencies in the resale market.

b. Commission Determination

59. As the Commission explained in Order No. 890–A, and reiterates above, the reassignment of transmission capacity results in the reseller obtaining the right to schedule the reserved capacity during the period of the reassignment consistent with the original customer's reservation.[42] This applies equally to long-term firm point-to-point service using the conditional firm option adopted in Order No. 890. We conclude that the NAESB standards adequately address resales of conditional firm transactions. WEQ–001–11.1 makes clear that confirmation of a resale ''shall also convey any outstanding conditions that may exist on the Parent Reservation (such as conditional approval pursuant to section 13.2(ii) of the OATT).'' WEQ–001–11.7 and WEQ–001–11.7.1 also address the transmission provider's right to nullify resale transactions when a higher priority transaction displaces a lower priority transaction and when those rights apply to conditional firm transactions.

60. Since these standards permit resales of conditional firm transactions and give the transmission provider the right to nullify resales of displaced transactions, we find that the standards address the concerns of Duke and Bonneville about the effective management of conditional firm transactions. If Duke and Bonneville believe that these standards are not workable upon implementation, they may submit a request to NAESB to modify these standards based on their experience with these standards.

61. The Commission finds no reason to reject the industry's decision to permit a transmission provider to develop a blanket service agreement for resales of conditional firm service. Order No. 890 required only that an original conditional firm service contract would be nonconforming in every case, and thus, would be required to be filed with the Commission for approval. However, we see no reason to prohibit the use of a blanket service agreement for the resale of conditional firm service, since the resale only provides the right to schedule service consistent with the original transmission customer's reservation, which will be on file with the Commission. We agree with NAESB that the development of a blanket agreement for resales is beneficial because it will help encourage and expedite the processing of resales.

12. WEQ–004 (Coordinate Interchange) and WEQ–008 (Transmission Loading Relief—Eastern Interconnection)

62. WEQ–004 provides the NAESB business practice standards for coordinate interchange. These standards are designed to facilitate the transfer of electric energy between entities responsible for balancing load and generation.

63. WEQ–008 provides the NAESB business practice standards to complement the transmission loading relief procedures needed for curtailment and reloading of interchange transactions to relieve overloads on transmission facilities modeled for the eastern interconnection.

a. NOPR Requests for Comments

64. In the WEQ Version 001 NOPR, the Commission raised three questions concerning reliability-related standards and sought comments in response to these questions. First, as to WEQ–004, the Commission asked whether passive approval (also referred to as confirmation by silence) is appropriate for a business practice intended to

[41] Duke cites Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 960.

[42] Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 425.

complement a reliability standard.[43] Second, the Commission also asked a question about e-tagging.[44] Third, as to WEQ–008, the Commission asked whether the differences in NAESB and NERC definitions are significant and whether a single definition for reliability-related terms should be adopted in future standards.[45]

b. Comments

65. In response to the Commission's request for comments regarding whether confirmation by silence is appropriate for a business practice intended to complement a reliability standard, NERC claims that it does not create a reliability impact and that the NAESB Standard does not alter the NERC Reliability Standards requirements, which require active response by the Balancing Authority and Transmission Service Provider.

66. In response to the Commission's request for comments on whether the differences in the definition used by NAESB and NERC are significant and whether a single definition for reliability-related terms should be adopted in future standards, NERC asserts that the definitions do not affect the industry's ability to successfully implement the standards as written and reports that it is working with NAESB to develop more in-depth coordination procedures to ensure that definitions are consistent between both organizations. This task has been assigned to a newly formed Standards Committee Process Subcommittee.

67. Regarding the Commission's request for comment concerning the differences in the reliability-related definitions used by NAESB and NERC, the Midwest ISO states that it will rely on an effort undertaken by NAESB to resolve these differences and assumes that the Commission will direct that NAESB and NERC use the same definitions. SPP concurs with and endorses the comments submitted by the Midwest ISO on whether the differences in reliability-related definitions are significant and whether single definitions should be adopted in future standards.

68. The Midwest ISO is concerned that the inclusion of the Regional Difference in Appendix D of WEQ–008 Transmission Loading Relief—Eastern Interconnection results in overlapping requirements, since the same Regional Difference appears as Section E in the NERC TLR Standard IRO–006–04—Reliability Coordination—Transmission Loading Relief. NERC retains responsibility for the Regional Difference Section of the NERC TLR Standard (section E) while a field test permitting PJM, Midwest ISO, and SPP market flows to use a three percent threshold is being conducted; however, when the field test and an evaluation of the results are completed and a recommendation on the proper curtailment threshold that will be included in the Regional Difference is approved based on the results, the Regional Difference will be transferred to NAESB and removed from the NERC TLR Standard. In Order No. 693,[46] the Commission stated that it would neither approve nor remand the waiver of the regional difference to NERC TLR Standard IRO–006–03 while the field test was being conducted, and the Midwest ISO requests that the Commission take a similar action regarding WEQ–008 Appendix D, neither approving it nor remanding it while the field test is being conducted.

c. Commission Determination

69. As stated above, NAESB and NERC have agreed to establish a subcommittee to ensure that their definitions are consistent. Since all industry segments indicate that any existing differences in terms used by NAESB and NERC will not affect reliability or the ability to implement these standards, we will incorporate these standards.[47]

70. While we will adopt the Regional Differences Section in Appendix D of the WEQ–008 TLR—Eastern Interconnection standards, we will not require it to be implemented until after the completion of the field tests within PJM, Midwest ISO, and SPP. Currently, the Regional Differences Section is housed in the NERC Reliability Standards and will remain so until the completion of the field tests.[48] NERC states that, at that time, Section E of the NERC TLR Standard will be deleted from its Reliability Standards and transferred to the NAESB Business Practice Standards.

71. The Commission is mindful of Midwest ISO's concern regarding overlapping requirements, and therefore will postpone the implementation of Appendix D until after the field tests are over and NERC has transferred its responsibility to NAESB. This transfer will leave the responsibility for the Regional Differences Section in only one party's hands at a given time, and alleviate Midwest ISO's concerns.

72. Regarding the Commission's request for comments concerning passive approval, NERC replied that it does not believe NAESB's standard allowing confirmation by silence creates a detrimental effect on reliability. In addition, NAESB's standard does not alter or interfere with any of the reliability requirements for the NERC Reliability Standard. Therefore, we will accept the NAESB standard.

13. WEQ–012–1.5 (Public Key Infrastructure)[49]

73. WEQ–012–1.5 provides that the WEQ authorized certification authority may impose a ''reasonable fee'' for the issuance or renewal of certificates and other services and may not impose a fee to revoke certificates, for access to the subscriber's certificate, or for access to an authorized certification authority's published certificate revocation list.[50]

a. Comments

74. The Midwest ISO is concerned about the provision in WEQ–012–1.5, stating that the provisions allowing a ''reasonable fee'' for the issuance or renewal of certificates and other services could lead to arbitrary fees and undue discrimination, because it: does not define what constitutes a ''reasonable fee,'' does not establish a methodology for determining whether or not a fee is reasonable, and does not establish what entity has the responsibility of deciding what constitutes a reasonable fee. Furthermore, the Midwest ISO is concerned that the standard does not identify how often certificates must be renewed, which results in ambiguity regarding how often fees would be charged. Lastly, the Midwest ISO is

[43] WEQ Version 001 NOPR at P 21.

[44] *Id.* P 20. No comments in response to this question were received.

[45] *Id.* P 28.

[46] Mandatory Reliability Standards for the Bulk-Power System, 72 FR 31,452 (June 7, 2007), FERC Stats. & Regs. ¶ 31,242, at P 989 (Mar. 16, 2007).

[47] In Docket No. RM08–7–000, the Commission has deferred action on the proposed NERC TLR Reliability Standards. However, there is no need for us to defer action on WEQ–008. Thus, we will proceed to incorporate WEQ–008 by reference in this Final Rule. If developments concerning NERC's TLR Reliability Standards necessitate revisions to these standards, we are relying on NAESB, in coordination with NERC, to adopt any needed revisions.

[48] Pursuant to section E of the NERC TLR Standard.

[49] As we explained in the WEQ Version 001 NOPR, FERC Stats. & Regs. ¶ 32,633, n.23, the PKI mechanism involves the use of extremely long prime numbers, called keys, to provide assurance that communications are properly protected. Two keys are involved—a private key, which only the user has access to, and a public key, which can be accessed by anyone. The two keys work together so a message scrambled with the private key can only be unscrambled with the public key and vice versa. The more digits in these keys, the more secure the process. Similar to proving an identity through a handwritten signature offline, a digital signature is used to prove an identity online.

[50] Defined in WEQ–012–0.7.

concerned that because the standard allows for imposing ''reasonable fees'' for other services, additional fees may be charged. To address these concerns, the Midwest ISO requests that the Commission direct NAESB to modify WEQ–012–1.5 to remove the ambiguities and recommends that all fees charged by a NAESB WEQ Certification Authority be approved by the Commission.

b. Commission Determination

75. The Commission will incorporate the standard. In order to implement PKI encryption companies are required to use a Certification Authority, and the company can choose among potential certifiers who offer electronic certificates that meet the NAESB PKI Standards.[51] Competition among the Certification Authorities should ensure that fees are reasonable. In any event, the fees charged by a Certification Authority for PKI are not subject to the Commission's jurisdiction, because they are not fees for the transmission or sale at wholesale of electric energy in interstate commerce.

14. Requests for Modifications to NAESB Standards

a. Comments

76. In their comments, Bonneville[52] and Duke[53] request modifications to numerous NAESB standards, and suggests the addition of two new standards. Bonneville's comments do not object to the incorporation by reference of these standards, nor allege that the standards are inconsistent with Commission policy, but in main part offer editorial suggestions that in Bonneville's view will make the standards clearer or clarify how they will play out in specific situations. For example, Bonneville's Attachment A suggests a number of revisions that attempt to make certain standards clearer by adding qualifications already implicit in NAESB's adopted standards.[54]

b. Commission Determination

77. The Commission will not modify the various NAESB standards as requested by Bonneville and Duke. The task before the Commission in this Final Rule is to review the standards recently adopted by NAESB, and to decide whether to incorporate those standards by reference into the Commission's regulations as mandatory standards that must be complied with by public utilities. Our task is not to rewrite NAESB's standards to make editorial revisions and enhancements, even if commenters correctly observe and point out some improvement that could be added to the standards. If the Commission finds NAESB's standards inadequate or finds that they conflict with the Commission's policies or regulations, we will decline to incorporate that standard by reference into our regulations and on occasion we may provide NAESB with guidance as to revisions NAESB might make to that standard to make it acceptable to the Commission.

78. While it is appropriate for commenters who object to the Commission's incorporation by reference of a standard to raise those arguments with the Commission, Bonneville should direct any proposed modifications or additions to NAESB's standards to NAESB for consideration. Following this procedure, Bonneville's proposed changes can receive proper consideration from all industry segments before they are acted on.[55]

79. Duke also suggests that WEQ–001–12 be modified so as to revise the procedure established in Order No. 890–A for the pricing of reassigned transmission. But, as Duke concedes, WEQ–001–12 does not address the issue of pricing reassigned transmission. Duke is attempting to use the adoption of WEQ–001–12 as a pretext to collaterally attack an issue already determined by Order No. 890–A.

## III. Implementation Dates and Procedures

80. The standards incorporated by reference in this Final Rule must be implemented by October 1, 2008, with the following exceptions:

(1) The reliability related standards (WEQ–004 Coordinate Interchange, WEQ–005 Area Control Error (ACE) Equation Special Cases, WEQ–006 Manual Time Error, WEQ–007 Inadvertent Interchange Payback, and WEQ–008 Transmission Loading Relief—Eastern Interconnection) are required to be implemented by the later of the effective date of the Final Rule in RM08–7-000 or the effective date of this Final Rule;

(2) WEQ–001 OASIS Standards are required to be implemented by January 31, 2009; and

(3) Appendix D to the WEQ–008 Transmission Loading Relief—Eastern Interconnection standards need not be implemented until NERC completes the field testing.

81. To reduce the burden on filers, as we did in Order No. 676, although public utilities must fully comply with the requirements of this Final Rule in accordance with the implementation schedule above, we are not requiring public utilities immediately to file revised OATTs incorporating these changes.

82. The Commission is also requiring, consistent with our regulation at 18 CFR 35.28(c)(vi), each electric utility to revise its OATT to include the Version 001 WEQ standards we are incorporating by reference herein. For standards that do not require implementing tariff provisions, the Commission will allow the utility to incorporate the WEQ standard by reference in its OATT. We are not, however, requiring a separate tariff filing to accomplish this change. Consistent with our prior practice, we will allow public utilities the option of including these changes as part of an unrelated tariff filing.[56] However, consistent with our prior practice, as of the implementation dates above, public utilities must abide by these standards even before they update their tariffs to incorporate these changes.

83. If adoption of these standards does not require any changes or revisions to existing OATT provisions, public utilities may comply with this rule by adding a provision to their OATTs that incorporates the standards adopted in this rule by reference, including the standard number and Version 001 to identify the standard. To incorporate these standards into their OATTs, public utilities must use the following language in their OATTs:

• Business Practices for Open Access Same-Time Information Systems (OASIS), Version 1.4 (WEQ–001, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007)

[51] Certification Authorities are no different than other entities which public utilities must hire to comply with Commission or other government regulations. For instance, the Commission requires companies to produce audited financial statements, and companies therefore must pay fees to produce such statements. Midwest ISO's request for the Commission to regulate Certification Authority fees is akin to asking the Commission to approve the fees certified public accountants charge for preparing financial statements.

[52] Specifically, Bonneville suggests revisions to WEQ–001–8.3, WEQ–013–2.1, WEQ–013–2.2, WEQ–013–2.4.2, WEQ–013–2.6.4, WEQ–013–2.6.5.1, WEQ–013–2.6.5.2, WEQ–013–2.6.6, WEQ–013–2.6.7.1, and WEQ–013–2.6.7.2. Bonneville also suggests the addition of new standards WEQ–001–11.5.4 and WEQ–001–12.5.3.

[53] Duke's suggested revisions relate only to WEQ–001–12. Duke suggests substituting the term ''assignment'' for ''transfer,'' and adding a restricted value and definition for the term ''transfer'' (or its replacement).

[54] *See, e.g.*, WEQ–013–2.6.6 and WEQ–013–2.6.7.1.

[55] As to Bonneville's request that we clarify the reference to ''deferral requests posted by the Primary Provider,'' *see* Bonneville Comments at 7, this matter may also be brought up with NAESB.

[56] *See* Order No. 676, FERC Stats. & Regs. ¶ 31,216 at P 100. If the public utility makes no unrelated tariff filing by January 31, 2009, it must make a separate tariff filing incorporating these standards by that date. They are to use the language specified later in this order, *see infra* P 83.

including Standards 001–0.2 through 001–0.8, 001–0.14 through 001–0.20, 001–2.0 through 001–9.6.2, 001–9.8 through 001–12.5.2, and 001–A and 001–B;

• Business Practices for Open Access Same-Time Information Systems (OASIS) Standards & Communication Protocols, Version 1.4 (WEQ–002, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Standards 002–0.1 through 002–5.10;

• Open Access Same-Time Information Systems (OASIS) Data Dictionary, Version 1.4 (WEQ–003, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Standard 003–0;

• Coordinate Interchange (WEQ–004, Version 001, October 31, 2007, with minor corrections applied on Nov. 16, 2007) including Purpose, Applicability, and Standards 004–0.1 through 004–17.2, and 004–A through 004–D;

• Area Control Error (ACE) Equation Special Cases Standards (WEQ–005, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Purpose, Applicability, and Standards 005–0.1 through 005–3.1.3, and 005–A;

• Manual Time Error Correction (WEQ–006, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Purpose, Applicability, and Standards 006–0.1 through 006–12;

• Inadvertent Interchange Payback (WEQ–007, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Purpose, Applicability, and Standards 007–0.1 through 007–2, and 007–A;

• Transmission Loading Relief—Eastern Interconnection (WEQ–008, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Purpose, Applicability, and Standards 008–0.1 through 008–3.11.2.8, and 008–A through 008–D;

• Gas/Electric Coordination (WEQ–011, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Standards 011–0.1 through 011–1.6;

• Public Key Infrastructure (PKI) (WEQ–012, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Recommended Standard, Certification, Scope, Commitment to Open Standards, and Standards 012–0.1 through 012–1.26.5; and

• Business Practices for Open Access Same-Time Information Systems (OASIS) Implementation Guide, Version 1.4 (WEQ–013, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) including Introduction and Standards 013–0.1 through 013–4.2.

84. If a public utility requests waiver of a standard, it will not be required to comply with the standard until the Commission acts on its waiver request. Therefore, if a public utility has obtained a waiver or has a pending request for a waiver, its proposed revision to its OATT should not include the standard number associated with the standard for which it has obtained or seeks a waiver. Instead, the public utility's OATT should specify those standards for which the public utility has obtained a waiver or has pending a request for waiver. Once a waiver request is denied, the public utility will be required to include in its OATT the standard(s) for which waiver was denied.

## IV. Notice of Use of Voluntary Consensus Standards

85. Office of Management and Budget Circular A–119 (section 11) (February 10, 1998) provides that when a federal agency issues or revises a regulation containing a standard, the agency should publish a statement in the Final Rule stating whether the adopted standard is a voluntary consensus standard or a government-unique standard. In this rulemaking, the Commission is incorporating by reference voluntary consensus standards developed by the WEQ.

## V. Information Collection Statement

86. OMB's regulations in 5 CFR 1320.11 (2005) require that it approve certain reporting and recordkeeping requirements (collections of information) imposed by an agency. Upon approval of a collection of information, OMB assigns an OMB control number and an expiration date. Respondents subject to the filing requirements of this Final Rule will not be penalized for failing to respond to this collection of information unless the collection of information displays a valid OMB control number.

87. This Final Rule will affect the following existing data collections: Standards for Business Practices and Communication Protocols for Public Utilities (FERC–717) and Electric Rate Schedule Filings (FERC–516).

88. The following burden estimate is based on the projected costs for the industry to implement revisions to the WEQ Standards currently incorporated by reference into the Commission's regulations at 18 CFR 38.2 and to implement the new standards adopted by NAESB that we are incorporating by reference in this Final Rule.

| Data collection | Number of respondents | Number of responses per respondent | Hours per response | Total number of hours |
|---|---|---|---|---|
| FERC–516 | 176 | 1 | 6 | 1,056 |
| FERC–717 | 176 | 1 | 10 | 1,760 |
| Totals | | | | 2,816 |

*Total Annual Hours for Collection:* (Reporting and Recordkeeping, (if appropriate)) = 2816 hours.

*Information Collection Costs:* The Commission seeks comments on the costs to comply with these requirements. It has projected the average annualized cost for all respondents to be the following: [57]

| | FERC–516 | FERC–717 |
|---|---|---|
| Annualized Capital/Startup Costs | $337,920 | $563,200 |
| Annualized Costs (Operations & Maintenance) | N/A | |
| Total Annualized Costs | 337,920 | 563,200 |

[57] The total annualized costs for the information collection is $901,120. This number is reached by multiplying the total hours to prepare responses (2816) by an hourly wage estimate of $320 (a composite estimate that includes legal, technical and support staff rates, $200+$95+$25=$320), 2816 hours × $320/hour= $901,120.

89. The Commission sought comments on the burden of complying with the requirements imposed by these requirements. No comments were filed addressing the reporting burden.[58]

90. The Commission's regulations adopted in this rule are necessary to establish a more efficient and integrated wholesale electric power grid. Requiring such information ensures both a common means of communication and common business practices that provide entities engaged in the wholesale transmission of electric power with timely information and uniform business procedures across multiple transmission providers. These requirements conform to the Commission's goal for efficient information collection, communication, and management within the electric power industry. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

91. OMB regulations [59] require OMB to approve certain information collection requirements imposed by agency rule. The Commission is submitting notification of this proposed rule to OMB. These information collections are mandatory requirements.

*Title:* Standards for Business Practices and Communication Protocols for Public Utilities (*formerly* Open Access Same Time Information System) (FERC–717); Electric Rate Schedule Filings (FERC–516).

*Action:* Proposed collection.

*OMB Control No.:* 1902–0096 (FERC–516); 1902–0173 (FERC–717).

*Respondents:* Business or other for profit, (Public Utilities—Not applicable to small businesses).

*Frequency of Responses:* One-time implementation (business procedures, capital/start-up).

*Necessity of the Information:* This rule, will upgrade the Commission's current business practice and communication standards. Specifically, these standards include several modifications to the existing business practice standards as well as creating new standards to provide additional functionality for OASIS transactions, transmission loading relief and public key infrastructure. The standards will assist in providing greater security for business transactions over the Internet, identify the business practices to be used to relieve potential or actual loading on a constrained facility and facilitate the transfer of electric energy between entities responsible for balancing load and generation. These practices will ensure that potential customers of open access transmission service receive access to information that will enable them to obtain transmission service on a non-discriminatory basis and will assist the Commission in maintaining a safe and reliable infrastructure and also will assure the reliability of the interstate transmission grid. The implementation of these standards and regulations is necessary to increase the efficiency of the wholesale electric power grid.

92. The information collection requirements of this Final Rule are based on the transition from transactions being made under the Commission's existing business practice standards to conducting such transactions under the proposed revisions to these standards and to account for the burden associated with the new standard(s) being proposed here (i.e., WEQ–008 and WEQ–012).

93. *Internal Review:* The Commission has reviewed the revised business practice standards and has made a determination that the revisions adopted in this Final Rule are necessary to maintain consistency between the business practice standards and reliability standards on this subject. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimate associated with the information requirements.

94. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, Attn: Michael Miller, Office of the Executive Director, 888 First Street, NE., Washington, DC 20426, Tel: (202) 502–8415/Fax: (202) 273–0873, E-mail: *michael.miller@ferc.gov.*

## VI. Environmental Analysis

95. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[60] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[61]

96. The actions required by this Final Rule fall within categorical exclusions in the Commission's regulations for rules that are clarifying, corrective, or procedural, for information gathering, analysis, and dissemination, and for sales, exchange, and transportation of electric power that requires no construction of facilities.[62] Therefore, an environmental assessment is unnecessary and has not been prepared in this Final Rule.

## VII. Regulatory Flexibility Act Certification

97. The Regulatory Flexibility Act of 1980 (RFA) [63] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The regulations adopted here impose requirements only on public utilities, which are not small businesses, and, these requirements are, in fact, designed to benefit all customers, including small businesses.

98. The Commission has followed the provisions of both the RFA and the Paperwork Reduction Act on potential impact on small business and other small entities. Specifically, the RFA directs agencies to consider four regulatory alternatives to be considered in a rulemaking to lessen the impact on small entities: tiering or establishment of different compliance or reporting requirements for small entities, classification, consolidation, clarification or simplification of compliance and reporting requirements, performance rather than design standards, and exemptions. As the Commission originally stated in Order No. 889, the OASIS regulations now known as Standards for Business Practices and Communication Protocols for Public Utilities, apply only to public utilities that own, operate, or control transmission facilities subject to the Commission's jurisdiction and should a

[58] We note, however, that two comments argued that it would be too costly for small entities to obtain copies of the NAESB Standards from NAESB. We addressed these comments in the preamble of this Final Rule.

[59] 5 CFR 1320.11.

[60] Order No. 486, *Regulations Implementing the National Environmental Policy Act of 1969*, 52 FR 47,897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,783 (1987).

[61] 18 CFR 380.4.

[62] *See* 18 CFR 380.4(a)(2)(ii), 380.4(a)(5), 380.4(a)(27).

[63] 5 U.S.C. 601–612.

small entity be subject to the Commission's jurisdiction, it may file for waiver of the requirements.[64] This is consistent with the exemption provisions of the RFA. Accordingly, pursuant to section 605(b) of the RFA,[65] the Commission hereby certifies that the regulations proposed herein will not have a significant adverse impact on a substantial number of small entities.

### VIII. Document Availability

99. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

100. From FERC's Home Page on the Internet, this information is available in the eLibrary. The full text of this document is available in the eLibrary both in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.[66]

101. User assistance is available for eLibrary and the FERC's Web site during our normal business hours. For assistance contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

### IX. Effective Date and Congressional Notification

102. This Final Rule will become effective August 28, 2008. The Commission has determined with the concurrence of the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, that this rule is not a major rule within the meaning of section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.[67]

### List of Subjects in 18 CFR part 38

Electric utilities, Reporting and recordkeeping requirements, Incorporation by reference.

By the Commission.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

■ In consideration of the foregoing, the Commission amends Chapter I, Title 18, part 38 of the *Code of Federal Regulations*, as follows:

## PART 38—BUSINESS PRACTICE STANDARDS AND COMMUNICATION PROTOCOLS FOR PUBLIC UTILITIES

■ 1. The authority citation for part 38 continues to read as follows:

**Authority:** 16 U.S.C. 791–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. In § 38.2, paragraphs (a)(1) through (8) are revised, and paragraphs (a)(9) through (11) are added to read as follows:

**§ 38.2 Incorporation by reference of North American Energy Standards Board Wholesale Electric Quadrant standards.**

(a) * * *

(1) Business Practices for Open Access Same-Time Information Systems (OASIS), Version 1.4 (WEQ–001, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007) with the exception of Standards 001–0.1, 001–0.9 through 001–0.13, 001–1.0 through 001–1.8, and 001–9.7;

(2) Business Practices for Open Access Same-Time Information Systems (OASIS) Standards & Communication Protocols, Version 1.4 (WEQ–002, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007);

(3) Open Access Same-Time Information Systems (OASIS) Data Dictionary, Version 1.4 (WEQ–003, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007);

(4) Coordinate Interchange (WEQ–004, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007);

(5) Area Control Error (ACE) Equation Special Cases (WEQ–005, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007);

(6) Manual Time Error Correction (WEQ–006, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007);

(7) Inadvertent Interchange Payback (WEQ–007, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007);

(8) Transmission Loading Relief—Eastern Interconnection (WEQ–008, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007);

(9) Gas/Electric Coordination (WEQ–011, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007);

(10) Public Key Infrastructure (PKI) (WEQ–012, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007); and

(11) Business Practices for Open Access Same-Time Information Systems (OASIS) Implementation Guide, Version 1.4 (WEQ–013, Version 001, Oct. 31, 2007, with minor corrections applied on Nov. 16, 2007).

* * * * *

**Note:** The following appendix will not be published in the Code of Federal Regulations.

### List of Entities Filing Comments on NOPR in Docket No. RM05–5-005, and the Abbreviations Used To Identify Them

Bonneville Power Administration (Bonneville).

Duke Energy Corporation (Duke).

Lafayette Utilities System (Lafayette).

Louisiana Energy and Power Authority (LEPA).

Midwest Independent Transmission System Operator, Inc. (Midwest ISO).

New York Independent System Operator, Inc. (NYISO).

North American Electric Reliability Corporation (NERC).

PJM Interconnection, L.L.C. (PJM).

Southern Company Services, Inc. (Southern Companies).

Southwest Power Pool, Inc. (SPP).

[FR Doc. E8–17194 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

[64] We also have provided for requests of waiver in instances where compliance would be very burdensome and a waiver would not diminish the overall benefits of the standards. *See supra* P 19.

[65] 5 U.S.C. 605(b).

[66] NAESB's Dec. 26, 2007 submittal is also available for viewing in eLibrary. The link to this file is as follows: *http://elibrary.ferc.gov:0/idmws/doc_info.asp?document_id=13566661*.

[67] *See* 5 U.S.C. 804(2).

## DEPARTMENT OF THE TREASURY

## Internal Revenue Service

## 26 CFR Part 1

**[TD 9418]**

**RIN 1545–BE65**

## Converting an IRA Annuity to a Roth IRA

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations under section 408A of the Internal Revenue Code (Code). These final regulations provide guidance concerning the tax consequences of converting a non-Roth IRA annuity to a Roth IRA. These final regulations affect individuals establishing Roth IRAs, beneficiaries under Roth IRAs, and trustees, custodians and issuers of Roth IRAs.

**DATES:** *Effective date:* These final regulations are effective July 29, 2008.

*Applicability date:* These regulations are applicable to any Roth IRA

conversion where an annuity contract is distributed or treated as distributed from a traditional IRA on or after August 19, 2005.

**FOR FURTHER INFORMATION CONTACT:** William D. Gibbs at 202–622–6060 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

## Background

*Roth IRAs and Conversions*

This document contains final regulations that amend the Income Tax Regulations (26 CFR Part 1) under section 408A of the Code relating to Roth IRAs. Section 408A of the Code, which was added by section 302 of the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788), establishes the Roth IRA as a type of individual retirement plan, effective for taxable years beginning on or after January 1, 1998.

The identifying characteristic of Roth IRAs is that all contributions to Roth IRAs are after-tax contributions (that is, an IRA owner cannot take a deduction for a contribution made to a Roth IRA) but qualified distributions are tax-free. A qualified distribution from a Roth IRA is a distribution that is made: (1) at least 5 years after the account owner (or the account owner's spouse) made a Roth IRA contribution, and (2) after age 59½, after death, on account of disability, or for a first-time home purchase.

A taxpayer whose modified adjusted gross income for a year does not exceed $100,000 (and who, if married, files jointly) [1] may convert an amount held in a non-Roth IRA (that is, a traditional IRA or SIMPLE IRA) to an amount held in a Roth IRA. If a taxpayer converts an amount held in a non-Roth IRA to a Roth IRA, the taxpayer must include the value of the non-Roth IRA being converted in gross income (to the extent the conversion is not a conversion of basis in the non-Roth IRA).

A conversion may be accomplished by means of a rollover, trustee-to-trustee transfer, or account redesignation. Regardless of the means used to convert, any amount converted from a non-Roth IRA to a Roth IRA is treated as distributed from the non-Roth IRA and rolled over to the Roth IRA. In the case of a conversion involving property, the conversion amount generally is the fair market value of the property on the date of distribution or the date the property is treated as distributed from the traditional IRA.

Final regulations regarding Roth IRAs were published in the **Federal Register** on February 4, 1999 (64 FR 5597). On August 19, 2005, the IRS issued temporary regulations under section 408A (70 FR 48868) relating to conversions involving annuities. These temporary regulations were also issued in identical form as proposed regulations (70 FR 48924).

Rev. Proc. 2006–13 (2006–1 CB 315), which was issued on January 17, 2006, in response to several comments received on the temporary and proposed regulations, provided interim guidance with respect to the temporary regulations. See § 601.601(d)(2)(ii)(*b*). After consideration of all comments received on the proposed regulations, these final regulations adopt the provisions of the proposed regulations with certain modifications described in the Explanation of Provisions.

## Explanation of Provisions

Like the proposed regulations, these final regulations clarify that when a non-Roth individual retirement annuity is converted to a Roth IRA, the amount that is treated as distributed is the fair market value of the annuity contract on the date the annuity contract is converted. Similarly, when a non-Roth individual retirement account holds an annuity contract as an account asset and the account is converted to a Roth IRA, the amount that is treated as distributed with respect to the annuity contract is the fair market value of the annuity contract on the date the annuity contract is converted (that is distributed or treated as distributed from the non-Roth IRA).

One commentator suggested that the final regulations should clarify that where a conversion is made by surrendering an annuity without retaining or transferring rights, the amount converted, and hence the amount that must be included in income as a result of the conversion, is limited to the surrendered cash value (the actual proceeds to be deposited into the Roth IRA). Rev. Proc. 2006–13 provided that, in such a case, the valuation methods in the temporary regulations do not apply.

The final regulations adopt this suggestion. Thus, to the extent an individual retirement annuity or an annuity contract held by an individual retirement account is surrendered with no retained or transferred rights, the amount treated as a distribution is limited to the surrendered cash value (the actual proceeds available to be deposited into the Roth IRA).

The proposed regulations used a methodology from the gift tax regulations (§ 25.2512–6) to determine fair market value of an annuity contract. Those rules depend on how soon after purchase the contract was converted and whether future premiums were to be paid. The different time periods were ''soon after'' the contract was sold and after the contract ''has been in force for some time.'' A commentator stated that these terms are not defined and do not lend themselves to clear or uniform interpretation.

In response to these comments, the final regulations modify the application of the valuation rules taken from the gift tax regulations (collectively referred to under these regulations as the gift tax method). The applicability of one valuation rule within the gift tax method is based upon whether the company which sold the initial contract sells comparable annuities. If there is such a comparable contract currently being sold, the fair market value of the contract is determined as the price of the comparable contract. For example, assume a taxpayer who is age 60 at the time of the conversion had purchased from an insurance company a contract at an earlier age which will pay him $500 per month for life beginning at age 70. If the insurance company is selling contracts that will provide a taxpayer who is age 60 $500 per month for life at age 70, then the fair market value of the taxpayer's contract, for purposes of determining the amount converted, is the current price of the similar contract. (If the conversion occurs soon after the annuity was sold, the comparable contract is the annuity itself and, thus, the fair market value of the annuity is established by the actual premiums paid for such contract.) This comparable contract valuation rule subsumes the first two methods under the proposed regulations.

The gift tax method under the final regulations includes a second alternative for situations where there is no comparable contract. If no comparable contract is available to make a comparison, the fair market value is established through an approximation that is based on the interpolated terminal reserve at the date of the conversion, plus the proportionate part of the gross premium paid before the date of the conversion which covers the period extending beyond that date. This reserve alternative is the same as the third method under the proposed regulations, except that it applies whenever there is no comparable contract.

Rev. Proc. 2006–13 provided an alternative to the valuation method in the proposed regulations based on the accumulation of premiums and this alternative is included in the final regulations. Under this ''accumulation

[1] These limitations are removed for taxable years beginning after December 31, 2009.

method'', the fair market value of an annuity contract is permitted to be determined using the methodology provided in § 1.401(a)(9)–6, A–12, with the following modifications. First, all front-end loads and other non-recurring charges assessed in the twelve months immediately preceding the conversion must be added to the account value. Second, future distributions are not to be assumed in the determination of the actuarial present value of additional benefits. Finally, the exclusions provided under § 1.401(a)(9)–6, A–12(c)(1) and (c)(2), are not to be taken into account.

These final regulations also provide authority for the Commissioner to issue additional guidance regarding the fair market value of an individual retirement annuity, including formulas to be used for determining fair market value.

**Effective Date**

These regulations are applicable to any Roth IRA conversion where an annuity contract is distributed or treated as distributed from a traditional IRA on or after August 19, 2005. However, taxpayers may instead apply the valuation methods in the temporary regulations and Rev. Proc. 2006–13 for annuity contracts distributed or treated as distributed from a traditional IRA on or before December 31, 2008. See § 601.601 (d)(2)(ii)(b). Thus, for example, the adoption of these final regulations does not eliminate the special rule for 2005 conversions set forth in section 4 of Rev. Proc. 2006–13.

**Special Analyses**

It has been determined that these final regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these final regulations and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

**Drafting Information**

The principal authors of these regulations are William Douglas Gibbs and Cathy V. Pastor of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in the development of these regulations.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Adoption of Amendments to the Regulations**

■ Accordingly, 26 CFR part 1 is amended as follows:

## PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read, in part, as follows:

**Authority:** 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.408A–4T is removed.

**§ 1.408A–4T [Removed].**

■ **Par. 3.** Section 1.408A–4 is amended by revising Q–14 and A–14 to read as follows:

**§ 1.408A–4 Converting amounts to Roth IRAs.**

* * * * *

Q–14. What is the amount that is treated as a distribution, for purposes of determining income inclusion, when a conversion involves an annuity contract?

A–14. (a) *In general*—(1) *Distribution of Fair Market Value Upon Conversion.* Notwithstanding § 1.408–4(e), when part or all of a traditional IRA that is an individual retirement annuity described in section 408(b) is converted to a Roth IRA, for purposes of determining the amount includible in gross income as a distribution under § 1.408A–4, A–7, the amount that is treated as distributed is the fair market value of the annuity contract on the date the annuity contract is converted. Similarly, when a traditional IRA that is an individual retirement account described in section 408(a) holds an annuity contract as an account asset and the traditional IRA is converted to a Roth IRA, for purposes of determining the amount includible in gross income as a distribution under § 1.408A–4, A–7, the amount that is treated as distributed with respect to the annuity contract is the fair market value of the annuity contract on the date that the annuity contract is distributed or treated as distributed from the traditional IRA. The rules in this A–14 also apply to conversions from SIMPLE IRAs.

(2) *Annuity contract surrendered.* Paragraph (a)(1) of this paragraph A–14 does not apply to a conversion of a traditional IRA to the extent the conversion is accomplished by the complete surrender of an annuity contract for its cash value and the reinvestment of the cash proceeds in a Roth IRA, but only if the surrender extinguishes all benefits and other characteristics of the contract. In such a case, the cash from the surrendered contract is the amount reinvested in the Roth IRA.

(3) *Definitions.* The definitions set forth in § 1.408A–8 apply for purposes of this paragraph A–14.

(b) *Determination of fair market value*—(1) *Overview*—(i) *Use of alternative methods.* This paragraph (b) sets forth methods which may be used to determine the fair market value of an individual retirement annuity for purposes of paragraph (a)(1) of this paragraph A–14. However, if, because of the unusual nature of the contract, the value determined under one of these methods does not reflect the full value of the contract, that method may not be used.

(ii) *Additional guidance.* Additional guidance regarding the fair market value of an individual retirement annuity, including formulas to be used for determining fair market value, may be issued by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*)).

(2) *Gift tax method*—(i) *Cost of contract or comparable contract.* If with respect to an annuity, there is a comparable contract issued by the company which sold the annuity, the fair market value of the annuity may be established by the price of the comparable contract. If the conversion occurs soon after the annuity was sold, the comparable contract may be the annuity itself, and thus, the fair market value of the annuity may be established through the sale of the particular contract by the company (that is, the actual premiums paid for such contract).

(ii) *Use of reserves where no comparable contract available.* If with respect to an annuity, there is no comparable contract available in order to make the comparison described in paragraph (b)(2)(i) of this paragraph A–14, the fair market value may be established through an approximation that is based on the interpolated terminal reserve at the date of the conversion, plus the proportionate part of the gross premium last paid before the date of the conversion which covers the period extending beyond that date.

(3) *Accumulation method.* As an alternative to the gift tax method described in paragraph (b)(2) of this paragraph A–14, this paragraph (b)(3) provides a method that may be used for an annuity contract which has not been

annuitized. The fair market value of such an annuity contract is permitted to be determined using the methodology provided in § 1.401(a)(9)–6, A–12, with the following modifications:

(i) All front-end loads and other non-recurring charges assessed in the twelve months immediately preceding the conversion must be added to the account value.

(ii) Future distributions are not to be assumed in the determination of the actuarial present value of additional benefits.

(iii) The exclusions provided under § 1.401(a)(9)–6, A–12(c)(1) and (c)(2), are not to be taken into account.

(c) *Effective/applicability date.* The provisions of this paragraph A–14 are applicable to any conversion in which an annuity contract is distributed or treated as distributed from a traditional IRA on or after August 19, 2005. However, for annuity contracts distributed or treated as distributed from a traditional IRA on or before December 31, 2008, taxpayers may instead apply the valuation methods in § 1.408A–4T (as it appeared in the April 1, 2008, edition of 26 CFR part 1) and Revenue Procedure 2006–13 (2006–1 CB 315) (See § 601.601(d)(2)(ii)(*b*)).

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

Approved: July 20, 2008.

**Eric Solomon,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. E8–17271 Filed 7–28–08; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[TD 9406]**

**RIN 1545–BH03**

## Modifications to Subpart F Treatment of Aircraft and Vessel Leasing Income; Correction

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Correcting amendment.

**SUMMARY:** This document contains a correction to final and temporary regulations (TD 9406) that was published in the **Federal Register** on Thursday, July 3, 2008 (73 FR 38113) addressing the treatment of certain income and assets related to the leasing of aircraft or vessels in foreign commerce under sections 367, 954, and 956 of the Internal Revenue Code. The regulations reflect statutory changes made by section 415 of the American Jobs Creation Act of 2004. In general, the regulations will affect the United States shareholders of controlled foreign corporations that derive income from the leasing of aircraft or vessels in foreign commerce and U.S. persons that transfer property subject to these leases to a foreign corporation.

**DATES:** This correction is effective July 29, 2008, and is applicable on July 3, 2008.

**FOR FURTHER INFORMATION CONTACT:** Concerning the temporary regulations under section 367, John H. Seibert at (202) 622–3860; concerning the temporary regulations under section 954 or 956, Paul J. Carlino at (202) 622–3840 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

### Background

The final and temporary regulations that are the subjects of this document are under sections 367, 954, and 956 of the Internal Revenue Code.

### Need for Correction

As published, final and temporary regulations (TD 9406) contain an error that may prove to be misleading and is in need of clarification.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Correction of Publication

■ Accordingly, 26 CFR part 1 is corrected by making the following correcting amendment:

## PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read, in part, as follows:

**Authority:** 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.954–2(c)(2) is amended by adding paragraph (vii) to read as follows:

**§ 1.954–2 Foreign personal holding company income.**

* * * * *

(c) * * *

(2) * * *

(vii) [Reserved]. For further guidance, see § 1.954–2T(c)(2)(vii).

* * * * *

**LaNita Van Dyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. E8–17269 Filed 7–28–08; 8:45 am]

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[TD 9420]**

**RIN 1545–BC22**

## Section 42 Utility Allowance Regulations Update

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations that amend the utility allowances regulations concerning the low-income housing tax credit. The final regulations update the utility allowance regulations to provide new options for estimating tenant utility costs. The final regulations affect owners of low-income housing projects who claim the credit, the tenants in those low-income housing projects, and the State and local housing credit agencies that administer the credit.

**DATES:** *Effective Date:* These regulations are effective July 29, 2008. *Applicability Date:* For dates of applicability see § 1.42–12(a)(4).

**FOR FURTHER INFORMATION CONTACT:** David Selig (202) 622–3040 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### Background

This document contains amendments to the Income Tax Regulations (26 CFR Part 1) relating to the low-income housing credit under section 42 of the Internal Revenue Code (Code). On June 19, 2007, the IRS and Treasury Department published in the **Federal Register** proposed regulations under section 42(g)(2)(B)(ii) (72 FR 33703). Written and electronic comments responding to the proposed regulations were received and a public hearing was held on the proposed regulations on October 9, 2007. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision.

*General Overview*

Section 42(a) provides that, for purposes of section 38, the amount of the low-income housing credit determined under section 42 for any taxable year in the credit period is an amount equal to the applicable percentage of the qualified basis of each qualified low-income building. A qualified low-income building is defined in section 42(c)(2) as any building that is part of a qualified low-income housing project.

A qualified low-income housing project is defined in section 42(g)(1) as any project for residential rental property if the project meets one of the following tests elected by the taxpayer: (1) At least 20 percent of the residential units in the project are rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income; or (2) at least 40 percent of the residential units in the project are rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income. If a taxpayer does not meet the elected test, the project is not eligible for the section 42 credit.

Under section 42(g)(4), section 142(d)(2)(B) applies when determining whether any project is a qualified low-income housing project under section 42(g)(1). Section 142(d)(2)(B) provides that the income of individuals and area median gross income is determined by the Secretary in a manner consistent with determinations of lower income families and area median gross income under section 8 of the United States Housing Act of 1937. Under Rev. Rul. 94–57 (1994–2 CB 5), taxpayers may rely on a list of income limits released by the Department of Housing and Urban Development (HUD) until 45 days after HUD releases a new list of income limits, or until HUD's effective date for the new list, whichever is later.

In order to qualify as a rent-restricted unit within the meaning of section 42(g)(2), the gross rent for the unit must not exceed 30 percent of the imputed income limitation applicable to the unit. Section 42(g)(2)(B)(ii) requires the inclusion in gross rent of a utility allowance determined by the Secretary after taking into account the determinations under section 8 of the United States Housing Act of 1937.

Section 1.42–10(a) provides that if utility costs (other than telephone) for a residential rental unit are paid directly by the tenant, then the gross rent for that unit includes the applicable utility allowance as determined under § 1.42–10. Section 1.42–10(b) provides rules for calculating the appropriate utility allowance based upon whether (1) the building receives rental assistance from the Farmers Home Administration (FmHA), now known as the Rural Housing Service; (2) the building has any tenant that receives FmHA rental assistance; (3) the building is not described in (1) or (2) above and the building's rents and utility allowances are reviewed by HUD on an annual basis; or (4) the building is not described in (1), (2), or (3) above (other buildings).

Currently, under § 1.42–10(b)(4), other buildings generally use the applicable Public Housing Authority (PHA) utility allowance established for the Section 8 Existing Housing Program or use a local utility company estimate. The local utility company estimate may be obtained by any interested party (including a low-income tenant, a building owner, or a State or local housing credit agency (Agency)).

The proposed regulations proposed two additional options for calculating utility allowances. The first option would permit a building owner to obtain a utility estimate for each unit in a building from the Agency that has jurisdiction over the building (the Agency estimate). The Agency estimate must take into account the local utility rates data, property type, climate variables by region in the State, taxes and fees on utility charges, and property building materials and mechanical systems. An Agency may also use actual utility company usage data and rates for the building. The second option would permit a building owner to calculate utility allowances using the ''HUD Utility Schedule Model'' found on the Low-Income Housing Tax Credits page at *http://www.huduser.org/datasets/lihtc.html* (or successor URL). The HUD Utility Schedule Model is based on data from the Residential Energy Consumption Survey (RECS) conducted by the Department of Energy. RECS data provides energy consumption by structure for heating, air conditioning, cooking, water heating, and other electric (lighting and refrigeration). The HUD Utility Schedule Model incorporates building location and climate.

**Summary of Comments and Explanation of Changes**

*Exclusions From Utility Allowance*

Prior to these final regulations, § 1.42–10(a) provided for the exclusion of telephone costs in determining the amount of the utility allowance to be included in gross rent. The proposed regulations excluded cable television costs as well as telephone costs. The final regulations retain the exclusions for cable television and telephone costs and also exclude Internet costs. The IRS and Treasury Department believe it is appropriate to exclude cable television and Internet costs as comparable to telephone costs.

*Additional Option for Determining Utility Allowances*

Commentators stated that the Agency estimate in the proposed regulations may be administratively burdensome for some Agencies. As an alternative, commentators suggested adding an option that would allow utility estimates to be calculated by a state-certified engineer or other qualified professional. The commentators specified that, under this option, computer software could be developed that would estimate the energy or water and sanitary sewer service cost for each type of unit in a building. The estimates would be determined based on the applicable current local utility billing rate schedule and would be applied to all comparable units in the building using specific information about the design, materials, equipment, and location of the building.

A computer software model that incorporates specific information about the design and location of the building for which the utility allowances are being developed, and that can be updated with actual consumption data and with consumption estimates as new efficiency measures and improvements are undertaken, would provide more accurate estimates of utility consumption. Therefore, the final regulations also include a new option allowing building owners to retain the services of a qualified professional to calculate utility allowances based on an energy consumption model.

The use of this new option is subject to several special rules. First, the energy consumption model must, at a minimum, take into account specific factors including, but not limited to, unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of the building location. Second, the utility estimates must be calculated by either (1) a properly licensed engineer or (2) a qualified professional approved by the Agency that has jurisdiction over the building (together, qualified professional). The qualified professional and the building owner must not be related within the meaning of section 267(b) or 707(b). Third, the building owner must furnish a copy of the estimates derived from the energy consumption model to the Agency and make copies of the estimates available to

all tenants in the building. Finally, the building owner must pay for all costs incurred in obtaining the utility estimates from the qualified professional and providing the estimates to the Agency and tenants.

*Default Option/Option Ordering*

One commentator suggested that the final regulations should provide a default option because, in the absence of a definitive standard for determining utility allowances, building owners would use the option that yields the lowest utility estimates. Commentators further requested clarification as to which option should be used when multiple options are available, whether building owners may use different options for different utilities, and whether owners may change the options used for calculating utilities from time to time.

An energy consumption model developed by a qualified professional that takes into account specific information about the design and location of the building for which the utility allowances are being developed should produce the most accurate utility estimates. It is expected that this more accurate model will be the model most commonly used by most building owners, particularly those with buildings that are not very old. However, if a building owner selects an option that yields higher utility allowances, the building owner should be free to accept a lower amount of rent from tenants. Therefore, there is no need for a stated default option or option ordering rule. Further, the final regulations neither prohibit using different options for different utilities nor prohibit changing the options used for calculating utilities. If an Agency determines that a building owner has understated the utility allowances for the building under the particular option chosen by the owner for calculating the utility allowance, and the building's units are not rent-restricted units under section 42(g)(2) as a result, the Agency must report the noncompliance on Form 8823, *Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition.*

*Application of Newly Calculated Utility Allowances*

Under current § 1.42–10(c) of the regulations, if the applicable utility allowance for units changes, the new utility allowance must be used to compute gross rent of rent-restricted units due 90 days after the change (the 90-day period). The proposed regulations limited the effective date of any new utility allowances to the earlier of the date the building has achieved 90 percent occupancy for a period of 90 consecutive days or the end of the first year of the credit period. The proposed regulations also modified § 1.42–10(c) by requiring that a building owner must review at least annually the basis on which utility allowances have been established and must update the applicable utility allowance. The review must take into account any changes to the building such as any energy conservation measures that affect energy consumption and changes in utility rates.

Commentators suggested that building owners should be obligated to adjust utility allowances when utility rates increase by a stated percentage, for example, 10 percent, which is the rule for revising utility allowance schedules for PHAs under 24 CFR 982.517(c). This HUD rule provides that a PHA must review its schedule of utility allowances each year and revise its allowance for a utility category if the utility rate has changed by 10 percent or more since the utility allowance schedule was last revised. The commentators did not address decreases in utility rates. A commentator also suggested that the final regulations should require an Agency to review or have owners review local utility rates quarterly to determine if rates have increased sufficiently to require an adjustment. A different commentator suggested limiting reviews to no more than once per year.

The IRS and Treasury Department do not believe that fluctuations in utility rates within a given year should trigger recalculations of utility allowances more than once a year. The IRS and Treasury Department do not believe that the additional burden of updating the utility allowances more than once a year is warranted at this time. Utility rates generally do not change more than once a year, and yearly updated utility allowances would reflect average rates applicable to all tenants in a building from year to year. Therefore, the final regulations require building owners to calculate new utility allowances once during the calendar year regardless of any percentage change in utility rates. Building owners may choose, however, to calculate new utility allowances more frequently than once during the calendar year provided the owner complies with the requirements of these regulations, including the notification requirements to the Agency and tenants.

Another commentator suggested that new utility allowances should be implemented within 90 days after HUD publishes its annual income limits (which are used in determining section 42 rents), but in no case later than June 30 of any year. Section 42 rents under section 42(g)(2) may or may not increase depending on HUD's calculation of area median gross income. Therefore, the IRS and Treasury Department do not believe that the rules should require that the effective date of any new utility allowance coincide with the section 42 effective date of HUD's income lists. Building owners, however, may choose to implement any new utility allowances on the section 42 effective date of HUD's income lists.

To bring financial stability to a project during the beginning of its operations, the final regulations clarify that the building owner is not required to review the utility allowances, or implement new utility allowances, until the earlier of the date the building has achieved 90 percent occupancy for a period of 90 consecutive days or the end of the first year of the credit period.

*Procedural Safeguards for Tenants*

One commentator made several recommendations regarding procedural safeguards for tenants including: Owners should be required to give tenants 30 days notice before the effective date of any utility allowance; tenants should be provided with all information used in calculating the utility allowances; tenants should be given the opportunity to comment on the proposed allowances; and owners should be required to review those comments prior to the utility allowances becoming effective. The commentator believed that the new options for determining utility allowances should be available only after one full year of occupancy and one full year after the building is placed in service. A commentator also recommended that a building owner should be allowed to use the new options only if the owner provides all data to the Agency no later than February 15 and the Agency informs the owner whether the proposed utility allowances are approved by March 31.

To provide tenants with the opportunity to comment on proposed utility allowances to the Agency and building owner, the final regulations apply the existing disclosure requirement under current § 1.42–10(b)(4)(ii)(B) (regarding the utility company estimate) to an owner using a utility company estimate, the HUD Utility Schedule Model, or an energy consumption model. Therefore, an owner must submit copies of the proposed utility allowances to the Agency and make the proposed utility allowances available to all tenants in the building at the beginning of the 90-day period before the utility allowances are

used in determining the gross rents of rent-restricted units. Similarly, the final regulations require that any utility estimates obtained under the Agency estimate option must be made available to all tenants in the building at the beginning of the 90-day period. An Agency may continue to require additional information from the owner during the 90-day period.

Commentators suggested that the final regulations should limit the use of the HUD Utility Schedule Model to data for a twelve-month period ending in the most recent calendar year and require the owner to certify the accuracy of the data and the calculations of the utility allowances. However, the HUD Utility Schedule Model already incorporates consumption data derived from RECS data. Thus, building owners using this option need not be required to use consumption data for any particular twelve-month period. These final regulations, however, provide that the use of the energy consumption model is limited to consumption data for a twelve-month period ending no earlier than 60 days prior to the beginning of the 90-day period. In the case of newly constructed or renovated buildings with less than twelve months of consumption data, the energy consumption model allows a qualified professional to use consumption data for the twelve-month period of units of similar size and construction in the geographic area in which the building containing the units is located. Further, the final regulations require that utility rates used for the HUD Utility Schedule Model, the Agency estimate option, and the energy consumption model must be no older than the rates in place 60 days prior to the beginning of the 90-day period.

In addition to these safeguards, if an Agency determines that a building owner has understated the utility allowances for the owner's building under the particular option chosen, and, therefore, some or all of the units in the building are not rent-restricted units under section 42(g)(2), then the Agency must report the noncompliance to the Service on Form 8823, *Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition.*

Commentators requested that building owners should be required to certify the estimate and the accuracy of the data used under the new options. Because Agencies may request additional information at any time during their mandatory review of proposed utility allowances, and must report any noncompliance to the Service, the final regulations do not require building owners to provide such certification.

*Utility Allowances for Tenants With Special Needs*

One commentator suggested that the calculation of utility allowances should take into account any special needs tenants such as people with disabilities who require high energy consumption equipment. Section 42 does not require that the owner's calculation of utility allowances be based on a tenant's particular use of utility services. If such a requirement were imposed, owners and Agencies would have to determine the utility allowance for the tenants in each unit, as opposed to allowances based on the size of the unit, which would greatly increase burden. Additionally, it is unclear whether it is appropriate to implement rules that might encourage tenants to be indifferent to their energy consumption. Such indifference could lead to cost overruns by owners, and the viability of low-income housing could be jeopardized. Therefore, the final regulations do not require the calculation of utility allowances based on consumption by particular tenants.

*Calculation of Utility Company Estimate Option for Deregulated Utilities*

Section 1.42–10(b)(4)(ii)(B) currently provides that any interested party (including an owner, low-income tenant, or Agency) may obtain a local utility company estimate for a unit. The estimate is obtained when the interested party receives, in writing, information from a local utility company providing the estimated cost of that utility for a unit of similar size and construction for the geographic area in which the building containing the units is located. In light of utility services deregulation, the proposed regulations proposed to amend this option by requiring the interested party to obtain cost estimates from the local utility company that include combined rate charges from multiple utility companies.

Commentators thought this proposed amendment would require the interested party to obtain utility consumption estimates from every utility company providing the same utility service and stated that this would present an unworkable administrative burden in deregulated jurisdictions with multiple utility providers. In some jurisdictions, many utility providers may be available for a given building. The proposed amendment was not intended to require the interested party to obtain utility consumption estimates from every utility company providing the same utility service. The amendment was proposed to address deregulation by requiring the interested party to obtain estimates for all the components of the utility service if the service is divided between two or more types of service providers (for example, electric generation and electric transmission). The final regulations clarify that, in the case of deregulated utility services, the interested party is required to obtain an estimate from only one utility company even if multiple companies can provide the same utility service to a unit. However, the utility company furnishing the estimate must offer utility services to the building in order for that utility company's rates to be used in calculating utility allowances. The estimate should include all component charges for providing the utility service.

*Agency Costs/Administrative Burden*

One commentator requested that specific language be added to address when Agencies may charge a reasonable fee for making a determination pursuant to the Agency estimate option, and who bears the fee when a particular option is used. The proposed regulations provided that costs incurred in obtaining an Agency estimate are borne by the building owner. The final regulations adopt this provision, and further require building owners to pay for all costs incurred in obtaining the estimates under the HUD Utility Schedule Model and the energy consumption model and in providing estimates to Agencies and tenants.

*Effective/Applicability Date*

The proposed regulations were proposed to be effective for taxable years beginning on or after the date of publication of the final regulations in the **Federal Register**. A commentator suggested that the final regulations be effective earlier on the basis that if they are published after 2007, they would not be effective until 2009 for calendar year taxpayers. The IRS and Treasury Department believe that the burden associated with an earlier effective date is not warranted. Therefore, the final regulations do not adopt this suggestion. However, in order to allow a building owner to implement the utility allowances as of the first day of the owner's taxable year beginning on or after July 29, 2008, the final regulations provide that taxpayers may rely on the rules for determining utility allowances before the first day of the owner's taxable year beginning on or after July 29, 2008 provided that any utility allowances so calculated are effective no earlier than the first day of the owner's taxable year beginning on or after July 29, 2008.

**Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the information has previously been reviewed and approved under OMB control number 1545–1102, and that the information required by these final regulations adds no new burden to the existing requirements. Accordingly, a Regulatory Flexibility Analysis under the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

**Drafting Information**

The principal author of these regulations is David Selig, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Adoption of Amendments to the Regulations**

■ Accordingly, 26 CFR part 1 is amended as follows:

## PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.42–10 is amended by:

■ 1. Revising the first sentence of paragraph (a).

■ 2. Revising paragraphs (b)(1), (b)(2), and (b)(3), and the introductory text of paragraph (b)(4).

■ 3. Adding two sentences at the end of paragraph (b)(4)(ii)(A).

■ 4. Adding three sentences after the second sentence in paragraph (b)(4)(ii)(B).

■ 5. Adding paragraphs (b)(4)(ii)(C), (b)(4)(ii)(D), and (b)(4)(ii)(E).

■ 6. Revising paragraph (c).

■ 7. Adding paragraph (d).

The additions and revisions read as follows:

**§ 1.42–10 Utility allowances.**

(a) * * * If the cost of any utility (other than telephone, cable television, or Internet) for a residential rental unit is paid directly by the tenant(s), and not by or through the owner of the building, the gross rent for that unit includes the applicable utility allowance determined under this section. * * *

(b) *Applicable utility allowances*—(1) *Buildings assisted by the Rural Housing Service.* If a building receives assistance from the Rural Housing Service (RHS-assisted building), the applicable utility allowance for all rent-restricted units in the building is the utility allowance determined under the method prescribed by the Rural Housing Service (RHS) for the building (whether or not the building or its tenants also receive other state or federal assistance).

(2) *Buildings with Rural Housing Service assisted tenants.* If any tenant in a building receives RHS rental assistance payments (RHS tenant assistance), the applicable utility allowance for all rent-restricted units in the building (including any units occupied by tenants receiving rental assistance payments from the Department of Housing and Urban Development (HUD)) is the applicable RHS utility allowance.

(3) *Buildings regulated by the Department of Housing and Urban Development.* If neither a building nor any tenant in the building receives RHS housing assistance, and the rents and utility allowances of the building are reviewed by HUD on an annual basis (HUD-regulated building), the applicable utility allowance for all rent-restricted units in the building is the applicable HUD utility allowance.

(4) *Other buildings.* If a building is neither an RHS-assisted nor a HUD-regulated building, and no tenant in the building receives RHS tenant assistance, the applicable utility allowance for rent-restricted units in the building is determined under the following methods.

* * * * *

(ii) * * * (A) * * * However, if a local utility company estimate is obtained for any unit in the building under paragraph (b)(4)(ii)(B) of this section, a State or local housing credit agency (Agency) provides a building owner with an estimate for any unit in a building under paragraph (b)(4)(ii)(C) of this section, a cost estimate is calculated using the HUD Utility Schedule Model under paragraph (b)(4)(ii)(D) of this section, or a cost estimate is calculated by an energy consumption model under paragraph (b)(4)(ii)(E) of this section, then the estimate under paragraph (b)(4)(ii)(B), (C), (D), or (E) becomes the applicable utility allowance for all rent-restricted units of similar size and construction in the building. Paragraphs (b)(4)(ii)(B), (C), (D), and (E) of this section do not apply to units to which the rules of paragraphs (b)(1), (2), (3), or (4)(i) of this section apply.

(B) * * * In the case of deregulated utility services, the interested party is required to obtain an estimate only from one utility company even if multiple companies can provide the same utility service to a unit. However, the utility company must offer utility services to the building in order for that utility company's rates to be used in calculating utility allowances. The estimate should include all component deregulated charges for providing the utility service. * * *

(C) *Agency estimate.* A building owner may obtain a utility estimate for each unit in the building from the Agency that has jurisdiction over the building provided the Agency agrees to provide the estimate. The estimate is obtained when the building owner receives, in writing, information from the Agency providing the estimated per-unit cost of the utilities for units of similar size and construction for the geographic area in which the building containing the units is located. The Agency estimate may be obtained by a building owner at any time during the building's extended use period (see section 42(h)(6)(D)). Costs incurred in obtaining the estimate are borne by the building owner. In establishing an accurate utility allowance estimate for a particular building, an Agency (or an agent or other private contractor of the Agency that is a qualified professional within the meaning of paragraph (b)(4)(ii)(E) of this section) must take into account, among other things, local utility rates, property type, climate and degree-day variables by region in the State, taxes and fees on utility charges, building materials, and mechanical systems. If the Agency uses an agent or other private contractor to calculate the utility estimates, the agent or contractor and the owner must not be related within the meaning of section 267(b) or 707(b). An Agency may also use actual utility company usage data and rates for the building. However, use of the Agency estimate is limited to the building's consumption data for the twelve-month period ending no earlier than 60 days prior to the beginning of the 90-day period under paragraph (c)(1)

of this section and utility rates used for the Agency estimate must be no older than the rates in place 60 days prior to the beginning of the 90-day period under paragraph (c)(1) of this section. In the case of newly constructed or renovated buildings with less than 12 months of consumption data, the Agency (or an agent or other private contractor of the Agency that is a qualified professional within the meaning of paragraph (b)(4)(ii)(E) of this section) may use consumption data for the 12-month period of units of similar size and construction in the geographic area in which the building containing the units is located.

(D) *HUD Utility Schedule Model.* A building owner may calculate a utility estimate using the ''HUD Utility Schedule Model'' that can be found on the Low-Income Housing Tax Credits page at *http://www.huduser.org/datasets/lihtc.html* (or successor URL). Utility rates used for the HUD Utility Schedule Model must be no older than the rates in place 60 days prior to the beginning of the 90-day period under paragraph (c)(1) of this section.

(E) *Energy consumption model.* A building owner may calculate utility estimates using an energy and water and sewage consumption and analysis model (energy consumption model). The energy consumption model must, at a minimum, take into account specific factors including, but not limited to, unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of the building location. The utility consumption estimates must be calculated by either a properly licensed engineer or a qualified professional approved by the Agency that has jurisdiction over the building (together, qualified professional), and the qualified professional and the building owner must not be related within the meaning of section 267(b) or 707(b). Use of the energy consumption model is limited to the building's consumption data for the twelve-month period ending no earlier than 60 days prior to the beginning of the 90-day period under paragraph (c)(1) of this section, and utility rates used for the energy consumption model must be no older than the rates in place 60 days prior to the beginning of the 90-day period under paragraph (c)(1) of this section. In the case of newly constructed or renovated buildings with less than 12 months of consumption data, the qualified professional may use consumption data for the 12-month period of units of similar size and construction in the geographic area in which the building containing the units is located.

(c) *Changes in applicable utility allowance*—(1) *In general.* If, at any time during the building's extended use period (as defined in section 42(h)(6)(D)), the applicable utility allowance for units changes, the new utility allowance must be used to compute gross rents of the units due 90 days after the change (the 90-day period). For example, if rent must be lowered because a local utility company estimate is obtained that shows a higher utility cost than the otherwise applicable PHA utility allowance, the lower rent must be in effect for rent due at the end of the 90-day period. A building owner using a utility company estimate under paragraph (b)(4)(ii)(B) of this section, the HUD Utility Schedule Model under paragraph (b)(4)(ii)(D) of this section, or an energy consumption model under paragraph (b)(4)(ii)(E) of this section must submit copies of the utility estimates to the Agency that has jurisdiction over the building and make the estimates available to all tenants in the building at the beginning of the 90-day period before the utility allowances can be used in determining the gross rent of rent-restricted units. An Agency may require additional information from the owner during the 90-day period. Any utility estimates obtained under the Agency estimate under paragraph (b)(4)(ii)(C) of this section must also be made available to all tenants in the building at the beginning of the 90-day period. The building owner must pay for all costs incurred in obtaining the estimates under paragraphs (b)(4)(ii)(B), (C), (D), and (E) of this section and providing the estimates to the Agency and the tenants. The building owner is not required to review the utility allowances, or implement new utility allowances, until the building has achieved 90 percent occupancy for a period of 90 consecutive days or the end of the first year of the credit period, whichever is earlier.

(2) *Annual review.* A building owner must review at least once during each calendar year the basis on which utility allowances have been established and must update the applicable utility allowance in accordance with paragraph (c)(1) of this section. The review must take into account any changes to the building such as any energy conservation measures that affect energy consumption and changes in utility rates.

(d) *Record retention.* The building owner must retain any utility consumption estimates and supporting data as part of the taxpayer's records for purposes of § 1.6001–1(a).

■ **Par. 3.** Section 1.42–12 is amended by adding paragraph (a)(4) to read as follows:

**§ 1.42–12 Effective dates and transitional rules.**

(a) * * *

(4) *Utility allowances.* The first sentence in § 1.42–10(a), § 1.42–10(b)(1), (2), (3), and (4), the last two sentences in § 1.42–10(b)(4)(ii)(A), the third, fourth, and fifth sentences in § 1.42–10(b)(4)(ii)(B), § 1.42–10(b)(4)(ii)(C), (D), and (E), and § 1.42–10(c) and (d) are applicable to a building owner's taxable years beginning on or after July 29, 2008. Taxpayers may rely on these provisions before the beginning of the building owner's taxable year beginning on or after July 29, 2008 provided that any utility allowances calculated under these provisions are effective no earlier than the first day of the building owner's taxable year beginning on or after July 29, 2008. The utility allowances provisions that apply to taxable years beginning before July 29, 2008 are contained in § 1.42–10 (see 26 CFR part 1 revised as of April 1, 2008).

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

Approved: July 20, 2008.

**Eric Solomon,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. E8–17268 Filed 7–28–08; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 165

**[Docket No. USCG–2008–0695]**

**RIN 1625–AA00**

## Safety Zone; Maine; Sector Northern New England August Swim Events.

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing temporary safety zones during the month of August around the ''Sprucewold Cabbage Island Swim,'' ''Tri for a Cure Triathlon,'' ''Greater Burlington YMCA Lake Swim,'' ''Y-Tri Triathlon,'' and ''Rockland Breakwater Swim'' marine events while the events are in progress. These safety zones are needed to protect swimmers, event sponsors' safety vessels, and others in the maritime community from the safety hazards that may arise from events of

this type. Entry into these safety zones is prohibited unless authorized by the Captain of the Port Sector Northern New England.

**DATES:** This rule is effective from August 9 through August 23, 2008.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0695 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 U.S. Coast Guard Sector Northern New England, 259 High Street, South Portland, ME 04106 between the hours of 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call LT Jarrett Bleacher, U.S. Coast Guard Sector Northern New England, Waterways Management Division, at (207) 741–5421. 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. The logistics of these events were not provided to the Coast Guard with sufficient time to publish a NPRM and still ensure that this temporary final rule would be effective by August 9, 2008, the start of the events. These safety zones are needed to protect the event participants and maritime public by ensuring that large numbers of swimmers remain separate and safe from vessel traffic.

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**. Immediately implementing this rule promotes the public interest by protecting the maritime public and participants.

## Background and Purpose

The ''Greater Burlington YMCA Lake Swim,'' ''Tri for a Cure,'' ''Y-Tri Triathlon Swim,'' ''Sprucewold Cabbage Island Swim,'' and ''Rockland Breakwater Swim'' are annual marine swimming events held in the month of August. This rule creates safety zones from 8 a.m. to 6 p.m. EDT on August 9, 2008 for 33 CFR 165.T01–0695(a) (''Greater Burlington YMCA Lake Swim''), 7:30 a.m. to 9:30 a.m. EDT on August 9, 2008 for 33 CFR 165.T01–0695(b) (''Tri for a Cure''), 9 a.m. to 10 a.m. EDT on August 9, 2008 for 33 CFR 165.T01–0695(c) (''Y-Tri Triathlon''), 3 p.m. to 4 p.m. EDT on August 9, 2008 for 33 CFR 165.T01–0695(d) (''Sprucewold Cabbage Island Swim''), and 10 a.m. to 12 p.m. on August 23, 2008 for 33 CFR 165.T01–0695(e) (''Rockland Breakwater Swim'').

## Discussion of Rule

This rule establishes fixed safety zones for each of these events in the locations and at the times listed in the regulatory text. During the effective period of the safety zones, vessel traffic will be prohibited from entering the affected locations during the marine events, unless specifically authorized by the Captain of the Port Sector Northern New England. These safety zones are needed to safeguard the maritime public and the participants from the hazards associated with this type of large scale swimming event.

The Captain of the Port anticipates negligible negative impact on vessel traffic from these temporary safety zones as they will be in effect only for a short duration. The zones are not expected to affect commercial vessels transiting in or out of the port. The zones around the events will only be enforced while the participants are in the water. The enhanced safety to life and property provided by this rule greatly outweighs any potential negative impacts. Public notifications will be made during the entire effective period of these safety zones via marine information broadcasts.

## 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.

The Coast Guard expects the economic impact of this rule to be so minimal that a full regulatory evaluation is unnecessary. The effect of this rule will not be significant for the following reasons: the safety zones will be of limited duration; the events are designed to avoid, as much as practicable, deep draft, fishing, and recreational boating traffic routes; vessels may be authorized to transit the zone with permission of the COTP; and, advance notice of the zones will be provided via marine broadcast.

## 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 the safety zones. However, this rule will not have a significant economic impact on a substantial number of small entities due to the minimal time that vessels will be restricted from the areas, the ample space available for vessels to maneuver and navigate around the zones, and advance notifications will be made to the local community by marine information broadcasts.

## 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.lD and Department of Homeland Security Management Directive 5100.1, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have 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 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. 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T01–0695 to read as follows:

**§ 165.T01–0695 Safety Zone; Maine; Sector Northern New England August Swim Events.**

(a) The following area is a fixed safety zone for the ''Greater Burlington YMCA Lake Swim'':

(1) *Location.* All waters in Lake Champlain in the vicinity of North Hero Island enclosed by an area from shore to shore starting at latitude 44°46′55″N, longitude 73°22′14″W; thence to latitude 44°47′08″N, longitude 73°19′05″W; from latitude 44°46′48″N, longitude 73°17′13″W; thence to latitude 44°46′09″N, longitude 73°16′39″W; and from latitude 44°41′08″N, longitude 73°20′58″W thence to latitude 44°41′36″N, longitude 73°23′01″W.

(2) *Effective Date.* This rule will be enforced from 8 a.m. to 6 p.m. on August 9, 2008.

(b) The following area is a fixed safety zone for the ''Tri for a Cure Triathlon'':

(1) *Location.* All waters in the vicinity of Spring Point in Portland Harbor, Maine enclosed by a box starting at latitude 43°39′05″N, longitude 70°13′42″W; thence to latitude 43°39′08″N, longitude 70°13′39″W; thence to latitude 43°39′07″N, longitude 70°13′27″W thence to the point of beginning.

(2) *Effective Date.* This rule will be enforced from 7:30 a.m. to 9:30 a.m. on August 9, 2008.

(c) The following area is a fixed safety zone for the ''Y-Tri Triathlon'':

(1) *Location.* All waters in the vicinity of Point Au Roche State Park in Plattsburgh, New York, enclosed by a box starting at latitude 44°46′30″N, longitude 73°23′26″W; thence to latitude 44°46′17″N, longitude 73°23′26″W; thence to latitude 44°46′17″N, longitude 73°23′46″W; thence to latitude 44°46′29″N, longitude 73°23′46″W; thence to the point of beginning.

(2) *Effective Date.* This rule will be enforced from 9 a.m. to 10 a.m. on August 9, 2008.

(d) The following area is a fixed safety zone for the ''Sprucewold Cabbage Island Swim'':

(1) *Location.* All waters in the vicinity of Linekin Bay between Cabbage Island and Sprucewold Beach in Boothbay Harbor, Maine enclosed by a box starting at latitude 43°50′37″N, longitude 69°36′23″W; thence to latitude 43°50′37″N, longitude 69°36′59″W; thence to latitude 43°50′16″N, longitude 69°36′46″W; thence to latitude 43°50′22″N, longitude 69°36′21″W; thence to the point of beginning.

(2) *Effective Date.* This rule will be enforced from 3 p.m. to 4 p.m. on August 9, 2008.

(e) The following area is a fixed safety zone for the ''Rockland Breakwater Swim'':

(1) *Location.* All waters in the vicinity of Rockland Breakwater in Rockland Harbor, Maine enclosed by a box starting at latitude 44°06′16″N, longitude 69°04′39″W; thence to latitude 44°06′14″N, longitude 69°04′36″W; thence to latitude 44°06′13″N, longitude 69°04′41″W; thence to latitude 44°06′16″N, longitude 69°04′42″W; thence to latitude 44°06′16″N, longitude 69°04′40″W.

(2) *Effective Date.* This rule will be enforced from 10 a.m. to 12 p.m. on August 23, 2008.

(f) *Definition:* As used in this section, designated representative means any Coast Guard commissioned, warrant, or petty officer, or any federal, state, or local law enforcement officer authorized to enforce this regulation on behalf of the Coast Guard Captain of the Port(COTP).

(g) Regulations. (1) In accordance with the general regulations in 165.23 of this part, entry into or movement within this zone by any person or vessel is prohibited unless authorized by the COTP Sector Northern New England or the COTP's designated representative.

(2) Vessel operators desiring to enter or operate within the safety zones may contact the COTP or the COTP's designated representative for permission at telephone number 207–767–0303, on VHF Channel 13 (156.7 MHz), or VHF channel 16 (156.8 MHz). If permission is granted, all persons and vessels must comply with the instructions provided by the COTP or the COTP's designated representative.

Dated: July 16, 2008.

**J.B. McPherson,**

*Captain, U.S. Coast Guard, Captain of the Port, Sector Northern New England.*

[FR Doc. E8–17292 Filed 7–28–08; 8:45 am]

BILLING CODE 4910–15–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

[EPA–R08–OAR–2006–0806, FRL–8683–5]

## Approval and Promulgation of Air Quality Implementation Plans; Montana; Revisions to the Administrative Rules of Montana—Air Quality, Incinerators

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The EPA is approving revisions to the State Implementation Plan (SIP) submitted by the Governor of Montana on December 8, 1997, May 28, 2003, and August 25, 2004. The December 8, 1997 submittal revised the Administrative Rules of Montana (ARM) chapter 8, subchapter 3, section 17.8.316 (Incinerators) by adding subsection (6). ARM 17.8.316(6) excludes incinerators from having to comply with the other provisions of ARM 17.8.316, including the particulate matter emissions standard of 0.10 grains per cubic foot and the 10% opacity standard, if these sources have been issued a Montana air quality permit under 75–2–215, Montana Code Annotated (MCA), and ARM 17.8.770, which pertain to permitting of solid or hazardous waste incinerators. The August 25, 2004 submittal made a minor editorial revision to ARM 17.8.316(5). The May 28, 2003 submittal made minor editorial revisions to ARM 17.8.316(6). In a December 12, 2007 Notice of Proposed Rulemaking (72 FR 70540), we proposed to approve these revisions to the Montana State Implementation Plan (SIP). This action is being taken under section 110 of the Clean Air Act (CAA).

**DATES:** *Effective Date:* This final rule is effective August 28, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2006–0806. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Kathy Dolan, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, 303–312–6142, *dolan.kathy@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

I. Summary of SIP Revision
II. Final Action
III. Statutory and Executive Order Reviews

### Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Montana* mean the State of Montana, unless the context indicates otherwise.

### I. Summary of SIP Revision

On December 8, 1997, the State of Montana submitted a SIP revision for EPA's approval. The revision added subsection (6) to section 17.8.316 (Incinerators) of the Administrative Rules of Montana (ARM), chapter 8 (Air Quality), subchapter 3 (Emission Standards). Subsection (6) exempts incinerators from the requirements of ARM 17.8.316, including the particulate matter emissions standard of 0.10 grains per cubic foot and the 10% opacity standard, if these sources have been issued a Montana air quality permit

under 75–2–215, MCA, and ARM 17.8.706(5).[1] [2]

The revision also included wording changes to ARM 17.8.316. Most are minor editorial or technical corrections and do not change the substance of the rule. One of the changes was to substitute the words ''solid and hazardous waste'' for the word ''refuse'' in the rule. The effect of this change was to extend the rule requirements to incinerators burning solid or hazardous waste, not just refuse. The full text of the changes can be found in our Technical Support Document (TSD), which is contained in the Docket for this action.

We interpret ARM 17.8.316(6) to allow terms of a permit to override a requirement that has been approved as part of the SIP (i.e., the provisions in ARM 17.8.316(1)–(5)). Therefore, an analysis was needed to show that this new rule would not interfere with compliance with the National Ambient Air Quality Standards (NAAQS) or Prevention of Significant Deterioration (PSD) increments. Section 110(l) of the CAA states that EPA cannot approve a SIP revision that would interfere with any applicable requirement concerning attainment or reasonable further progress, as defined in section 171 of the CAA, or any other applicable requirements of the CAA. Montana did not provide any demonstration in its December 8, 1997 submittal that ARM 17.8.316(6) meets these criteria. Subsequent to the State's submittal, we requested information from the Montana Department of Environmental Quality (DEQ) in order to conduct our own analysis on the impact of ARM 17.8.316(6) on the attainment and maintenance of the NAAQS for particulate matter with an aerodynamic diameter less than or equal to 10 and 2.5 micrometers (PM–10 and PM–2.5) and compliance with the PSD PM–10 increments. Based on this analysis, we have determined that this specific change to a SIP requirement will not adversely impact the attainment and maintenance of the PM–10 and PM–2.5 NAAQS, or compliance with the PM–10 increments, in Montana. Our analysis of this revision's impact is contained in the TSD for this action. In addition, the TSD discusses our verification that ARM 17.8.316(6) will not impact compliance with, or the ability to enforce, the Federal New Source Performance Standards (NSPS) or Maximum Achievable Control Technology (MACT) regulations. Based on a letter from the Montana DEQ dated October 2, 2007, and our own consideration of the rule change, we have determined that ARM 17.8.316(6) will not interfere with, supersede, or replace any NSPS or MACT requirements for sources, or affect in any way the State's, EPA's, or any other person's ability to enforce such NSPS or MACT requirements. The TSD and the DEQ letter are available for review as part of the Docket for this action.

On August 25, 2004, the State of Montana submitted for our approval a revision to subsection (5) to ARM 17.8.316 (Incinerators). This revision makes a minor change to the third sentence of subsection (5), from: ''Testing shall be conducted in accordance with ARM 17.8.106 and the Montana Source Testing Protocol and Procedures Manual''; to: ''Testing shall be conducted in accordance with ARM 17.8.106 and the Montana Source Test Protocol and Procedures Manual.''

On May 28, 2003, the State of Montana submitted for our approval a revision to ARM 17.8.316(6). This revision makes minor changes to subsection (6), from: ''This rule does not apply to incinerators for which an air quality preconstruction permit has been issued under 75–2–215, MCA, and ARM 17.8.706(5)''; to: ''This rule does not apply to incinerators for which a Montana air quality permit has been issued under 75–2–215, MCA, and ARM 17.8.770.''

## II. Final Action

Our review of the revisions to ARM 17.8.316 indicates that they are consistent with the CAA. Thus, we are approving the revisions to ARM 17.8.316, submitted on December 8, 1997, May 28, 2003, and August 25, 2004, into the Montana SIP.

## III. Statutory and Executive Order Reviews

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

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and

[1] MCA section 75–2–215 is titled ''Solid or hazardous waste incineration—Additional permit requirements''.

[2] ARM 17.8.706(5) was recodifed to ARM 17.8.770 effective on December 6, 2002. This provision has not been submitted by the State to be incorporated into the federally approved SIP. ARM 17.8.770 (formerly ARM 17.8.706(5)) requires applicants for a preconstruction permit for an incineration facility to submit a human health risk assessment protocol and a human health risk assessment.

the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 52**

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

Dated: June 5, 2008.

**Carol Rushin,**

*Acting Regional Administrator, Region 8.*

■ 40 CFR part 52 is amended to read as follows:

## PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

## Subpart BB—Montana

■ 2. Section 52.1370 is amended by adding paragraph (c)(67) to read as follows:

### § 52.1370 Identification of plan.

* * * * *

(c) * * *

(67) On December 8, 1997, May 28, 2003, and August 25, 2004, the Governor of Montana submitted revisions to the Montana State Implementation Plan. The December 8, 1997 submittal adds subsection (6) to Administrative Rules of Montana (ARM) section 17.8.316 (Incinerators); the August 25, 2004 submittal makes a minor revision to ARM 17.8.316(5); and, the May 28, 2003 submittal makes minor editorial revisions to ARM 17.8.316(6).

(i) Incorporation by reference. Administrative Rules of Montana (ARM) section 17.8.316, Incinerators, effective April 9, 2004.

(ii) Additional Material.

(A) October 2, 2007 Letter from MT DEQ to EPA regarding NSPS/MACT compliance.

[FR Doc. E8–17094 Filed 7–28–08; 8:45 am]

BILLING CODE 6560–50–P

# Proposed Rules

Federal Register
Vol. 73, No. 146
Tuesday, July 29, 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.

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 73

**[Docket No. PRM–73–11; NRC–2001–0023]**

### Petition for Rulemaking Filed by Scott Portzline, Three Mile Island Alert; Consider Petition in the Rulemaking Process

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Resolution and closure of petition docket.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is considering the issues raised in a petition for rulemaking submitted by Scott Portzline, on behalf of the Three Mile Island Alert, in the ongoing ''Power Reactor Security Requirements'' rulemaking. The petitioner requested that the NRC regulations governing physical protection of plants and materials be amended to require NRC licensees to post at least one armed guard at each entrance to the ''owner controlled areas'' (OCAs) surrounding all U.S. nuclear power plants. The petitioner stated that this should be accomplished by adding armed site protection officers (SPOs) to the security forces—not by simply moving SPOs from their protected area (PA) posts to the OCA entrances. The petitioner believes that its proposed amendment would provide an additional layer of security that would complement existing measures against radiological sabotage and would be consistent with the long-standing principle of defense-in-depth.

**DATES:** The docket for the petition for rulemaking PRM–73–11 is closed on July 29, 2008.

**ADDRESSES:** You can access publicly available documents related to this petition for rulemaking using the following methods:

*Federal e-Rulemaking Portal:* Further NRC action on the issues raised by this petition will be accessible at the federal rulemaking portal, *http://www.regulations.gov*, by searching on rulemaking docket ID: NRC–2006–0016 and docket ID: NRC–2008–0019. The NRC also tracks all rulemaking actions in the ''NRC Regulatory Agenda: Semiannual Report (NUREG–0936).''

*NRC's Public Document Room (PDR):* The public may examine and have copied for a fee, publicly available documents at the NRC's PDR, Public File Area O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Document Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/NRC/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are any problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *PDR.resource@nrc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Lauren Quinones, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–2007, or toll-free: 800–368–5642, *e-mail: Lauren.Quinones@nrc.gov.*

**SUPPLEMENTARY INFORMATION:** On November 2, 2001 (66 FR 55603), the Nuclear Regulatory Commission (NRC) published for public comment a petition for rulemaking (PRM) filed by Scott Portzline, Three Mile Island Alert. The comment period closed on January 16, 2002. Eleven comments were received.

In a **Federal Register** notice published January 5, 2007 (72 FR 481), the NRC informed the public that PRM–73–11 and the public comments received on the petition would be considered in the proposed rulemaking, ''Power Reactor Security Requirements,'' published in the **Federal Register** on October 26, 2006 (71 FR 62664). That rulemaking did consider the topics of PRM–73–13 and proposed extensive revisions to the NRC regulations in 10 CFR Parts 50, 72, and 73 that address security requirements for nuclear power reactor licensees. The comment period on that proposed rule expired on March 26, 2007.

Dated at Rockville, Maryland, this 1st day of July 2008.

For the Nuclear Regulatory Commission.

**R.W. Borchardt,**

*Executive Director for Operations.*

[FR Doc. E8–17319 Filed 7–28–08; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 73

**[Docket No. PRM–73–13; NRC–2007–0023]**

### David Lochbaum, Union of Concerned Scientists; Consideration of Petition in the Rulemaking Process

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Resolution and closure of petition docket.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is considering the issues raised in a petition for rulemaking submitted by David Lochbaum, on behalf of the Union of Concerned Scientists, in the ongoing ''Power Reactor Security Requirements'' rulemaking. The petitioner requested that the NRC amend its regulations to require that licensees implement procedures to ensure that when information becomes known to a licensee about an individual that would prevent that individual from gaining unescorted access to the protected area of a nuclear power plant, the licensee will implement measures to ensure the individual does not enter the protected area, whether escorted, or not; and, when sufficient information is not available to a licensee about an individual to determine whether the criteria for unescorted access are satisfied, the licensee will implement measures to allow that individual to enter the protected area only when escorted at all times by an armed member of the security force who remains in periodic communication with security supervision.

**DATES:** The docket for the petition for rulemaking PRM–73–13 is closed on July 29, 2008.

**ADDRESSES:** You can access publicly available documents related to this petition for rulemaking using the following methods:

*Federal e-Rulemaking Portal:* Further NRC action on the issues raised by this petition will be accessible at the federal rulemaking portal, *http://www.regulations.gov*, by searching on rulemaking docket ID: NRC–2006–0016 and docket ID: NRC–2008–0019. The NRC also tracks all rulemaking actions in the ''NRC Regulatory Agenda: Semiannual Report (NUREG–0936).''

*NRC's Public Document Room (PDR):* The public may examine and have copied for a fee, publicly available documents at the NRC's PDR, Public File Area O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Document Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/NRC/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are any problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *PDR.resource@nrc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Lauren Quinones, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–2007, or toll-free: 800–368–5642, *e-mail: Lauren.Quinones@nrc.gov.*

**SUPPLEMENTARY INFORMATION:** On April 9, 2007 (72 FR 17440), the Nuclear Regulatory Commission (NRC) published for public comment a petition for rulemaking (PRM) filed by David Lochbaum, Union of Concerned Scientists. The comment period closed on June 25, 2007 and the NRC received twelve comments.

The NRC has determined that the issues raised in PRM–73–13 are appropriate for consideration and, in fact, the issues are already being considered in the ongoing ''Power Reactors Security Requirements'' rulemaking. NRC staff will address the comments filed in PRM–73–13 as part of the ''Power Reactor Security Requirements'' rulemaking. The proposed rule was published in the **Federal Register** on October 26, 2006 (71 FR 62664). That rulemaking did consider the topics of PRM–73–13 and proposed extensive revisions to the NRC regulations in 10 CFR Parts 50, 72, and 73 that address security requirements for nuclear power reactor licensees. The comment period on that proposed rule expired on March 26, 2007.

Dated at Rockville, Maryland, this 1st day of July 2008.

For the Nuclear Regulatory Commission.

**R.W. Borchardt,**

*Executive Director for Operations.*

[FR Doc. E8–17321 Filed 7–28–08; 8:45 am]

**BILLING CODE 7590–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2008–0788; Directorate Identifier 2008–CE–039–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; DG Flugzeugbau GmbH Model DG–500MB Gliders

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking; correction.

**SUMMARY:** This document makes a correction to a proposed airworthiness directive (AD), which was published in the **Federal Register** on July 3, 2008 (73 FR 38160), and applies to certain Stemme GmbH & Co. KG (Stemme) Model S10–VT powered sailplanes. This document proposed to require replacement of the single ear clamps in the fuel system with improved design parts. The FAA incorrectly referenced the docket number of this proposed AD as ''FAA–2008–0685'' instead of ''FAA–2008–0788.'' This document corrects the docket number.

**DATES:** The comment period ending date of August 4, 2008, remains the same. The FAA will also address any comments relating to this proposed AD submitted to Docket No. FAA–2008–0685.

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

**SUPPLEMENTARY INFORMATION:**

### Discussion

On June 27, 2008, the FAA issued a notice of proposed rulemaking (NPRM) to require replacement of the single ear clamps in the fuel system with improved design parts. This NPRM was published in the **Federal Register** on July 3, 2008 (73 FR 38160). The FAA incorrectly referenced the docket number of this proposed AD as ''FAA–2008–0685'' instead of ''FAA–2008–0788.'' This document corrects the docket number.

### Need for the Correction

This correction is needed to assure that all correspondence related to this subject is posted in the correct docket.

### Correction of Publication

Accordingly, the publication of July 3, 2008 (73 FR 38160), which was the subject of FR Doc. E8–15177, is corrected as follows:

On page 38160, in the first column, in the third line under the heading ***DEPARTMENT OF TRANSPORTATION***, replace ''FAA–2008–0685'' with ''FAA–2008–0788.''

On page 38160, in the third column, in the third line, replace ''FAA–2008–0685'' with ''FAA–2008–0788.''

**§ 39.13 [Corrected]**

On page 38161, in the second column, in the fifth and sixth lines under the heading ***§ 39.13 [Amended]***, replace ''FAA–2008–0685'' with ''FAA–2008–0788.''

Action is taken herein to correct this reference in the proposed AD.

The comment period ending date of August 4, 2008, remains the same. The FAA will also address any comments relating to this proposed AD submitted to Docket No. FAA–2008–0685.

Issued in Kansas City, Missouri, on July 23, 2008.

**John R. Colomy,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. E8–17369 Filed 7–28–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[REG–106251–08]**

**RIN 1545–BH68**

## Employee Stock Purchase Plans Under Internal Revenue Code Section 423

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations relating to options granted under an employee stock purchase plan as defined in section 423 of the Internal Revenue Code (Code). These proposed regulations affect certain taxpayers who participate in the

transfer of stock pursuant to the exercise of options granted under an employee stock purchase plan. These proposed regulations provide guidance to assist taxpayers in complying with section 423 in addition to clarifying certain rules regarding options granted under an employee stock purchase plan. This document also contains proposed regulations under sections 421 and 422 of the Code.

**DATES:** Written or electronic comments must be received by October 27, 2008.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG–106251–08), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–106251–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov/* (IRS REG–106251–08).

**FOR FURTHER INFORMATION CONTACT:** Concerning these proposed regulations, Thomas Scholz at (202) 622–6030; concerning submissions of comments, and/or to request a hearing, Oluwafunmilayo Taylor, at (202) 622–7180 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

## Background

This document contains proposed amendments to 26 CFR part 1 under section 423 of the Code. This document also contains minor proposed amendments to 26 CFR part 1 under sections 421 and 422 of the Code.

Section 423 was added to the Code by section 221(a) of the Revenue Act of 1964, Public Law 88–272 (78 Stat. 63 (1964)). Changes to the applicable law concerning section 423 were made by sections 1402(b)(1)(C) and 1402(b)(2) of the Tax Reform Act of 1976, Public Law 94–455 (90 Stat. 1731 and 1732–1733 (1976)); section 1001(b)(5) of the Deficit Reduction Act of 1984, Public Law 98–369 (98 Stat. 1011 (1984)); section 1114 of the Tax Reform Act of 1986, Public Law 99–514 (100 Stat. 2451 (1986)); and sections 11801(c)(9)(D)(i)–(ii) and 11801(c)(9)(E) of the Omnibus Budget Reconciliation Act of 1990, Public Law 101–508 (104 Stat. 1388–525 (1990)).

Regulations under section 423 were published in the **Federal Register** on June 23, 1966 (TD 6887). These regulations were amended on September 27, 1979 (TD 7645), October 31, 1980 (TD 7728), and December 1, 1988 (TD 8235). In Notice 2004–55, 2004–34 IRB 319 (August 23, 2004), (see § 601.601(d)(2)(ii)(*b*)), the IRS and the Treasury Department requested comments concerning whether the existing regulations under section 423 should be amended, and if so, what issues should be addressed. Two comment letters were submitted in response to Notice 2005–55 and the suggestions in those letters are addressed in this preamble.

In general, the income tax treatment of the grant of an option to purchase stock in connection with the performance of services and of the transfer of stock pursuant to the exercise of the option is determined under section 83 and the regulations thereunder. However, section 421 provides special rules for determining the income tax treatment of the transfer of shares of stock pursuant to the exercise of an option if the requirements of sections 422(a) or 423(a), as applicable, are met. Section 422 applies to incentive stock options and section 423 applies to options granted under an employee stock purchase plan (collectively, statutory options).

Under section 421, if a share of stock is transferred to an individual pursuant to the exercise of a statutory option, there is no income at the time of exercise of the option with respect to the transfer and no deduction under section 162 is allowed to the employer corporation with respect to the transfer.

Section 423(a) provides that section 421 applies to the transfer of stock to an individual pursuant to the exercise of an option granted under an employee stock purchase plan if: (i) no disposition of the stock is made within two years from the date of grant of the option or within one year from the date of transfer of the share, and (ii) at all times during the period beginning on the date of grant and ending on the day three months before the exercise of the option, the individual is an employee of either the corporation granting the option or a parent or subsidiary of such corporation, or a corporation (or a parent or subsidiary of such corporation) issuing or assuming a stock option in a transaction to which section 424(a) applies. Section 423(b) sets forth several requirements that must be met for a plan to qualify as an employee stock purchase plan. Section 423(c) provides a special rule that is applicable where the option exercise price is between 85 and 100 percent of the fair market value of the stock at the time the option was granted.

Section 424 provides special rules applicable to statutory options, including rules concerning the modification of statutory options and the substitution or assumption of an option by reason of a corporate merger, consolidation, acquisition of property or stock, separation, reorganization, or liquidation. Section 424 also contains definitions of certain terms, including disposition, parent corporation, and subsidiary corporation. Finally, section 424 provides special rules related to attribution of stock ownership and the effect of stockholder approval on the date of grant of a statutory option.

## Explanation of Provisions

These proposed regulations would provide a comprehensive set of rules governing stock options issued under an employee stock purchase plan and would incorporate substantially all of the rules contained in the existing regulations under section 423. These proposed regulations are comprised of two sections: Section 1.423–1, applicability of section 421(a); and § 1.423–2, employee stock purchase plan defined. These proposed regulations would amend the existing regulations under section 423 in several ways. First, these proposed regulations would update the existing regulations to incorporate statutory changes and to make them consistent, where appropriate, with the regulations under section 422 related to incentive stock options. The regulations under section 422 were last updated in 2004. See TD 9144, 2004–26 IRB 413. Second, these proposed regulations would update the existing regulations to provide additional guidance in certain areas as discussed below. Finally, these proposed regulations would also update the existing regulations to remove obsolete rules.

### *1. General Requirements*

Under § 1.423–2(a)(1) of these proposed regulations, an employee stock purchase plan must meet the requirements of paragraphs (i) through (ix) of § 1.423–2(a)(2). The terms of the plan, or an offering under the plan, must satisfy the requirements of paragraphs (iii) through (ix) of § 1.423–2(a)(2). Consistent with § 1.422–2(b)(1), § 1.423–2(a)(1) of these proposed regulations would provide that the plan and the terms of an offering must be in writing or electronic form, provided that such writing or electronic form is adequate to establish the terms of the plan or offering.

Section 1.423–2(a)(2) of these proposed regulations lists the requirements that must be met for qualification as an employee stock purchase plan and provides cross references to the specific section of

these regulations that addresses each requirement.

Under § 1.423–2(a)(3) of these proposed regulations, if the terms of an option are inconsistent with the terms of the employee stock purchase plan or an offering under the plan, then the option will not be treated as granted under an employee stock purchase plan. (Section 1.423–2(a)(2) of the existing regulations has been re-numbered as § 1.423–2(a)(3) of these proposed regulations.) If an option with terms that are inconsistent with the terms of the plan or an offering under the plan is granted to an employee who is entitled to the grant of an option under the terms of the plan or offering, and the employee is not granted an option under the offering that qualifies as an option granted under an employee stock purchase plan, then the offering will not meet the requirements of § 1.423–2(e) of these proposed regulations, which generally requires that options be granted to all employees of any corporation whose employees are granted options under an employee stock purchase plan. As a result, none of the options granted under the offering will be eligible for the special tax treatment of section 421. *Example 1* in § 1.423–2(a)(4) illustrates this principle. Section 1.423–2(a)(4) of these proposed regulations contains additional examples to illustrate the principles of § 1.423–2(a)(3).

If an option with terms that are inconsistent with the terms of the plan or an offering under the plan is granted to an individual who is not entitled to the grant of an option under the terms of the plan or offering, then the option will not be treated as an option granted under an employee stock purchase plan, and the grant of the option will not disqualify the options granted under the offering. *Examples 2 and 3* in § 1.423–2(a)(4) of these proposed regulations illustrate this principle. *Example 2* also appears in § 1.423–2(a)(2) of the existing regulations.

If, at the time of grant, an option qualifies as an option granted under an employee stock purchase plan, but the terms of the option are not satisfied, then the option will not be treated as granted under an employee stock purchase plan. However, this failure to comply with the terms of the option will not disqualify the options granted under the plan or offering. *Example 4* in § 1.423–2(a)(4) of these proposed regulations illustrates this principle.

*2. Stockholder Approval of the Employee Stock Purchase Plan*

To qualify as an employee stock purchase plan, section 423(b)(2) requires that the plan be approved by the stockholders of the granting corporation within 12 months before or after the date the plan is adopted. These proposed regulations would provide the same basic requirements for stockholder approval as those included in the existing regulations. Consistent with § 1.422–2(b)(2), these proposed regulations would provide additional guidance concerning the circumstances under which stockholder approval is required.

These proposed regulations, like the existing regulations, would require stockholder approval if there is a change in the aggregate number of shares or in the employees eligible to be granted options under the plan. The standard for determining when stockholder approval is required under these proposed regulations generally is the same as under the existing regulations. These proposed regulations would clarify the requirements for stockholder approval and would provide a more comprehensive list of situations that require new stockholder approval of the plan. In particular, these proposed regulations would clarify that new stockholder approval is required if there is a change in the shares with respect to which options are issued or a change in the granting corporation.

For example, assume that S, a wholly owned subsidiary of P, adopts an employee stock option plan under which options for S stock will be granted to S employees, and the plan is approved by the stockholder of S (in this case, P) within the applicable 24-month period. If S later amends the plan to provide for the grant of options to acquire P stock (rather than S stock), S must obtain approval from the stockholders of S (in this case, P) within 12 months before or after the date of the amendment of the plan because the amendment of the plan to allow the grant of options for P stock is considered the adoption of a new plan. See paragraph (iii) of *Example 1* in § 1.423–2(c)(5) of these proposed regulations. This conclusion differs from that in paragraph (iii) of *Example 1* under § 1.422–2(b)(6), which concludes that the stockholders of P rather than the stockholders of S must approve the plan as a result of its amendment to provide for the grant of options to acquire P stock. The IRS and the Treasury Department invite comment on this result and are proposing a conforming change to *Example 1*, paragraph (iii) under § 1.422–2(b)(6).

These proposed regulations also would provide additional guidance regarding the application of the stockholder approval requirements where an employee stock purchase plan is assumed in connection with a corporate transaction. *Example 3* in § 1.423–2(c)(5) of these proposed regulations illustrates this principle.

*3. Maximum Aggregate Number of Shares*

Section 1.423–2(c)(3) of the existing regulations provides that an employee stock purchase plan must designate the maximum aggregate number of shares that may be issued under the plan. Consistent with § 1.422–2(b)(3)(ii), these proposed regulations would provide that the plan may specify that the maximum aggregate number of shares available for grants under the plan may increase annually by a specified percentage of the authorized, issued, or outstanding shares at the date of the adoption of the plan. Further, a plan providing that the maximum aggregate number of shares issued subject to options under the plan may change based on any other specific circumstances will satisfy the requirements of § 1.423–2(c)(3) only if the stockholders approve an immediately determinable maximum number of shares that may be issued under the plan in any event. *Examples 4 and 5* in § 1.423–2(c)(5) of these proposed regulations illustrate these principles.

*4. Employees Covered by the Plan*

Section 423(b)(4) permits an employer to exclude from participation one or more of the following categories of employees: Employees who have been employed less than two years; Employees who customarily work 20 hours or less per week; Employees who customarily work not more than five months in any calendar year; and Highly compensated employees (HCEs) within the meaning of section 414(q). Section 1.423–1(e)(1) of these proposed regulations has been updated to reflect the 1986 amendment of section 423(b)(4)(D) to substitute ''highly compensated employees (within the meaning of section 414(q))'' for ''officers, persons whose principal duties consist of supervising the work of other employees, or highly compensated employees.'' See Public Law 99–514, section 1114(b)(13).

One commentator suggested that the regulations clarify that an employer may exclude from participation a subset of one of the groups set forth in section 423(b)(4). For example, an employer should be permitted to exclude a subset of HCEs, such as officers, from participation in the plan. The commentator further suggested that the regulations clarify that an employer may

impose shorter service requirements than those permitted. For example, an employer should be permitted to exclude employees who have been employed less than one year from participation in the plan.

The IRS and the Treasury Department agree that a more inclusive application of the rules of section 423(b)(4) is consistent with the intent of section 423. Accordingly, § 1.423–2(e)(2) of these proposed regulations would provide that an employee stock purchase plan does not fail to satisfy the coverage provision of section 423(b)(4) merely because the plan excludes employees who have completed a shorter period of service or whose customary employment is for fewer hours per week or fewer months in a calendar year than is specified in subparts (A), (B) and (C) of section 423(b)(4), provided the exclusion is applied in an identical manner to all employees of every corporation whose employees are granted options under the plan. In addition, these proposed regulations would provide that the terms of an employee stock purchase plan may exclude HCEs: (a) with compensation above a certain level, or (b) who are officers or subject to the disclosure requirements of section 16(a) of the Securities Exchange Act of 1934, provided the exclusion is applied in an identical manner to all HCEs of every corporation whose employees are granted options under the plan. *Examples 3, 4, 5, 6, and 7* in § 1.423–2(e)(6) of these proposed regulations illustrate these principles. (The examples under § 1.423–2(e)(3) of the existing regulations have been re-numbered as § 1.423–2(e)(6) of these proposed regulations.)

Another commentator suggested that the regulations permit employers to exclude from plan participation employees who are nonresident aliens and who receive no earned income that constitutes income from sources within the United States. The IRS and the Treasury Department agree that it may be appropriate to exclude foreign employees from plan participation in certain limited circumstances. However, unlike section 410(b), section 423 does not provide an exclusion for such nonresident aliens. Accordingly, the IRS and the Treasury Department are constrained by statutory authority from providing a general exclusion from plan participation for employees who are nonresident aliens and who receive no United States source income. Therefore, § 1.423–2(e)(3) of these proposed regulations would provide that employees who are citizens or residents of a foreign jurisdiction (without regard to whether they are also citizens of the United States or resident aliens (within the meaning of § 7701(b)(1)(A))) may be excluded from the coverage of an employee stock purchase plan only if the grant of an option under the plan to a citizen or resident of the foreign jurisdiction is prohibited under the laws of such jurisdiction or if compliance with the laws of the foreign jurisdiction would cause the plan to violate the requirements of section 423. *Example 8* in § 1.423–2(e)(6) of these proposed regulations illustrates this principle.

Another commentator suggested that the regulations permit employers to exclude collectively bargained employees from plan participation. However, unlike section 410(b), section 423 does not provide an exclusion for collectively bargained employees. Accordingly, the IRS and the Treasury Department are again constrained by statutory authority from providing a general exclusion from plan participation for collectively bargained employees.

One commentator suggested that the regulations be amended to provide that an offering will not lose its tax-favored status due to the inadvertent exclusion of employees from plan participation. Rather, the commentator suggested that the granting corporation be permitted to correct certain errors in plan administration through a corrections program that would permit the excluded employees to participate in past offerings under a plan. Such a corrections program is beyond the scope of these regulations. However, the IRS and the Treasury Department invite comments on whether such a program is appropriate (including the statutory authority for such a program) and suggestions for the types of violations that might be covered and the methods of correction.

Section 1.423–2(e)(4) of these proposed regulations includes language that appears under § 1.423–2(e)(1) of the existing regulations. Section 1.423–2(e)(2) of the existing regulations has been re-numbered as § 1.423–2(e)(5) of these proposed regulations.

*5. Equal Rights and Privileges*

Section 423(b)(5) requires that, subject to certain exceptions, an employee stock purchase plan, by its terms, provide that all employees granted options under the plan have the same rights and privileges.

Section 1.423–2(f)(3) of these proposed regulations includes language that appears in § 1.423–2(f)(1) of the existing regulations. (The examples in § 1.423–2(f)(2) of the existing regulations have been relocated to *Examples 1 and 2* of § 1.423–2(f)(7) of these proposed regulations. The example in § 1.423–2(f)(4) of the existing regulations has been relocated to *Example 3* of § 1.423–2(f)(7). Section 1.423–2(f)(4) of the existing regulations is re-numbered under these proposed regulations as § 1.423–2(f)(6)).

One commentator suggested that a plan or offering should not fail to satisfy the equal rights and privileges provision of section 423(b)(5) if the provisions of the plan or offering applied to foreign employees are reasonably designed to avoid adverse consequences for such employee under foreign law as a result of plan participation. The IRS and the Treasury Department agree that in certain limited circumstances it may be appropriate for the terms of an employee stock purchase plan to be less favorable with respect to foreign employees than those terms are with respect to employees resident in the United States. Accordingly, § 1.423–2(f)(4) of these proposed regulations would provide that a plan or offering will not fail to satisfy the requirements of section 423(b)(5) if, in order to comply with the laws of a foreign jurisdiction, the terms of an option granted under a plan or offering to citizens or residents of such foreign jurisdiction (without regard to whether they are also citizens of the United States or resident aliens (within the meaning of § 7701(b)(1)(A))) are less favorable than the terms of options granted under the same plan or offering to employees resident in the United States. *Example 4* in § 1.423–2(f)(7) of these proposed regulations illustrates this principle.

A plan or offering will not satisfy the requirements of section 423(b)(5), however, if, in order to comply with the laws of a foreign jurisdiction, the terms of the plan or offering are more favorable with respect to citizens or residents of such foreign jurisdiction than the terms of the plan or offering are with respect to employees resident in the United States.

Another commentator suggested that the regulations addressing the carryover of amounts from one offering to another be clarified. In response to this comment, these proposed regulations would clarify § 1.423–2(f)(3) of the existing regulations (which has been re-numbered as § 1.423–2(f)(5)). Generally, a plan permitting one or more employees to carry forward amounts that were withheld but not applied toward the purchase of stock under an earlier plan or offering and apply such amounts toward the purchase of additional stock under a subsequent plan or offering will be a violation of the

equal rights and privileges requirement under section 423(b)(5). However, the carry forward of amounts withheld but not applied toward the purchase of stock under an earlier plan or offering will not violate the equal rights and privileges requirement of section 423(b)(5) if all other employees participating in the current plan or offering are permitted to make direct payments toward the purchase of shares under a subsequent plan or offering in an amount equal to the excess of: (a) the greatest amount that any employee is allowed to carry forward from an earlier plan or offering over (b) the amount, if any, the employee will carry forward from an earlier plan or offering. *Example 5* in § 1.423–2(f)(7) of these proposed regulations illustrates this principle.

Further, a plan will not fail to satisfy the equal rights and privileges requirement of section 423(b)(5) merely because employees are permitted to carry forward amounts representing a fractional share which were withheld but not applied toward the purchase of stock under an earlier plan or offering and apply such amounts toward the purchase of additional stock under a subsequent plan or offering.

*6. Option Price*

Under section 423(b)(6), the option price must not be less than the lesser of: (a) an amount equal to 85 percent of the fair market value of the stock at the time the option is granted, and (b) an amount not less than 85 percent of the fair market value of the stock at the time the option is exercised. Consistent with § 1.422–2(e)(1), § 1.423–2(g)(1) of these proposed regulations would provide that the option price may be determined in any reasonable manner, including the valuation methods permitted under § 20.2031–2 (Estate Tax Regulations), so long as the option price meets the minimum pricing requirements of section 423(b)(6).

*7. Date of Grant*

Section 1.421–1(c) provides, that for purposes of §§ 1.421–2 through 1.424–1, the language ''the date of the granting of the option'' and ''the time such option is granted'' and similar phrases refer to the date or time when the granting corporation completes the corporate action constituting an offer of stock for sale to an individual under the terms and conditions of a statutory option. The date of grant for an option granted under an employee stock purchase plan is important for several reasons. First, the favorable tax consequences under section 421 apply to the shares acquired pursuant to the exercise of an option granted under an employee stock purchase plan if the shares are not disposed of within two years from the date of grant of the option or within one year from the date of exercise of the option. Second, the $25,000 limitation under section 423(b)(8) is determined based on the fair market value of the stock measured on the date of grant of the option. The date of grant is also important for purposes of determining the employees eligible to participate in the plan and, in certain cases, determining the purchase price of stock under the plan.

Section 1.421–1(c) further provides that a corporate action constituting an offer of stock for sale is not considered complete until the date on which the maximum number of shares that can be purchased under the option and the minimum option price are fixed or determinable. Because options under an employee stock purchase plan may be priced at the lesser of an amount equal to 85 percent of the fair market value of the stock at the time the option is granted, and an amount not less than 85 percent of the fair market value of the stock at the time the option is exercised, it is not always possible to determine the minimum option price on the first day of an offering. However, many granting corporations intend for the first day of an offering to be the date of grant.

Accordingly, § 1.423–2(h)(2) of these proposed regulations would provide that, for purposes of options granted under an employee stock purchase plan, the principles of § 1.421–1(c) shall be applied without regard to the requirement that the minimum option price be fixed or determinable in order for the corporate action constituting an offer of stock to be considered complete. As a result, the first day of an offering could be the date of grant for an option issued under an employee stock purchase plan even though the minimum option price is not fixed or determinable on the first day of the offering. These proposed regulations include an amendment to § 1.421–1(c).

One commentator questioned whether it is necessary for a plan to contain a limit on the number of shares that can be purchased by each participant during an offering in order for the date of grant of the option to be the first day of an offering. Section 1.423–2(h)(3) of these proposed regulations would provide that the date of grant will be the first day of an offering if the terms of an employee stock purchase plan or offering designate a maximum number of shares that may be purchased by each participant during the offering. Similarly, the date of grant will be the first day of an offering if the terms of the plan or offering require the application of a formula to establish, on the first day of the offering, the maximum number of shares that may be purchased by each participant during the offering.

However, § 1.423–2(h)(3) of these proposed regulations does not require that an employee stock purchase plan or offering designate a maximum number of shares that may be purchased by each participant during the offering or incorporate a formula to establish a maximum number of shares that may be purchased by each participant during the offering. If the maximum number of shares that can be purchased under an option is not fixed or determinable until the date the option is exercised, then the date of exercise will be the date of grant of the option. The $25,000 limit under section 423(b)(8) and the limit on the aggregate number of shares that may be issued under an employee stock purchase plan are not sufficient to establish the maximum number of shares that can be purchased under an option so that the date of grant will be the first day of the offering. *Examples 1, 2, 3 and 4* in § 1.423–2(h)(4) of these proposed regulations illustrate these principles.

Section 1.423–2(h) of the existing regulations is re-numbered as § 1.423–2(h)(1) of these proposed regulations.

*8. Annual $25,000 Limitation*

Section 423(b)(8) provides that an employee stock purchase plan must, by its terms, provide that no employee may be permitted to purchase stock under all the employee stock purchase plans of his or her employer corporation and its related corporations at a rate which exceeds $25,000 in fair market value of the stock (determined on the date of grant) for each calendar year in which an option granted to the employee is outstanding and exercisable. Section 1.423–2(i) of these proposed regulations would provide guidance on the operation of the $25,000 limitation that incorporates and clarifies the guidance provided in the existing regulations.

One commentator suggested that the calculation of the amount of stock that may be purchased under an employee stock purchase plan be determined in a manner consistent with the $100,000 limitation for incentive stock options described in § 1.422–4. The proposed regulations generally adopt this suggestion and would provide that the $25,000 limit for employee stock purchase plans is, to the extent possible, calculated in a manner consistent with the $100,000 limitation for incentive stock options. The timing of both measures is based on when the option first becomes exercisable and both

measures are made based on the fair market value of the stock determined at the date of grant. Section 1.423–2(i) of these proposed regulations emphasizes that an employee may purchase up to $25,000 of stock (based on the fair market value of such stock on the date of grant) in each calendar year during which an option granted to the employee under an employee stock purchase plan is not only outstanding, but also exercisable. *Example 5* in § 1.423–2(i)(5) of these proposed regulations illustrates this principle.

For clarification, *Example 1* in the existing regulations has been separated into *Example 1* and *Example 4* in § 1.423–2(i)(5) of these proposed regulations.

*9. Special Rule Where Option Price Is Between 85 Percent and 100 Percent of the Value of the Stock*

Section 423(c) provides a special rule for calculating the timing and amount of compensation income that must be recognized when the option price for a share is between 85 and 100 percent of the value of the share on the date of grant. Generally, the income recognized is the lesser of: (a) the excess of the fair market value of the share on the date of grant over the option price, and (b) the excess of the fair market value of the share at the time of disposition (or death) over the option price. The flush language of section 423(c) provides that if the exercise price is not known on the date of grant, the exercise price shall be determined as if the option were exercised on the date of grant.

One commentator suggested that it is unclear how this special rule and the flush language of section 423(c) apply when the option price is determined based on some percentage of the value of a share on the last day of an offering. *Example 3* of § 1.423–2(k)(3) of the existing regulations specifically addresses this issue and has been retained in § 1.423–2(k)(3) of these proposed regulations. *Example 4* has been added under § 1.423–2(k)(3) to illustrate the tax consequences under an employee stock purchase plan that uses a look-back feature to determine the exercise price of the option.

**Proposed Effective Date**

These regulations under section 423 are proposed to apply as of January 1, 2010, and will apply to any option issued under an employee stock purchase plan that is granted on or after that date. Taxpayers may rely on these proposed regulations for the treatment of any option issued under an employee stock purchase plan that is granted after publication of these proposed regulations in the **Federal Register**.

**Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

**Comments and Requests for Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are timely submitted to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

**Drafting Information**

The principal author of these proposed regulations is Thomas Scholz, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

## PART 1—INCOME TAXES

**Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 * * *

**Par. 2.** Section 1.421–1, paragraphs (c)(1) and (j)(1) are revised to read as follows:

**§ 1.421–1 Meaning and use of certain terms.**

* * * * *

(c) *Time and date of granting option.* (1) For purposes of this section and §§ 1.421–2 through 1.424–1, the language ''the date of the granting of the option'' and ''the time such option is granted,'' and similar phrases refer to the date or time when the granting corporation completes the corporate action constituting an offer of stock for sale to an individual under the terms and conditions of a statutory option. Except as set forth in § 1.423–2(h)(2), a corporate action constituting an offer of stock for sale is not considered complete until the date on which the maximum number of shares that can be purchased under the option and the minimum option price are fixed or determinable.

* * * * *

(j) *Effective/applicability date*—(1) *In general.* Except for paragraph (c)(1), these regulations are effective on August 3, 2004. Upon the date of publication of the Treasury decision adopting paragraph (c)(1) of this section as a final regulation in the **Federal Register**, paragraph (c)(1) will apply as of January 1, 2010.

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**Par. 3.** Section 1.422–2, paragraph (b)(6), *Example 1* (iii) is revised to read as follows:

**§ 1.422–2 Incentive stock options defined.**

* * * * *

(b) * * *

(6) * * *

*Example (1).* * * * (iii) Assume the same facts as in paragraph (i) of this Example 1. Assume further that the plan was approved by the stockholders of S (in this case, P) on March 1, 2006. On January 1, 2008, S changes the plan to provide that incentive stock options for P stock will be granted to S employees under the plan. Because there is a change in the stock available for grant under the plan, the change is considered the adoption of a new plan that must be approved by the stockholder of S (in this case, P) within 12 months before or after January 1, 2008.

* * * * *

**Par. 4.** Section 1.422–5, paragraph (f)(1) is revised to read as follows:

**§ 1.422–5 Permissible provisions.**

* * * * *

(f) *Effective/applicability date*—(1) *In general.* Except for § 1.422–2(b)(6), *Example 1* (iii), these regulations are effective on August 3, 2004. Upon the date of publication of the Treasury decision adopting Section 1.422–2(b)(6),

*Example 1* (iii) of this section as a final regulation in the **Federal Register**, Section 1.422–2(b)(6), *Example 1* (iii) will apply as of January 1, 2010.

* * * * *

**Par. 5.** Section 1.423–1 is revised to read as follows:

**§ 1.423–1 Applicability of section 421(a).**

(a) *General rule.* Subject to the provisions of section 423(c) and paragraph (k) of § 1.423–2, the special rules of income tax treatment provided in section 421(a) apply with respect to the transfer of a share of stock to an individual pursuant to the individual's exercise of an option granted under an employee stock purchase plan if the following conditions are satisfied—

(1) The individual makes no disposition of such share before the later of the expiration of the two-year period from the date of the grant of the option pursuant to which such share was transferred or the expiration of the one-year period from the date of transfer of such share to the individual; and

(2) At all times during the period beginning on the date of the grant of the option and ending on the day three months before the date of exercise, the individual was an employee of the corporation granting the option, a related corporation, or a corporation (or a related corporation) substituting or assuming the stock option in a transaction to which section 424(a) applies.

(b) *Cross-references.* For rules relating to the requisite employment relationship, see paragraph (h) of § 1.421–1. For rules relating to the effect of a disqualifying disposition, see section 421(b) and paragraph (b) of § 1.421–2. For the definition of the term *disposition*, see section 424(c) and paragraph (c) of § 1.424–1. For the definition of the term *related corporation*, see section paragraph (i) of § 1.421–1.

(c) *Effective/applicability date.* Upon the date of publication of the Treasury decision adopting the rules of this section as a final regulation in the **Federal Register**, these rules will apply as of January 1, 2010.

**Par. 6.** Section 1.423–2 is revised to read as follows:

**§ 1.423–2 Employee stock purchase plan defined.**

(a) *In general*—(1) The term *employee stock purchase plan* means a plan that meets the requirements of paragraph (a)(2)(i) through (ix) of this section. If the terms of the plan do not satisfy the requirements of paragraph (a)(2)(iii) through (ix) of this section, such requirements may be satisfied by the terms of an offering made under the plan. However, where the requirements of paragraph (a)(2)(iii) through (ix) are satisfied by the terms of an offering, such requirements will be treated as satisfied only with respect to options exercised under that offering. The plan and the terms of an offering must be in writing or electronic form, provided that such writing or electronic form is adequate to establish the terms of the plan or offering, as applicable.

(2) To qualify as an employee stock purchase plan under this section and § 1.423–1, the plan must meet all of the following requirements—

(i) The plan must provide that options can be granted only to employees of the employer corporation or of a related corporation (as defined in paragraph (i) of § 1.421–1) to purchase stock in any such corporation (see paragraph (b) of this section);

(ii) The plan must be approved by the stockholders of the granting corporation within 12 months before or after the date the plan is adopted (see paragraph (c) of this section);

(iii) Under the terms of the plan, an employee cannot be granted an option if, immediately after the option is granted, the employee owns stock possessing 5 percent or more of the total combined voting power or value of all classes of stock of the employer corporation or of a related corporation (see paragraph (d) of this section);

(iv) Under the terms of the plan, options must be granted to all employees of any corporation whose employees are granted any options by reason of their employment by the corporation (see paragraph (e) of this section);

(v) Under the terms of the plan, all employees granted options must have the same rights and privileges (see paragraph (f) of this section);

(vi) Under the terms of the plan, the option price cannot be less than the lesser of—

(A) An amount equal to 85 percent of the fair market value of the stock at the time the option is granted, or

(B) An amount not less than 85 percent of the fair market value of the stock at the time the option is exercised (see paragraph (g) of this section);

(vii) Under the terms of the plan, options cannot be exercised after the expiration of—

(A) Five years from the date the option is granted if, under the terms of such plan, the option price cannot be less than 85 percent of the fair market value of the stock at the time the option is exercised, or

(B) Twenty-seven months from the date the option is granted, if the option price is not determined in the manner described in paragraph (A) (see paragraph (h) of this section);

(viii) Under the terms of the plan, no employee may be granted an option that permits the employee's rights to purchase stock under all employee stock purchase plans of the employer corporation and its related corporations to accrue at a rate that exceeds $25,000 of fair market value of the stock (determined at the time the option is granted) for each calendar year in which the option is outstanding at any time (see paragraph (i) of this section); and

(ix) Under the terms of the plan, options are not transferable by the optionee other than by will or the laws of descent and distribution, and are exercisable, during the lifetime of the optionee, only by the optionee (see paragraph (j) of this section).

(3) The determination of whether a particular option is an option granted under an employee stock purchase plan is made at the time the option is granted. If the terms of an option are inconsistent with the terms of the employee stock purchase plan or an offering under the plan, the option will not be treated as granted under an employee stock purchase plan. If an option with terms that are inconsistent with the terms of the plan or an offering under the plan is granted to an employee who is entitled to the grant of an option under the terms of the plan or offering, and the employee is not granted an option under the offering that qualifies as an option granted under an employee stock purchase plan, the offering will not meet the requirements of paragraph (e) of this section. Accordingly, none of the options granted under the offering will be eligible for the special tax treatment of section 421. However, if an option with terms that are inconsistent with the terms of the plan or an offering under the plan is granted to an individual who is not entitled to the grant of an option under the terms of the plan or offering, the option will not be treated as an option granted under an employee stock purchase plan, and the grant of the option will not disqualify the options granted under the plan or offering. If, at the time of grant, an option qualifies as an option granted under an employee stock purchase plan, but the terms of the option are not satisfied, the option will not be treated as granted under an employee stock purchase plan and this failure to comply with the terms of the option will not disqualify the options granted under the plan or offering.

(4) *Examples.* The following examples illustrate the principles of paragraph (a)(3):

*Example 1.* Corporation A operates an employee stock purchase plan under which options for A stock are granted to employees of A. The terms of an offering provide that the option price will be 90 percent of the fair market value of A stock on the date of exercise. A grants an option under the offering to Employee Z, an employee of A. The terms of the option provide that the option price will be 85 percent of the fair market value of A stock on the date of exercise. Because the terms of Z's option are inconsistent with the terms of the offering, the option granted to Z will not be treated as an option granted under the employee stock purchase plan. Further, unless Z is granted an option under the offering that qualifies as an option granted under the employee stock purchase plan, the offering will not meet the requirements of paragraph (e) of this section and none of the options granted under the offering will be eligible for the special tax treatment of section 421.

*Example 2.* Corporation B operates an employee stock purchase plan that provides that options for B stock may only be granted to employees of B. Under the terms of the plan, options may not be granted to consultants and other non-employees. B grants an option under the plan to Consultant Y, a consultant of B. Because Y is ineligible to receive an option under the plan by reason of Y's status as a non-employee, the grant of the option to Y is inconsistent with the terms of the plan and the option granted to Y will not be treated as an option granted under the employee stock purchase plan. However, the grant of the option to Y will not disqualify the options granted under the plan or offering because Y was not entitled to the grant of an option under the plan.

*Example 3.* Corporation C operates an employee stock purchase plan under which options for C stock are granted to employees of C. C grants an option under the plan to Employee X, an employee of C who is a highly compensated employee. The terms of the employee stock purchase plan exclude highly compensated employees from participation in the plan. Because X is ineligible to receive an option under the plan by reason of X's exclusion from participation in the plan, the option granted to X will not be treated as an option granted under the employee stock purchase plan. However, the grant of the option to X will not disqualify the options granted under the plan or offering because X was not entitled to the grant of an option under the plan.

*Example 4.* Corporation D operates an employee stock purchase plan under which options for D stock are granted to employees of D. D grants an option under the plan to Employee W, an employee of D. The terms of the option provide that the option price will be 90 percent of the fair market value of D stock on the date of exercise. On the date of exercise, W pays only 85 percent of the fair market value of D stock. Because the terms of W's option are not satisfied, the option granted to W will not be treated as an option granted under the employee stock purchase plan. However, the failure to comply with the terms of the option granted to W will not disqualify the options granted under the plan or offering.

(b) *Options restricted to employees.* An employee stock purchase plan must provide that options can be granted only to employees of the employer corporation (or employees of its related corporations) to purchase stock in the employer corporation (or one of its related corporations). If such a provision is not included in the terms of the plan, the plan will not be an employee stock purchase plan and options granted under the plan will not qualify for the special tax treatment of section 421. For rules relating to the employment requirement, see paragraph (h) of § 1.421–1.

(c) *Stockholder approval*—(1) An employee stock purchase plan must be approved by the stockholders of the granting corporation within 12 months before or after the date such plan is adopted. The approval of the stockholders must comply with all applicable provisions of the corporate charter, bylaws and applicable State law prescribing the method and degree of stockholder approval required for the issuance of corporate stock or options. If the applicable State law does not prescribe a method and degree of stockholder approval, then an employee stock purchase plan must be approved—

(i) By a majority of the votes cast at a duly held stockholder's meeting at which a quorum representing a majority of all outstanding voting stock is, either in person or by proxy, present and voting on the plan; or

(ii) By a method and in a degree that would be treated as adequate under applicable State law in the case of an action requiring stockholder approval (such as an action on which stockholders would be entitled to vote if the action were taken at a duly held stockholders' meeting).

(2) For purposes of the stockholder approval required by this paragraph (c), ordinarily, a plan is adopted when it is approved by the granting corporation's board of directors, and the date of the board's action is the reference point for determining whether stockholder approval occurs within the applicable 24-month period. However, if the board's action is subject to a condition (such as stockholder approval) or the happening of a particular event, the plan is adopted on the date the condition is met or the event occurs, unless the board's resolution fixes the date of approval as the date of the board's action.

(3) An employee stock purchase plan, as adopted and approved, must designate the maximum aggregate number of shares that may be issued under the plan, and the corporations or class of corporations whose employees may be offered options under the plan. A plan that merely provides that the number of shares that may be issued under the plan may not exceed a stated percentage of the shares outstanding at the time of each offering or grant under the plan does not satisfy the requirements of this paragraph (c)(3). However, the maximum aggregate number of shares that may be issued under the plan may be stated in terms of a percentage of the authorized, issued, or outstanding shares on the date of the adoption of the plan. The plan may specify that the maximum aggregate number of shares available for grants under the plan may increase annually by a specified percentage of the authorized, issued, or outstanding shares on the date of the adoption of the plan. A plan that provides that the maximum aggregate number of shares that may be issued as options under the plan may change based on any other specific circumstances satisfies the requirements of this paragraph only if the stockholders approve an immediately determinable maximum number of shares that may be issued under the plan in any event. If there is more than one employee stock purchase plan under which options may be granted and stockholders of the granting corporation merely approve a maximum aggregate number of shares that are available for issuance under the plans, the stockholder approval requirements described in paragraph (c)(1) of this section are not satisfied. A separate maximum aggregate number of shares available for issuance pursuant to options must be specified and approved for each plan.

(4) Once an employee stock purchase plan is approved by the stockholders of the granting corporation, the plan need not be reapproved by the stockholders of the granting corporation within the prescribed 24-month period unless the plan is amended or changed in a manner that is considered the adoption of a new plan. Any increase in the aggregate number of shares that may be issued under the plan (other than an increase merely reflecting a change in the number of outstanding shares, such as a stock dividend or stock split) will be considered the adoption of a new plan requiring stockholder approval within the prescribed 24-month period. Similarly, a change in the designation of corporations whose employees may be offered options under the plan will be considered the adoption of a new plan requiring stockholder approval within the prescribed 24-month period unless the plan provides that designations of participating corporations may be made

from time to time from among a group consisting of the granting corporation and its related corporations. The group from among which such changes and designations are permitted without additional stockholder approval may include corporations having become parents or subsidiaries of the granting corporation after the adoption and approval of the plan. In addition, a change in the granting corporation or the stock available for purchase under the plan will be considered the adoption of a new plan requiring stockholder approval within the prescribed 24-month period. Any other changes in the terms of an employee stock purchase plan are not considered the adoption of a new plan and, thus, do not require stockholder approval.

(5) *Examples.* The following examples illustrate the principles of this paragraph (c):

*Example 1.* (i) Corporation E is a subsidiary of Corporation F, a publicly traded corporation. On January 1, 2010, E adopts an employee stock purchase plan under which options for E stock are granted to E employees.

(ii) To meet the requirements of paragraph (c)(1) of this section, the plan must be approved by the stockholders of E (in this case, F) within 12 months before or after January 1, 2010.

(iii) Assume the same facts as in paragraph (i) of this *Example 1*, except that the plan was approved by the stockholders of E (in this case, F) on March 1, 2010. On January 1, 2012, E changes the plan to provide that options for F stock will be granted to E employees under the plan. Because there is a change in the stock available for grant under the plan, under paragraph (c)(4) of this section, the change is considered the adoption of a new plan that must be approved by the stockholders of E (in this case, F) within 12 months before or after January 1, 2012.

*Example 2.* (i) Assume the same facts as in paragraph (i) of *Example 1,* except that on March 15, 2011, F completely disposes of its interest in E. Thereafter, E continues to grant options for E stock to E employees under the plan.

(ii) The new E options are granted under a plan that meets the stockholder approval requirements of paragraph (c)(1) of this section without regard to whether E seeks approval of the plan from the stockholders of E after F disposes of its interest in E.

(iii) Assume the same facts as in paragraph (i) of this *Example 2,* except that under the plan as adopted on January 1, 2010, only options for F stock are granted to E employees. Assume further that, after F disposes of its interest in E, E changes the plan to provide for the grant of options for E stock to E employees. Because there is a change in the stock available for purchase or grant under the plan, under paragraph (c)(4) of this section, the stockholders of E must approve the plan within 12 months before or after the change to the plan to meet the stockholder approval requirements of paragraph (c) of this section.

*Example 3.* (i) Corporation G maintains an employee stock purchase plan. Corporation H does not maintain an employee stock purchase plan. On May 15, 2010, G and H consolidate under State law to form one corporation. The new corporation is named Corporation H. The consolidation agreement describes the G plan, including the maximum aggregate number of shares available for issuance under the plan after the consolidation. Additionally, the consolidation agreement states that the plan will be continued by H after the consolidation. The consolidation agreement is unanimously approved by the stockholders of G and H on May 1, 2010. H assumes the plan formerly maintained by G and continues to grant options under the plan to all eligible employees.

(ii) Because there is a change in the granting corporation (from G to H), under paragraph (c)(4) of this section, H is considered to have adopted a new plan. Because the plan is fully described in the consolidation agreement, including the maximum aggregate number of shares available for issuance under the plan, the approval of the consolidation agreement by the stockholders constitutes approval of the plan. Thus, the stockholder approval of the consolidation agreement satisfies the stockholder approval requirements of paragraph (c)(1) of this section, and the plan is considered to be adopted by H and approved by its stockholders on May 1, 2010.

*Example 4.* Corporation I adopts an employee stock purchase plan on November 1, 2010. On that date, there are two million shares of I stock outstanding. The plan provides that the maximum aggregate number of shares that may be issued under the plan may not exceed 15 percent of the number of shares of I stock outstanding on November 1, 2010. Because the maximum aggregate number of shares that may be issued under the plan is designated in the plan, the requirements of paragraph (c)(3) of this section are met.

*Example 5.* (i) Corporation J adopts an employee stock purchase plan on March 15, 2010. The plan provides that the maximum aggregate number of shares of J stock available for issuance under the plan is 50,000, increased on each anniversary date of the adoption of the plan by 5 percent of the then outstanding shares. Because the maximum aggregate number of shares is not designated under the plan, the requirements of paragraph (c)(3) of this section are not met.

(ii) Assume the same facts as in paragraph (i) of this *Example 5*, except that the plan provides that the maximum aggregate number of shares available under the plan is the lesser of (a) 50,000 shares, increased each anniversary date of the adoption of the plan by 5 percent of the then-outstanding shares, or (b) 200,000 shares. Because the maximum aggregate number of shares that may be issued under the plan is designated as the lesser of two numbers, one of which provides an immediately determinable maximum aggregate number of shares that may be issued under the plan in any event, the requirements of paragraph (c)(3) of this section are met.

(d) *Options granted to certain shareholders*—(1) An employee stock purchase plan must by its terms provide that an employee cannot be granted an option if the employee, immediately after the option is granted, owns stock possessing 5 percent or more of the total combined voting power or value of all classes of stock of the employer corporation or a related corporation. In determining whether the stock ownership of an employee equals or exceeds this 5 percent limit, the rules of section 424(d) (relating to attribution of stock ownership) shall apply, and stock that the employee may purchase under outstanding options (whether or not the options qualify for the special tax treatment afforded by section 421(a)) shall be treated as stock owned by the employee. An option is outstanding for purposes of this paragraph (d) although under its terms it may be exercised only in installments or after the expiration of a fixed period of time. If an option is granted to an employee whose stock ownership (as determined under this paragraph (d)) exceeds the limitation set forth in this paragraph (d), no portion of the option will be treated as having been granted under an employee stock purchase plan.

(2) The determination of the percentage of the total combined voting power or value of all classes of stock of the employer corporation (or a related corporation) that is owned by the employee is made by comparing the voting power or value of the shares owned (or treated as owned) by the employee to the aggregate voting power or value of all shares actually issued and outstanding immediately after the grant of the option to the employee. The aggregate voting power or value of all shares actually issued and outstanding immediately after the grant of the option does not include the voting power or value of treasury shares or shares authorized for issue under outstanding options held by the employee or any other person.

(3) *Examples*. The following examples illustrate the principles of this paragraph (d):

*Example 1.* Employee V, an employee of Corporation K, owns 6,000 shares of K common stock, the only class of K stock outstanding. K has 100,000 shares of its common stock outstanding. Because V owns 6 percent of the combined voting power or value of all classes of K stock, K cannot grant an option to V under K's employee stock purchase plan. If V's father and brother each owned 3,000 shares of K stock and V did not own any K stock, then the result would be the same because, under section 424(d), an individual is treated as owning stock held by the person's father and brother. Similarly, the result would be the same if, instead of

actually owning 6,000 shares, V merely held an option on 6,000 shares of K stock, irrespective of whether the transfer of stock under the option could qualify for the special tax treatment of section 421, because this paragraph (d) provides that stock the employee may purchase under outstanding options is treated as stock owned by such employee.

*Example 2.* Assume the same facts as in *Example 1,* except that K is a subsidiary corporation of Corporation L. Irrespective of whether V owns any L stock, V cannot receive an option from L under L's employee stock purchase plan because he owns 5 percent of the total combined voting power of all classes of stock of a subsidiary of L, in this example, K. An employee who owns (or is treated as owning) stock in excess of the limitation of this paragraph (d), in any corporation in a group of related corporations, consisting of a parent and its subsidiary corporations, cannot receive an option under an employee stock purchase plan from any corporation in the group.

*Example 3.* Employee U is an employee of Corporation M. M has only one class of stock, of which 100,000 shares are issued and outstanding. Assuming U does not own (and is not treated as owning) any stock in M or in any related corporation of M, M may grant an option to U under its employee stock purchase plan for 4,999 shares, because immediately after the grant of the option, U would not own 5 percent or more of the combined voting power or value of all classes of M stock actually issued and outstanding at such time. The 4,999 shares that U would be treated as owning under this paragraph (d) would not be added to the 100,000 shares actually issued and outstanding immediately after the grant for purposes of determining whether U's stock ownership exceeds the limitation of this paragraph (d).

*Example 4.* Assume the same facts as in *Example 3* but instead of an option for 4,999 shares, M grants U an option, purportedly under its employee stock purchase plan, for 5,000 shares. No portion of this option will be treated as granted under an employee stock purchase plan because U's stock ownership exceeds the limitation of this paragraph (d).

(e) *Employees covered by plan*—(1) Subject to the provisions of this paragraph (e) and the limitations of paragraphs (d), (f) and (i) of this section, an employee stock purchase plan must, by its terms, provide that options are to be granted to all employees of any corporation whose employees are granted any of such options by reason of their employment by the corporation, except that one or more of the following categories of employees may be excluded from the coverage of the plan—

(i) Employees who have been employed less than two years;

(ii) Employees whose customary employment is 20 hours or less per week;

(iii) Employees whose customary employment is for not more than five months in any calendar year; and

(iv) Highly compensated employees (within the meaning of section 414(q)).

(2) An employee stock purchase plan does not fail to satisfy the coverage provision of paragraph (e)(1) of this section in the following circumstances—

(i) The plan excludes employees who have completed a shorter period of service or whose customary employment is for fewer hours per week or fewer months in a calendar year than is specified in paragraph (e)(1)(i), (ii) and (iii), provided the exclusion is applied in an identical manner to all employees of every corporation whose employees are granted options under the plan.

(ii) The plan excludes highly compensated employees (within the meaning of section 414(q)) with compensation above a certain level or who are officers or subject to the disclosure requirements of section 16(a) of the Securities Exchange Act of 1934, provided the exclusion is applied in an identical manner to all highly compensated employees of every corporation whose employees are granted options under the plan.

(3) Notwithstanding paragraph (e)(1) of this section, employees who are citizens or residents of a foreign jurisdiction (without regard to whether they are also citizens of the United States or resident aliens (within the meaning of section 7701(b)(1)(A))) may be excluded from the coverage of an employee stock purchase plan under the following circumstances—

(i) The grant of an option under the plan to a citizen or resident of the foreign jurisdiction is prohibited under the laws of such jurisdiction; or

(ii) Compliance with the laws of the foreign jurisdiction would cause the plan to violate the requirements of section 423.

(4) No option granted under a plan or offering that excludes from participation any employees, other than those who may be excluded under this paragraph (e), and those barred from participation by reason of paragraphs (d), (f) and (i) of this section, can be regarded as having been granted under an employee stock purchase plan. If an option is not granted to any employee who is entitled to the grant of an option under the terms of the plan or offering, none of the options granted under such offering will be treated as having been granted under an employee stock purchase plan. However, a plan that, by its terms, permits all eligible employees to elect to participate in an offering will not violate the requirements of this paragraph solely because eligible employees who elect not to participate in the offering are not granted options pursuant to such offering.

(5) For purposes of this paragraph (e), the existence of the employment relationship between an individual and the corporation participating under the plan will be determined under paragraph (h) of § 1.421–1.

(6) *Examples.* The following examples illustrate the principles of this paragraph (e):

*Example 1.* Corporation N has a stock purchase plan that meets all the requirements of paragraph (a)(2) of this section except that options are not required to be granted to employees whose weekly rate of pay is less than $1,000. As a matter of corporate practice, however, N grants options under its plan to all employees, irrespective of their weekly rate of pay. Even though N's plan is operated in compliance with the requirements of this paragraph (e), N's plan is not an employee stock purchase plan because the terms of the plan exclude a category of employees that is not permitted under this paragraph (e).

*Example 2.* Assume the same facts as in *Example 1*, except that the first offering under N's plan provides that options will be granted to all employees of N. The terms of the first offering will be treated as part of the terms of N's plan, but only for purposes of the first offering. Because the terms of the first offering satisfy the requirements of this paragraph (e), stock transferred pursuant to options exercised under the first offering will be treated as stock transferred pursuant to the exercise of options granted under an employee stock purchase plan for purposes of section 421.

*Example 3.* Corporation O has a stock purchase plan that excludes from participation all employees who have been employed less than one year. Assuming all other requirements of paragraph (a)(2) of this section are satisfied, O's plan qualifies as an employee stock purchase plan under section 423.

*Example 4.* Corporation P has a stock purchase plan that excludes from participation clerical employees who have been employed less than two years. However, non-clerical employees with less than two years of service are permitted to participate in the plan. P's plan is not an employee stock purchase plan because the exclusion of employees who have been employed less than two years applies only to certain employees of P and is not applied in an identical manner to all employees of P. If, instead, P's plan excludes from participation all employees (both clerical and non-clerical) who have been employed less than two years, then P's plan would qualify as an employee stock purchase plan under section 423 assuming all other requirements of paragraph (a)(2) of this section are satisfied.

*Example 5.* Corporation Q has a stock purchase plan that excludes from participation all officers who are highly compensated employees (within the meaning

of section 414(q)). Assuming all other requirements of paragraph (a)(2) of this section are satisfied, Q's plan qualifies as an employee stock purchase plan under section 423.

*Example 6.* Corporation R maintains an employee stock purchase plan that excludes from participation all highly compensated employees (within the meaning of section 414(q)), except highly compensated employees who are officers of R. R's plan is not an employee stock purchase plan because the exclusion of all highly compensated employees except highly compensated employees who are officers of R is not a permissible exclusion under paragraph (e)(2)(ii) of this section.

*Example 7.* Corporation S is the parent corporation of Subsidiary YY and Subsidiary ZZ. S maintains an employee stock purchase plan with both YY and ZZ participating under the plan. Under the terms of the plan, all employees of YY and ZZ are permitted to participate in the plan with the exception of ZZ's highly compensated employees with annual compensation greater than $300,000. S's plan is not an employee stock purchase plan because the exclusion of highly compensated employees with annual compensation greater than $300,000 is not applied in an identical manner to all employees of YY and ZZ.

*Example 8.* The laws of Country A require that options granted to residents of Country A be transferable during the lifetime of the option recipient. Corporation T has a stock purchase plan that excludes residents of Country A from participation in the plan. Because compliance with the laws of Country A would cause options granted to residents of Country A to violate paragraph (j) of this section, T may exclude residents of Country A from participation in the plan. Assuming all other requirements of paragraph (a)(2) of this section are satisfied, T's plan qualifies as an employee stock purchase plan under section 423.

(f) *Equal rights and privileges*—(1) Except as otherwise provided in paragraphs (f)(2) through (f)(6) of this section, an employee stock purchase plan must, by its terms, provide that all employees granted options under the plan shall have the same rights and privileges. Thus, the provisions applying to one option under an offering (such as the provisions relating to the method of payment for the stock and the determination of the purchase price per share) must apply to all other options under the offering in the same manner. If all the options granted under a plan or offering do not, by their terms, give the respective optionees the same rights and privileges, none of the options will be treated as having been granted under an employee stock purchase plan for purposes of section 421.

(2) The requirements of this paragraph (f) do not prevent the maximum amount of stock that an employee may purchase from being determined on the basis of a uniform relationship to the total compensation, or the basic or regular rate of compensation, of all employees.

(3) A plan or offering will not fail to satisfy the requirements of this paragraph (f) because the plan or offering provides that no employee may purchase more than a maximum amount of stock fixed under the plan.

(4) A plan or offering will not fail to satisfy the requirements of this paragraph (f) if, in order to comply with the laws of a foreign jurisdiction, the terms of an option granted under a plan or offering to citizens or residents of such foreign jurisdiction (without regard to whether they are also citizens of the United States or resident aliens (within the meaning of section 7701(b)(1)(A))) are less favorable than the terms of options granted under the same plan or offering to employees resident in the United States.

(5)(i) Except as provided in this paragraph and paragraph (f)(5)(ii) of this section, a plan permitting one or more employees to carry forward amounts that were withheld but not applied toward the purchase of stock under an earlier plan or offering and apply the amounts towards the purchase of additional stock under a subsequent plan or offering will be a violation of the equal rights and privileges under paragraph (f)(1) of this section. However, the carry forward of amounts withheld but not applied toward the purchase of stock under an earlier plan or offering will not violate the equal rights and privileges requirement of paragraph (f)(1) of this section if all other employees participating in the current plan or offering are permitted to make direct payments toward the purchase of shares under a subsequent plan or offering in an amount equal to the excess of the greatest amount which any employee is allowed to carry forward from an earlier plan or offering over the amount, if any, the employee will carry forward from an earlier plan or offering.

(ii) A plan will not fail to satisfy the requirements of this section merely because employees are permitted to carry forward amounts representing a fractional share, that were withheld but not applied toward the purchase of stock under an earlier plan or offering and apply the amounts toward the purchase of additional stock under a subsequent plan or offering.

(6) Paragraph (f) does not prohibit the delaying of the grant of an option to any employee who is barred from being granted an option solely by reason of the employee's failing to meet a minimum service requirement set forth in paragraph (e)(1) of this section until the employee meets such requirement.

(7) *Examples.* The following examples illustrate the principles of this paragraph (f):

*Example 1.* Corporation U has an employee stock purchase plan that provides that the maximum amount of stock that each employee may purchase under the offering is one share for each $100 of annual gross pay. The plan meets the requirements of this paragraph (f).

*Example 2.* Corporation V has an employee stock purchase plan that provides that the maximum amount of stock that each employee may purchase under the offering is one share for each $100 of annual gross pay up to and including $10,000, and two shares for each $100 of annual gross pay in excess of $10,000. The plan will not meet the requirements of this paragraph (f) because the amount of stock that may be purchased under the plan is not based on a uniform relationship to the total compensation of all employees.

*Example 3.* Corporation W has an employee stock purchase plan that provides that options to purchase stock in an amount equal to ten percent of an employee's annual salary at a price equal to 85 percent of the fair market value on the first day of the offering will be granted to all employees other than those who have been employed less than 18 months. In addition, the plan provides that employees who have not yet met the minimum service requirements on the first day of the offering will be granted similar options on the date the 18 month service requirement has been attained. The plan meets the requirements of this paragraph (f).

*Example 4.* Corporation X has an employee stock purchase plan that provides that options to purchase stock at a price equal to 90 percent of the fair market value at the time the option is exercised will be granted to all employees. The laws of Country B provide that options granted to employees who are residents of Country B must have a purchase price not less than 95 percent of the fair market value at the time the option is exercised. The plan will not fail to satisfy the requirements of this paragraph (f) merely because the residents of Country B are granted options under the plan to purchase stock at a price equal to 95 percent of the fair market value at the time the option is exercised.

*Example 5.* Corporation Y maintains an employee stock purchase plan. Employee T is employed by Y. T is granted an option under the current offering to purchase a maximum of 100 shares of Y stock at an option price equal to 85 percent of the fair market value of the stock at exercise. The plan permits the carry forward of withheld but unused amounts from an earlier offering. Prior to the exercise date, $2,000 of T's salary has been withheld and is available to be applied toward the purchase of Y stock. On the exercise date, the fair market value of Y stock is $20 per share. T is able to purchase 100 shares of Y stock at $17 per share for an aggregate purchase price of $1,700. T can carry forward $300 to the subsequent offering. Each employee in the subsequent offering other than T will be permitted to

make direct payments toward the purchase of shares under the subsequent offering in a maximum amount of $300 less any amount the employee has carried forward from an earlier offering. The plan does not violate the equal rights and privileges requirement of this paragraph (f).

(g) *Option price*—(1) An employee stock purchase plan must, by its terms, provide that the option price will not be less than the lesser of—

(i) An amount equal to 85 percent of the fair market value of the stock at the time the option is granted, or

(ii) An amount that under the terms of the option may not be less than 85 percent of the fair market value of the stock at the time the option is exercised.

(2) The option price may be determined in any reasonable manner, including the valuation methods permitted under § 20.2031–2, so long as the option price meets the minimum pricing requirements of this paragraph (g). For general rules relating to the option price, see paragraph (e) of § 1.421–1. For rules relating to the determination of when an option is granted, see paragraph (c) of § 1.421–1 and § 1.423–2(h)(2). Any option that does not meet the minimum pricing requirements of this paragraph (g) will not be treated as an option granted under an employee stock purchase plan irrespective of whether the plan or offering satisfies those requirements. If an option that does not meet the minimum pricing requirements is granted to an employee who is entitled to the grant of an option under the terms of the plan or offering, and the employee is not granted an option under such offering that qualifies as an option granted under an employee stock purchase plan, the offering will not meet the requirements of paragraph (e) of this section. Accordingly, none of the options granted under the offering will be eligible for the special tax treatment of section 421.

(3) The option price may be stated either as a percentage or as a dollar amount. If the option price is stated as a dollar amount, then the requirement of this paragraph (g) can only be met by a plan or offering in which the price is fixed at not less than 85 percent of the fair market value of the stock at the time the option is granted. If the fixed price is less than 85 percent of the fair market value of the stock at grant, then the option cannot meet the requirement of this paragraph (g) even if a decline in the fair market value of the stock results in such fixed price being not less than 85 percent of the fair market value of the stock at the time the option is exercised, because that result was not certain to occur under the terms of the option.

(4) *Examples.* The following examples illustrate the principles of this paragraph (g):

*Example 1.* Corporation Z has an employee stock purchase plan that provides that the option price will be 85 percent of the fair market value of the stock on the first day of the offering (which is the date of grant in this case), or 85 percent of the fair market value of the stock at exercise, whichever amount is the lesser. Upon the exercise of an option issued under Z's plan, Z agrees to accept an option price that is less than the minimum amount allowable under the terms of such plan. Notwithstanding that the option was issued under an employee stock purchase plan, the transfer of stock pursuant to the exercise of such option does not satisfy the requirement of this paragraph (g) and cannot qualify for the special tax treatment of section 421.

*Example 2.* Corporation AA has an employee stock purchase plan that provides that the option price is set at 85 percent of the fair market value of AA stock at exercise, but not less than $80 per share. On the first day of the offering (which is the date of grant in this case), the fair market value of AA stock is $100 per share. The option satisfies the requirement of this paragraph (g), and can qualify for the special tax treatment of section 421.

*Example 3.* Assume the same facts as in *Example 2,* except that the option price is set at 85 percent of the fair market value of AA stock at exercise, but not more than $80 per share. This option cannot satisfy the requirement of this paragraph (g) irrespective of whether, at the time the option is exercised, 85 percent of the fair market value of AA stock is $80 or less.

(h) *Option period*—(1) An employee stock purchase plan must, by its terms, provide that options granted under the plan cannot be exercised after the expiration of 27 months from the date of grant unless, under the terms of the plan, the option price is not less than 85 percent of the fair market value of the stock at the time of the exercise of the option. If the option price is not less than 85 percent of the fair market value of the stock at the time the option is exercised, then the option period provided under the plan must not exceed five years from the date of grant. If the requirements of this paragraph (h) are not met by the terms of the plan or offering, then options issued under such plan or offering will not be treated as options granted under an employee stock purchase plan irrespective of whether the options, by their terms, are exercisable beyond the period allowable under this paragraph (h). An option that provides that the option price is not less than 85 percent of the fair market value of the stock at exercise may have an option period of 5 years irrespective of whether the fair market value of the stock at exercise is more or less than the fair market value of the stock at grant. However, if the option provides that the option price is 85 percent of the fair market value of the stock at exercise, but not more than some other fixed amount determined in accordance with the provisions of paragraph (g) of this section, then irrespective of the price paid on exercise, the option period must not be more than 27 months.

(2) Section 1.421–1(c) provides that, for purposes of §§ 1.421–1 through 1.424–1, the language *the date of the granting of the option* and *the time such option is granted,* and similar phrases refer to the date or time when the granting corporation completes the corporate action constituting an offer of stock for sale to an individual under the terms and conditions of a statutory option. With respect to options granted under an employee stock purchase plan, the principles of § 1.421–1(c) shall be applied without regard to the requirement that the minimum option price must be fixed or determinable in order for the corporate action constituting an offer of stock to be considered complete.

(3) The date of grant will be the first day of an offering if the terms of an employee stock purchase plan or offering designate a maximum number of shares that may be purchased by each employee during the offering. Similarly, the date of grant will be the first day of an offering if the terms of the plan or offering require the application of a formula to establish, on the first day of the offering, the maximum number of shares that may be purchased by each employee during the offering. It is not required that an employee stock purchase plan or offering designate a maximum number of shares that may be purchased by each employee during the offering or incorporate a formula to establish a maximum number of shares that may be purchased by each employee during the offering. If the maximum number of shares that can be purchased under an option is not fixed or determinable until the date the option is exercised, then the date of exercise will be the date of grant of the option.

(4) *Examples.* The following examples illustrate the principles of this paragraph (h):

*Example 1.* (i) Corporation BB has an employee stock purchase plan that provides that the option price will be the lesser of 85 percent of the fair market value of the stock on the first day of an offering or 85 percent of the fair market value of the stock on the last day of the offering. Options are exercised on the last day of the offering. One million shares of BB stock are reserved for issuance under the plan. The plan provides that no employee may be permitted to purchase

stock under the plan at a rate that exceeds $25,000 in fair market value of the BB stock (determined on the date of grant) for each calendar year during which an option granted to the employee is outstanding and exercisable. The terms of each option granted under an offering provide that a maximum of 500 shares may be purchased by the option recipient during the offering. Because the maximum number of shares that can be purchased under the option is fixed and determinable on the first day of the offering, the date of grant for the option is the first day of the offering.

(ii) Assume the same facts as in paragraph (i) of *Example 1* except that BB's plan excludes all employees who have been employed less than 18 months. The plan provides that employees who have not yet met the minimum service requirements on the first day of an offering will be granted an option on the date the 18-month service requirement has been attained. With respect to those employees who have been employed less than 18 months on the first day of an offering, the date of grant for the option is the date the 18-month service requirement has been attained.

*Example 2.* Assume the same facts as in paragraph (i) of *Example 1* except that the terms of each option granted do not provide that a maximum of 500 shares may be purchased by the option recipient during the offering. Notwithstanding the fixed number of shares reserved for issuance under the plan and the $25,000 limitation set forth in the plan, the maximum number of shares that can be purchased under the option is not fixed or determinable until the last day of the offering when the option is exercised. Therefore the date of grant for the option is the last day of the offering when the option is exercised.

*Example 3.* Corporation CC has an employee stock purchase plan that provides that the option price will be 85 percent of the fair market value of the stock on the last day of the offering. Options are exercised on the last day of the offering. Each offering under the plan begins on January 1 and ends on December 31 of the same calendar year. The terms of each option granted under an offering provide that the maximum number of shares that may be purchased by any employee during the offering equals $25,000 divided by the fair market value of the stock on the first day of the offering. The maximum number of shares that can be purchased under the option is fixed and determinable on the first day of the offering and therefore the date of grant for the option is the first day of the offering.

*Example 4.* Assume the same facts as in *Example 3* except that the terms of each option granted under an offering provide that the maximum number of shares that may be purchased by any employee during the offering equals 10 percent of the employee's annual salary (determined as of January 1 of the year in which the offering commences) divided by the fair market value of the stock on the first day of the offering. The maximum number of shares that can be purchased under the option is fixed and determinable on the first day of the offering and therefore the date of grant for the option is the first day of the offering.

(i) *Annual $25,000 limitation*—(1) An employee stock purchase plan must, by its terms, provide that no employee may be permitted to purchase stock under all the employee stock purchase plans of the employer corporation and its related corporations at a rate that exceeds $25,000 in fair market value of the stock (determined at the time the option is granted) for each calendar year in which any option granted to the employee is outstanding at any time. In applying the foregoing limitation—

(i) The right to purchase stock under an option is deemed to accrue when the option (or any portion thereof) first becomes exercisable during the calendar year;

(ii) The right to purchase stock under an option accrues at the rate provided in the option, but in no case may such rate exceed $25,000 of fair market value of such stock (determined at the time such option is granted) for any one calendar year; and

(iii) A right to purchase stock that has accrued under one option granted pursuant to the plan may not be carried over to any other option.

(2) If an option is granted under an employee stock purchase plan that satisfies the requirement of this paragraph (i), but the option gives the optionee the right to buy stock in excess of the maximum rate allowable under this paragraph (i), then no portion of the option will be treated as having been granted under an employee stock purchase plan. Furthermore, if the option was granted to an employee entitled to the grant of an option under the terms of the plan or offering, and the employee is not granted an option under the offering that qualifies as an option granted under an employee stock purchase plan, then the offering will not meet the requirements of paragraph (e) of this section. Accordingly, none of the options granted under the offering will be eligible for the special tax treatment of section 421.

(3) The limitation of this paragraph (i) applies only to options granted under employee stock purchase plans and does not limit the amount of stock that an employee may purchase under incentive stock options (as defined in section 422(b)) or any other stock options except those to which section 423 applies. Stock purchased under options to which section 423 does not apply will not limit the amount that an employee may purchase under an employee stock purchase plan, except for purposes of the 5-percent stock ownership provision of paragraph (d) of this section.

(4) Under the limitation of this paragraph (i), an employee may purchase up to $25,000 of stock (based on the fair market value of the stock at the time the option was granted) in each calendar year during which an option granted to the employee under an employee stock purchase plan is outstanding and exercisable. Alternatively, an employee may purchase more than $25,000 of stock (based on the fair market value of such stock at the time the option was granted) in a calendar year, so long as the total amount of stock that the employee purchases does not exceed $25,000 in fair market value of the stock (determined at the time the option was granted) for each calendar year in which the option was outstanding and exercisable. If, in any calendar year, the employee holds two or more outstanding and exercisable options granted under employee stock purchase plans of the employer corporation, or a related corporation, then the employee's purchases of stock attributable to that year under all options granted under employee stock purchase plans must not exceed $25,000 in fair market value of the stock (determined at the time the options were granted). Under an employee stock purchase plan, an employee may not purchase stock in anticipation that the option will be outstanding and exercisable in some future year. Thus, the employee may purchase only the amount of stock that does not exceed the limitation of this paragraph (i) for the year of the purchase and for preceding years during which the option was outstanding and exercisable. Thus, the amount of stock that may be purchased under an option depends on the number of years in which the option is actually outstanding and exercisable. The amount of stock that may be purchased under an employee stock purchase plan may not be increased by reason of the failure to grant an option in an earlier year under such plan, or by reason of the failure to exercise an earlier option. For example, if an option is granted to an individual and expires without having been exercised at all, then the failure to exercise the option does not increase the amount of stock which such individual may be permitted to purchase under an option granted in a year following the year of such expiration. If an option granted under an employee stock purchase plan is outstanding and exercisable in more than one calendar year, then stock purchased pursuant to the exercise of such an option will be applied first, to the extent allowable under this paragraph (i), against the $25,000 limitation for the earliest year in which the option was outstanding

and exercisable, then, against the $25,000 limitation for each succeeding year, in order.

(5) *Examples.* The following examples illustrate the principles of this paragraph (i):

*Example 1.* Assume that Corporation DD maintains an employee stock purchase plan and that Employee S is employed by DD. On June 1, 2010, DD grants S an option under the plan to purchase a total of 750 shares of DD stock at $85 per share. On that date, the fair market value of DD stock is $100 per share. The option provides that it may be exercised at any time but cannot be exercised after May 31, 2012. Under this paragraph (i), the option must not permit S to purchase more than 250 shares of DD stock during the calendar year 2010, because 250 shares are equal to $25,000 in fair market value of DD stock determined at the time of grant. During the calendar year 2011, S may purchase under the option an amount of DD stock equal to the difference between $50,000 in fair market value of DD stock (determined at the time the option was granted) and the fair market value of DD stock (determined at the time of grant of the option) purchased during the year 2010. During the calendar year 2012, S may purchase an amount of DD stock equal to the difference between $75,000 in fair market value of the stock (determined at the time of grant of the option) and the total amount of the fair market value of the stock (determined at the time of grant of the option) purchased under the option during the calendar years 2010 and 2011. S may purchase $25,000 of stock for the year 2010, and $25,000 of stock for the year 2012, although the option was outstanding and exercisable for only a part of each of such years. However, S may not be granted another option under an employee stock purchase plan of DD or a related corporation to purchase stock of DD or a related corporation during the calendar years 2010, 2011, and 2012, so long as the option granted June 1, 2010, is outstanding.

*Example 2.* Assume the same facts as in *Example 1,* except that the option granted to S in 2010 is terminated in 2011 without any part of the option having been exercised, and that subsequent to the termination and during 2011, S is granted another option under DD's employee stock purchase plan. Under that option, S may be permitted to purchase $25,000 of stock for 2011. The failure of S to exercise the option granted to S in 2010, does not increase the amount of stock that S may be permitted to purchase under the option granted to S in 2011.

*Example 3.* Assume the same facts as in *Example 1,* except that, on May 31, 2012, S exercised the option granted to S in 2010, and purchased 600 shares of DD stock. Five hundred shares, the maximum amount of stock that could have been purchased in 2011, under the option, are treated as having been purchased for the years 2010 and 2011. Only 100 shares of the stock are treated as having been purchased for 2012. After S's exercise of the option on May 31, 2012, S is granted another option under DD's employee stock purchase plan. S may be permitted under the new option to purchase for 2012 stock having a fair market value of no more than $15,000 at the time the new option is granted.

*Example 4.* Corporation EE maintains an employee stock purchase plan and Employee R is employed by EE. On August 1, 2010, EE grants R an option under the plan to purchase 150 shares of EE stock at $85 per share during each of the calendar years 2010, 2011, and 2012. On that date, the fair market value of EE stock is $100 per share. The option provides that it may be exercised at any time during years 2010, 2011, and 2012. Because this option permits R to purchase only $15,000 of EE's stock for each year the option is outstanding and exercisable, R could be granted another option by EE, or by a related corporation, in year 2010, permitting R to purchase an additional $10,000 of stock during each of the calendar years 2010, 2011, and 2012.

*Example 5.* Corporation FF maintains an employee stock purchase plan and Employee Q is employed by FF. On September 1, 2010, FF grants Q an option under the plan that will be automatically exercised on August 31, 2011, and August 31, 2012. On August 31, 2011, Q may purchase under the option an amount of FF stock equal to $25,000 in fair market value of FF stock (determined at the time the option was granted). On August 31, 2012, Q may purchase under the option an amount of FF stock equal to the difference between $50,000 in fair market value of Q stock (determined at the time the option was granted) and the fair market value of Q stock (determined at the time of grant of the option) purchased during year 2011.

(j) *Restriction on transferability.* An employee stock purchase plan must, by its terms, provide that options granted under the plan are not transferable by the optionee other than by will or the laws of descent and distribution, and must be exercisable, during the optionee's lifetime, only by the optionee. For general rules relating to the restriction on transferability required by this paragraph (j), see paragraph (b)(2) of § 1.421–1. For a limited exception to the requirement of this paragraph (j), see section 424(h)(3).

(k) *Special rule where option price is between 85 percent and 100 percent of value of stock*—(1)(i) If all the conditions necessary for the application of section 421(a) exist, this paragraph (k) provides additional rules that are applicable in cases where, at the time the option is granted, the option price per share is less than 100 percent (but not less than 85 percent) of the fair market value of the share. In that case, upon the disposition of the share by the employee after the expiration of the two-year and the one-year holding periods, or upon the employee's death while owning the share (whether occurring before or after the expiration of such periods), there shall be included in the employee's gross income as compensation (and not as gain upon the sale or exchange of a capital asset) the lesser of—

(A) The amount, if any, by which the price paid under the option was exceeded by the fair market value of the share at the time the option was granted, or

(B) The amount, if any, by which the price paid under the option was exceeded by the fair market value of the share at the time of such disposition or death.

(ii) For purposes of applying the rules of this paragraph (k), if the option price is not fixed or determinable at the time the option is granted, the option price will be computed as if the option had been exercised at such time. The amount of compensation resulting from the application of this paragraph (k) shall be included in the employee's gross income for the taxable year in which the disposition occurs, or for the taxable year closing with the employee's death, whichever event results in the application of this paragraph (k).

(iii) The application of the special rules provided in this paragraph (k) shall not affect the rules provided in section 421(a) with respect to the employee exercising the option, the employer corporation, or a related corporation. Thus, notwithstanding the inclusion of an amount as compensation in the gross income of an employee, as provided in this paragraph (k), no income results to the employee at the time the stock is transferred to the employee, and no deduction under section 162 is allowable at any time to the employer corporation or a related corporation with respect to such amount.

(iv) If, during the employee's lifetime, the employee exercises an option granted under an employee stock purchase plan, but the employee dies before the stock is transferred to the employee pursuant to the exercise of the option, then the transfer of the stock to the employee's executor, administrator, heir, or legatee is deemed, for the purpose of sections 421 and 423, to be a transfer of the stock to the employee exercising the option and a further transfer by reason of death from the employee to the employee's executor, administrator, heir, or legatee.

(2) If the special rules provided in this paragraph (k) are applicable to the disposition of a share of stock by an employee, then the basis of the share in the employee's hands at the time of the disposition, determined under section 1011, shall be increased by an amount equal to the amount includible as compensation in the employee's gross income under this paragraph (k). However, the basis of a share of stock

acquired after the death of an employee by the exercise of an option granted to the employee under an employee stock purchase plan shall be determined in accordance with the rules of section 421(c) and paragraph (c) of § 1.421–2. If the special rules provided in this paragraph (k) are applicable to a share of stock upon the death of an employee, then the basis of the share in the hands of the estate or the person receiving the stock by bequest or inheritance shall be determined under section 1014, and shall not be increased by reason of the inclusion upon the decedent's death of any amount in the decedent's gross income under this paragraph (k). See *Example (9)* of this paragraph with respect to the determination of basis of the share in the hands of a surviving joint owner.

(3) *Examples.* The following examples illustrate the principles of this paragraph (k):

*Example 1.* On June 1, 2010, the Corporation GG grants to Employee P, an employee of GG, an option under GG's employee stock purchase plan to purchase a share of GG stock for $85. The fair market value of GG stock on such date is $100 per share. On June 1, 2011, P exercises the option and on that date GG transfers the share of stock to P. On January 1, 2013, P sells the share for $150, its fair market value on that date. P's income tax return is filed on the basis of the calendar year. The income tax consequences to P and GG are as follows—

(i) Compensation in the amount of $15 is includible in P's gross income for the year 2013, the year of the disposition of the share. The $15 represents the difference between the option price ($85) and the fair market value of the share on the date the option was granted ($100), because the value is less than the fair market value of the share on the date of disposition ($150). For the purpose of computing P's gain or loss on the sale of the share, P's cost basis of $85 is increased by $15, the amount includible in P's gross income as compensation. Thus, P's basis for the share is $100. Because the share was sold for $150, P realizes a gain of $50, which is treated as long-term capital gain; and

(ii) GG is not entitled to any deduction under section 162 at any time with respect to the share transferred to P.

*Example 2.* Assume the same facts as in *Example 1,* except that P sells the share of GG stock on January 1, 2014, for $75, its fair market value on that date. Because $75 is less than the option price ($85), no amount in respect of the sale is includible as compensation in P's gross income for the year 2014. P's basis for determining gain or loss on the sale is $85. Because P sold the share for $75, P realized a loss of $10 on the sale that is treated as a long-term capital loss.

*Example 3.* Assume the same facts as in *Example 1,* except that the option provides that the option price shall be 90 percent of the fair market value of the stock on the day the option is exercised. On June 1, 2011, when the option is exercised, the fair market value of the stock is $120 per share so that P pays $108 for the share of the stock. Compensation in the amount of $10 is includible in P's gross income for the year 2013, the year of the disposition of the share. This is determined in the following manner: the excess of the fair market value of the stock at the time of the disposition ($150) over the price paid for the share ($108) is $42; and the excess of the fair market value of the stock at the time the option was granted ($100) over the option price, computed as if the option had been exercised at such time ($90), is $10. Accordingly, $10, the lesser, is includible in gross income. In this situation, P's cost basis of $108 is increased by $10, the amount includible in P's gross income as compensation. Thus, P's basis for the share is $118. Because the share was sold for $150, P realizes a gain of $32 that is treated as long-term capital gain.

*Example 4.* Assume the same facts as in *Example 1,* except that the option provides that the option price shall be the lesser of 95 percent of the fair market value of the stock on the first day of the offering period and 95 percent of the fair market value of the stock on the day the option is exercised. On June 1, 2011, when the option is exercised, the fair market value of the stock is $120 per share. P pays $95 for the share of the stock. Compensation in the amount of $5 is includible in P's gross income for the year 2013, the year of the disposition of the share. This is determined in the following manner: the excess of the fair market value of the stock at the time of the disposition ($150) over the price paid for the share ($95) is $55; and the excess of the fair market value of the stock at the time the option was granted ($100) over the option price, computed as if the option had been exercised at such time ($95), is $5. Accordingly, $5, the lesser, is includible in gross income. In this situation, P's cost basis of $95 is increased by $5, the amount includible in P's gross income as compensation. Thus, P's basis for the share is $100. Because the share was sold for $150, P realizes a gain of $50 that is treated as long-term capital gain.

*Example 5.* Assume the same facts as in *Example 1,* except that instead of selling the share on January 1, 2013, P makes a gift of the share on that day. In that case $15 is includible as compensation in P's gross income for 2013. P's cost basis of $85 is increased by $15, the amount includible in P's gross income as compensation. Thus, P's basis for the share is $100, which becomes the donee's basis, as of the time of the gift, for determining gain or loss.

*Example 6.* Assume the same facts as in *Example 2,* except that instead of selling the share on January 1, 2014, P makes a gift of the share on that date. Because the fair market value of the share on that day ($75) is less than the option price ($85), no amount in respect of the disposition by way of gift is includible as compensation in P's gross income for 2014. P's basis for the share is $85, which becomes the donee's basis, as of the time of the gift, for the purpose of determining gain. The donee's basis for the purpose of determining loss, determined under section 1015(a), is $75 (fair market value of the share at the date of gift).

*Example 7.* Assume the same facts as in *Example 1,* except that after acquiring the share of stock on June 1, 2011, P dies on August 1, 2012, at which time the share has a fair market value of $150. Compensation in the amount of $15 is includible in P's gross income for the taxable year closing with P's death, $15 being the difference between the option price ($85) and the fair market value of the share when the option was granted ($100), because such value is less than the fair market value at date of death ($150). The basis of the share in the hands of P's estate is determined under section 1014 without regard to the $15 includible in the decedent's gross income.

*Example 8.* Assume the same facts as in *Example 7,* except that P dies on August 1, 2011, at which time the share has a fair market value of $150. Although P's death occurred within six months after the transfer of the share to P, the income tax consequences are the same as in *Example 7.*

*Example 9.* Assume the same facts as in *Example 1,* except that the share of stock was issued in the names of P and P's spouse jointly with right of survivorship, and that P and P's spouse sold the share on June 15, 2012, for $150, its fair market value on that date. Compensation in the amount of $15 is includible in P's gross income for the year 2012, the year of the disposition of the share. The basis of the share in the hands of P and P's spouse for the purpose of determining gain or loss on the sale is $100, that is, the cost of $85 increased by the amount of $15 includible as compensation in P's gross income. The gain of $50 on the sale is treated as long-term capital gain, and is divided equally between P and P's spouse.

*Example 10.* Assume the same facts as in *Example 1,* except that the share of stock was issued in the names of P and P's spouse jointly with right of survivorship, and that P predeceased P's spouse on August 1, 2012, at which time the share had a fair market value of $150. Compensation in the amount of $15 is includible in P's gross income for the taxable year closing with his death. See *Example 7.* The basis of the share in the hands of P's spouse as survivor is determined under section 1014 without regard to the $15 includible in the decedent's gross income.

*Example 11.* Assume the same facts as in *Example 10,* except that P's spouse predeceased P on July 1, 2012. Section 423(c) does not apply in respect of the death of P's spouse. Upon the subsequent death of P on August 1, 2012, the income tax consequences in respect of P's taxable year closing with the date of P's death, and in respect of the basis of the share in the hands of P's estate, are the same as in *Example 7.* If P had sold the share on July 15, 2012 (after the death of P's spouse), for $150, its fair market value at that time, the income tax consequences would be the same as in *Example 1.*

(l) *Effective/applicability date.* Upon the date of publication of the Treasury decision adopting the rules of this section as a final regulation in the

**Federal Register**, these rules will apply as of January 1, 2010.

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. E8–17255 Filed 7–28–08; 8:45 am]

**BILLING CODE 4830–01–P**

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Parts 1, 40, and 48

**[REG–155087–05]**

**RIN 1545–BF17**

## Alcohol Fuel and Biodiesel; Renewable Diesel; Alternative Fuel; Diesel-Water Fuel Emulsion; Taxable Fuel Definitions; Excise Tax Returns

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations relating to credits and payments for alcohol mixtures, biodiesel mixtures, renewable diesel mixtures, alternative fuel mixtures, and alternative fuel sold for use or used as a fuel, as well as proposed regulations relating to the definition of gasoline and diesel fuel. These regulations reflect changes made by the American Jobs Creation Act of 2004, the Energy Policy Act of 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, and the Tax Technical Corrections Act of 2007. These regulations affect producers of alcohol, biodiesel, and renewable diesel; producers of alcohol, biodiesel, renewable diesel, and alternative fuel mixtures; sellers and users of alternative fuel; and certain persons liable for the tax on removals, entries, or sales of gasoline or diesel fuel.

**DATES:** Written or electronic comments and requests for a public hearing must be received by October 27, 2008.

**ADDRESSES:** Send submissions to CC:PA:LPD:PR (REG–155087–05), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–155087–05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–155087–05).

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Stephanie Bland, Taylor Cortright, or DeAnn Malone, all of whom can be reached at (202) 622–3130 (not a toll-free call); concerning the submission of comments or requests for a public hearing, Oluwafunmilayo Taylor at (202) 622–7180 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

### Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by September 29, 2008. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in § 48.6426–3(e), describing the certificate the biodiesel producer must give to the claimant of a biodiesel mixture credit or biodiesel credit; § 48.6426–3(f), describing the statement a biodiesel reseller must give to the claimant of a biodiesel mixture credit or biodiesel credit; § 48.6426–4(e), describing the certificate the renewable diesel producer must give to the claimant of a renewable diesel mixture credit or renewable diesel credit; § 48.6426–4(f), describing the statement a renewable diesel reseller must give to the claimant of a renewable diesel mixture credit or renewable diesel credit; and § 48.6426–6(c), describing the statement given to a seller of liquefied natural gas. This information is required to obtain a tax benefit. This information will be used by the IRS to substantiate claims for the tax benefits. The likely recordkeepers are business or other for-profit institutions and small businesses or organizations.

Estimated total annual reporting burden: 17,710 hours.

Estimated average annual burden hours per respondent varies from 2.5 hours to 25 hours, depending on individual circumstances, with an estimated average of 22 hours.

Estimated number of respondents: 756.

Estimated annual frequency of responses: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

### Background

The Internal Revenue Code (Code) provides incentives for certain renewable and alternative fuels. Before January 1, 2005, a reduced rate of tax applied to most alcohol-blended fuels. The American Jobs Creation Act of 2004 (Pub. L. 108–357) replaced the reduced rate of tax for alcohol-blended fuels with credits or payments for alcohol and alcohol mixtures that are sold for use or used as a fuel. The Act also added credits and payments for biodiesel and biodiesel mixtures sold for use or used as a fuel. Credit and payment provisions for renewable diesel, renewable diesel mixtures, alternative fuel, alternative fuel mixtures, and diesel-water fuel emulsions were added to the Code by the Energy Policy Act of 2005 (Pub. L. 109–58) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109–59) (SAFETEA). Technical corrections to SAFETEA were made by the Tax Technical Corrections Act of 2007 (Pub. L. 110–172).

The incentives include a credit under section 6426 for alcohol fuel mixtures, biodiesel mixtures, renewable diesel mixtures (incorporated into section

6426 by section 40A(f)), and alternative fuel mixtures sold for use or used as a fuel and alternative fuel sold for use or used as a fuel in a motor vehicle or motorboat. The credit under section 6426 is allowed against the claimant's fuel tax liability. The incentives for these fuels also include a payment under section 6427(e) and a refundable income tax credit under section 34. The amount allowed as a payment or credit under these provisions is reduced by the claimant's excise tax liability against which a credit is allowed under section 6426. Section 40 provides a nonrefundable income tax credit for alcohol fuel mixtures, alcohol that is sold for use or used as a fuel, and for the production of alcohol by certain small ethanol producers; section 40A provides similar rules relating to biodiesel and renewable diesel. The Code includes coordination rules that limit the maximum incentive that may be claimed for any particular gallon of alcohol, biodiesel, renewable diesel, and alternative fuel. Generally, for alcohol that is ethanol, the benefit is $0.51 per gallon; for biodiesel, the incentive is $0.50 per gallon ($1.00 per gallon in the case of agri-biodiesel); for renewable diesel, the incentive is $1.00 per gallon; and, for alternative fuel, the incentive is $0.50 per gallon. In the case of small ethanol producers and small agri-biodiesel producers, however, the Code allows an additional income tax credit of $0.10 per gallon.

Notice 2005–4 (2005–1 CB 289) describes the alcohol and biodiesel credits and payments and provides general guidance for these incentives. Comments received after the publication of Notice 2005–4 requested additional guidance with regard to the biodiesel producer certificates in the case of resale, commingled biodiesel, the definition of agri-biodiesel, and the definition of a biodiesel mixture. Guidance on these issues was provided in Notice 2005–62 (2005–2 CB 443). Notice 2005–80 (2005–2 CB 953) describes the registration requirements related to diesel-water fuel emulsions. Notice 2006–92, (2006–43 IRB. 774) describes the alternative fuel credits and payments. Notice 2007–37 (2007–17 IRB 1002) provides guidance on renewable diesel. Notice 2007–97 (2007–49 IRB 1092) provides guidance on liquid hydrocarbons for purposes of the definition of alternative fuel. Comments were received in response to these notices and have been considered in the development of this notice of proposed rulemaking.

*Renewable and Alternative Fuels; Currently Applicable Rules*

The IRS has received numerous inquiries about the proper steps that must be taken to comply with the tax laws and to take full advantage of the tax incentives for certain renewable and alternative fuels. The following are general rules that are currently applicable and would not be changed by these proposed regulations.

*Registration*

Registration by the IRS is required for each person that produces alcohol, biodiesel, renewable diesel, or blended taxable fuel or claims credits or payments with respect to alternative fuel.

Application for registration is made on Form 637, ''Application for Registration (For Certain Excise Tax Activities).'' A person generally may not engage in an activity for which registration is required until the IRS has approved the person's registration with respect to the activity.

*Imposition of Tax*

Tax is imposed on the removal of a biodiesel mixture that is diesel fuel from the terminal at the terminal rack. In the case of blended taxable fuel, tax is imposed on a blender's sale or removal of the fuel and the blender is liable for the tax. Blended taxable fuel includes diesel fuel or gasoline produced outside of the bulk transfer/terminal system by mixing an untaxed liquid, such as biodiesel or alcohol, with a taxable fuel, such as diesel fuel or gasoline, that has been previously taxed (even if only at the Leaking Underground Storage Tank Trust Fund financing rate). Thus, for example, if a person produces, outside the bulk transfer/terminal system, a biodiesel mixture that is diesel fuel, that person is liable for tax on its removal or sale of the mixture. Further, tax generally is imposed on the delivery of fuel that has not been taxed into the fuel supply tank of a motor vehicle or diesel-powered train and on the delivery of alternative fuel (liquid fuel other than gas oil, fuel oil, or taxable fuel) into the fuel supply tank of a motorboat unless the delivery of the fuel or alternative fuel is for a nontaxable purpose.

Liability for these excise taxes is reported on Form 720, ''Quarterly Federal Excise Tax Return.'' Persons that are liable for excise taxes may also be required to make semi-monthly deposits. See Form 720 for more information on deposits.

*Tax Incentives for Mixtures*

The excise tax credits for mixtures containing alcohol, biodiesel, renewable diesel, or alternative fuel must be claimed on Form 720, Schedule C. These credits are allowed to the extent of certain fuel tax liability. The credits are claimed by the person producing the mixture.

The mixture producer may also claim payments (or refundable income tax credits) for incentives that exceed tax liability; that is, for the amount by which the maximum incentive allowable for the mixture exceeds the credit allowed on the Form 720. Notice 2005–62 contains guidance on the computation of payment limitations. Claims for payment are made either on Form 8849, ''Claim for Refund of Excise Taxes,'' or Schedule C, Form 720, ''Quarterly Federal Excise Tax Return.'' (Thus, claims on Form 720 may be for both an excise tax credit and a payment.) Claims for the refundable income tax credit are made on Form 4136, ''Credit for Federal Tax Paid on Fuel,'' which is attached to the claimant's income tax return.

*Tax Incentives for Neat Fuels*

A nonrefundable general business tax credit may be claimed for alcohol, biodiesel, and renewable diesel fuels that are not in a mixture and are used as a fuel. This is the only credit or payment allowed with respect to the use of these neat fuels as a fuel. Claims for the credit are made by the person using the renewable fuel in a trade or business or by the person that sold the fuel at retail and delivered it into a vehicle. The small ethanol producer credit and the small agri-biodiesel producer credit are also nonrefundable general business credits. Claims for nonrefundable general business credits are made on Form 6478, ''Credit for Alcohol Used as Fuel,'' and Form 8864, ''Biodiesel and Renewable Diesel Fuels Credit,'' attached to the claimant's income tax return.

An excise tax credit may be claimed for alternative fuel that is not in a mixture and is used as a fuel. The excise tax credit is claimed on Form 720, Schedule C. The credit is allowed to the extent of certain fuel excise tax liability. The credit is claimed by the alternative fueler (unmixed fuel). If the incentive for unmixed alternative fuel exceeds the applicable excise tax liability the excess may be claimed as a payment on Form 8849 or as a refundable income tax credit on Form 4136.

**Explanation of Provisions**

The proposed regulations add provisions relating to registration requirements and excise tax credits or payments for alcohol, biodiesel, renewable diesel and alternative fuel

mixtures and for alternative fuel and diesel-water fuel emulsions. The regulations provide definitions and prescribe rules for claiming a credit or payment. Specifically, the regulations prescribe the conditions to allowance of a credit or payment, the content of claims for credit or payment, and the form of applicable certificates. The proposed regulations also remove obsolete regulations relating to gasohol and other alcohol fuels.

The proposed regulations generally adopt the rules of Notices 2005–4, 2005–62, 2005–80, 2006–92, 2007–37, and 2007–97. Differences between the notices and the proposed regulations are described in this preamble.

*Biodiesel Mixtures and Liability for Tax*

Notice 2005–62 provides that *biodiesel mixture* means a mixture of biodiesel and diesel fuel that contains at least 0.1 percent (by volume) of diesel fuel. That rule is unchanged by these proposed regulations.

Under existing regulations, diesel fuel does not include ''excluded liquid''; biodiesel mixtures with a high concentration of biodiesel typically are classified as an excluded liquid. The definition of ''excluded liquid'' predates the biodiesel incentives and was intended to ensure that the diesel fuel tax was not imposed on certain liquids typically not used as fuel. The proposed regulations revise the definition of ''excluded liquid'' so that all biodiesel mixtures, which are generally used as a substitute for diesel fuel, will be classified as diesel fuel for tax purposes. As a result, under the proposed regulations, tax is imposed on a biodiesel mixture when it is removed from the bulk transfer/terminal system. If a biodiesel mixture is produced outside the bulk transfer/terminal system, tax is imposed on the sale or removal of the mixture by the mixture producer. The mixture producer is liable for the tax and must be registered as a blender of taxable fuel. The tax incentive for the biodiesel mixture generally must be taken as a credit against the producer's fuel tax liability and any excess over the fuel tax liability is allowable as either a payment or an income tax credit.

Also, the de minimis exception to the definition of ''blended taxable fuel'' is removed. Under this exception, a mixture is not blended fuel if the person creating the mixture adds less than 400 gallons of untaxed liquid to previously taxed fuel during the quarter and the operator of the vehicle using the mixture is liable for the tax on the untaxed liquid. Thus, in cases in which the untaxed liquid is alcohol, biodiesel, or alternative fuel, the exception prevents the credit for which the mixture producer is eligible from being used to offset the tax. With the removal of this exception, the same person (the producer of the mixture) will be liable for the tax and eligible for the credit that can be used to offset the tax.

*Biodiesel and EPA Registration Requirements*

The Code defines *biodiesel* as monoalkyl esters of long chain fatty acids derived from plant or animal matter that meet (1) the registration requirements of the Environmental Protection Agency (EPA) for fuel and fuel additives and, (2) ASTM D6751. Under the proposed regulations, a product meets the EPA registration requirements if the EPA does not require the product to be registered. Thus, for example, if a biodiesel mixture is to be sold only at a marina for use in boats, the biodiesel in the mixture meets the EPA registration requirement because EPA registration requirements do not apply to fuels or fuel additives sold for use in boats.

*Biodiesel Certificates*

The Code provides that a claim relating to a biodiesel mixture is not allowed unless, among other conditions, the claimant obtains the prescribed certificate from the biodiesel producer. Under existing rules, as well as the proposed regulations, this certificate must be attached to the claim that is filed with the IRS. However, the proposed regulations do not require a separate certificate to accompany the claim filed by a mixture producer that is also the producer of the biodiesel in the mixture. Further, the proposed regulations require, as a condition to allowance of an excise tax credit or a payment, that the claimant obtain the certificate from a registered biodiesel producer. If the claim is for a nonrefundable general business credit, the certificate may be from the registered producer or importer.

*Erroneous Biodiesel Certificates*

Under the Code, a claim relating to a biodiesel mixture is not allowed if the mixture does not actually contain biodiesel. Guidance was requested on whether a claim would be allowed if the claimant attached a certificate for biodiesel and the information on the certificate proved to be incorrect. The proposed regulations make clear that such a claim is not allowed even if the claim is based on a biodiesel certificate that the claimant accepted in good faith. In such a case, however, the proposed regulations generally provide that reliance on the certificate will be treated as reasonable cause for purposes of the penalties imposed by sections 6651 (relating to failure to pay) and 6675 (relating to excessive claims).

*Alternative Fuel*

The Code allows a credit or payment for alternative fuel that is not in a mixture if the alternative fuel is sold for use or used as a fuel in a motor vehicle or motorboat. If the claim is based on a sale, the claimant must deliver the fuel into the fuel supply tank of the motor vehicle or motorboat or, in the case of a bulk sale, obtain the statement described in § 48.4041–5(a)(2), § 48.4041–21(b), or proposed § 48.6426–6(c).

*Registration of Alternative Fuelers*

A person must be registered by the IRS before claiming the alternative fuel or alternative fuel mixture credit or payment. Section 34 allows a refundable income tax credit with respect to alternative fuel or an alternative fuel mixture. This credit is claimed on Form 4136 filed with the claimant's Federal income tax return. Because partnerships do not file Federal income tax returns, the refundable income tax credit allowable with respect to a partnership's sale or use of alternative fuel is made by its partners. The partners may file Form 4136 with their income tax returns to claim a credit based on the information provided them on the partnership's Schedule K–1.

The proposed regulations provide that a partner in a partnership is treated as a registered alternative fueler for purposes of claims on Form 4136 if the partnership is registered for purposes of claims for an excise tax credit or payment. A partner that is treated as registered under this rule is to provide the partnership's registration number on Form 4136. These rules also apply for purposes of ultimate vendor claims by partners in partnerships that are ultimate vendors of diesel fuel or kerosene.

*Small Ethanol Producer Credit*

Section 40(a)(3) provides an income tax credit for ethanol produced by eligible small ethanol producers. The amount of ethanol that is eligible for the credit during any taxable year cannot exceed 15,000,000 gallons for any producer. A small ethanol producer generally means a person whose productive capacity for all alcohol, including alcohol for which a credit is not allowable under section 40, does not exceed 60,000,000 gallons at any time during the taxable year. Section 40(g)(5) authorizes the Secretary to prescribe

regulations to prevent the credit from benefiting a person that directly or indirectly has a productive capacity for alcohol in excess of 60,000,000 gallons and to prevent any person from directly or indirectly benefiting with respect to more than 15,000,000 gallons during the taxable year. Section 40A provides similar rules with respect to the small agri-biodiesel producer credit.

The proposed regulations provide that *producer* means the person that has title to the ethanol immediately after the ethanol is created. Also, the producer must use a feedstock other than ethanol to produce the ethanol. The proposed regulations do not allow the credit for ethanol produced at the facilities of a contract manufacturer if the contract manufacturer has a direct or indirect productive capacity of more than 60,000,000 gallons of alcohol during the taxable year. Similarly, if the manufacturer does not have a productive capacity of more than 60,000,000 gallons but more than 15,000,000 gallons of ethanol is produced at the manufacturer's facilities during the taxable year, the proposed regulations allow the credit with respect to only the first 15,000,000 gallons of ethanol produced at the facilities during the taxable year. These rules apply to small agri-biodiesel producers also.

*Gasoline and Gasoline Blends*

The Code defines gasoline as including gasoline blends. The proposed regulations generally define a gasoline blend as any liquid that contains at least 0.1 percent (by volume) of finished gasoline and that is suitable for use as a fuel in a motor vehicle or motorboat. Thus, for example, E–85 (a mixture of 85 percent ethanol made from corn or other agricultural products and 15 percent gasoline) is treated as a gasoline blend. Tax is imposed on the gasoline blend when it is removed from the bulk transfer/terminal system or, if it is blended taxable fuel, when it is sold or removed by the blender. The proposed regulations also classify leaded gasoline as gasoline. Thus, for example, gasoline products that are sold as ''racing gasoline'' generally are treated as gasoline even though their lead content make them unsuitable for highway use.

*Excise Tax Returns*

The privilege to file consolidated returns under section 1501 applies only to income tax returns and not to excise tax returns. The proposed regulations note this rule and also reflect the rules of § 301.7701–2(c)(2)(v), which was added by TD 9356 (72 FR 45891, August 16, 2007), relating to the excise tax treatment of certain business entities that are treated as separate from their owner for income tax purposes.

*Proposed Effective/Applicability Date*

The amendments to the regulations generally are proposed to be effective on the date they are published as final regulations in the **Federal Register**.

*Future Regulations Projects*

Future proposed regulations will address other fuel-related provisions in the American Jobs Creation Act, the Energy Policy Act, and SAFETEA. These include provisions related to kerosene used in aviation, the Leaking Underground Storage Tank Trust Fund tax, the tax on alternative fuel, and two-party exchanges.

*Availability of IRS Documents*

IRS notices cited in this preamble are published in the Internal Revenue Bulletin or Cumulative Bulletin and are available at IRS.gov.

**Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed regulations. It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on IRS estimates that less than 700 small entities will be required to provide certificates each year, such certificates will be provided only on occasion, and the average annual burden per respondent will be 22 hours. The economic impact of the collection of information is limited to completing a certificate in the form prescribed by the regulations. The certificate can be completed by filling in a small number of fields with information that is readily available to the taxpayer, and completion of a certificate should generally take less than 15 minutes. Accordingly, the time and resources required to prepare and provide these certificates is minimal and will not have a significant effect on those entities providing them. Therefore, an analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

**Comments and Requests for a Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

**Drafting Information**

The principal authors of these regulations are Taylor Cortright and Frank Boland, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

**List of Subjects**

*26 CFR Part 1*

Income taxes, Reporting and recordkeeping requirements.

*26 CFR Parts 40 and 48*

Excise taxes, Reporting and recordkeeping requirements.

**Proposed Amendments to the Regulations**

Accordingly, 26 CFR parts 1, 40, and 48 are proposed to be amended as follows:

## PART 1—INCOME TAXES

**Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805 * * *

Section 1.40–2 also issued under 26 U.S.C. 40(g)(5); Section 1.40A–1 also issued under 26 U.S.C. 40A(e)(5); * * *

**Par. 2.** Section 1.40–1 is revised to read as follows:

### § 1.40–1 Alcohol used as a fuel.

For the definition of ''alcohol'' for purposes of the credits allowed by section 40, see § 48.6426–1(c) of this chapter.

**Par. 3.** Sections 1.40–2 and 1.40A–1 are added to read as follows:

**§ 1.40–2 Small ethanol producer credit.**

(a) *In general.* Section 40 provides a small ethanol producer credit for each gallon of qualified ethanol production of an eligible small ethanol producer. Section 40(b)(4)(B) defines ''qualified ethanol production''. Section 40(g)(1) defines ''eligible small ethanol producer''. Section 40(g)(5) provides authority to prescribe such regulations as may be necessary to prevent the credit from directly or indirectly benefiting any person with a direct or indirect productive capacity of more than 60 million gallons of alcohol during the taxable year. A person has produced ethanol if the person has title to the ethanol immediately after it is created.

(b) *Qualified ethanol production.* Section 40(b)(4)(B) limits qualified ethanol production to ethanol that is produced by an eligible small ethanol producer. Ethanol is ''produced'' for this purpose only when a feedstock other than ethanol is transformed into ethanol.

(c) *Denial of credit for ethanol produced at certain facilities.* The person at whose facilities ethanol is produced is treated for purposes of section 40(g)(5) as an indirect beneficiary of any credit allowed with respect to the ethanol. Accordingly, the small ethanol producer credit is not allowed with respect to ethanol that is produced at the facilities of a contract manufacturer or other person if such contract manufacturer or other person has a direct or indirect productive capacity of more than 60 million gallons of alcohol during the taxable year. Similarly, if the manufacturer does not have a productive capacity of more than 60 million gallons but more than 15 million gallons of ethanol is produced at the manufacturer's facilities during the taxable year, the small ethanol producer credit is allowed with respect to only the first 15 million gallons of ethanol produced at the facilities during the taxable year.

(d) *Examples.* The following examples illustrate the application of this section:

*Example 1.* X purchases hydrous ethanol and processes it into anhydrous ethanol. X is not the producer of the ethanol because X does not transform a feedstock other than ethanol into ethanol.

*Example 2.* Y arranges with contract manufacturer Z to produce 10 million gallons of ethanol. Y is not related to Z. Y provides the raw materials and retains title to them and to the finished ethanol. Z has the capacity to produce 100 million gallons of alcohol per year. The small producer credit is not allowed with respect to the 10 million gallons of ethanol because it is produced at the facilities of a contract manufacturer that has a productive capacity of more than 60 million gallons of alcohol during the taxable year.

(e) *Effective/applicability date.* This section is applicable on and after the date of publication of these regulations in the **Federal Register** as final regulations.

**§ 1. 40A–1 Biodiesel.**

(a) *In general.* Rules similar to the rules of § 1.40–2 apply for purposes of the small agri-biodiesel producer credit allowed by section 40A.

(b) *Definitions.* For the definitions of ''biodiesel'' and ''renewable diesel'' for purposes of the credits allowed by section 40A, see § 48.6426–1(b) of this chapter.

(c) *Effective/applicability date.* This section is applicable on and after the date of publication of these regulations in the **Federal Register** as final regulations.

## PART 40—EXCISE TAX PROCEDURAL REGULATIONS

**Par. 4.** The authority citation for part 40 is amended by removing the entry for section 40.6071(a)–3 to read in part as follows:

**Authority:** 26 U.S.C. 7805 * * *

**Par. 5.** Section 40.0–1 is amended by revising paragraph (d) and adding paragraph (e) to read as follows:

**§ 40.0–1 Introduction.**

* * * * *

(d) *Person.* For purposes of this part, each business unit that has, or is required to have, a separate employer identification number is treated as a separate person. Thus, business units (for example, a parent corporation and a subsidiary corporation, a proprietorship and a related partnership, or the various members of a consolidated group), each of which has a different employer identification number, are separate persons.

(e) *Effective/applicability date.* This part is effective for returns and deposits that relate to calendar quarters beginning after September 30, 2008. For rules applicable to returns and deposits that relate to prior periods, see 26 CFR part 40 (revised as of April 1, 2008).

**§ 40.6302(c)–1 [Amended]**

**Par. 6.** Section 40.6302(c)–1 is amended as follows:

1. Paragraph (e)(1)(ii) is amended by removing the language ''components);'' and adding ''components); and'' in its place.

2. Paragraph (e)(1)(iii) is amended by removing the language ''chemicals); and'' and adding ''chemicals).'' in its place.

3. Paragraph (e)(1)(iv) is removed.

## PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

**Par. 7.** The authority citation for part 48 is amended by removing the entries for §§ 48.4081–6, 48.6427–8, 48.6427–9, 48.6427–10, and 48.6427–11 and adding entries in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805 * * *

Section 48.6426–3 also issued under 26 U.S.C. 6426(c). Section 48.6426–4 also issued under 26 U.S.C. 6426(c). Section 48.6427–8 also issued under 26 U.S.C. 6427(n). Section 48.6427–9 also issued under 26 U.S.C. 6427(n). Section 48.6427–10 also issued under 26 U.S.C. 6427(n). Section 48.6427–11 also issued under 26 U.S.C. 6427(n). Section 48.6427–12 also issued under 26 U.S.C. 6427(n).

**§ 48.0–1 [Amended]**

**Par. 8.** Section 48.0–1 is amended as follows:

1. In the second sentence, ''and related credits, refunds, and payments'' is added after ''Code''.

2. In the third sentence, ''certain luxury items,'' is removed.

3. In the fourth sentence, ''aviation fuel,'' is removed.

**Par. 9.** Section 48.0–4 is added to read as follows:

**§ 48.0–4 Forms.**

Any reference to a form in this part is also a reference to any other form designated for the same use by the Commissioner after the date these regulations are published in the **Federal Register** as final regulations. All such forms must be completed in accordance with the instructions for the forms and contain any additional information required by this part.

**§ 48.4041–0 [Amended]**

**Par. 10.** Section 48.4041–0 is amended as follows:

1. In the first sentence, the language ''sales or uses of diesel fuel'' is removed and ''any liquid (other than biodiesel) that is sold for use or used as a fuel in a diesel-powered highway vehicle or diesel-powered train'' is added in its place.

2. In the second sentence, the language ''diesel fuel tax'' is removed and ''tax with respect to these liquids'' is added in its place.

**§ 48.4041–18 [Removed and Reserved]**

**Par. 11.** Section 48.4041–18 is removed and reserved.

**Par. 12.** Section 48.4041–19 is revised to read as follows:

**§ 48.4041–19 Reduction in tax for qualified methanol or ethanol fuel and partially exempt methanol or ethanol fuel.**

(a) *In general.* Section 4041(b)(2) provides a reduced rate of tax under sections 4041(a)(2) and (d) for qualified methanol or ethanol fuel. Section 4041(m) provides a reduced rate of tax under section 4041(a)(2) for partially exempt methanol or ethanol fuel.

(b) *Qualified methanol or ethanol fuel and partially exempt methanol or ethanol fuel defined.* For purposes of section 4041(b)(2) and this section, qualified methanol or ethanol fuel is liquid motor fuel, at least 85 percent of which (by volume) consists of alcohol produced from coal (including peat). For purposes of section 4041(m) and this section, partially exempt methanol or ethanol fuel is a liquid motor fuel, at least 85 percent of which (by volume) consists of alcohol produced from natural gas (including ethanol produced through the process of thermally cracking ethane that is a constituent of natural gas). The actual gallonage of each component of the mixture (without adjustment for temperature) shall be used in determining whether, at the time of the taxable sale or use, the applicable 85 percent alcohol requirement has been met. A mixture containing less than 85 percent alcohol produced from coal (or less than 85 percent alcohol produced from natural gas) may be treated as satisfying the applicable percentage requirement. In determining whether a particular mixture should be so treated, the Commissioner shall take into account the existence of any facts and circumstances establishing that, but for the commercial and operational realities of the blending process, it may reasonably be concluded that the mixture would have contained at least 85 percent alcohol from the appropriate source. The necessary facts and circumstances will not be found to exist if over a period of time the mixtures blended by a blender show a consistent pattern of failing to contain at least 85 percent alcohol from the appropriate source.

(c) *Effective/applicablity date.* This section is applicable on and after the date of publication of these regulations in the **Federal Register** as final regulations. For provisions applicable to prior periods, see 26 CFR 48.4041–19 (revised as of April 1, 2008).

**§ 48.4041–20 [Removed and Reserved]**

**Par. 13.** Section 48.4041–20 is removed and reserved.

**Par. 14.** Section 48.4081–1 is amended as follows:

1. Paragraph (b) is amended by:

a. Revising the definition of Blender.

b. Adding the definition of Diesel-water fuel emulsion in alphabetical order.

c. Adding the language ''(other than a mixture as defined in § 48.6426–1(b))'' after ''any liquid'' in the introductory text of the definition of Excluded liquid.

d. Revising the definition of Finished gasoline.

e. Revising the definition of Gasoline.

f. Adding the definition of Gasoline blend in alphabetical order.

g. Revising the definition of Refinery.

h. Removing the language ''effective January 2, 1998,'' from the last sentence in the definition of Terminal.

2. Paragraph (c) is amended by:

a. In paragraph (c)(1)(i), removing the language ''paragraphs (c)(1)(ii) and (c)(1)(iii)'' in the introductory text and adding ''paragraph (c)(1)(ii)'' in its place.

b. In paragraph (c)(1)(ii), removing the language ''A mixture'' and adding ''In calendar quarters beginning before the date of publication of these regulations in the **Federal Register** as final regulations, a mixture'' in its place.

c. Removing paragraph (c)(1)(iii).

d. In paragraph (c)(2)(i), first sentence, adding the language ''any of the following: a mixture (as defined in § 48.6426–1(b)) that contains diesel fuel; renewable diesel as defined in section 40A(f)(3); transmix (as defined in section 4083(a)(3)(B)); and'' after ''*diesel fuel* means''.

e. In paragraph (c)(2)(ii), first sentence, adding the language ''biodiesel, alternative fuel (as defined in section 6426(d)(2)), qualified methanol or ethanol fuel (as defined in section 4041(b)(2)(B)), partially exempt methanol or ethanol fuel (as defined in section 4041(m)(2)),'' after ''kerosene,''.

f. In paragraph (c)(3)(i)(V) removing the language ''gasoline;'' and adding ''gasoline; and'' in its place.

g. In paragraph (c)(3)(i)(W), removing the language ''Toluene; and'' and adding ''Toluene.'' in its place.

h. Removing paragraph (c)(3)(i)(X).

3. Paragraph (e) is amended by removing the language ''48.4081–6(b),'' and by adding the language ''48.6426–1(b)'' after ''48.4101–1(b),''.

4. Revising paragraph (f).

The revisions and additions read as follows:

**§ 48.4081–1 Taxable fuel; definitions**

* * * * *

(b) * * *

*Blender* means the person that has title to blended taxable fuel immediately after it is created.

* * * * *

*Diesel-water fuel emulsion* means diesel fuel at least 14 percent of which is water and with respect to which the emulsion additive is registered by a United States manufacturer with the Environmental Protection Agency pursuant to section 211 of the Clear Air Act (as in effect on March 31, 2003).

* * * * *

*Finished gasoline* means all products that are commonly or commercially known or sold as gasoline and are suitable for use as a motor fuel, other than—

(1) Products that have an ASTM octane number of less than 75 as determined by the motor method; and

(2) Alternative fuel as defined in section 6426(d)(2).

*Gasoline* means aviation gasoline, finished gasoline, gasoline blends, gasoline blendstocks, and leaded gasoline.

*Gasoline blend* includes any liquid (other than finished gasoline) that contains at least 0.1 percent (by volume) of finished gasoline and that is suitable for use as a fuel in a motor vehicle or motorboat. However, the term does not include qualified methanol or ethanol fuel (as defined in section 4041(b)(2)(B)), partially exempt methanol or ethanol fuel (as defined in section 4041(m)(2)), or alcohol that is denatured under a formula approved by the Secretary.

* * * * *

*Refinery* means a facility used to produce taxable fuel and from which taxable fuel may be removed by pipeline, by vessel, or at a rack. However, the term does not include a facility where only blended taxable fuel, and no other type of taxable fuel, is produced.

* * * * *

(f) *Effective/applicability date.* This section is applicable on and after the date of publication of these regulations in the **Federal Register** as final regulations. For provisions applicable to prior periods, see 26 CFR 48.4081–1 (revised as of April 1, 2008).

**§ 48.4081–2 [Amended]**

**Par. 15.** Section 48.4081–2 is amended by removing the last sentence of paragraph (d).

**§ 48.4081–3 [Amended]**

**Par. 16.** Section 48.4081–3 is amended as follows:

1. Paragraph (b)(1)(iii) is removed.

2. Removing the last sentence in paragraphs (g)(1) and (h).

**§ 48.4081–6 [Removed and Reserved]**

**Par. 17.** Section 48.4081–6 is removed and reserved.

**§ 48.4082–4 [Amended]**

**Par. 18.** Section 48.4082–4, is amended by adding the language ''or biodiesel'' after ''taxable fuel'' in paragraphs (a)(1)(iii) and (b)(1)(iii).

**Par. 19.** Section 48.4101–1 is amended as follows:

1. Paragraph (a)(1) is amended by removing the language ''4081 and'' and adding ''4081, for certain producers and importers of alcohol, biodiesel, and renewable diesel, and alternative fuelers under sections 6426 and 6427, and for purposes of'' in its place.

2. Revising paragraphs (a)(2), (c)(1)(vi), (c)(1)(vii), and adding paragraph (c)(1)(viii).

3. Paragraphs (a)(3) and (b)(3) are removed and reserved.

4. Paragraph (b)(9) is amended by removing the language ''48.4081–6(b), 48.4082–5(b), 48.4082–6(b), 48.4082–7(b)'' and adding ''48.4082–5(b), 48.4082–7(b), 48.6426–1(b),'' in its place.

5. Revising paragraph (d)(2) and adding paragraph (d)(7).

6. Paragraph (d)(5) is amended by, removing the language ''vendor; or'' and adding ''vendor;'' in its place.

7. Paragraph (d)(6) is amended by removing the language ''pump).'' and adding ''pump); or'' in its place.

8. Paragraph (f)(1)(i) is amended by removing from the heading the language ''and vessel operators.'' and adding ''vessel operators, alternative fuelers, producers or importers of alcohol, biodiesel, or renewable diesel, and diesel-water fuel emulsion producers.'' in its place.

9. Paragraph (f)(1)(ii) is amended by removing the language in the heading ''and vessel operators'' and adding ''vessel operators, alternative fuelers, producers or importers of alcohol, biodiesel, or renewable diesel, and diesel-water fuel emulsion producers'' in its place.

10. Paragraph (f)(1)(ii) is amended by removing the language in the introductory text ''or vessel operator'' and adding ''vessel operator, alternative fueler, producer or importer of alcohol, biodiesel, or renewable diesel, or diesel-water fuel emulsion producer'' in its place.

11. Paragraph (f)(1)(ii)(B) is amended by adding the language ''reporting,'' after ''payment,''.

12. Paragraph (f)(4)(ii)(A) is amended by removing the language in the introductory text ''district director'' and adding ''Commissioner'' in its place.

13. Paragraph (f)(4)(ii)(A)(*1*) is amended by removing the language ''district director);'' and adding ''Commissioner); and'' in its place.

14. Paragraph (f)(4)(ii)(A)(*2*) is amended by removing the language ''district director); and'' and adding ''Commissioner.'' in its place.

15. Removing paragraph (f)(4)(i)(A)(*3*).

16. Paragraph (f)(4)(iii) is amended by removing the language ''deposit, and payment'' and adding ''deposit, payment, reporting, and claim'' in its place.

17. Revising paragraph (h)(2)(iii).

18. Paragraph (j)(2) is amended by removing the language in the introductory text ''district director'' and adding ''Commissioner'' in its place.

19. Paragraph (j)(2)(i), is amended by removing the language ''district director);'' and adding ''Commissioner); and'' in its place.

20. Paragraph (j)(2)(ii) is amended by removing the language ''district director); and'' and adding ''Commissioner).'' in its place.

21. Removing paragraph (j)(2)(iii).

22. Paragraph (k) is amended by adding a new sentence between the existing second and third sentences.

23. Paragraph (l)(5) is added.

The revisions and additions read as follows:

**§ 48.4101–1 Taxable fuel; registration.**

(a) * * *

(2) A person is registered under section 4101 only if the Commissioner has issued a registration letter to the person and the registration has not been revoked or suspended or the person is treated under this paragraph (a)(2) as registered under section 4101. The following persons are treated as registered under section 4101:

(i) The United States is treated as registered under section 4101 for all purposes.

(ii) A partner in a partnership is treated as registered under section 4101 for purposes of claims filed under section 34 if the partnership is registered under section 4101 for purposes of filing claims under section 6426 or 6427.

(iii) A taxable fuel registrant is treated as registered under section 4101 as a diesel-water fuel emulsion producer.

(iv) A foreign person is treated as registered under section 4101 as a producer of alcohol, biodiesel, or renewable diesel if—

(A) The person produces alcohol, biodiesel, or renewable diesel outside the United States and does not produce alcohol, biodiesel, or renewable diesel within the United States; and

(B) The alcohol, biodiesel, or renewable diesel is imported into the United States by a person registered under section 4101 as a producer or importer of alcohol, biodiesel, or renewable diesel.

* * * * *

(c) * * *

(1) * * *

(vi) A terminal operator;

(vii) A vessel operator; or

(viii) A producer or importer of alcohol, biodiesel, or renewable diesel.

* * * * *

(d) * * *

(2) An alternative fueler;

* * * * *

(7) A diesel-water fuel emulsion producer.

* * * * *

(h) * * *

(2) * * *

(iii) Make any false statement on, or violate the terms of, any certificate given to another person to support—

(A) Any claim for credit, refund, or payment; or

(B) An exemption from, or reduced rate of, tax imposed by section 4081; or

* * * * *

(k) * * * For rules relating to claims with respect to alcohol, biodiesel, renewable diesel and alternative fuel, see §§ 48.6426–1 through 48.6426–7.

* * *

(l) * * *

(5) References in this section to biodiesel and alcohol are applicable after December 31, 2004. References in this section to renewable diesel and diesel-water fuel emulsion are applicable after December 31, 2005. References in this section to alternative fuel are applicable after September 30, 2006.

**Par. 20.** Sections 48.6426–1 through 48.6426–7 are added to read as follows:

**§ 48.6426–1 Renewable and alternative fuels; explanation of terms.**

(a) *Overview.* This section provides an explanation of terms for purposes of the credits allowed by sections 34 and 6426 and the payments allowed by section 6427(e). The definition of *alcohol* in paragraph (c) of this section is also applicable for purposes of the credits allowed by section 40. The definitions of *biodiesel* and *renewable diesel* in paragraph (b) of this section are also applicable for purposes of the credits allowed by section 40A.

(b) *Explanation of terms.*

*Agri-biodiesel* means biodiesel derived solely from virgin oils. Virgin oils include virgin vegetable oils from the sources listed in section 40A(d)(2), as well as virgin oils not listed, such as palm oil and fish oil. Biodiesel produced from a feedstock that includes any recycled oils (such as recycled cooking oils) is not agri-biodiesel

because it is not derived solely from virgin oils.

*Alcohol* is defined in paragraph (c) of this section.

*Alcohol fuel mixture* means a mixture of alcohol and taxable fuel that contains at least 0.1 percent (by volume) of taxable fuel.

*Alternative fuel* means, except as otherwise provided in the following sentence, liquefied petroleum gas, P Series Fuels (as defined by the Secretary of Energy under 42 U.S.C. 13211(2)), compressed or liquefied natural gas, liquefied hydrogen, any liquid fuel derived from coal (including peat) through the Fischer-Tropsch process, and liquid fuel derived from biomass (as defined in section 45K(c)(3)). The term does not include ethanol, methanol, biodiesel, or renewable diesel.

*Alternative fuel mixture* means a mixture of alternative fuel and taxable fuel that contains at least 0.1 percent (by volume) of taxable fuel.

*Alternative fueler* means a person that—

(1) Is an alternative fueler (unmixed fuel); or

(2) Produces alternative fuel mixtures for sale or use in its trade or business.

*Alternative fueler (unmixed fuel)* with respect to any alternative fuel that is sold for use or used as a fuel in a motor vehicle or motorboat is—

(1) In the case of alternative fuel on which tax is imposed by section 4041(a)(2) or (3), the person liable for such tax (determined in the case of compressed natural gas after the application of § 48.4041–21 and in the case of any other alternative fuel after the application of rules similar to the rules of §§ 48.4041–3 and 48.4041–5);

(2) In the case of alternative fuel that is not described in paragraph (1) or (3) of this definition, the person that would be so liable for such tax but for the application of an exemption provided by section 4041(a)(3)(B), (b), (f), (g), or (h); and

(3) In the case of liquefied natural gas (LNG) that is sold in bulk for the exclusive use of a State that provides the written waiver described in § 48.6426–6(c)(4) and is delivered into a bulk supply tank that can only fuel motor vehicles and motorboats of the State, the person that sells the alternative fuel to the State.

*Biodiesel* means biodiesel as defined in section 40A(d)(1). Biodiesel may be produced either within or outside the United States. Fuel meets the Environmental Protection Agency (EPA) registration requirements described in section 40A(d)(1)(A) if the EPA does not require the fuel to be registered.

*Biodiesel mixture* means a mixture of biodiesel and diesel fuel that contains at least at least 0.1 percent (by volume) of diesel fuel. The kerosene in a biodiesel mixture is not included in either the overall volume of the mixture or the volume of diesel fuel in the mixture for purposes of determining whether the biodiesel mixture satisfies the 0.1 percent requirement. The diesel fuel in a biodiesel mixture may be dyed or undyed. See, however, section 6715 for the penalty for willful alteration of the strength or composition of any dye in dyed fuel and § 48.6715–1 for related rules.

*Commingled biodiesel* means biodiesel that is held by—

(1) Its producer in a storage tank at a time when the tank is used only for the storage of biodiesel and is used to store both biodiesel (other than agri-biodiesel) and agri-biodiesel; or

(2) A person other than its producer in a storage tank at a time when the tank is used only for the storage of biodiesel and is used to store biodiesel to which more than a single Certificate for Biodiesel applies.

*Commingled renewable diesel* means renewable diesel held by a person other than its producer in a storage tank at a time when the tank is used only for the storage of renewable diesel and is used to store renewable diesel to which more than a single Certificate for Renewable Diesel applies.

*Mixture* means an alcohol fuel mixture, a biodiesel mixture, a renewable diesel mixture, or an alternative fuel mixture.

*Mixture producer* is the person that has title to the mixture immediately after it is created.

*Motor vehicle* has the meaning given to the term by § 48.4041–8(c). Thus, for example, the term includes forklift trucks used to carry loads at industrial plants and warehouses.

*Producer* means the person that produces alcohol, biodiesel, or renewable diesel.

*Registered biodiesel producer* means a biodiesel producer that is registered under section 4101 as a producer of biodiesel.

*Registered renewable diesel producer* means a renewable diesel producer that is registered under section 4101 as a producer of renewable diesel.

*Renewable diesel* means renewable diesel as defined in section 40A(f)(3). For this purpose, a fuel meets the Environmental Protection Agency's (EPA's) registration requirements described in section 40A(f)(3)(A) if the EPA does not require the fuel to be registered or if diesel fuel coproduced from renewable diesel and petroleum feedstocks is registered. Renewable diesel may be produced either within or outside the United States.

*Renewable diesel mixture* is defined in paragraph (d) of this section.

*Reseller* means, with respect to any biodiesel or renewable diesel, a person that buys and subsequently sells such fuel without using the fuel to produce a biodiesel or renewable diesel mixture.

*Thermal depolymerization process* means, for purposes of the definition of *renewable diesel* in section 40A(f)(3), a process for the reduction of complex organic materials through the use of pressure and heat to decompose long chain polymers of hydrogen, oxygen, and carbon into short-chain petroleum hydrocarbons with a maximum length of around 18 carbons. A process may qualify as thermal depolymerization even if catalysts are used in the process.

*Use as a fuel* is defined in paragraph (e) of this section.

(c) *Alcohol; definition*—(1) *In general.* Except as otherwise provided in this paragraph (c), *alcohol* means any alcohol, including methanol and ethanol, that is not a derivative product of petroleum, natural gas, or coal (including peat). Thus, for example, the term does not include an ethanol by-product produced from a derivative of petroleum or natural gas. However, the term does include alcohol made from renewable resources, such as agricultural or forestry products. The term also includes alcohol made from urban wastes, such as methanol made from methane gas formed at waste disposal sites.

(2) *Source of the alcohol.* Alcohol may be produced either within or outside the United States.

(3) *Proof and denaturants.* Except for purposes of section 40, alcohol does not include alcohol with a proof of less than 190 degrees (determined without regard to added denaturants). For purposes of section 40, alcohol does not include alcohol with a proof of less than 150 degrees (determined without regard to added denaturants). If alcohol includes impurities or denaturants, the volume of alcohol is determined under the following rules:

(i) Except for purposes of section 40, the volume of alcohol includes the volume of any impurities (other than added denaturants and any fuel with which the alcohol is mixed) that reduce the purity of the alcohol to not less than 190 proof (determined without regard to added denaturants and any fuel with which the alcohol is mixed).

(ii) For purposes of section 40, the volume of alcohol includes the volume of any impurities (other than added denaturants and any fuel with which

the alcohol is mixed) that reduce the purity of the alcohol to not less than 150 proof (determined without regard to added denaturants and any fuel with which the alcohol is mixed).

(iii) The volume of alcohol includes the volume of any approved denaturants that reduce the purity of the alcohol, but only to the extent that the volume of the approved denaturants does not exceed five percent of the unadjusted volume of the alcohol. The unadjusted volume of the alcohol is determined for this purpose by including in unadjusted volume the approved denaturants and the impurities included in volume under paragraph (c)(3)(i) or (ii) of this section. If the volume of the approved denaturants exceeds five percent of the unadjusted volume of the alcohol, the excess over five percent is not considered alcohol.

(iv) For purposes of this paragraph (c)(3), approved denaturants are any denaturants (including gasoline and other nonalcohol fuel denaturants) that reduce the purity of the alcohol and are added to such alcohol under a formula approved by the Secretary.

(4) *ETBE.* Ethyl tertiary butyl ether (ETBE) and other ethers produced from alcohol are treated as alcohol. The ether is treated as alcohol of the same type as the alcohol used to produce the ether and the volume of alcohol resulting from such treatment is the volume of alcohol of such type with an energy content equal to the energy content of the ether.

(d) *Renewable diesel mixture; definition*—(1) *In general. Renewable diesel mixture* means—

(i) A mixture of renewable diesel and diesel fuel (other than renewable diesel) that contains at least 0.1 percent (by volume) of diesel fuel (other than renewable diesel); and

(ii) Fuel produced from biomass (as defined in section 45K(c)(3)) and petroleum feedstocks using a thermal depolymerization process if such fuel has been registered by the Environmental Protection Agency (EPA) under section 211 of the Clean Air Act (42 U.S.C. 7545) and meets the requirements of ASTM D975 or D396.

(2) *Special rules.* The kerosene in a renewable diesel mixture is not included in either the overall volume of the mixture or the volume of diesel fuel in the mixture for purposes of determining whether the renewable diesel mixture satisfies the 0.1 percent requirement. The diesel fuel in the renewable diesel mixture may be dyed or undyed. See, however, section 6715 for the penalty for willful alteration of the strength or composition of any dye in dyed fuel and § 48.6715–1 for related rules. For availability for ASTM specifications, see § 48.4081–1(d).

(e) *Use as a fuel; definitions*—(1) A mixture is *used as a fuel* when it is consumed in the production of energy. Thus, for example, a mixture is used as a fuel when it is consumed in an internal combustion engine to power a vehicle or in a furnace to produce heat. However, a mixture that is destroyed in a fire or other casualty loss is not used as a fuel.

(2) A mixture is *sold for use as a fuel* if the producer sells the fuel and has reason to believe that the mixture will be used as a fuel by either the producer's buyer or any later buyer of the mixture.

(3) Alternative fuel (not in a mixture) is sold for use or used as a fuel in a motor vehicle or motorboat when the alternative fueler (unmixed fuel) with respect to the fuel delivers it into the fuel supply tank of a motor vehicle or motorboat or sells it in bulk for use by the buyer as a fuel in a motor vehicle or motorboat.

(f) *Other definitions.* For the definitions of taxable fuel and diesel fuel, see § 48.4081–1.

(g) *Effective/applicability date.* This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

**§ 48.6426–2 Alcohol fuel mixtures.**

(a) *Overview.* This section provides rules under which an alcohol fuel mixture producer may claim an excise tax credit under section 6426, a payment under section 6427, or an income tax credit under section 34. These claims relate to the mixture producer's sale or use of an alcohol fuel mixture and are based on the amount of alcohol used to produce the alcohol fuel mixture. For the applicable claim rate, see section 6426.

(b) *Conditions to allowance*—(1) *Excise tax credit.* A claim for the alcohol fuel mixture credit with respect to an alcohol fuel mixture is allowed under section 6426 only if each of the following conditions is satisfied:

(i) The claimant produced the alcohol fuel mixture for sale or use in the trade or business of the claimant.

(ii) The claimant sold the alcohol fuel mixture for use as a fuel or used the alcohol fuel mixture as a fuel.

(iii) The claimant has made no other claim with respect to the alcohol in the mixture or, if another claim has been made, such other claim is disregarded under this paragraph (b)(1)(iii). A claim is disregarded under this paragraph (b)(1)(iii) if it is—

(A) A claim for the small ethanol producer credit under section 40; or

(B) An erroneous claim under section 6427 and either the claim has been disallowed or the claimant has repaid the government the amount received under section 6427 with interest.

(iv) The claimant has filed a timely claim on Form 720, ''Quarterly Federal Excise Tax Return,'' that contains all the information required in paragraph (c) of this section.

(2) *Payment or income tax credit.* A claim for an alcohol fuel mixture payment under section 6427 or an income tax credit under section 34 is allowed only if—

(i) The conditions of paragraphs (b)(1)(i) and (ii) of this section are met; and

(ii) The claimant has filed a timely claim for payment on Form 720 or Form 8849, ''Claim for Refund of Excise Taxes,'' or for a credit on Form 4136, ''Credit for Federal Tax Paid on Fuels,'' that contains all the information required by paragraph (c) of this section.

(3) *ETBE; sold for use or used as a fuel.* An alcohol fuel mixture that is produced at a refinery and that includes ethyl tertiary butyl ether or other ethers produced from alcohol is treated as meeting the requirement of paragraph (b)(1)(ii) of this section when the mixture is removed from the refinery and any subsequent sale or use of the mixture is disregarded for purposes of this section.

(4) *Overall limitations on credits and payments.* See § 48.6426–7(a) for overall limitations on credits and payments allowed with respect to mixtures under sections 34, 6426, and 6427.

(c) *Content of claim.* Each claim for an alcohol fuel mixture credit or payment must contain the following information with respect to the mixture covered by the claim:

(1) The amount of alcohol in the alcohol fuel mixture.

(2) A statement that the conditions to allowance described in paragraph (b) of this section have been met.

(3) A statement that the claimant either—

(i) Produced the alcohol it used in the mixture; or

(ii) Has in its possession a record of the name, address, and employer identification number of the person(s) that sold the alcohol to the claimant and the date of purchase.

(d) *Effective/applicability date.* This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

**§ 48.6426–3 Biodiesel mixtures.**

(a) *Overview.* This section provides rules under which a biodiesel mixture producer may claim an excise tax credit

under section 6426, a payment under section 6427, or an income tax credit under section 34. These claims relate to the mixture producer's sale or use of a biodiesel mixture and are based on the amount of biodiesel used to produce the biodiesel mixture. For the applicable claim rate, see section 6426.

(b) *Conditions to allowance*—(1) *Excise tax credit.* A claim for the biodiesel mixture credit with respect to a biodiesel mixture is allowed under section 6426 only if each of the following conditions is satisfied:

(i) The claimant produced the biodiesel mixture for sale or use in the trade or business of the claimant.

(ii) The claimant sold the biodiesel mixture for use as a fuel or used the biodiesel mixture as a fuel.

(iii) The claimant—

(A) Produced the biodiesel in the mixture; or

(B) Has obtained a certificate from the registered biodiesel producer as described in paragraph (e) of this section and, if applicable, a statement described in paragraph (f) of this section, for such biodiesel and has no reason to believe any information in the certificate and statement is false.

(iv) The claimant has made no other claim with respect to the biodiesel in the mixture or, if another claim has been made, such other claim is disregarded under this paragraph (b)(1)(iv). A claim is disregarded under this paragraph (b)(1)(iv) if it is—

(A) A claim for the small agri-biodiesel producer credit under section 40A; or

(B) An erroneous claim under section 6427 and either the claim has been disallowed or the claimant has repaid the government the amount received under section 6427 with interest.

(v) The claimant has filed a timely claim on Form 720, ''Quarterly Federal Excise Tax Return,'' that contains all the information required in paragraph (c) of this section.

(2) *Payment or income tax credit.* A claim for a biodiesel mixture payment under section 6427 or an income tax credit under section 34 is allowed only if—

(i) The conditions of paragraphs (b)(1)(i), (ii), and (iii) of this section are met; and

(ii) The claimant has filed a timely claim for payment on Form 720 or Form 8849, ''Claim for Refund of Excise Tax,'' or for a credit on Form 4136, ''Credit for Federal Tax Paid on Fuels,'' that contains all the information required by paragraph (c) of this section.

(3) *Overall limitations on credits and payments.* See § 48.6426–7(a) for overall limitations on credits and payments allowed with respect to mixtures under sections 34, 6426, and 6427.

(c) *Content of claim.* Each claim for a biodiesel mixture credit or payment must contain the following information with respect to the mixture covered by the claim:

(1) The amount of agri-biodiesel and biodiesel other than agri-biodiesel in the biodiesel mixture.

(2) Unless the claimant is the producer of the biodiesel in the biodiesel mixture, a copy of the applicable Certificate for Biodiesel described in paragraph (e) of this section and Statement(s) of Biodiesel Reseller described in paragraph (f) of this section. In the case of a certificate and statement that support a claim made on more than one claim form, the certificate and statement are to be included with the first claim and the claimant is to provide information related to the certificate and statement on any subsequent claim in accordance with the instructions applicable to the claim form.

(3) A statement that the conditions to allowance described in paragraph (b) of this section have been met.

(4) A statement that the claimant either—

(i) Is a registered biodiesel producer and produced the biodiesel it used in the mixture; or

(ii) Has in its possession a record of the name, address, and employer identification number of the person(s) that sold the biodiesel to the claimant and the date of purchase.

(d) *Commingled biodiesel; accounting method.* For purposes of determining the certificate applicable to commingled biodiesel, a person that holds commingled biodiesel may identify the biodiesel it sells or uses by any reasonable method, including the first-in, first-out method applied either on a tank-by-tank basis or on an aggregate basis to all commingled biodiesel the person holds.

(e) *Certificate for Biodiesel*—(1) *In general.* The certificate to be obtained by the claimant is a statement that is signed under penalties of perjury by a person with authority to bind the registered biodiesel producer, is in substantially the same form as the model certificate in paragraph (e)(4) of this section, and contains all the information necessary to complete such model certificate.

(2) *Certificate identification number.* The certificate identification number is determined by the producer and must be unique to each certificate.

(3) *Multiple certificates for single sale.* A registered biodiesel producer may, with respect to a particular sale of biodiesel, provide multiple separate certificates, each applicable to a portion of the total volume of biodiesel sold. Thus, for example, a biodiesel producer that sells 5,000 gallons of biodiesel may provide its buyer with five certificates for 1,000 gallons each. The multiple certificates may be provided either to the buyer at or after the time of sale or to a reseller in the circumstances described in paragraph (f)(2) of this section.

(4) *Model certificate.*

**CERTIFICATE FOR BIODIESEL**

*Certificate Identification Number:* _____

*(To support a claim related to biodiesel or a biodiesel mixture under the Internal Revenue Code)*

The undersigned biodiesel producer (''Producer'') hereby certifies the following under penalties of perjury:

1. _____

_____

_____

Producer's name, address, and employer identification number

2. _____

_____

_____

Name, address, and employer identification number of person buying the biodiesel from Producer

3. _____

Date and location of sale to buyer

4. This certificate applies to ____ gallons of biodiesel.

5. Producer certifies that the biodiesel to which this certificate relates is:

____% Agri-biodiesel (derived solely from virgin oils)

____ % Biodiesel other than agri-biodiesel

6. This certificate applies to the following sale:

____ Invoice or delivery ticket number

____ Total number of gallons of biodiesel sold under that invoice or delivery ticket number (including biodiesel not covered by this certificate)

7. ____ Total number of certificates issued for that invoice or delivery ticket number

8. _____

_____

_____

Name, address, and employer identification number of reseller to whom certificate is issued (only in the case of certificates reissued to a reseller after the return of the original certificate)

9. ____ Original Certificate Identification Number (only in the case of certificates reissued to a reseller after return of the original certificate)

10. Producer is registered as a biodiesel producer with registration number ____. Producer's registration has not been suspended or revoked by the Internal Revenue Service.

Producer certifies that the biodiesel to which this certificate relates is monoalkyl

esters of long chain fatty acids derived from plant or animal matter and that it meets the requirements of the American Society of Testing and Materials D6751 and the registration requirements for fuels and fuel additives established by EPA under section 211 of the Clean Air Act (42 U.S.C. 7545).

Producer understands that the fraudulent use of this certificate may subject Producer and all parties making any fraudulent use of this certificate to a fine or imprisonment, or both, together with the costs of prosecution.

_____

Printed or typed name of person signing this certificate

_____

Title of person signing

_____

Signature and date signed

(f) *Statement of Biodiesel Reseller*—(1) *In general.* A person that receives a Certificate for Biodiesel, and subsequently sells the biodiesel without producing a biodiesel mixture, is to give the certificate and a statement that satisfies the requirements of this paragraph (f) to its buyer. The statement must contain all of the information necessary to complete the model statement in paragraph (f)(4) of this section and be attached to the Certificate for Biodiesel. A reseller cannot make multiple copies of a Certificate for Biodiesel to divide the certificate between multiple buyers.

(2) *Multiple resales.* If a single Certificate for Biodiesel applies to biodiesel that a reseller expects to sell to multiple buyers, the reseller should return the certificate (together with any statements provided by intervening resellers) to the producer who may reissue to the reseller multiple Certificates for Biodiesel in the appropriate volumes. The reissued certificates must include the Certificate Identification Number from the certificate that has been returned.

(3) *Withdrawal of the right to provide a certificate.* The Internal Revenue Service may withdraw the right of a reseller of biodiesel to provide the certificate and a statement under this section if the Internal Revenue Service cannot verify the accuracy of the reseller's statements. The Internal Revenue Service may notify any person to whom the buyer has provided a statement that the reseller's right to provide the certificate and a statement has been withdrawn.

(4) *Model statement of biodiesel reseller.*

**STATEMENT OF BIODIESEL RESELLER**

*(To support a claim related to biodiesel or a biodiesel mixture under the Internal Revenue Code)*

The undersigned biodiesel reseller (''Reseller'') hereby certifies the following under penalties of perjury:

1. _____

_____

_____

Reseller's name, address, and employer identification number

2. _____

_____

_____

Name, address, and employer identification number of Reseller's buyer

3. _____

Date and location of sale to buyer

4. _____

Volume of biodiesel sold

5. _____

Certificate Identification Number on the Certificate for Biodiesel

Reseller has bought the biodiesel described in the accompanying Certificate for Biodiesel and Reseller has no reason to believe that any information in the certificate is false.

Reseller has not been notified by the Internal Revenue Service that its right to provide a certificate and a statement has been withdrawn.

Reseller understands that the fraudulent use of this statement may subject Reseller and all parties making any fraudulent use of this statement to a fine or imprisonment, or both, together with the costs of prosecution.

_____

Printed or typed name of person signing this certificate

_____

Title of person signing

_____

Signature and date signed

(g) *Erroneous certificates; reasonable cause.* If a claim for credit or payment described in this section is based on erroneous information in a certificate or statement described in paragraph (e)(4) or (f)(4) of this section, the claim is not allowed. Thus, for example, if a producer identifies a product as agri-biodiesel on a Certificate for Biodiesel and the product does not meet the registration requirements established by EPA, a claim for a biodiesel mixture credit based on the certificate is not allowed. However, if the claimant has met the conditions of paragraph (b)(1)(iii)(B) of this section with respect to the certificate or statement, reliance on the certificate or statement will be treated as reasonable cause for purposes of the penalties imposed by sections 6651 (relating to failure to pay) and 6675 (relating to excessive claims).

(h) *Effective/applicability date.* This section is applicable on and after the date of publication of these regulations as final regulations in the **Federal Register**.

**§ 48.6426–4 Renewable diesel mixtures.**

(a) *Overview.* This section provides rules under which a renewable diesel mixture producer may claim an excise tax credit under section 6426, a payment under section 6427, or an income tax credit under section 34. These claims relate to the mixture producer's sale or use of a renewable diesel mixture and are based on the amount of renewable diesel used to produce the renewable diesel mixture. For the applicable claim rate, see section 40A(f)(2).

(b) *Conditions to allowance*—(1) *Excise tax credit.* A claim for the renewable diesel mixture credit with respect to a renewable diesel mixture is allowed under section 6426 only if each of the following conditions is satisfied:

(i) The claimant produced the renewable diesel mixture for sale or use in the trade or business of the claimant.

(ii) The claimant sold the renewable diesel mixture for use as a fuel or used the renewable diesel mixture as a fuel.

(iii) The claimant—

(A) Produced the renewable diesel in the mixture; or

(B) Has obtained a certificate from the registered renewable diesel producer as described in paragraph (e) of this section and, if applicable, a statement described in paragraph (f) of this section, for such renewable diesel and has no reason to believe any information in the certificate and statement is false.

(iv) The claimant has made no other claim with respect to the renewable diesel in the mixture or, if another claim has been made, such other claim is disregarded under this paragraph (b)(1)(iv). A claim is disregarded under this paragraph (b)(1)(iv) if it is an erroneous claim under section 6427 and either the claim has been disallowed or the claimant has repaid the government the amount received under section 6427 with interest.

(v) The claimant has filed a timely claim on Form 720, ''Quarterly Federal Excise Tax Return,'' that contains all the information required in paragraph (c) of this section.

(2) *Payment or income tax credit.* A claim for a renewable diesel mixture payment under section 6427 or an income tax credit under section 34 is allowed only if—

(i) The conditions of paragraphs (b)(1)(i), (ii), and (iii) of this section are met; and

(ii) The claimant has filed a timely claim for payment on Form 720 or Form 8849, ''Claim for Refund of Excise

Taxes,'' or for a credit on Form 4136, ''Credit for Federal Tax Paid on Fuels,'' that contains all the information required by paragraph (c) of this section.

(3) *Overall limitations on credits and payments.* See § 48.6426–7(a) for overall limitations on credits and payments allowed with respect to mixtures under sections 34, 6426, and 6427.

(c) *Content of claim.* Each claim for a renewable diesel mixture credit or payment must contain the following information with respect to the mixture covered by the claim:

(1) The amount of renewable diesel in the renewable diesel mixture.

(2) Unless the claimant is the producer of the renewable diesel in the renewable diesel mixture, a copy of the applicable Certificate for Renewable Diesel described in paragraph (e) of this section and Statement(s) of Renewable Diesel Reseller described in paragraph (f) of this section. In the case of a certificate and statement that support a claim made on more than one claim form, the certificate and statement are to be included with the first claim and the claimant is to provide information related to the certificate and statement on any subsequent claim in accordance with the instructions applicable to the claim form.

(3) A statement that the conditions to allowance described in paragraph (b) of this section have been met.

(4) A statement that the claimant either—

(i) Is a registered renewable diesel producer and produced the renewable diesel it used in the mixture; or

(ii) Has in its possession a record of the name, address, and employer identification number of the person(s) that sold the renewable diesel to the claimant and the date of purchase.

(d) *Commingled renewable diesel; accounting method.* For purposes of determining the certificate applicable to commingled renewable diesel, a person that holds commingled renewable diesel may identify the renewable diesel it sells or uses by any reasonable method, including the first-in, first-out method applied either on a tank-by-tank basis or on an aggregate basis to all commingled renewable diesel the person holds.

(e) *Certificate for Renewable Diesel*—(1) *In general.* The certificate to be obtained by the claimant is a statement that is signed under penalties of perjury by a person with authority to bind the registered renewable diesel producer, is substantially in the same form as the model certificate in paragraph (e)(4) of this section, and contains all the information necessary to complete such model certificate.

(2) *Certificate identification number.* The certificate identification number is determined by the producer and must be unique to each certificate.

(3) *Multiple certificates for single sale.* A registered renewable diesel producer may, with respect to a particular sale of renewable diesel, provide multiple separate certificates, each applicable to a portion of the total volume of renewable diesel sold. Thus, for example, a renewable diesel producer that sells 5,000 gallons of renewable diesel may provide its buyer with five certificates for 1,000 gallons each. The multiple certificates may be provided either to the buyer at or after the time of sale or to a reseller in the circumstances described in paragraph (f)(2) of this section.

(4) *Model certificate.*

**CERTIFICATE FOR RENEWABLE DIESEL**

_____

*Certificate Identification Number:*

_____

*(To support a claim related to renewable diesel or a renewable diesel mixture under the Internal Revenue Code)*

The undersigned renewable diesel producer (''Producer'') hereby certifies the following under penalties of perjury:

1. _____

_____

_____

Producer's name, address, and employer identification number

2. _____

_____

_____

Name, address, and employer identification number of person buying the renewable diesel from Producer

3. _____

Date and location of sale to buyer

4. This certificate applies to _____ gallons of renewable diesel.

5. This certificate applies to the following sale:

_____ Invoice or delivery ticket number

_____ Total number of gallons of renewable diesel sold under that invoice or delivery ticket number (including renewable diesel not covered by this certificate)

6. _____ Total number of certificates issued for that invoice or delivery ticket number

7. _____

_____

_____

Name, address, and employer identification number of reseller to whom certificate is issued (only in the case of certificates reissued to a reseller after the return of the original certificate)

8. _____ Original Certificate Identification Number (only in the case of certificates reissued to a reseller after return of the original certificate)

9. Producer is registered as a renewable diesel producer with registration number _____. Producer's registration has not been suspended or revoked by the Internal Revenue Service.

Producer certifies that the renewable diesel to which this certificate relates is diesel fuel derived from biomass (as defined in section 45K(c)(3) of the Internal Revenue Code) using a thermal depolymerization process and that it meets the requirements of the American Society of Testing and Materials D975 or D396 and the registration requirements for fuels and fuel additives established by EPA under section 211 of the Clean Air Act (42 U.S.C. 7545).

Producer understands that the fraudulent use of this certificate may subject Producer and all parties making any fraudulent use of this certificate to a fine or imprisonment, or both, together with the costs of prosecution.

_____

Printed or typed name of person signing this certificate

_____

Title of person signing

_____

Signature and date signed

(f) *Statement of Renewable Diesel Reseller*—(1) *In general.* A person that receives a Certificate for Renewable Diesel, and subsequently sells the renewable diesel without producing a renewable diesel mixture, is to give the certificate and a statement that satisfies the requirements of this paragraph (f) to its buyer. The statement must contain all of the information necessary to complete the model statement in paragraph (f)(4) of this section and be attached to the Certificate for Renewable Diesel. A reseller cannot make multiple copies of a Certificate for Renewable Diesel to divide the certificate between multiple buyers.

(2) *Multiple resales.* If a single Certificate for Renewable Diesel applies to renewable diesel that a reseller expects to sell to multiple buyers, the reseller should return the certificate (together with any statements provided by intervening resellers) to the producer who may reissue to the reseller multiple Certificates for Renewable Diesel in the appropriate volumes. The reissued certificates must include the Certificate Identification Number from the certificate that has been returned.

(3) *Withdrawal of the right to provide a certificate.* The Internal Revenue Service may withdraw the right of a reseller of renewable diesel to provide the certificate and a statement under this section if the Internal Revenue Service cannot verify the accuracy of the reseller's statements. The Internal Revenue Service may notify any person to whom the buyer has provided a statement that the reseller's right to

provide the certificate and a statement has been withdrawn.

(4) *Model statement of renewable diesel reseller.*

**STATEMENT OF RENEWABLE DIESEL RESELLER**

*(To support a claim related to renewable diesel or a renewable diesel mixture under the Internal Revenue Code)*

The undersigned renewable diesel reseller (''Reseller'') hereby certifies the following under penalties of perjury:

1. _____

_____

_____

Reseller's name, address, and employer identification number

2. _____

_____

_____

Name, address, and employer identification number of Reseller's buyer

3. _____

Date and location of sale to buyer

4. _____

Volume of renewable diesel sold

5. _____

Certificate Identification Number on the Certificate for Renewable Diesel

Reseller has bought the renewable diesel described in the accompanying Certificate for Renewable Diesel and Reseller has no reason to believe that any information in the certificate is false.

Reseller has not been notified by the Internal Revenue Service that its right to provide a certificate and a statement has been withdrawn.

Reseller understands that the fraudulent use of this statement may subject Reseller and all parties making any fraudulent use of this statement to a fine or imprisonment, or both, together with the costs of prosecution.

_____

Printed or typed name of person signing this certificate

_____

Title of person signing

_____

Signature and date signed

(g) *Erroneous certificates; reasonable cause.* If a claim for credit or payment described in this section is based on erroneous information in a certificate or statement described in paragraph (e)(4) or (f)(4) of this section, the claim is not allowed. Thus, for example, if a producer identifies a product as renewable diesel on a Certificate for Renewable Diesel and the product does not meet the registration requirements established by EPA, a claim for a renewable diesel mixture credit based on the certificate is not allowed. However, if the claimant has met the conditions of paragraph (b)(1)(iii)(B) of this section with respect to the certificate or statement, reliance on the certificate or statement will be treated as reasonable cause for purposes of the penalties imposed by sections 6651 (relating to failure to pay) and 6675 (relating to excessive claims).

(h) *Effective/applicability date.* This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

**§ 48.6426–5 Alternative fuel mixtures.**

(a) *Overview.* This section provides rules under which an alternative fueler that produces an alternative fuel mixture may claim an excise tax credit under section 6426, a payment under section 6427, or an income tax credit under section 34. These claims relate to the mixture producer's sale or use of an alternative fuel mixture and are based on the amount of alternative fuel used to produce the alternative fuel mixture. For the applicable claim rate, see section 6426.

(b) *Conditions to allowance*—(1) *Excise tax credit.* A claim for the alternative fuel mixture credit with respect to an alternative fuel mixture is allowed under section 6426 only if each of the following conditions is satisfied:

(i) The claimant produced the alternative fuel mixture for sale or use in the trade or business of the claimant.

(ii) The claimant sold the alternative fuel mixture for use as a fuel or used the alternative fuel mixture as a fuel.

(iii) The claimant is registered under section 4101 as an alternative fueler.

(iv) The claimant has made no other claim with respect to the alternative fuel in the mixture or, if another claim has been made, such other claim is disregarded under this paragraph (b)(1)(iv). A claim is disregarded under this paragraph (b)(1)(iv) if it is an erroneous claim under section 6427 and either the claim has been disallowed or the claimant has repaid the government the amount received under section 6427 with interest.

(v) The claimant has filed a timely claim on Form 720, ''Quarterly Federal Excise Tax Return,'' that contains all the information required by the claim form described in paragraph (c) of this section.

(2) *Payment or income tax credit.* A claim for an alternative fuel mixture payment under section 6427 or an alternative fuel mixture credit under sections 34 and 6427 is allowed only if—

(i) The conditions of paragraphs (b)(1)(i), (ii), and (iii) of this section are met; and

(ii) The claimant has filed a timely claim for payment on Form 720 or Form 8849, ''Claim for Refund of Excise Taxes,'' or for a credit on Form 4136, ''Credit for Fuel Tax Paid on Fuels,'' that contains all the information required by the claim form described in paragraph (c) of this section.

(3) *Overall limitations on credits and payments.* See § 48.6426–7(a) for overall limitations on credits and payments allowed with respect to mixtures under sections 34, 6426, and 6427.

(c) *Content of claim.* Each claim for an alternative fuel mixture credit or payment must contain the following information with respect to the mixture covered by the claim:

(1) The amount of alternative fuel in the alternative fuel mixture.

(2) A statement that the conditions to allowance described in paragraph (b) of this section have been met.

(3) A statement that the claimant either—

(i) Produced the alternative fuel it used in the mixture; or

(ii) Has in its possession—

(A) A record of the name, address, and employer identification number of the person(s) that sold the alternative fuel to the claimant and the date of purchase; and

(B) An invoice or other purchase documentation identifying the alternative fuel.

(d) *Effective/applicability date.* This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

**§ 48.6426–6 Alternative fuel.**

(a) *Overview.* This section provides rules under which an alternative fueler (unmixed fuel) may claim an excise tax credit under section 6426, a payment under section 6427, or an income tax credit under section 34. These claims are based on the amount of alternative fuel sold or used. For the applicable claim rate, see section 6426.

(b) *Conditions to allowance*—(1) *Excise tax credit.* A claim for the alternative fuel excise tax credit with respect to alternative fuel sold for use or used as a fuel in a motor vehicle or motorboat is allowed under section 6426 only if each of the following conditions is satisfied:

(i) The claimant is the alternative fueler (unmixed fuel) with respect to the fuel.

(ii) The claimant is registered under section 4101 as an alternative fueler (unmixed fuel).

(iii) The claimant has made no other claim with respect to the alternative fuel or, if another claim has been made, such other claim is disregarded under this paragraph (b)(1)(iii). A claim is disregarded under this paragraph (b)(1)(iii) if it is an erroneous claim under section 6427 and either the claim

has been disallowed or the claimant has repaid the government the amount received under section 6427 with interest.

(iv) The claimant has filed a timely claim on Form 720, ''Quarterly Federal Excise Tax Return,'' that contains all the information required by the claim form described in paragraph (c) of this section.

(2) *Payment or income tax credit.* A claim for an alternative fuel payment under section 6427 or an income tax credit under section 34 is allowed only if—

(i) The conditions of paragraphs (b)(1)(i) and (ii) of this section are met;

(ii) The sale or use is in the claimant's trade or business; and

(iii) The claimant has filed a timely claim for payment on Form 8849, ''Claim for Refund of Excise Taxes,'' or for a credit on Form 4136, ''Credit for Fuel Tax Paid on Fuels,'' that contains all the information required by paragraph (c) of this section.

(3) *Overall limitations on credits and payments.* See § 48.6426–7(b) for overall limitations on credits and payments allowed with respect to alternative fuel under sections 34, 6426, and 6427.

(c) *Content of claim.* Each claim for an alternative fuel credit or payment must contain the following information with respect to the alternative fuel covered by the claim:

(1) The amount of alternative fuel sold or used.

(2) A statement that the conditions to allowance described in paragraph (b) of this section have been met.

(3) A statement that the claimant either—

(i) Produced the alternative fuel it sold or used; or

(ii) Has in its possession—

(A) A record of the name, address, and employer identification number of the person(s) that sold the alternative fuel to the claimant and the date of purchase; and

(B) An invoice or other purchase documentation identifying the alternative fuel.

(4) In the case of liquefied natural gas (LNG) that the claimant sold in bulk for the exclusive use of the State and delivered into a bulk supply tank that can only fuel motor vehicles or motorboats of the State, a statement that the claimant has in its possession a written waiver, signed under penalties of perjury by a person with authority to bind the State, stating that the LNG is delivered in bulk for the exclusive use of the State in a motor vehicle or motorboat and that the State gives up its right to claim any alternative fuel credit for such LNG.

(d) *Effective/applicability date.* This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**

**§ 48.6426–7 Overall limitations on credits and payments.**

(a) *Limitations applicable to mixtures.* In the case of mixtures, the following limitations apply:

(1) The aggregate amount that, but for the coordination rules in sections 6426(g) and 6427(e)(3), would be allowable to a claimant either as a credit under section 6426 or a payment under section 6427 with respect to sales and uses of mixtures during a calendar quarter is allowed only as a credit under section 6426 to the extent such amount does not exceed the claimant's tax liability under section 4081 for the calendar quarter.

(2) The aggregate amount allowed to a claimant as a payment under section 6427 or an income tax credit under section 34 with respect to sales and uses of mixtures during a calendar quarter shall not exceed the amount that, but for the coordination rules in sections 6426(g) and 6427(e)(3), would be allowable to the claimant with respect to such sales and uses reduced by the claimant's tax liability under section 4081 for the calendar quarter.

(b) *Limitations applicable to alternative fuel.* In the case of alternative fuel, the following limitations apply:

(1) The aggregate amount that, but for the coordination rules in sections 6426(g) and 6427(e)(3), would be allowable to a claimant either as a credit under section 6426 or a payment under section 6427 with respect to sales and uses of alternative fuel during a calendar quarter is allowed only as a credit under section 6426 to the extent such amount does not exceed the claimant's tax liability under section 4041 for the calendar quarter.

(2) The aggregate amount allowed to a claimant as a payment under section 6427 or an income tax credit under section 34 with respect to sales and uses of alternative fuel during a calendar quarter shall not exceed the amount that, but for the coordination rules in sections 6426(g) and 6427(e)(3), would be allowable to the claimant with respect to such sales and uses reduced by the claimant's tax liability under section 4041 for the calendar quarter.

(c) *Effective/applicability dates.* This section is applicable on and after the date of publication of these regulations as final regulations in the **Federal Register**.

**Par. 21.** Section 48.6427–8 is amended as follows:

1. Revising paragraph (b)(1)(v) and adding (b)(1)(vii)(E).

2. Paragraph (b)(1)(vii)(C) is amended by removing the language ''vehicle; or'' and adding ''vehicle;'' in its place.

3. Paragraph (b)(1)(vii)(D) is amended by removing the language ''6427(b)(3)).'' and adding ''6427(b)(3)); or'' in its place.

4. Paragraph (f) is amended by removing the language from the first sentence ''1994.'' and adding ''1994, and paragraph (b)(1)(vii)(E), which is applicable after the date these regulations are published as final regulations in the **Federal Register**.'' in its place.''

The revision and addition read as follows:

**§ 48.6427–8 Diesel fuel and kerosene; claims by ultimate purchasers.**

* * * * *

(b) * * *

(1) * * *

(v) The diesel fuel or kerosene was not used on a farm for farming purposes (as defined in § 48.6420–4) or, except in the case of fuel described in paragraph (b)(1)(vii)(E) of the section, by a State;

* * * * *

(vii) * * *

(E) For the exclusive use, in the case of blended taxable fuel that is produced by a State and is both diesel fuel and a mixture (as defined in § 48.6426–1(b)), of the State that produced the blended taxable fuel.

* * * * *

**Par. 22.** Section 48.6427–12 is added to read as follows:

**§ 48.6427–12 Alcohol, alternative fuel, biodiesel, and renewable diesel.**

(a) *In general.* This section contains special rules for payments related to fuels containing alcohol, alternative fuel, biodiesel, and renewable diesel. Other rules for these payments are in §§ 48.6426–1 through 48.6426–7.

(b) *Coordination with excise tax credit.* If the aggregate amount a person receives as a payment under section 6427(e) with respect to sales and uses of mixtures during a calendar quarter exceeds the amount allowed under § 48.6426–7(a), the excess constitutes an excessive amount for purposes of section 6206 and such amount, as well as the civil penalty under section 6675, may be assessed as if it were a tax imposed by section 4081. If the excessive amount is repaid to the government, with interest from the date of the payment (section 6602), on or before the due date of the Form 720, ''Quarterly Federal Excise Tax Return,'' for the calendar quarter, the claim for the excessive amount will be treated as due to reasonable cause and the penalty

under section 6675 will not be imposed with respect to the claim. If a person claims an income tax credit under section 34 in lieu of a payment under section 6427(e) with respect to sales and uses of mixtures during a calendar quarter and the aggregate amount claimed as an income tax credit with respect to such sales and uses exceeds the amount allowed under § 48.6426–7(a)(2), the income tax rules related to assessing an underpayment of income tax liability apply. The section 6675 penalty for excessive claims with respect to fuels does not apply in the case of section 34 income tax credits. Similar rules apply to excessive claims under sections 34 or 6427 with respect to sales and uses of alternative fuel.

(c) *Payment computation for certain blenders*—(1) *In general.* This paragraph (c) applies to a blender for any calendar quarter in which the blender's entire tax liability under section 4081 is based solely on the volume of alcohol in alcohol fuel mixtures, biodiesel in biodiesel mixtures, renewable diesel in renewable diesel mixtures, or alternative fuel in alternative fuel mixtures. If this paragraph (c) applies for a calendar quarter, the blender may use the following procedure to determine the amount it may claim as an income tax credit under section 34 or a payment under section 6427(e) with respect to each mixture that it sells or uses during the quarter:

(i) First, determine the amount allowed under section 6426 as a credit on Form 720 by multiplying the volume of untaxed liquid used to produce the mixture by the tax imposed per gallon on the untaxed liquid.

(ii) Then, determine the total credit and payment allowable by multiplying the volume of untaxed liquid used to produce the mixture by the tax credit rate per gallon.

(iii) Then, subtract the amount determined in paragraph (c)(1)(i) of this section (the section 6426 credit amount) from the amount determined in paragraph (c)(1)(ii) of this section. This difference is the amount of the payment or income tax credit that may be claimed with respect to that mixture.

(2) *Example.* The following example illustrates the provisions of this paragraph (c):

(i) P is a biodiesel mixture producer.

P produces blended taxable fuel outside of the bulk transfer/terminal system by adding biodiesel that is agri-biodiesel to taxed diesel fuel. See §§ 48.4081–1(c)(1) and 48.4081–3(g). P has no § 4081 liability other than its liability as a blender on its sale of the biodiesel mixture. During the period August 1 through August 10 (at which time the tax rate on diesel fuel is $0.244 per gallon and the claim amount on agri-biodiesel is $1.00 per gallon), P uses 5,000 gallons of agri-biodiesel to produce a biodiesel mixture. P determines that it may claim $3,780 as a payment under section 6427(e) with respect to this mixture. P computes this amount by—

(A) Multiplying 5,000 (gallons of agri-biodiesel) × $0.244 (tax imposed per gallon) = $1,220;

(B) Multiplying 5,000 (gallons of agri-biodiesel) × $1.00 (tax credit rate per gallon) = $5,000; and

(C) Subtracting $1,220 from $5,000 = $3,780.

(ii) On August 11, P files Form 8849 for the period August 1–August 10. To avoid an excessive claim, P limits the claim on Form 8849 to $3,780 reporting 3,780 gallons of agri-biodiesel.

(iii) On Form 720 P reports liability for IRS No. 60(c) of $1,220 (5,000 gallons × $.244) and claims a credit on Schedule C for $1,220 for period August 1–August 10, reporting on Schedule C 1,220 gallons of agri-biodiesel.

(d) *Effective/applicability date.* This section is applicable on and after the date these regulations are published as final regulations in the **Federal Register**.

**Kevin M. Brown,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. E8–17270 Filed 7–28–08; 8:45 am]

**BILLING CODE 4830–01–P**

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Parts 26 and 301

**[REG–147775–06]**

**RIN 1545–BH63**

### Regulations Under Section 2642(g); Hearing

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Cancellation of notice of public hearing on proposed rulemaking.

**SUMMARY:** This document cancels a public hearing on proposed rulemaking providing guidance under section 2642(g)(1). The proposed regulations describe the circumstances and procedures under which an extension of time will be granted under section 2642(g)(1). The proposed guidance affects individuals (or their estates) who failed to make a timely allocation of generation-skipping transfer (GST) exemption to a transfer, and individuals (or their estates) who failed to make a timely election under section 2632(b)(3) or (c)(5).

**DATES:** The public hearing, originally scheduled for August 5, 2008, at 10 a.m., is cancelled.

**FOR FURTHER INFORMATION CONTACT:** Richard A. Hurst of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration), at *Richard.A.Hurst@irscounsel.treas.gov.*

**SUPPLEMENTARY INFORMATION:** A notice of public hearing that appeared in the **Federal Register** on Thursday, April 17, 2008 (73 FR 20870), announced that a public hearing was scheduled for August 5, 2008, at 10 a.m., in the auditorium, Internal Revenue Building, 1111 ConstitutionAvenue, NW., Washington, DC. The subject of the public hearing is under sections 2642 and 9100 of the Internal Revenue Code.

The public comment period for these regulations expired on July 16, 2008. Outlines of topics to be discussed at the hearing were due on July 15, 2008. The notice of proposed rulemaking and notice of public hearing instructed those interested in testifying at the public hearing to submit an outline of the topics to be addressed. As of Friday, July 18, 2008, no one has requested to speak. Therefore, the public hearing scheduled for August 5, 2008, is cancelled.

**LaNita Van Dyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).*

[FR Doc. E8–17291 Filed 7–28–08; 8:45 am]

**BILLING CODE 4830–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 45 CFR Parts 1385, 1386, 1387, and 1388

**RIN 0970–AB11**

### Developmental Disabilities Program

**AGENCY:** Administration on Developmental Disabilities, Administration for Children and Families, HHS.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** The Administration on Developmental Disabilities (ADD) reopens the public comment period on the proposed rule published in the **Federal Register** on April 10, 2008 (73 FR19708) to propose clarifications and new requirements to implement the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act of 2000). During the comment period there were instances when the electronic system was not available and individuals were having difficulties using the system. ADD is reopening the

comment period of the NPRM to ensure that all individuals have an opportunity to comment on the proposed rule. Also, the submission of comments electronically will now be through the OMB regulations Web site, regulations.gov, rather than ACF's regulations Web site.

**DATES:** Comments will be accepted through September 29, 2008.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to: Commissioner, Administration on Developmental Disabilities, Administration for Children and Families, 370 L'Enfant Promenade, SW., Mail Stop: HHH 405D, Washington, DC 20447. Persons may also transmit comments electronically via the internet at: *http://www.regulations.gov.* Electronic comments must include the full name, address, and organizational affiliation (if any) of the commenter. All comments and letters will be available for public inspection, Monday through Friday 7 a.m. to 4 p.m., at the address above, by calling (202) 690–5841 to set up an appointment and gain entry to the building. Electronically-submitted comments will be available for viewing immediately. To download an electronic version of the rule, access the OMB Web site *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Elsbeth Porter Wyatt, Administration on Developmental Disabilities, telephone (202) 690–5841 (Voice). The TDD telephone number for the Administration on Developmental Disabilities is (202) 690–6415. These are not toll-free numbers. This document will be made available in alternative formats upon request.

Dated: July 22, 2008.

**Ann C. Agnew,**

*Executive Secretary to the Department.*

[FR Doc. E8–17296 Filed 7–28–08; 8:45 am]

**BILLING CODE 4194–01–P**

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**[FWS–R2–ES–2008–0060]; [1111–FY06–MO–B2]**

## Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Tucson Shovel-Nosed Snake (Chionactis occipitalis klauberi) as Threatened or Endangered with Critical Habitat

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding and initiation of status review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the Tucson shovel-nosed snake (*Chionactis occipitalis klauberi*) as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). We find that the petition presents substantial scientific or commercial information indicating that listing the Tucson shovel-nosed snake may be warranted. Therefore, with the publication of this notice, we are initiating a status review of the subspecies, and we will issue a 12-month finding to determine if listing the subspecies is warranted. To ensure that the status review of the Tucson shovel-nosed snake is comprehensive, we are soliciting scientific and commercial information regarding this subspecies.

**DATES:** To allow us adequate time to conduct a status review, we request that information be submitted on or before September 29, 2008.

**ADDRESSES:** You may submit information by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R2–ES–2008–0060, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all information received on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

**FOR FURTHER INFORMATION CONTACT:** Steve Spangle, Field Supervisor, Arizona Ecological Services Office, 2321 West Royal Palm Drive, Suite 103, Phoenix, AZ 85021; telephone 602–242–0210; facsimile 602–242–2513. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Information Solicited

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information on the status of the Tucson shovel-nosed snake. We request information from the public, other concerned governmental agencies, Tribes, the scientific community, industry, or any other interested parties concerning the status of the Tucson shovel-nosed snake. We are seeking information regarding the subspecies' historical and current status and distribution, its biology and ecology, its taxonomy (especially genetics of the subspecies), ongoing conservation measures for the subspecies and its habitat, and threats to either the subspecies or its habitat.

If we determine that listing the Tucson shovel-nosed snake is warranted, it is our intent to propose critical habitat to the maximum extent prudent and determinable at the time we would propose to list the subspecies. Therefore, with regard to areas within the geographical range currently occupied by the Tucson shovel-nosed snake, we also request data and information on what may constitute physical or biological features essential to the conservation of the subspecies, where these features are currently found, and whether any of these features may require special management considerations or protection. In addition, we request data and information regarding whether there are areas outside the geographical area occupied by the subspecies that are essential to the conservation of the subspecies. Please provide specific information as to what, if any, critical habitat should be proposed for designation, if the subspecies is proposed for listing, and why that proposed habitat meets the requirements of the Act.

Please note that comments merely stating support or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.'' Based on the status review, we will issue a 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act.

You may submit your information concerning this finding by one of the methods listed in the **ADDRESSES** section. We will not consider submissions sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Information and materials we receive, as well as supporting documentation we used in preparing this finding, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

## Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. Such findings are based on information contained in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the finding. To the maximum extent practicable, we are to make this finding within 90 days of receipt of the petition and publish our notice of this finding promptly in the **Federal Register**.

Our standard for ''substantial information,'' as defined in the Code of Federal Regulations at 50 CFR 424.14(b), with regards to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.'' If we find that substantial information was presented, we are required to promptly commence a status review of the species.

We evaluated the information provided by the petitioner in accordance with 50 CFR 424.14(b). Our process for making this 90-day finding under section 4(b)(3)(A) of the Act and 50 CFR 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the ''substantial scientific and commercial information'' threshold (as mentioned above).

We received a petition, dated December 15, 2004, from the Center for Biological Diversity (CBD) requesting that we list the Tucson shovel-nosed snake as threatened or endangered throughout its range and designate critical habitat within its range in the United States. The petition, which was clearly identified as such, contained detailed information on the natural history, biology, current status and distribution of the Tucson shovel-nosed snake. It also contained information on what the petitioner reported as potential threats to the subspecies from urban development, agricultural practices, collecting, inadequacy of existing regulations, drought, and climate change. In response to the petitioner's requests, we sent a letter to the petitioner, dated September 7, 2005, explaining that, due to funding constraints in fiscal year 2005, we would not be able to address the petition in a timely manner. On February 28, 2006, the petitioner filed a 60-day notice of intent to sue (NOI) the Department of the Interior for failure to issue 90-day and 12-month findings, and a proposed listing rule, as appropriate, in response to the petition as required by 16 U.S.C. 1533(b)(3)(A) and (B). In response to the NOI, we agreed to submit a 90-day finding to the **Federal Register** as expeditiously as possible.

The petition also requested that the Service consider an ''intergrade zone'' between the Tucson shovel-nosed snake and the Colorado Desert shovel-nosed snake as part of the Tucson shovel-nosed snake's range. An intergrade zone is an area of overlap between the ranges of two subspecies where individuals may possess intermediate characters or traits of both subspecies. It is generally recognized and accepted by practitioners of subspecies taxonomy that intergrade zones may exist between the ranges of two subspecies where the diagnostic characters of both subspecies may be found (Mayr 1942, 1963, 1969, 1970; Huxley 1943; Wake 1997, 2006; Rodríguez-Robles and De Jesus-Escobar 2000; Isaac *et al.* 2004; Krysko and Judd 2006). Current practice in the scientific literature is to objectively describe the ranges of different subspecies and any intergrade zones between them with narrative descriptions, maps, or both (e.g., Wake, 1997, 2006; Rodríguez-Robles and De Jesus-Escobar 2000; Mahrdt *et al.* 2001; Leaché and Reeder, 2002; Krysko and Judd 2006). Following this practice, intergrade zones are identified, but not assigned to either of the subspecies. As such, we find that including all shovel-nosed snakes within the intergrade zone in the subspecies taxon of the Tucson shovel-nosed snake would not be consistent with current scientific practice in describing the ranges of the subspecies and the intergrade zone between them. Therefore, we do not consider shovel-nosed snakes within the intergrade zone to be members of the Tucson shovel-nosed snake subspecies, and thus they are not included in our threats analysis below.

## Previous Federal Action

No previous Federal action has been taken on the Tucson shovel-nosed snake. The Tucson shovel-nosed snake has no Federal regulatory status under the Act.

## Species Information

The Tucson shovel-nosed snake was first described as a subspecies, *Sonora occipitalis klauberi,* by Stickel in 1941. The genus was changed to *Chionactis* from the genus *Sonora* two years later (Stickel 1943). Since being described, the Tucson shovel-nosed snake has been widely accepted as a subspecies (Klauber 1951, p. 187; Stebbins 2003, p. 394; Crother 2008, p. 48), and is one of four currently recognized subspecies of western shovel-nosed snakes, *Chionactis occipitalis* (Crother 2008). In a recent study of genetic variation of mitochondrial DNA, Wood *et al.* (2006) found significant geographical structuring suggesting two distinct subspecies of western shovel-nosed snake rather than four, combining western populations of *C. o. occipitalis*, the Mojave shovel-nosed snake, with *C. o. talpina,* the Nevada shovel-nosed snake; and eastern populations of *C. o. occipitalis* with *C. o. annulata,* the Colorado Desert shovel-nosed snake, and *C. o. klauberi*. However, Wood *et al.'s* inference was based on a single genetic marker of mitochondrial DNA and did not include examination of nuclear markers, which would more fully elucidate our understanding of the taxonomic standing of this subspecies. Therefore, we continue to accept the currently accepted designation of the subspecies *C. o. klauberi.*

The Tucson shovel-nosed snake is a small snake (250–425 millimeters (mm) (9.84–16.73 inches (in)) total length) in the family Colubridae with a shovel-shaped snout, an inset lower jaw, and coloring that mimics coral snakes (Mahrdt *et al.* 2001, p. 731.1). The most notable features of the Tucson shovel-nosed snake distinguishing it from the other subspecies are (a) the red crossbands suffused with dark pigment, making them appear brown or partly black, and (b) both black and red crossbands not encircling the body (CBD 2004, p. 2).

Like other shovel-nosed snakes, the Tucson shovel-nosed snake uses venom to capture arthropod prey (Rosen 2003).

The diet of shovel-nosed snakes consists of scorpions, beetle larvae, spiders, crickets and centipedes (Rosen *et al.* 1996, p. 22–23). Like the other subspecies, the Tucson shovel-nosed snake probably feeds on scorpions. Glass (1972, p. 447) suggests that Tucson shovel-nosed snakes may have developed a resistance to scorpion venom. Rosen *et al.* (1996, p. 22) suggest that shovel-nosed snakes eat relatively frequently. The authors (pp. 22–23) further support this observation by noting that individual shovel-nosed snakes in captivity each consumed five to eight crickets per week, and showed significant weight loss after a two- to three-week lapse in feeding.

Like the other three subspecies of the western shovel-nosed snake, the Tucson shovel-nosed snake uses ''sand swimming'' as its primary locomotion. The snake moves using a sideways swaying motion while it is either on or under the sand or loose soil (Stebbins 2003, p. 393). Shovel-nosed snakes are primarily nocturnal in activity, although specimens have been documented as active during daylight hours. Shovel-nosed snakes are predominantly active at air temperatures between 70 and 90 degrees Fahrenheit (21 and 32 degrees Celsius), and from 7 p.m. to 9 p.m. (Klauber 1951, p. 187). Rosen *et al.* (1996, p. 21) have also observed that shovel-nosed snakes have been documented to be active in the morning and just before sunset. Rosen *et al.* (1996, p. 21) further note that activity seems to be highest when summer and spring temperatures are moderate, and when the relative humidity is high.

Klauber (1951, p. 185) indicates that scattered sand hummocks, crowned with mesquite or other desert shrubs, are favorite refuges for shovel-nosed snakes. Rosen (2003, p. 8) suggests that the Tucson shovel-nosed snake is found in more productive creosote-mesquite floodplain environments, differing from the habitats preferred by other subspecies of the western shovel-nosed snake. Rosen (2003, p. 8) describes the associated soils of the Tucson shovel-nosed snake as soft, sandy loams, with sparse gravel.

The subspecies is historically known from Pima County in the Avra and Santa Cruz valleys and from southeastern Maricopa County and southern Pinal County, including the Gila River Indian Community. The area between the Tucson and Phoenix metropolitan areas is believed to encompass the majority of the current range of this subspecies, particularly west of Tucson northward along Avra Valley to Pinal County, and westward into Maricopa County. The last verifiable record of the Tucson shovel-nosed snake in Pima County was in 1979, near the intersection of Avra Valley Road and Sanders Road in the Avra Valley (Rosen 2003, p. 10). Although habitat still exists in Pima County, the current distribution and abundance in Pima County is unknown. According to the petition, most of the currently occupied range of the Tucson shovel-nosed snake is believed to lie in southern Pinal County and Maricopa County. An intergrade zone occurs between the range of the Colorado Desert shovel-nosed snake and the range of the Tucson shovel-nosed snake in Pima County (Klauber 1951, p. 159). Recent records of shovel-nosed snakes in Pima County have been from within the intergrade zone.

**Threats Analysis**

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations (50 CFR 424) set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species, subspecies, or distinct population segment of vertebrate taxa may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1) of the Act: (A) Present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In making this 90-day finding, we evaluated whether information on threats to the Tucson shovel-nosed snake, as presented in the petition, and clarified by information readily available in our files at the time of the petition review, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

*A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range*

The petition states that the Tucson shovel-nosed snake is known only from south central Arizona in Pima, Pinal, and Maricopa counties, where it is dependent on Sonoran Desert scrub, particularly areas with loose, sandy, wind-blown soils (CBD 2004, p. 6; Mattison 1989, p. 25). According to the petitioner, much of the habitat within the former range of the Tucson shovel-nosed snake has been converted to agricultural fields and urban development, as well as new roads to access these areas, all of which are unsuitable as habitat for this subspecies. The petition further claims that once an area has been plowed, or the soil has been compacted by urbanization or other factors, it is unknown whether the habitat can ever be recovered and, if so, how long it will take (CBD 2004, p. 10).

The petitioner cites a personal communication with herpetologist Dr. Philip Rosen in which he pointed out that full recovery of native vegetation to pre-disturbance conditions has not been documented, and partial recovery of reptile and invertebrate groups has also not been observed. We interpret partial recovery to mean either the re-invasion of the disturbed lands by reptile and invertebrate groups or an increase in their populations following a decline associated with the disturbance. The petitioner notes that post-disturbance recovery (we presume of both vegetation and wildlife) is possible with enough time, but may not be practical because it may not provide habitat for the Tucson shovel-nosed snake before it is extirpated from areas adjacent to those rehabilitated habitats. The petitioner provided no data to support such claims regarding habitat recovery.

To determine the historical and current distribution of Tucson shovel-nosed snake habitat, the petitioner developed a model of the snake's potential habitat with the cooperation of Dr. Rosen. The model was developed and refined based on Dr. Rosen's professional knowledge of habitat conditions, the conditions at observed locations, and descriptions of habitat requirements from the literature.

Rosen (2003, p. 8) notes that significant amounts of Tucson shovel-nosed snake habitat in the eastern portion of the Avra Valley in Pima County was converted from desert to either agricultural or urban development between 1954 and 1966, with many canals, wells, and field-edge roads appearing in the interim. Rosen (2003, p. 7) also notes that traffic in the Avra Valley increased after the 1960s, especially in the late 1970s, following urban and agricultural development. Rosen (2003, p. 8) further indicates that agricultural development was already widespread in the western portion of the Avra Valley by 1959.

Surveys for the Tucson shovel-nosed snake began in the mid-to-late 1950s by Dr. Charles H. Lowe and his graduate students at the University of Arizona, with a peak in the 1960s (Rosen 2003, p. 7). The petition refers to records indicating the Tucson shovel-nosed snake was reasonably abundant in the Avra Valley during the 1970s (Rosen 2003, p.10). The last verifiable record of the Tucson shovel-nosed snake in the

Avra Valley was in 1979, near the intersection of Avra Valley Road and Sanders Road (Rosen 2003, p. 10). Surveys for the subspecies were conducted in the Avra Valley and part of Pinal County in 2003, 2004 and 2007 (Rosen 2003, p. 6; Rosen 2004, p. 2; Rosen 2007, p. 1). Surveys for shovel-nosed snakes were also conducted on Organ Pipe Cactus National Monument in Pima County from 1987 through 1994 (Rosen et al. 1996, pp. 6–7). Additionally, surveys have been conducted intermittently by various researchers throughout the range of the Tucson shovel-nosed snake since the mid-1990s. During these recent surveys, the Tucson shovel-nosed snake has been found in Pinal County (Rosen 2003, p. 9; Rosen 2007, p. 2).

To determine the extent to which the Tucson shovel-nosed snake's historical habitat has been lost to urban or agricultural development, the petitioner combined the model of snake habitat (CBD 2004, p. 13) with coverage of urban and agricultural areas developed by the Southwestern Regional Gap Analysis Project, which used imagery current to 2001. Their model of ''remaining good habitat'' (CBD 2004, p. 15) covers roughly half of the historical range of the subspecies. Because of a lack of available soils data, their model of historical habitat does not include the entire range of the Tucson shovel-nosed snake on lands in the east-central portion of Pinal and Maricopa counties. The areas of habitat that were not modeled comprise approximately 25 percent of the historical range of the Tucson shovel-nosed snake. In the areas modeled, the petitioner indicated that 1,271,319 acres (ac) (514,503 hectares (ha)) of potential habitat occur within the range of the Tucson shovel-nosed snake. Of this area, 914,015 ac (369,902 ha) (72 percent) have been converted to either agriculture or urban development (CBD 2004, p. 14). No estimates of habitat loss were presented for areas not evaluated by the models.

The petitioner concluded that human population growth and habitat loss predicted for Pima County also are likely to occur within the species' range in Pinal and Maricopa counties, but did not provide supporting citations or other information (CBD 2004, p. 14). We concur, and have information readily available in our files that substantiates human population growth and habitat loss are occurring, and will continue to occur, in Pinal and Maricopa counties. For instance, population growth in Pinal County is the sixth fastest among all counties in the United States, and the current population of 313,000 is predicted to grow to 600,000 by 2015 (Pisano 2007). The town of Maricopa, which is within the current range of the Tucson shovel-nosed snake in Pinal County, had a population of 4,855 in 2004, but is now one of the country's fastest growing cities, and is planning for a population of 350,000 by 2025 (Holcombe 2005). Additionally, a 275-square-mile area of State Trust and private lands centered on Florence Junction, also in Pinal County, is being planned for development (Grammage 2006); approximately two thirds of this area falls within the current range of the Tucson shovel-nosed snake. From July 2004 to July 2005, the population of Maricopa County increased by 137,000, which was the largest numerical increase of any of the 3,141 counties in the nation during that period (The Business Journal of Phoenix 2006). The metropolitan areas of Tucson and Phoenix, between which the snake's current range exists, are forecasted to meet and merge within a decade, with the population increasing from 5 million today to upward of 10 million by 2040 (Reagor 2006).

The petition also lists mining, off-highway vehicles, construction of roads, and livestock grazing as potential threats to the Tucson shovel-nosed snake and its habitat. According to the petitioners (CBD 2004, p. 16), the Pima County Multi-Species Conservation Plan (2004) indicates that off-highway vehicles can crush snakes buried in the sand or compact soils used by the snake, although the Pima County Multi-Species Conservation Plan (2004) does not provide specific evidence of this threat. The petition further claims that construction of roads fragments snake habitat, roads are a source of snake mortality, and that livestock grazing compacts soils and may reduce the snake's prey base by reducing and altering vegetation cover. No data or references were provided to support the claims that mining and livestock grazing are potential threats. Additionally, the petitioners provide no data to support the claim that road construction fragments snake habitat and roads are a source of snake mortality; however, we have information from our files which supports this claim. Papers by Rosen and Lowe (1994, pp. 146–148) and Andrews and Gibbons (2005, pp. 776–781) provide substantial information indicating that road construction and increased traffic on roads isolates habitat for snakes and increases snake mortality.

We conclude that the petition provides substantial information to support the claim that agricultural and urban development present direct and indirect threats to the Sonoran Desert scrub habitat upon which the Tucson shovel-nosed snake currently depends. Dr. Phil Rosen has studied shovel-nosed snakes in Arizona for 17 years and has coauthored one peer-reviewed journal article regarding the reproductive ecology of *C. occipitalis* and coauthored a literature review of both species. Dr. Rosen has studied herpetology in the American Southwest for almost 30 years and has been instrumental in various aspects of conservation of reptiles and amphibians in the southwestern United States. Dr. Rosen has been active in helping Pima County develop the Sonoran Desert Conservation Plan, particularly with regard to the reptiles and amphibians being considered for protection in the plan. Additionally, Dr. Rosen has worked with the Town of Marana to help develop their Habitat Conservation Plan, which also considers the conservation of local reptiles. Both the Sonoran Desert Conservation Plan and the Town of Marana Habitat Conservation Plan are considering conservation of the Tucson shovel-nosed snake, and Dr. Rosen has helped them develop habitat models of what constitutes Tucson shovel-nosed snake habitat, including former habitat and remaining habitat. Although the petition relies heavily on non-peer-reviewed literature to support its claims regarding loss and degradation of Tucson shovel-nosed snake habitat, we find that the data presented, as well as clarifying information in our files, relating to threats from agricultural and urban development are credible and substantial, indicating that listing the Tucson shovel-nosed snake may be warranted.

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

The petition claims that scientific and commercial collection is not widespread, but that the Tucson shovel-nosed snake could be somewhat affected by collection in limited areas. The petition further claims that enforcement of laws prohibiting commercial collection of reptiles is limited. While we accept the claim that the Tucson shovel-nosed snake occurs within a limited distribution in Arizona, the petition does not provide data to substantiate the claim that the subspecies may be threatened by collection. Therefore, we find that the petition does not provide substantial information to support the claim that overutilization for commercial, recreational, scientific, or educational purposes may pose a significant threat to the Tucson shovel-nosed snake.

*C. Disease or Predation*

The petitioner presented no data that diseases affect Tucson shovel-nosed snakes. The petitioner provided data that predation by native wildlife occurs on Colorado Desert shovel-nosed snakes (Funk 1965, p. 16; Mahrdt and Banta 1996, p. 81). It is likely that predation also occurs on Tucson shovel-nosed snakes since most of the native wildlife occurs within the range of both subspecies; however, the petitioner provided no data to support predation as a significant impact to populations of Tucson shovel-nosed snakes. Therefore, we find that the petition does not provide substantial information that listing the subspecies due to disease or predation may be warranted.

*D. Inadequacy of Existing Regulatory Mechanisms*

The petition claims the Tucson shovel-nosed snake is not currently afforded any State or Federal protection and is not listed on any State or Federal list of species of concern. The petitioner indicated that, according to the Arizona Game and Fish Department's Wildlife Management Program Strategic Plan for the Years 2001–2006, the Tucson shovel-nosed snake is not included on Arizona's Wildlife of Special Concern list (Arizona Game and Fish Department 2001). The petitioner further stated that, even if the Tucson shovel-nosed snake was considered Wildlife of Special Concern, it would receive little protection because the list only serves to notify the public of the species' status and does not require any conservation or management actions (Arizona Game and Fish Department 2001). Since we received the petition, the Arizona Game and Fish Department has developed Arizona's Comprehensive Wildlife Conservation Strategy: 2005–2015 (CWCS), in which the Tucson shovel-nosed snake has been identified as a Species of Greatest Conservation Need for which immediate conservation action is necessary (Tier 1b under the Vulnerable category) (Arizona Game and Fish Department 2006, Appendix A p. 3, Appendix K p. 139). However, the CWCS was not designed to replace or duplicate the Department's existing wildlife management strategic plan (Arizona Game and Fish Department 2001), nor does it provide further regulatory protection for the snake. It serves only to prioritize funds and guide implementation of conservation activities for Arizona's vulnerable wildlife (Arizona Game and Fish Department 2006, p. 9).

The petitioner claims that approximately 21 percent of the Tucson shovel-nosed snake's historical range (including the intergrade zone) occurs on lands administered by the State of Arizona. The percentage of State of Arizona lands within the current range (and excluding the intergrade zone) was not presented and is unknown to the Service. The State of Arizona currently has no regulations or programs to protect the Tucson shovel-nosed snake. The petitioner pointed out that the Federal Enabling Act for Arizona and the State Constitution limit conservation on State lands by requiring that use of the lands maximize the economic value of State lands to benefit schools. The petition further describes the Arizona Preserve Initiative (HB 2555) passed in 1996, which establishes a process by which State lands can be leased or purchased for conservation purposes; however, the petitioner claims that the legality of this law is in question because of the Arizona State Constitutional requirement to maximize economic value. The petitioner also claims that even without its legality issues, the Arizona Preserve Initiative provides little protection for the Tucson shovel-nosed snake because it only allows for the lease and purchase of State land. The Arizona Preserve Initiative does not require any purchase or lease to conserve habitat for the snake. Although State lands currently provide open space, there are no known plans to require protection of Tucson shovel-nosed snake habitat on State lands, and no other protections are afforded the snake on State lands.

The petition claims that enforcement of laws prohibiting commercial collection of reptiles is limited. State law limits the collection of non-protected snakes to no more than four individuals of a species per year with a valid hunting license. If more than four are to be collected (e.g., for research purposes), a scientific collecting permit must be obtained. It is illegal to commercially sell, barter, or trade any native Arizona wildlife. While we are aware that the Arizona Game and Fish Department enforces these laws to the extent that it can, it is likely that some level of illegal collection of shovel-nosed snakes occurs. We do not, however, have information indicating the level of this illegal activity, nor how it impacts the population as a whole.

The petition states that 16 percent of the Tucson shovel-nosed snake's habitat occurs on Bureau of Land Management (BLM) lands, most of which falls within the intergrade zone of the snake. The intergrade zone is an area not included in this analysis (see Background). Of the remaining area (not within the intergrade zone), the petition states that the recent creation of the Ironwood Forest National Monument, which is administered by the BLM, provides the Tucson shovel-nosed snake possible protections. Additionally, we are aware of BLM lands between Tucson and Florence, Arizona, that may support habitat for the Tucson shovel-nosed snake for which the petitioner provided no information on status or threats.

The BLM currently has no regulations to protect the Tucson shovel-nosed snake, does not survey for the snake on its habitat, and does not consider impacts on the subspecies during project-specific analyses. BLM lands are secure from agricultural and urban development; however, as previously mentioned, the petitioner claims that off-highway vehicle use, livestock grazing, roads, and mine leasing are all potential threats to Tucson shovel-nosed snakes and their habitat. The petitioner admitted that the extent of these threats and their impacts on the Tucson shovel-nosed snake have not been studied, but they expect that they are likely impacting the snake to some unknown level. Impacts from these activities may exist; however, the petition provides no data to support these claims.

The petitioner points to the perceived inadequacies in the Pima County Multi-species Conservation Plan (referred to in the petition as the Sonoran Desert Conservation Plan) and the Town of Marana Habitat Conservation Plan as regulatory mechanisms. Because neither of these plans is finalized, we will not explore the adequacies of these plans as possible regulatory mechanisms for the snake.

The petition provides no information about existing regulatory mechanisms on lands managed by the Gila River Indian Community, which is within the current range of the Tucson shovel-nosed snake. The petition does state that 17 percent of the snake's habitat is under the control of the Tohono O'odham Nation. Most of the Tohono O'odham lands are in Pima County west of Tucson, with a small portion falling within Pinal and Maricopa counties. All of these lands are within the intergrade zone, which we have excluded from consideration.

We have reviewed the information provided in the petition as well as all sources cited in the petition. Many of the regulatory mechanisms discussed pertain to lands that are in the intergrade zone of the snake, which we have excluded from this analysis. For the remaining areas within the snake's range, we conclude that the petition and information in our files present substantial information that existing regulatory mechanisms may be

inadequate to prevent the progressive decline of populations of the Tucson shovel-nosed snake and its habitat.

*E. Other Natural or Manmade Factors Affecting the Species' Continued Existence*

The petition claims that severe weather, particularly prolonged drought, has the potential to negatively impact Tucson shovel-nosed snake populations. The petitioner described prolonged drought as a potential reason that no Tucson shovel-nosed snakes were located in the Avra Valley within the historical range in Pima County during extensive searches by local researchers (Rosen 2003, p. 16). No data to support this claim were provided by the petitioner or by Rosen (2003), and although we have information in our files indicating that conditions in the United States (Intergovernmental Panel on Climate Change 2007, p. 9), and in the southwestern United States in particular (Seager *et al.* 2007, p. 1181) are likely to be drier and warmer in the near future, we have no information indicating such changes will negatively impact the Tucson shovel-nosed snake. The petitioner also claims that, in addition to prolonged drought, climate change or habitat modification that results in permanently wetter environmental conditions could also lead to further declines of this arid-adapted subspecies, particularly under prevailing conditions in which only fragments of the original distribution remain occupied. However, the petition provides no data to support the claim that climate change will result in wetter environmental conditions within the current range of the species, nor does it provide data to support the claims that the Tucson shovel-nosed snake responds negatively to wetter environmental conditions and that fragmented habitat would exacerbate negative impacts due to wetter conditions. Therefore, we do not find that the petition provides substantial information to support the claim that prolonged drought or climate change pose significant threats to the Tucson shovel-nosed snake.

## Finding

We have reviewed the petition and the literature cited in the petition, and evaluated the information to determine whether the sources cited support the claims made in the petition. We also reviewed reliable information that was readily available in our files to clarify and verify information in the petition. Based on our evaluation of the information provided in the petition, and in accordance with recent applicable court decisions pertaining to 90-day findings, we find that the petition presents substantial scientific information indicating that listing the Tuscon shovel-nosed snake may be warranted. Our process for making this 90-day finding under section 4(b)(3)(A) of the Act is limited to a determination of whether the information in the petition presents ''substantial scientific and commercial information,'' which is interpreted in our regulations as ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)).

The petitioners presented substantial information indicating that the Tucson shovel-nosed snake may be threatened by Factors A and D throughout the entire range of the subspecies. The petitioners did not present substantial information that Factors B, C and E are currently, or in the future, considered a threat to this species. Based on this review and evaluation, we find that the petition has presented substantial scientific or commercial information that listing the Tucson shovel-nosed snake throughout all or a portion of its range may be warranted due to current and future threats under Factors A and D. As such, we are initiating a status review to determine whether listing the Tucson shovel-nosed snake under the Act is warranted. We will issue a 12-month finding as to whether any of the petitioned actions are warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information regarding the Tuscon shovel-nosed snake.

It is important to note that the ''substantial information'' standard for a 90-day finding is in contrast to the Act's ''best scientific and commercial data'' standard that applies to a 12-month finding as to whether a petitioned action is warranted. A 90-day finding is not a status assessment of the species and does not constitute a status review under the Act. Our final determination as to whether a petitioned action is warranted is not made until we have completed a thorough status review of the species, which is conducted following a positive 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a positive 90-day finding does not mean that the 12-month finding also will be positive.

## References Cited

A complete list of all references cited is available, upon request, from the Arizona Ecological Services Office (see FOR ADDITIONAL INFORMATION CONTACT section).

## Author

The primary author of this notice is the Arizona Ecological Services Office (see FOR ADDITIONAL INFORMATION CONTACT section).

## Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 14, 2008.

**Kenneth Stansell,**

*Deputy Director, U.S. Fish and Wildlife Service.*

[FR Doc. E8–17221 Filed 7–28–08; 8:45 am]

BILLING CODE 4310–55–P

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[FWS–R8–ES–2007–0008; 92210–1117–0000–FY08 B4]**

**RIN 1018-AV07**

# Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the San Bernardino Kangaroo Rat (Dipodomys merriami parvus)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service) announce the reopening of the public comment period on the June 19, 2007, proposed rule (72 FR 33808) to revise critical habitat for the San Bernardino kangaroo rat (*Dipodomys merriami parvus*) under the Endangered Species Act of 1973, as amended (Act). This action will provide all interested parties with an additional opportunity to submit written comments on the proposed revised designation, draft economic analysis (DEA), and addendum to the DEA. Comments previously submitted need not be resubmitted as they are already incorporated into the public record and will be fully considered in any final decision.

**DATES:** We are reopening the comment period and will accept information received or postmarked on or before August 13, 2008.

**ADDRESSES:** You may submit comments by one of the following methods:

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

• *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R8–ES–2007–0008, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203. We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011; telephone 760/431–9440; facsimile 760/431–5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## Public Comments

We will accept comments and information during this reopened comment period on our proposed revision to critical habitat for the San Bernardino kangaroo rat published in the **Federal Register** on June 19, 2007 (72 FR 33808), the additions to revised critical habitat and the notice of availability of the DEA published in the **Federal Register** on April 16, 2008 (73 FR 20581), and the addendum to the DEA made available to the public on the Federal eRulemaking Portal: *http://www.regulations.gov* on June 11, 2008. You may obtain copies of all of these documents on the Internet at *http://www.regulations.gov*. If you submitted comments or information previously on the proposed rule, revisions, or DEA during previous open comment periods, please do not resubmit them. These comments have been incorporated into the public record and will be fully considered in the preparation of our final determination.

You may submit your comments and materials concerning the proposed rule, DEA and the addendum to the DEA by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

## Background

On June 19, 2007, we published a proposed rule to revise critical habitat for the San Bernardino kangaroo rat (72 FR 33808). On April 16, 2008, we published a notice in the **Federal Register** (73 FR 20581) announcing the availability of the draft economic analysis and changes to the proposed revised critical habitat designation for the San Bernardino kangaroo rat. Five critical habitat units, totaling approximately 7,779 acres (3,148 hectares), are proposed as revised critical habitat for the San Bernardino kangaroo rat. These units, which generally correspond to the three units in the 2007 proposed rule plus two additional units, if finalized, would entirely replace the current critical habitat designation for the San Bernardino kangaroo rat in 50 CFR 17.95(a). The proposed critical habitat is located within San Bernardino and Riverside Counties, California. For locations of these proposed units, please consult the proposed rule. The original public comment period for the proposed critical habitat rule closed on August 20, 2007. The public comment period was reopened for 30 days upon publication of the April 16, 2008 **Federal Register** notice, ending on May 16, 2008. An addendum to the DEA was made available for public comment on June 11, 2008, on the Federal eRulemaking Portal: *http://www.regulations.gov*. Because the addendum to the DEA was not available on the Federal eRulemaking Portal during the previous comment period, we are reopening the comment period to provide all interested parties with an additional opportunity to submit written comments on the proposed revised designation, the DEA, and the addendum to the DEA.

Critical habitat is defined by the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed pursuant to section 4 of the Act, on which are found those physical or biological features (a) essential to the conservation of the species, and (b) which may require special management considerations or protection, and

(2) Specific areas outside the geographic areas occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

If the proposed critical habitat designation is finalized, section 7(a)(2) of the Act would require that Federal agencies ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat.

Section 4(b)(2) of the Act requires that we designate or revise critical habitat on the basis of the best scientific and commercial data available, after taking into consideration economic, and any other relevant, impacts of specifying any particular area as critical habitat.

**Authority:** The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: July 8, 2008.

**David Verhey,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E8–17054 Filed 7–28–08; 8:45 am]

BILLING CODE 4310–55–P

# Notices

Federal Register

Vol. 73, No. 146

Tuesday, July 29, 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–2008–0021]**

### Codex Alimentarius Commission: Meeting of the Codex Committee on Processed Fruits and Vegetables

**AGENCY:** Office of the Under Secretary for Food Safety, USDA.

**ACTION:** Notice of public meeting and request for comments.

**SUMMARY:** The Office of the Under Secretary for Food Safety, U.S. Department of Agriculture (USDA), and the Agricultural Marketing Service (AMS) are hosting a public meeting on August 14th, 2008. The objective of the public meeting is to provide information and receive public comments on agenda items and draft United States positions for the 24th Session of the Codex Committee on Processed Fruits and Vegetables (CCPFV), which will be held in Arlington, VA (Washington, DC, metro area), September 15–20, 2008. The Under Secretary for Food Safety and AMS recognize the importance of providing interested parties the opportunity to obtain background information on this forthcoming Session of CCPFV and to address items on the agenda.

**DATES:** The public meeting is scheduled for Thursday, August 14, 2008, from 10 a.m. to 12 noon.

**ADDRESSES:** The public meeting will be held in Room 2068, USDA, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC. Documents related to the 24th Session of CCPFV will be accessible via the World Wide Web at the following address: *http://www.codexalimentarius.net/current.asp*.

The U.S. Delegate to the 24th Session of the CCPFV, Dorian LaFond, AMS, invites interested parties to submit their comments electronically to the following e-mail address *dorian.lafond@usda.gov*.

**FOR FURTHER INFORMATION ABOUT THE 24TH SESSION OF CCPFV CONTACT:** Dorian LaFond, International Standards Coordinator, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, 1400 Independence Avenue, SW., Washington, DC 20250, Phone: (202) 690–4944, Fax: (202) 720–0016, e-mail: *dorian.lafond@usda.gov*.

**FOR FURTHER INFORMATION ABOUT THE PUBLIC MEETING CONTACT:** Doreen Chen-Moulec, International Issues Analyst, U.S. Codex Office, USDA, FSIS, Room 4861, South Building, 1400 Independence Avenue, SW., Washington, DC 20250, Phone: (202) 205–7760, Fax: (202) 720–3157. E-mail: *Doreen.chen-moulec@fsis.usda.gov*.

**SUPPLEMENTARY INFORMATION:**

#### Background

The Codex Alimentarius (Codex) was established in 1963 by two United Nations organizations, the Food and Agriculture Organization and the World Health Organization. Through adoption of food standards, codes of practice, and other guidelines developed by its committees and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers and ensure that fair practices are used in trade.

The Codex Committee on Processed Fruits and Vegetables is hosted by the United States. It elaborates new and revised worldwide standards for various processed fruits and vegetables, including certain dried and canned products. This committee does not cover standards for fruit and vegetable juices.

#### Issues To Be Discussed at the Public Meeting

The following items on the Agenda for the 24th Session of CCPFV will be discussed during the public meeting:

- Matters Referred to the Committee From Other Codex Bodies;
- Proposed Layout for Codex Standards for Processed Fruits and Vegetables;
- Draft Codex Standards for Jams, Jellies and Marmalades;
- Draft Codex Standard for Certain Canned Vegetables (General Provisions);
- Proposed Draft Annexes Specific to Certain Canned Vegetables (Draft Codex Standard for Certain Canned Vegetables);
- Proposed Draft Guidelines for Packing Media on Canned Vegetables;
- Proposed Draft Sampling Plans, including Methodological Provisions for Controlling Minimum Drained Weight of Canned Fruits and Vegetables in Packing Media;
- Proposals for Amendments to the Priority List for the Standardization of Processed Fruits and Vegetables;
- Methods of Analysis for Processed Fruits and Vegetables; and
- Food Additive Provisions for Processed Fruits and Vegetables.

Each issue listed will be fully described in documents distributed, or to be distributed, by the Secretariat prior to the Meeting. Members of the public may access or request copies of these documents (see **ADDRESSES**).

#### Public Meeting

At the August 14th, 2008 public meeting, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to the U.S. Delegate for the 24th Session of CCPFV, Dorian LaFond (see *For Further Information About the 24th Session of the CCPFV Contact*). Written comments should state that they relate to activities of the 24th Session of the CCPFV.

#### 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 on-line through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2008_Notices_Index/*. FSIS also will 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, recalls, 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 July 23, 2008.

**Paulo Almeida,**

*Acting U.S. Manager for Codex Alimentarius.*

[FR Doc. E8–17257 Filed 7–28–08; 8:45 am]

BILLING CODE 3410–DM–P

## DEPARTMENT OF COMMERCE

## INTERNATIONAL TRADE ADMINISTRATION

**(A–570–848)**

## Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** July 29, 2008.

**FOR FURTHER INFORMATION CONTACT:** Dmitry Vladimirov or Minoo Hatten, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0665 or (202) 482–1690, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

On October 31, 2007, the Department published a notice of initiation of administrative review of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China (PRC). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 72 FR 61621 (October 31, 2007). On June 6, 2008, we extended the time period for issuing the preliminary results of the review by 60 days until July 31, 2008. *See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review*, 73 FR 32289 (June 6, 2008). The period of review is September 1, 2006, through August 31, 2007. The preliminary results of the administrative review are currently due no later than July 31, 2008.

### Extension of Time Limit for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to make a preliminary determination within 245 days after the last day of the anniversary month of an order for which a review is requested and a final determination within 120 days after the date on which the preliminary determination is published. If it is not practicable to complete the review within these time periods, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the preliminary determination to a maximum of 365 days after the last day of the anniversary month.

We determine that it is not practicable to complete the preliminary results of the review within the current time limit because we require additional time to analyze additional factors–of-production data submitted by a respondent's affiliated producers in response to our decision to collapse them. Therefore, we are extending the time period for issuing the preliminary results of the review by 60 days until September 29, 2008. The deadline for the final results of the review continues to be 120 days after the publication of the preliminary results.

This extension notice is issued and published in accordance with sections 751(a)(3)(A) and 777(i) of the Act and 19 CFR 351.213(h)(2).

Dated: July 22, 2008.

**Stephen J. Claeys,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. E8–17358 Filed 7–28–08; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

## International Trade Administration

**A–570–932**

## Postponement of Preliminary Determination of Antidumping Duty Investigation: Steel Threaded Rod from the People's Republic of China

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** July 29, 2008.

**FOR FURTHER INFORMATION CONTACT:** Bobby Wong or Toni Dach 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) 482–0409 and (202) 482–1655, respectively.

**SUPPLEMENTARY INFORMATION:**

### Postponement of Preliminary Determination

On April 1, 2008, the Department of Commerce (the Department) published in the **Federal Register** the initiation of the antidumping investigation on steel threaded rod from the People's Republic of China (PRC). *See Steel Threaded Rod from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 73 FR 17318 (April 1, 2008) (*Initiation Notice*).

The notice of initiation stated that the Department would issue its preliminary determination for this investigation no later than 140 days after the date of issuance of the initiation, in accordance with section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act).

On July 15, 2008, the petitioner, Vulcan Threaded Products Inc., made a request pursuant to 19 CFR 351.205(b)(2) and (e) for a 50-day postponement of the preliminary determination. The petitioner requested postponement of the preliminary determination in order to allow more time to analyze and comment on the respondents' questionnaire responses.

For the reasons identified by the petitioner and because there are no compelling reasons to deny the request, the Department is postponing the deadline for the preliminary determination under section 733(c)(1)(A) of the Act by 50 days from the current deadline of August 12, 2008, to October 1, 2008. The deadline for the final determination will continue to be 75 days after the date of the preliminary determination, unless extended.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: July 23, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

[FR Doc. E8–17365 Filed 7–28–08; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

**[Docket No.: 070413089–8493–02]**

### Announcing Approval of Federal Information Processing Standard (FIPS) Publication 198–1, The Keyed-Hash Message Authentication Code (HMAC), a Revision of FIPS 198

**AGENCY:** National Institute of Standards and Technology (NIST), Commerce.

**ACTION:** Notice.

**SUMMARY:** The National Institute of Standards and Technology (NIST) announces approval of Federal Information Processing Standard (FIPS) Publication 198–1, The Keyed-Hash Message Authentication Code (HMAC), a revision of FIPS 198. The FIPS specifies a mechanism for message authentication using cryptographic hash functions in federal information systems. The technical information about the security provided by the HMAC algorithm, and the length limit and security implications of truncated HMAC outputs have been removed from the revised standard. This information may need frequent updating, and its removal from the specification will enable NIST to employ a more effective process for keeping the information current. NIST will provide specific guidelines about the security provided by the HMAC and the use of truncation techniques for it in Special Publication (SP) 800–17, which can be updated in a timely manner as the technical conditions change.

**DATES:** The approval changes are effective as of July 29, 2008.

**FOR FURTHER INFORMATION CONTACT:** Elaine Barker, Telephone (301)975–2911, or via e-mail at *elaine.barker@nist.gov* or Quynh Dang, (301) 975–3610, e-mail: *quynh.dang@nist.gov*, National Institute of Standards and Technology, 100 Bureau Drive, Mailstop 8930, Gaithersburg, MD 20899. FIPS 198–1 is available electronically from the NIST Web site at: *http://csrc.nist.gov/publications/PubsFIPS.html*. NIST Special Publications (SPs) are available electronically from the NIST Web site at: *http://csrc.nist.gov/publications/PubsFIPS.html*.

**SUPPLEMENTARY INFORMATION:** On June 12, 2007, NIST published a notice in the **Federal Register** (72 FR 32281), announcing draft FIPS 198–1, and soliciting comments on draft standard from the public, research communities, manufacturers, voluntary standards organizations and federal, state and local government organizations. In addition, to being published in the **Federal Register**, the notice was posted on the NIST web pages. Information was provided about the submission of electronic comments and an electronic template for the submission of comments was made available.

NIST received comments, responses, and questions from three federal government organizations and two from the public. The comments received asked for clarification of the text of the standard or recommended editorial and formatting changes. None of the comments opposed the approval of the revised standard. All of the suggestions and recommendations were carefully reviewed, and changes were made to the standard where appropriate. The following is the summary of the specific comments and NIST's responses to them:

*Comment:* What are the changes between FIPS 198 and FIPS 198–1?

*Response:* The length specifications for the truncated HMAC outputs and their security implications are no longer discussed in this Standard; instead, they are included in SP 800–107. The discussion about the limitations of MAC algorithms has been moved to SP 800–107. Examples and OIDs have been removed from the standards and are now posted on a NIST Web site that is identified in the Standard. This list of changes has been provided in Appendix A.

*Comment:* ''K'' in the last sentence of Section 3 should be changed ''K0'' to be consistent with Section 4.

*Response:* NIST revised the text in Section 3 to improve the clarity of the meaning of the text.

*Comment:* The first paragraph of Section 5 talks about replacing one of the hashes with a different hash. The need for this paragraph is not clearly understood.

*Response:* NIST revised Section 5 to improve the clarity of the intended meaning of the text.

*Comment:* Why has truncation been removed from the algorithm specification?

*Response:* Truncation is still addressed in FIPS 198–1. However, the length of the truncated HMAC outputs and the security implications of truncation are not discussed in this Standard; instead, they are discussed in SP 800–107. A pointer to SP 800–107 has been provided in FIPS 198–1.

*Comment:* Why is the security of the HMAC not mentioned in the FIPS 198–1?

*Response:* The discussion on the limitations of the MAC algorithms (*i.e.*, the security discussion) has been moved to SP 800–107. A pointer to SP 800–107 has been provided in FIPS 198–1.

*Comment:* A number of editorial and legal text changes were suggested.

*Response:* NIST made the suggested changes.

*Comment:* Change 0x00 to x'00' in Step 3 of Table 1 to make it consistent with the definition in Section 2.3.

*Response:* NIST made the suggested change.

*Comment:* Figure 1 does not accurately represent the steps in the HMAC algorithm.

*Response:* NIST reviewed Figure 1 and determined that it is accurate.

Security issues related to the HMAC algorithm, its applications and truncation limitations are addressed in draft NIST Special Publication 800–107, Recommendation for Using Approved Hash Algorithms. Draft NIST Special Publication 800–107 will become NIST Special Publication 800–107 in the near future.

**Authority:** In accordance with the Information Technology Management Reform Act of 1996 (Pub. L. 104–106) and the Federal Information Security Management Act (FISMA) of 2002 (Pub. L. 107–347), the Secretary of Commerce is authorized to approve Federal Information Processing Standards (FIPS). NIST activities to develop computer security standards to protect Federal sensitive (unclassified) information systems are undertaken pursuant to specific responsibilities assigned to NIST by section 20 of the National Institute of Standards and Technology Act (5 U.S.C. 278g–3) as amended by section 303 of the Federal Information Security Management Act of 2002.

*E.O. 12866:* This notice has been determined not be significant for the purpose of E.O.12866.

Dated: July 21, 2008.

**James M. Turner,**

*Deputy Director.*

[FR Doc. E8–17363 Filed 7–28–08; 8:45 am]

**BILLING CODE 3510–13–P**

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

**RIN 0693–ZA81**

**[Docket No: 080411556–8904–02]**

### Construction Grant Program Extension of Due Date for Proposals

**AGENCY:** National Institute of Standards and Technology (NIST), United States Department of Commerce.

**ACTION:** Notice.

**SUMMARY:** Due to technical difficulties, NIST is extending the deadline for proposal submission for its Construction Grant Program competition to 3 p.m. Eastern Time, Friday, August 1, 2008. NIST will accept only paper submissions during the extended time period.

**DATES:** Paper submissions must be received no later than 3 p.m. Eastern Time, Friday, August 1, 2008. Review, selection, and grant award processing is expected to be completed by the middle of November 2008.

**ADDRESSES:** Paper submissions must be sent to the National Institute of Standards and Technology, 100 Bureau Drive, Stop 4701, Gaithersburg, MD 20899–4701.

**FOR FURTHER INFORMATION CONTACT:** Barbara Lambis via e-mail at *barbara.lambis@nist.gov* or telephone (301) 975–4447.

**SUPPLEMENTARY INFORMATION:** On May 27, 2008, the National Institute of Standards and Technology (NIST) announced that it was soliciting proposals under a competitive Construction Grant Program for research buildings (73 FR 30380). The due date for submission of all proposals was 3 p.m. Eastern Time, Monday, July 21, 2008. Due to technical difficulties some applicants were unable to submit their proposals electronically on Monday, July 21, 2008. In order to provide all interested parties the opportunity to submit a proposal for the Construction Grant Program, NIST is extending the solicitation period until 3 p.m. Eastern Time, Friday, August 1, 2008. Electronic proposals received between 3 p.m. and 11:59 p.m. Eastern Time on July 21, 2008 will be deemed timely and given full consideration. Paper proposals received between 3 p.m., Monday, July 21, 2008 and the publication date of this notice will be deemed timely and given full consideration. During the extended solicitation period, NIST will accept only paper submissions. Applicants who attempted to submit electronic applications but were unsuccessful are encouraged to resubmit a paper application. Paper submissions must be received by 3 p.m. Eastern Time, Friday, August 1, 2008. Please note that for paper submissions the Program requires one original and two (2) copies of the proposal.

The application submission deadline applies to any mode of paper proposal delivery, including hand-delivery, courier, and express mailing, but not facsimile. Proposals submitted via facsimile will not be accepted. NIST will not make any allowances for late submissions. All NIST Construction Grant Program competition requirements and information announced in the May 27, 2008, **Federal Register** notice apply to proposals submitted during the extended time period with the exception of the review, selection, and grant award processing time that is now expected to be completed by the middle of November 2008.

Executive Order 12372 (Intergovernmental Review of Federal Programs). Proposals under this program are not subject to Executive Order 12372.

Executive Order 13132 (Federalism). This notice does not contain policies with Federalism implications as defined in Executive Order 13132.

Executive Order 12866 (Regulatory Planning and Review). This notice is not a significant regulatory action under Sections 3(f)(3) and 3(f)(4) of Executive Order 12866, as it does not materially alter the budgetary impact of a grant program and does not raise novel policy issues. This notice 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.

Administrative Procedure Act and Regulatory Flexibility Act. Prior notice and comment are not required under 5 U.S.C. 553, or any other law, for rules relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553(a)). Because prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. et. seq.) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

Dated: July 25, 2008.

**James M. Turner,**

*Deputy Director.*

[FR Doc. 08–1475 Filed 7–25–08; 2:34 pm]

**BILLING CODE 3510–13–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Availability of Diving Operations, Recreational Fishing,Research and Conservation Seats for the Flower Garden Banks National Marine Sanctuary Advisory Council

**AGENCY:** National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

**ACTION:** Notice and request for applications.

**SUMMARY:** The Flower Garden Banks National Marine Sanctuary (FGBNMS or Sanctuary) is seeking applicants for the Diving Operations, Recreational Fishing, Research and Conservation seats on its Sanctuary Advisory Council (Council). Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary. The Applicant chosen as a member should expect to serve a 3-year term, pursuant to the Council's Charter.

**DATES:** Applications are due by September 12, 2008.

**ADDRESSES:** Application kits may be obtained from Jennifer Morgan at NOA–Flower Garden Banks National Marine Sanctuary, 4700 Avenue U, Bldg. 216, Galveston, TX 77551 or downloaded from the sanctuary Web site *http://flowergarden.noaa.gov*. Completed applications should be sent to the same mailing address.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Morgan, NOAA—Flower Garden Banks National Marine Sanctuary, 4700 Avenue U, Bldg. 216, Galveston, TX 77551, 409–621–5151 ext. 103, *Jennifer.Morgan@noaa.gov*.

**SUPPLEMENTARY INFORMATION:** Located in the northwestern Gulf of Mexico, the Flower Garden Banks National Marine Sanctuary includes three separate areas, known as East Flower Garden, West Flower Garden, and Stetson Banks. The Sanctuary was designated on January 17, 1992. Stetson Bank was added to the Sanctuary in 1996. The Sanctuary

Advisory Council will consist of no more than 11 members; 8 non-governmental voting members and 3 governmental non-voting members. The Council may serve as a forum for consultation and deliberation among its members and as a source of advice to the Sanctuary manager regarding the management of the Flower Garden Banks National Marine Sanctuary.

**Authority:** 16 U.S.C. sections 1431, *et seq.* (Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: July 21, 2008.

**Daniel J. Basta,**

*Director, Office of National Marine Sanctuaries, National Oceanic and Atmospheric Administration.*

[FR Doc. E8–17192 Filed 7–28–08; 8:45 am]

**BILLING CODE 3510–NK–M**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Draft Management Plan and Environmental Assessment for the Gerry E. Studds Stellwagen Bank National Marine Sanctuary: Notice of Public Comment Period Extension

**AGENCY:** Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Notice of public comment period extension.

**SUMMARY:** A 90-day public comment period was announced in the May 6, 2008 **Federal Register**, Volume 73, No. 88, to end on August 4, 2008. To accommodate receipt of additional comments NOAA's Office of National Marine Sanctuaries has extended the period for public comments on the draft management plan and draft environmental assessment for the Gerry E. Studds Stellwagen Bank National Marine Sanctuary to October 3, 2008.

**DATES:** Comments on the draft management plan and draft environmental assessment will now be considered if received on or before October 3, 2008.

**ADDRESSES:** To obtain a copy: For a copy of the draft management plan and draft environmental assessment, contact the Management Plan Review Coordinator, Stellwagen Bank National Marine Sanctuary, 175 Edward Foster Rd., Scituate, MA 02066. Copies can also be downloaded from the SBNMS Web site at *http://stellwagen.noaa.gov*.

*To submit comments:* Comments on the draft management plan and draft environmental assessment may be submitted by one of the following methods:

1. In writing to the SBNMS Management Plan Review Coordinator (see to obtain a copy section above);
2. By e-mail to *sbplan@noaa.gov*; or
3. By facsimile to (781) 545–8036.

**FOR FURTHER INFORMATION CONTACT:** Benjamin Cowie-Haskell at (781) 545–8026 or via e-mail at *sbplan@noaa.gov*.

Dated: July 18, 2008.

**Daniel J. Basta,**

*Office of National Marine Sanctuaries.*

[FR Doc. E8–17193 Filed 7–28–08; 8:45 am]

**BILLING CODE 3510–22–M**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Docket No. DoD–2008–OS–0043]**

### Submission for OMB Review; Comment Request

**ACTION:** Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**DATES:** Consideration will be given to all comments received by August 28, 2008.

*Title, Form, and OMB Number:* Utility of Test Preparation Guides and Education Programs in Enhancing Recruit Candidate Performance on the Armed Services Vocational Aptitude Battery (ASVAB), OMB Number 0704–TBD.

*Type of Request:* New.

*Number of Respondents:* 145,000.

*Responses per Respondent:* 1 or 2.

*Annual Responses:* 145,000.

*Average Burden per Response:* 12 minutes.

*Annual Burden Hours:* 33,350.

*Needs and Uses:* The 2007 National Defense Authorization Act (NDAA), section 546, directs the Secretary of Defense to conduct a test of the utility of test preparation guides in enhancing recruit candidate performance on the Armed Services Vocational Aptitude Battery (ASVAB). The ASVAB is a cognitive ability test used to select and classify applicants for enlistment into the U.S. military. This information data collection is needed to meet the following objectives, as stated in the NDAA, to examine: The degree to which test preparation assistance degrades test reliability and accuracy, the degree to which test preparation assistance allows more accurate testing of skill aptitudes and mental capability, and to recommend a role for test preparation assistance in military recruiting.

*Affected Public:* Individuals or households.

*Frequency:* On Occasion.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Ms. Sharon Mar.

Written comments and recommendations on the proposed information collection should be sent to Ms. Mar at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503. Comments may be e-mail to Ms. Mar at *Sharon_Mar@omb.eop.gov*.You may also submit comments, identified by docket number and title, by the following method:

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

*Instructions:* All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

*DOD Clearance Officer:* Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

July 21, 2008.

**Patricia L. Toppings,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. E8–17323 Filed 7–28–08; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Department of the Air Force

### Notice of Intent To Grant an Exclusive Patent License

**AGENCY:** Department of the Air Force.

**ACTION:** Notice.

**SUMMARY:** Pursuant to the provisions of Part 404 of Title 37, code of Federal Regulations, which implements Public Law 96–517, as amended, the Department of the Air Force announces its intention to grant FASORtronics, LLC., a corporation of New Mexico, having a place of business at 13240

Moon Dance Pl NE., Albuquerque, New Mexico, 87111, an exclusive license in any right, title and interest the Air Force has in:

U.S. Patent No. 7,035,297, issued April 25, 2006, entitled ''Continuous wave sodium beacon excitation source'' by Dr. David A. Denman, *et al.*

**DATES:** A license for this patent will be granted unless a written objection is received within fifteen (15) days from the date of publication of this Notice.

**FOR FURTHER INFORMATION CONTACT:** Written objection should be sent to: James M. Skorich, Attorney, 2251 Maxwell Ave., SE., 377th ABW/JAN Kirtland AFB, NM 87117–5773. Telephone: (505) 846–1542

**Bao-Anh Trinh,**

*Air Force Federal Register Liaison Officer.*

[FR Doc. E8–17325 Filed 7–28–08; 8:45 am]

**BILLING CODE 5001–05–P**

## DEPARTMENT OF DEFENSE

### Department of the Army

**[Docket ID: USA–2008–0044]**

### Privacy Act of 1974; System of Records

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice to alter a system of records.

**SUMMARY:** The Department of the Army is proposing to alter a system of records in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

**DATES:** The proposed action will be effective on August 28, 2008 unless comments are received that would result in a contrary determination.

**ADDRESSES:** Department of the Army, Freedom of Information/Privacy Division, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905.

**FOR FURTHER INFORMATION CONTACT:** Ms. Vicki Short at (703) 428–6508.

**SUPPLEMENTARY INFORMATION:** The Department of the Army systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on July 21, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: July 22, 2008.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer, Department of Defense.*

**A0025–2 SAIS DoD**

**SYSTEM NAME:**

Department of Defense Biometric Information Systems and Information Assurance for Automated Information Systems (AIS) (March 28, 2007, 72 FR 14538).

**CHANGES:**

* * * * *

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Delete entry and replace with ''10 U.S.C. 113, Secretary of Defense; 10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 8013, Secretary of the Air Force; and E.O.9397(SSN).''

**PURPOSE(S):**

Delete entry and replace with ''To control logical and physical access to Department of Defense (DoD) and DoD controlled information systems and DoD or DoD contractor operated, controlled, or secured facilities and to support the DoD physical and logical security, force protection, identity management, personnel recovery, and information assurance programs, by identifying an individual or verifying/authenticating the identity of an individual through the use of biometrics (i.e., measurable physiological or behavioral characteristics) for purposes of protecting U.S./Coalition/allied government and/or U.S./Coalition/allied national security areas of responsibility and information.

Information assurance purposes include the administration of passwords and identification numbers for operators/users of data in automated media; identifying data processing and communication customers authorized access to or disclosure from data residing in information processing and/or communication activities; and determining the propriety of individual access into the physical data residing in automated media.''

* * * * *

**SYSTEM MANAGER(S) AND ADDRESS:**

Delete entry and replace with ''Director, Biometrics Operations Directorate, Biometrics Task Force, 347 West Main Street, Clarksburg, West Virginia 26306–2947.''

**NOTIFICATION PROCEDURE:**

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to Director, Biometrics Operations Directorate, Biometrics Task Force, 347 West Main Street, Clarksburg, West Virginia 26306–2947.

For verification purposes, individual should provide full name, sufficient details to permit locating pertinent records, and signature.''

**RECORD ACCESS PROCEDURES:**

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to Director, Biometrics Operations Directorate, Biometrics Task Force, 347 West Main Street, Clarksburg, West Virginia 26306–2947.

For verification purposes, individual should provide full name, sufficient details to permit locating pertinent records, and signature.''

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**A0025–2 SAIS DoD**

**SYSTEM NAME:**

Department of Defense Biometric Information Systems and Army Information Assurance for Automated Information Systems (AIS).

**SYSTEM LOCATION:**

Department of Defense Biometrics Fusion Center, 347 West Main Street, Clarksburg, WV 26306–2947 and at any Department of Defense activity that receives, compares, retains, accesses, or uses biometric technology to recognize the identity or to verify the claimed identity of an individual.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals covered include, but are not limited to, members of the U.S. Armed Forces, DoD civilian and contractor personnel, military reserve personnel, Army and Air National Guard personnel, and other individuals (who are U.S. citizens or aliens lawfully admitted for permanent residence) requiring or requesting access to DoD or DoD controlled information systems and/or DoD or DoD contractor operated, controlled, or secured facilities.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Individual's name, Social Security Number, organization, telephone number, and office symbol; security clearance; level of access; subject interest code; user identification code; data files retained by users; assigned password; magnetic tape reel identification; abstracts of computer programs and names and phone numbers of contributors; similar relevant information; biometrics templates, biometric images, supporting documents, and biographic information including, but not limited to, name, date of birth, place of birth, height, weight, eye color, hair color, race and gender, and similar relevant information.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 113, Secretary of Defense; 10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 8013, Secretary of the Air Force; and E.O.9397(SSN).''

**PURPOSE(S):**

To control logical and physical access to Department of Defense (DoD) DoD and DoD controlled information systems and DoD or DoD contractor operated, controlled, or secured facilities and to support the DoD physical and logical security, force protection, identity management, personnel recovery, and information assurance programs, by identifying an individual or verifying/authenticating the identity of an individual through the use of biometrics (i.e., measurable physiological or behavioral characteristics) for purposes of protecting U.S./Coalition/allied government and/or U.S./Coalition/allied national security areas of responsibility and information.

Information assurance purposes include the administration of passwords and identification numbers for operators/users of data in automated media; identifying data processing and communication customers authorized access to or disclosure from data residing in information processing and/or communication activities; and determining the propriety of individual access into the physical data residing in automated media.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To Federal, State, tribal, local, or foreign agencies, for the purposes of law enforcement, counterterrorism, immigration management and control, and homeland security as authorized by U.S. Law or Executive Order, or for the purpose of protecting the territory, people, and interests of the United States of America against breaches of security related to DoD controlled information or facilities, and against terrorist activities.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper records in file folders and electronic storage media.

**RETRIEVABILITY:**

Name, Social Security Number, subject, application program key, and biometric template, and other biometric data.

**SAFEGUARDS:**

Computerized records maintained in a controlled area are accessible only to authorized personnel. Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Physical and electronic access is restricted to designated individuals having a need therefore in the performance of official duties and who are properly screened and cleared for need-to-know.

**RETENTION AND DISPOSAL:**

Data is destroyed when superseded or when no longer needed for operational purposes, whichever is later.

**SYSTEM MANAGER(S) AND ADDRESS:**

Director, Biometrics Operations Directorate, Biometrics Task Force, 347 West Main Street, Clarksburg, West Virginia 26306–2947, (304) 326–3004.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to Director, Biometrics Operations Directorate, Biometrics Task Force, 347 West Main Street, Clarksburg, West Virginia 26306–2947.

For verification purposes, individual should provide full name, sufficient details to permit locating pertinent records, and signature.

**RECORD ACCESS PROCEDURES:**

Individuals seeking access to information about themselves contained in this system should address written inquiries to Director, Biometrics Operations Directorate, Biometrics Task Force, 347 West Main Street, Clarksburg, West Virginia 26306–2947.

For verification purposes, individual should provide full name, sufficient details to permit locating pertinent records, and signature.

**CONTESTING RECORD PROCEDURES:**

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

From the individual, DoD security offices, system managers, computer facility managers, automated interfaces for user codes on file at Department of Defense sites.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. E8–17318 Filed 7–28–08; 8:45 am]

**BILLING CODE 5001–06–P**

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## DEPARTMENT OF DEFENSE

### Department of the Army

**[Docket ID: USA–2008–0043]**

### Privacy Act of 1974; System of Records

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice To Alter a System of Records.

**SUMMARY:** The Department of the Army is proposing to alter a system of records in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

**DATES:** The proposed action will be effective on August 28, 2008 unless comments are received that would result in a contrary determination.

**ADDRESSES:** Department of the Army, Freedom of Information/Privacy Division, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905.

**FOR FURTHER INFORMATION CONTACT:** Ms. Vicki Short at (703) 428–6508.

**SUPPLEMENTARY INFORMATION:** The Department of the Army systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on July 21, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: July 22, 2008.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer, Department of Defense.*

**A0715–9 DCS, G–4**

**SYSTEM NAME:**

Support Personnel Deployment Records (January 28, 2008, 73 FR 4853).

**CHANGES:**

**ID NUMBER:**

Add to entry ''DoD''.

**SYSTEM NAME:**

Delete entry and replace with ''Synchronized Predeployment and Operational Tracker (SPOT) Records.''

**SYSTEM LOCATION:**

Delete entry and replace with ''U.S. Army Acquisition, Logistics and Technology Enterprise Systems and Services (ALTESS), ATTN: SFAE–PS–ALT–SI, P.O. Box 4, Building 450, RFAAP, Radford, VA 24143–0004.''

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Delete entry and replace with ''Military and civilian employees, dependents, contractors and non-governmental organization personnel, volunteers, partner agencies personnel and members of the public who are supporting planned, ongoing, and historical contingency operations.''

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Delete entry and replace with ''Records include an individual profile containing: Full name of the individual; Social Security Number (SSN) or federal/foreign identification number; home, office, and deployed telephone numbers; home address and deployed address; home, office, and deployed e-mail addresses; emergency contact name and telephone numbers; contract number, contract capabilities and contractor organization name, along with employer's contact name, address, and telephone number; next of kin name, phone and address; air travel itineraries and movements in theater of operations; passport and/or visa number; common access or identification card user identification; clearance level; trip information (e.g., destinations and reservation information); travel authorization documentation (e.g., Government orders or letters of authorization); trip dates; predeployment processing information including training completed certifications, predeployment medical and dental processing completion, blood type; location and duty station; and other official deployment-related information. Records reflecting work experience, educational level achieved, and specialized education or training obtained outside of Federal service.

Records reflecting Federal service and documenting work experience and specialized education received while employed. Such records contain information about past and present positions held; grades, salaries, duty station locations; and notices of all personnel actions, such as appointments, transfers, reassignments, details, promotions, demotions, reductions-in-force, resignations, separations, suspensions, office approval of disability retirement applications, retirement, and removals.''

**AUTHORITY:**

Delete entry and replace with ''10 U.S.C. 3013; National Defense Appropriations Acts (NDAA) 2008, Section 861; Secretary of Defense; DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces; Army Regulation 715–9, Contractors Accompanying the Force and E.O. 9397.''

**PURPOSE(S):**

Delete entry and replace with ''Information will be used to plan, manage, account for, monitor and report on contracts, their capabilities, contractors and other individuals supporting the Federal Government (including civilian and military) during planning and operation of any contingency activity. This information will be used to analyze and correlate relationships between requirements and planned actions. Information will also be used to support Department of Defense, Department of State, other federal agencies and the private sector.''

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Add to entry ''To Federal, State, and local agencies, federal contractors and applicable civilian organizations to account for personnel located in a contingency area to determine status of processing and deployment documentation, current and historical locations, organizations they work for and contact information.''

**SAFEGUARDS:**

Delete entry and replace with ''Computerized records are maintained in a controlled area accessible only to authorized personnel. Entry to these areas is restricted to those personnel with a valid requirement and authorization to enter. Physical entry is restricted by the use of lock, guards, and administrative procedures. Access to any specific record is based on the need-to-know and the specific level of authorization granted to the user. Physical and electronic access is restricted to designated individuals having a need-to-know in the performance of official duties. Access to personal information is further restricted by the use of login/password authorization. Information is accessible only by authorized personnel with appropriate clearance/access in the performance of their duties.''

**SYSTEM MANAGER(S) AND ADDRESS:**

Delete entry and replace with ''Commander, U.S. Army Materiel Command, Plans & Operations Division, AMCOPS–CP, 9301 Chapek Road, Ft. Belvoir, VA 22060.''

**NOTIFICATION PROCEDURE:**

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to Commander, U.S. Army Materiel Command, Plans & Operations Division, AMCOPS–CP, 9301 Chapek Road, Ft. Belvoir, VA 22060.

Request should contain individual's full name, Social Security Number (SSN), current address, telephone number, when and where the accident occurred, type of equipment involved in the accident, and signature.''

**RECORD ACCESS PROCEDURES:**

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to their employer or to Commander, U.S. Army Materiel Command, Plans & Operations Division, 9301 Chapek Road, Ft. Belvoir, VA 22060.

Requests should contain the individual's full name, social security number (SSN), current address, telephone number, when and where

they were assigned during the contingency and their signature.''

* * * * *

**RECORD SOURCE CATEGORIES:**

Delete entry and replace with ''Records and reports of contingency contracts, contingency support, contractors authorized to accompany the U.S. Armed Forces, and known locations in a Joint Operational Area.''

* * * * *

**A0715–9 DCS, G–4 DoD**

**SYSTEM NAME:**

Synchronized Predeployment and Operational Tracker (SPOT) Records.

**SYSTEM LOCATION:**

U.S. Army Acquisition, Logistics and Technology Enterprise Systems and Services (ALTESS), ATTN: SFAE–PS–ALT–SI, P.O. Box 4, Building 450, RFAAP, Radford, VA 24143–0004 or similar certified Defense/Federal Network Enclave facility.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Military and civilian employees, dependents, contractors and non-governmental organization personnel, volunteers, partner agencies personnel and members of the public who are supporting planned, ongoing, and historical contingency operations.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Records include an individual profile containing: Full name of the individual; Social Security Number or federal/foreign identification number; home, office, and deployed telephone numbers; home address and deployed address; home, office, and deployed e-mail addresses; emergency contact name and telephone numbers; contract number, contract capabilities and contractor organization name, along with employer's contact name, address, and telephone number; next of kin name, phone and address; air travel itineraries and movements in theater of operations; passport and/or visa; common access or identification card user identification; clearance level; trip information (e.g., destinations, reservation information); travel authorization documentation (e.g., Government orders or letters of authorization); trip dates; predeployment processing information including training completed certifications, medical and dental screenings, blood type; location and duty station; and other official deployment-related information.

Records reflecting work experience, educational level achieved, and specialized education or training obtained outside of Federal service.

Records reflecting Federal service and documenting work experience and specialized education received while employed. Such records contain information about past and present positions held; grades, salaries, duty station locations; and notices of all personnel actions, such as appointments, transfers, reassignments, details, promotions, demotions, reductions-in-force, resignations, separations, suspensions, office approval of disability retirement applications, retirement, and removals.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 3013; National Defense Appropriations Acts (NDAA) 2008, Section 861; Secretary of Defense; DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces; Army Regulation 715–9, Contractors Accompanying the Force and E.O. 9397.

**PURPOSE(S):**

Information will be used to plan, manage, account for, monitor and report on contracts, their capabilities, contractors and other individuals supporting the Federal Government (including civilian and military) during planning and operation of any contingency activity. This information will be used to analyze and correlate relationships between requirements and planned actions. Information will also be used to support Department of Defense, Department of State, other federal agencies and the private sector.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To Federal, State, and local agencies, federal contractors and applicable civilian organizations to account for personnel located in a contingency area to determine status of processing and deployment documentation, current and historical locations, organizations they work for and contact information.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Electronic storage media.

**RETRIEVABILITY:**

Name and Social Security Number (SSN).

**SAFEGUARDS:**

Computerized records are maintained in a controlled area accessible only to authorized personnel. Entry to these areas is restricted to those personnel with a valid requirement and authorization to enter. Physical entry is restricted by the use of lock, guards, and administrative procedures. Access to any specific record is based on the need-to-know and the specific level of authorization granted to the user. Physical and electronic access is restricted to designated individuals having a need-to-know in the performance of official duties. Access to personal information is further restricted by the use of login/password authorization. Information is accessible only by authorized personnel with appropriate clearance/access in the performance of their duties. Records retrieved from SPOT only portray the last four digits of the Social Security Number (SSN).

**RETENTION AND DISPOSAL:**

Permanent. Keep until individual's final deployment is terminated and then retire to the Army Electronic Archives (AEA). The AEA will transfer to the National Archives when the record is 25 years old.

**SYSTEM MANAGER(S) AND ADDRESS:**

Commander, U.S. Army Materiel Command, Plans & Operations Division, AMCOPS–CP, 9301 Chapek Road, Ft. Belvoir, VA 22060.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the system manager.

Requests should contain the individual's full name, social security number (SSN), current address, telephone number, when and where they were assigned during the contingency and signature.

**RECORD ACCESS PROCEDURES:**

Individuals seeking access to information about themselves contained in this system should address written inquiries to their employer or to the System Manager.

Requests should contain the individual's full name, Social Security Number (SSN), current address, telephone number, when and where they were assigned during the contingency and signature.

**CONTESTING RECORD PROCEDURES:**

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505.

**RECORD SOURCE CATEGORIES:**

Records and reports of contingency contracts, contingency support, contractors authorized to accompany the U.S. Armed Forces, and known locations in a Joint Operational Area.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

[FR Doc. E8–17320 Filed 7–28–08; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### Department of the Army

**[Docket ID: USA–2008–0045]**

### Privacy Act of 1974; System of Records

**AGENCY:** Department of the Army, DoD.

**ACTION:** Notice to Amend a System of Records.

**SUMMARY:** The Department of the Army is amending a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

**DATES:** This proposed action will be effective without further notice on August 28, 2008 unless comments are received which result in a contrary determination.

**ADDRESSES:** Department of the Army, Freedom of Information/Privacy Division, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905.

**FOR FURTHER INFORMATION CONTACT:** Ms. Vicki Short at (703) 428–6508.

**SUPPLEMENTARY INFORMATION:** The Department of the Army systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: July 22, 2008.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer, Department of Defense.*

### A0210–7 DAMO

**SYSTEM NAME:**

Expelled or Barred Person Files (February 22, 1993, 58 FR 10002).

**CHANGES:**

* * * * *

**CATEGORY OF RECORDS:**

Delete entry and replace with ''Name of individual, Social Security Number (SSN), expulsion orders or debarment actions, investigative reports and supporting documents.''

* * * * *

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Delete entry and replace with ''10 U.S.C. 3013, Secretary of the Army; 18 U.S.C. 1382; Entering military, naval, or Coast Guard property; Army Regulation 210–7, Personal Commercial Solicitation on Army Installations; and E.O. 9397 (SSN).''

**PURPOSE(S):**

Delete entry and replace with ''To assist the commander in prohibiting any person from entering or reentering any military installation for any purpose prohibited by law.''

* * * * *

**STORAGE:**

Paper records in file folders and electronic storage media.

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### A0210–7 DAMO

**SYSTEM NAME:**

Expelled or Barred Person Files.

**SYSTEM LOCATION:**

Records are maintained at the Army installation initiating the expulsion or debarment action.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Any citizen who is expelled or barred from an Army installation.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Name of individual, Social Security Number (SSN), expulsion orders or debarment actions, investigative reports and supporting documents.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

10 U.S.C. 3013, Secretary of the Army; 18 U.S.C. 1382; Entering military, naval, or Coast Guard property; Army Regulation 210–7, Personal Commercial Solicitation on army Installations; and E.O. 9397 (SSN).

**PURPOSE(S):**

To assist the commander in prohibiting any person from entering or reentering any military installation for any purpose prohibited by law.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'Blanket Routine Uses' set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper records in file folders and electronic storage media.

**RETRIEVABILITY:**

By individual's name.

**SAFEGUARDS:**

Distribution and access to files are based on strict need-to-know. Physical security measures include locked containers/storage areas, controlled personnel access, and continuous presence of authorized personnel.

**RETENTION AND DISPOSAL:**

Destroyed on revocation or upon discontinuance.

**SYSTEM MANAGER(S) AND ADDRESS:**

Deputy Chief of Staff for Operations and Plans, ATTN: DAMO–ODL, Headquarters, Department of the Army, Washington, DC 20310–0440.

**NOTIFICATION PROCEDURE:**

Individuals seeking to determine whether information about themselves is contained in this system should address written inquires to the Deputy Chief of Staff for Operations and Plans, ATTN: DAMO–ODL, Headquarters, Department of the Army, Washington, DC 20310–0440.

Individual should provide the full name, Social Security Number, address, details concerning the expulsion or debarment action, and signature.

**RECORD ACCESS PROCEDURES:**

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Deputy Chief of Staff for Operations and Plans, ATTN: DAMO–ODL, Headquarters, Department of the Army, Washington, DC 20310–0440.

Individual should provide the full name, Social Security Number, address, details concerning the expulsion or debarment action, and signature.

**CONTESTING RECORD PROCEDURES:**

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager.

**RECORD SOURCE CATEGORIES:**

Subjects, witnesses, victims, Military Police and U.S. Army Criminal Investigations Command personnel and special agents, informants, various Department of Defense, federal, state and local investigative and law enforcement agencies, departments or agencies of foreign governments; and any other individuals or organizations which may supply pertinent information.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency that performs as its principle function any activity pertaining to the enforcement of criminal laws.

An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 505. For additional information contact the system manager.

[FR Doc. E8–17322 Filed 7–28–08; 8:45 am]

**BILLING CODE 5001–06–P**

## DEPARTMENT OF DEFENSE

### United States Army Corps of Engineers

### Solicitation for Public Sector Nominations To Serve on the Committee on Levee Safety

**AGENCY:** United States Army Corps of Engineers, DoD.

**ACTION:** Solicitation of Nominations, Public Sector.

**SUMMARY:** The U.S. Army Corps of Engineers (USACE) is soliciting nominations from the private sector to serve on the Committee on Levee Safety. The Water Resources Development Act (WRDA) of 2007 requires formation of a sixteen member Committee on Levee Safety (Committee) charged with developing recommendations for a national levee safety program, including a strategic implementation plan. Two representatives of the private sector will be selected to serve on the Committee.

**DATES:** Submit nominations on or before August 18, 2008.

**ADDRESSES:** Nominations shall be submitted to: U.S. Army Corps of Engineers, Headquarters, Attention: Mr. Eric Halpin, Special Assistant for Levee and Dam Safety (CECW–CE), 441 G Street, NW., Washington, DC 20314.

**FOR FURTHER INFORMATION CONTACT:** Ms. Tammy Conforti, 202–761–4649.

**SUPPLEMENTARY INFORMATION:** On November 8, 2007, the Water Resources Development Act (WRDA) of 2007 was enacted into law. Title IX of this WRDA, cited as the National Levee Safety Act of 2007 (the Act), involves development of a strategic plan for a national levee safety program, in addition to, inventory and inspection of levees. The initial step will be formation of a sixteen member ''Committee on Levee Safety,'' (Committee) charged with developing recommendations for a national levee safety program, including a strategic implementation plan. Recommendations shall address the nine program goals named in the Act. Committee membership will include the Secretary of the Army, or the Secretary's designee as Chairperson; the Administrator of the Federal Emergency Management Agency (FEMA) or the Administrator's designee; eight representatives of state levee safety agencies; two representatives of the private sector; two representatives of local and regional governmental agencies; and two representatives of Indian tribes.

The purpose of this notice is to solicit nominations for the private sector representatives. A private sector representative is defined as a person who is not an employee of a Federal, state, local, regional government or Indian tribe, with experience in levee safety. Nominees not selected as a Committee member may be given the opportunity to be on the review team for the strategic implementation plan. Potential review team members will be contacted by Headquarters of the U.S. Army Corps of Engineers (HQUSACE) at a later time.

The expected time commitment for Committee members is two years, with no financial compensation, except for travel. Review team members will serve without compensation. It is estimated that most of the time commitment will be to develop the strategic implementation plan within the first six months. The remaining 18 months will consist mainly of responding to comments or expanding recommendations for implementation. Total labor time is estimated to be a 75% time commitment in the first year, including approximately 16 meetings, and a 15% time commitment in the second year, including quarterly meetings. The review team will provide independent review of the strategic implementation plan developed by the Committee in the first year.

**Committee on Levee Safety: Criteria and Nomination Package**

*I. Definitions*

A. Levee: The term ''levee'' is defined in the Act as ''an embankment, including floodwalls'' in which,

○ The primary purpose of which is to provide hurricane, storm, or flood damage reduction relating to seasonal high water, storm surges, precipitation and other weather events;

○ Normally is subject to water loading for only a few days or weeks during a year; and,

○ Does not constitute a barrier across a watercourse, such as a dam.

○ A Federal levee is defined as a system owned and operated by any Federal agency. A non-Federal levee is defined as a system operated and maintained by a non-Federal agency or entity.

B. Expertise in Levee Safety: Demonstrates experience in,

○ The design and construction of levees or;

○ The inspection of levees or;

○ The operation and maintenance of levees or;

○ The emergency response associated with levees or;

○ The management/analysis of the risk and consequences associated with levees or;

○ The repair and rehabilitation of levees or;

○ The planning and policy development for flood damage reduction projects.

*II. Nomination Package*

Each nomination package should be no more than 5 pages and include,

A. A resume showing the following:

○ Years of experience in specific technical areas and a description of that experience.

○ Breadth of responsibility in levee safety (description of the levee safety program the nominee has experience with including the number of miles of levees, population at risk, etc.).

○ Professional registrations and/or certifications.

○ Level of education.

○ Membership and activity in professional organizations.

○ Leadership and management experience.

○ Public communication experience.

○ Additional applicable experience.

B. A short description of the entity the person nominated is representing.

C. A written statement explaining why the person nominated should be selected.

D. Acknowledgement from the nominee that they will accept a two year commitment to serve on the Committee without compensation, other than for travel expenses and per diem.

*III. Selection Criteria*

Selections will be made based on professional expertise, technical background, and leadership and communication experience. Final Committee members will receive information on the first Committee meeting with their official selection letter. Nominees will be notified by September 30, 2008.

Dated: July 23, 2008.

**Eric Halpin,**

*Special Assistant for Levee and Dam Safety.*

[FR Doc. E8–17341 Filed 7–28–08; 8:45 am]

BILLING CODE 3710–92–P

## DEPARTMENT OF ENERGY

### Fusion Energy Sciences Advisory Committee

### Notice of Open Meeting Cancellation

**AGENCY:** Department of Energy, Office of Science.

**ACTION:** Notice of open meeting cancellation.

On June 25, 2008, the Department of Energy published a notice of open meeting announcing an August 4–5, 2008, meeting of the Fusion Energy Sciences Advisory Committee 73 FR 36065.

Today's notice is announcing the cancellation of that meeting.

Issued in Washington, DC, on July 23, 2008.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. E8–17339 Filed 7–28–08; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

July 23, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Numbers:* RP08–448–000.
*Applicants:* Trailblazer Pipeline Company LLC.
*Description:* Trailblazer Pipeline Company LLC submits report on the refund of penalty revenues.
*Filed Date:* 07/18/2008.
*Accession Number:* 20080721–0047.
*Comment Date:* 5 p.m. Eastern Time on Wednesday, July 30, 2008.

*Docket Numbers:* RP08–449–000.
*Applicants:* Transcontinental Gas Pipeline Corporation.
*Description:* Transcontinental Gas Pipe Line Corporation submits Fifth Revised Sheet 134, Seventh Revised Sheet 135F, & Third Revised Sheet 135G to its FERC Gas Tariff, Third Revised Volume 1, to be effective 8/20/08.
*Filed Date:* 07/21/2008.
*Accession Number:* 20080722–0093.
*Comment Date:* 5 p.m. Eastern Time on Monday, August 4, 2008.

*Docket Numbers:* RP08–450–000.
*Applicants:* Northwest Pipeline GP.
*Description:* Northwest Pipeline GP submits First Revised Sheet 395 *et al.* of its FERC Gas Tariff, Fourth Revised Volume 1.
*Filed Date:* 07/21/2008.
*Accession Number:* 20080722–0094.
*Comment Date:* 5 p.m. Eastern Time on Monday, August 4, 2008.

*Docket Numbers:* RP08–451–000.
*Applicants:* NiSource Gas Transmission and Storage.
*Description:* Request of NiSource Gas Transmission and Storage for Temporary Waiver Capacity Release Requirements.
*Filed Date:* 07/22/2008.
*Accession Number:* 20080722–5097.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, July 29, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. E8–17344 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PF07–13–000]**

### Palomar Gas Transmission, LLC; Supplemental Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Palomar Gas Transmission Project and Request for Comments on Environmental Issues Related to an Alternative Pipeline Route Under Consideration

July 18, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) is preparing an environmental impact statement (EIS) that will discuss the environmental impacts of the Palomar Gas Transmission Project that could result from the construction and operation of a new underground natural gas pipeline proposed by the Palomar Gas Transmission, LLC (PGT). This notice 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 which issues need to be evaluated in the EIS. Please note that the scoping period for the project will close on August 18, 2008. This is not your only opportunity to provide comments. Please refer to the Pre-filing Environmental Review Process flow chart in Appendix 1 for future public input opportunities.

An initial Notice of Intent (NOI) for this Project was issued by the FERC on October 29, 2007. Since that time, PGT has been requested by the City of Molalla to consider an alternative route south of the City's study area for potential future expansion of the urban growth boundary. This route would also facilitate a horizontal directional drilling (HDD) crossing of the Molalla River. With this NOI, we [1] are specifically requesting comments on this alternative, referred to as the Herman Road Alternative.

Comments may be submitted in written form or verbally. In lieu of, or in addition to, sending written comments, you are invited to attend a public scoping meeting that has been scheduled in the project area. This meeting is scheduled to be held at 7 p.m. on August 5, 2008, at the Molalla High School Commons in Molalla, Oregon. 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 is the lead federal agency in the preparation of the EIS, and is preparing the EIS to satisfy the requirements of the National Environmental Policy Act (NEPA). The Commission will use the EIS in its decision-making processes to determine whether or not to authorize the Project.

This NOI is being sent to landowners affected by the current proposed route; landowners affected by the Herman Road Alternative; 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 a PGT representative about the acquisition of an easement to construct, operate, and maintain the proposed Project facilities. Depending on the alternative selected as the certificated route, PGT 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, the pipeline company could initiate condemnation proceedings in accordance with state law.

A number of fact sheets prepared by the FERC, including ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' and ''Guide to Electronic Information at FERC,'' are available for viewing on the FERC Internet Web site (*www.ferc.gov*), using the ''For Citizens'' link. These fact sheets address a number of typically asked questions including how to participate in the Commission's proceedings and how to access information on FERC-regulated projects in your area.

#### Involvement of Other Agencies

The U.S. Department of Agriculture, Forest Service, the Bureau of Land Management, and the U.S. Army Corps of Engineers have agreed to participate as cooperating agencies in the preparation of the EIS to satisfy their respective NEPA responsibilities.

#### Summary of the Proposed Project

PGT has announced its proposal to construct and operate a new natural gas pipeline and associated structures with a bi-directional flow capacity of 1.4 billion cubic feet per day. The project would be located in northwest Oregon and consist of a 211-mile-long, 36-inch-diameter pipeline running from near Shaniko, Wasco County, Oregon, to the Bradwood sendout pipeline in Clatsop County, Oregon. The pipeline would travel across Wasco, Clackamas, Marion, Yamhill, Washington, Columbia, and Clatsop Counties in Oregon. The pipeline would connect the existing Gas Transmission Northwest Corporation (GTN) mainline pipeline system in central Oregon to the Northwest Natural Gas Company (NW Natural) distribution system near Molalla in Clackamas County. The pipeline is also proposed to extend to other potential interconnections with NW Natural's system and to an interconnection with NorthernStar Energy, LLC's proposed Bradwood Landing pipeline in Clatsop County, Oregon. The proposed project would also include a 3.8-mile-long, 36-inch-diameter lateral pipeline [2] near Molalla, Clackamas County, Oregon, to connect the PGT Project mainline to an existing NW Natural city gate. Certain associated aboveground facilities are also proposed, i.e., mainline valves spaced at intervals along the pipeline as defined by U.S. Department of Transportation regulations per the Code of Federal Regulations (CFR) 49 Part 192, at least three meter stations, and pig launcher and receiver facilities. At this time, PGT does not anticipate that compression will be required for this project.

*More specifically, PGT proposes the following primary project components:*

- A 211-mile-long, 36-inch diameter underground natural gas mainline consisting of two segments:
- *The Cascades Segment:* A 108.5-mile of mainline from TransCanada's GTN pipeline system northwest of Madras in Wasco County to a location southwest of Molalla in Clackamas County; and a 3.8-mile, 36-inch diameter accessory lateral pipeline, the Molalla Lateral, which will connect the main pipeline to NW Natural's distribution system;
- *The Willamette Segment:* A 102.5-mile segment commencing at the Molalla Lateral interconnect and terminating at the proposed connection to the Bradwood Landing sendout pipeline in Clatsop County; there is potential for additional interconnections with NW Natural along this route;
- Two meter stations, eight mainline valves, and two pig launchers/receivers on Segment I; one pig launcher/receiver

[1] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the FERC's Office of Energy Projects.

[2] A lateral pipeline typically takes gas from the main system to deliver it to a customer, local distribution system, or another interstate transmission system.

on the Molalla Lateral; and one meter station, seven mainline valves, and one pig launcher/receiver on Section II;

• Temporary pipe storage and contractor yards at various locations along the pipeline for office trailers, parking, and pipe and equipment storage during construction; and

• Temporary construction roadways and short permanent roads from existing roads to meter station sites and other aboveground facilities.

In addition, PGT is evaluating an alternative pipeline route south of the City of Molalla's study area for potential future expansion of the urban growth boundary, referred to as the Herman Road Alternative. The Herman Road Alternative is approximately 5.1 miles long, or 0.2 mile longer than the corresponding current route segment and is located adjacent to an existing right-of-way (Herman Road) for about 0.9 mile. No addition valves, meter stations, or pig launchers/receivers would be required if this alternative is selected.

A map depicting PGT's proposed facilities is attached to this NOI as Appendix 2. A map depicting the Herman Road Alternative and the corresponding current route segment is attached to this NOI as Appendix 3.[3]

**The EIS Process**

Although no formal application has been filed with the FERC, we have initiated our NEPA review under the FERC's Pre-Filing Process. 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.

NEPA requires the Commission to take into account the environmental impacts that could result from an action when it considers whether or not a natural gas pipeline should be approved. FERC will use the EIS to consider the environmental impacts that could result if it issues project authorizations to PGT under Sections 3 and 7 of the Natural Gas Act. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of scoping is to focus the analysis in the EIS on the important environmental issues. With this NOI, the Commission staff is requesting public comments on the scope of the issues to be addressed in the EIS. All comments received will be considered during preparation of the EIS.

In the EIS we will discuss impacts that could occur as a result of the construction, operation, and maintenance of the proposed project under these general headings:

• Geology and soils.
• Water resources.
• Aquatic resources.
• Vegetation and wildlife.
• Threatened and endangered species.
• Land use, recreation, and visual resources.
• Cultural resources.
• Socioeconomics.
• Air quality and noise.
• Reliability and safety.
• Cumulative impacts.

In the EIS, we will also evaluate possible alternatives to the proposed project or portions of the project (including the Herman Road Alternative), and make recommendations on how to lessen or avoid impacts on affected resources.

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; affected landowners; environmental and public interest groups; Indian tribes and regional Native American organizations; commentors; other interested parties; local libraries and newspapers; and FERC's official service list for this proceeding. There will be, at a minimum, a 45-day comment period allotted for review of the draft EIS. We will consider all comments on the draft EIS and revise the document, if necessary, before issuing a final EIS. We will consider all comments on the final EIS before we make our recommendations to the Commission. To ensure that your comments are considered, please follow the instructions in the Public Participation section of this NOI.

**Public Participation**

You can make a difference by providing us with your specific comments or concerns about the Herman Road Alternative. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen the environmental impact of the Herman Road Alternative. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in you comments so that they will be received in Washington, DC, on or before August 15, 2008.

For your convenience, there are three methods in which you can use to submit your comments to the Commission. In all instances please reference the project docket number Docket No. PF07–13–000 with your submission. The docket number can be found on the front of this notice. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at 202–502–8258 or *efiling@ferc.gov.*

1. You may file your comments electronically by using the Quick Comment feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to Documents and Filings. A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

2. You may file your comments electronically by using the eFiling feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to Documents and Filings. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. 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. A comment on a particular project is considered a ''Comment on a Filing;'' or

3. You may file your comments via mail to the Commission by sending 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/DG2E/Gas Branch, PJ–11.2.

• Reference Docket No. PF07–13–000 on the original and both copies.

The scoping meeting is scheduled to be held at 7 p.m. on August 5, 2008 at: Molalla High School Commons, 357 Frances Street, Molalla, OR 97083.

**Environmental Mailing List**

Everyone who provides comments on this Supplemental NOI 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 4). Also, indicate on the form your preference for receiving a

[3] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies can be obtained from the Commission's Web site (excluding maps) at the ''eLibrary'' link, from the Commission's Public Reference Room, or by calling (202) 502–8371. For instructions on connecting to eLibrary, refer to the end of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

paper version of the EIS in lieu of an electronic version of the EIS on CD–ROM. If you have previously submitted comments or returned a Mailing List Retention Form you are already on our mailing list and do not need to resubmit comments or a Mailing List Retention Form.

**Additional Information**

Once PGT 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.

Additional information about the Project is available from the Commission's Office of External Affairs at 1–866–208 FERC (3372) 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.*, PF07–15). 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 rulemakings.

In addition, the FERC now 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.

Finally, PGT has established a Web site for this project at *http://www.palomargas.com/project.html.* The Web site includes a project overview, timeline, safety and environmental information, and answers to frequently asked questions. You can also request additional information by e-mailing PGT directly at *info@palomargas.com* or writing to: Palomar Gas Transmission, 1400 SW. Fifth Avenue, Suite 900, Portland, Oregon 97225.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17302 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. ER05–1432–006; EL06–2–006]**

### Entergy Services, Inc.; Notice of Filing

July 22, 2008.

Take notice that on June 19, 2008, Entergy Services, Inc. on behalf of the Entergy Operating Companies tendered for filing its refund report.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on August 1, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17278 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER08–1258–000]**

### New York Independent System Operator, Inc.; Notice of Filing

July 22, 2008.

Take notice that on July 14, 2008, the New York Independent System Operator, Inc. tendered for filing to formally report two instances in which the NYISO inaccurately calculated bid-based reference levels for generators and request for tariff waivers.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call

(866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on August 4, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17279 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER08–1281–000]**

### New York Independent System Operator, Inc.; Notice of Filing

July 22, 2008.

Take notice that on July 21, 2008, the New York Independent System Operator, Inc. tendered for filing its Exigent Circumstances Filing Requesting Authority to Amend its Tariffs to Preclude the Scheduling of Certain External Transactions, Requesting Prospective Limited Tariff Waivers, Seeking Expedited Commission Act, Requesting Shortened Notice and Comment Periods and Contingent Request for Consideration Under Section 206 of the Federal Power Act.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on August 1, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17280 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. RR07–16–004]**

### North American Electric, Reliability Corporation; Notice of Filing

July 22, 2008.

Take notice that on July 21, 2008, the North American Electric Reliability Corporation tendered for filing additional information, directed to NERC, of its business plans and budgets of the eight Regional Entities in compliance with the Commission'sJune 19, 2008 Order.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 pm Eastern Time on August 11, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17277 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of FERC Staff Attendance at Southwest Power Pool Independent Coordinator of Transmission (ICT) Transmission Summit Meeting

July 22, 2008.

The Federal Energy Regulatory Commission hereby gives notice that members of its staff may attend the meeting noted below. Their attendance is part of the Commission's ongoing outreach efforts.

**ICT Transmission Summit**

July 29, 2008 ( 8 a.m.–3 p.m. CST), Astor Crowne Plaza Hotel, 729 Canal Street,New Orleans, LA 70130.

The discussions may address matters at issue in the following proceedings:

| | |
|---|---|
| Docket No. EL07–52 | *Louisiana Public Service Commission* v. *Entergy Services, Inc.* |
| Docket No. OA07–32 | Entergy Services, Inc. |
| Docket No. ER05–1065 | Entergy Services, Inc. |
| Docket No. EL00–66 | *Louisiana Public Service Commission* v. *Entergy* |
| Docket No. EL95–33 | *Louisiana Public Service Commission* v. *Entergy* |
| Docket No. ER00–2854 | *Louisiana Public Service Commission* v. *Entergy* |
| Docket No. EL05–15 | *Arkansas Electric Cooperative, Corp.* v. *Entergy Arkansas, Inc.* |
| Docket No. ER08–845 | Entergy Services, Inc. |
| Docket No. ER08–844 | Entergy Services, Inc. |

| | |
|---|---|
| Docket No. EL01–88 | *Louisiana Public Service Commission* v. *Entergy* |
| Docket No. ER08–885 | Entergy Gulf States Louisiana, LLC |
| Docket No. ER03–583 | Entergy Services, Inc. |
| Docket No. ER08–879 | Entergy Services, Inc. |
| Docket No. ER01–2214 | Entergy Services, Inc. |
| Docket No. ER07–628 | Entergy Arkansas, Inc. |
| Docket No. ER07–629 | Entergy Arkansas, Inc. |
| Docket No. ER07–630 | Entergy Arkansas, Inc. |
| Docket No. EL08–59 | *ConocoPhillips* v. *Entergy Services, Inc.* |
| Docket No. EL08–60 | *Union Electric* v. *Entergy Services, Inc.* |
| Docket No. ER08–750 | Entergy Services, Inc. |
| Docket No. ER08–751 | Entergy Services, Inc. |
| Docket No. ER08–752 | Entergy Services, Inc. |
| Docket No. OA08–92 | Entergy Services, Inc. |
| Docket No. OA08–75 | Entergy Services, Inc. |
| Docket No. ER08–572 | Entergy Services, Inc. |
| Docket No. ER08–927 | Entergy Services, Inc. |
| Docket No. OA08–59 | Entergy Services, Inc. |
| Docket No. ER07–1252 | Entergy Services, Inc. |
| Docket No. EL03–230 | *ExxonMobil* v. *Entergy.* |
| Docket No. ER08–774 | Entergy Services, Inc. |
| Docket No. ER08–1006 | Entergy Services, Inc. |
| Docket No. ER08–1078 | Entergy Services, Inc. |
| Docket No. ER08–1079 | Entergy Services, Inc. |
| Docket No. ER08–1040 | Entergy Services, Inc. |
| Docket No. ER08–1041 | Entergy Services, Inc. |
| Docket No. ER08–1056 | Entergy Services, Inc. |
| Docket No. ER08–1057 | Entergy Services, Inc. |
| Docket No. ER08–1075 | Entergy Services, Inc. |
| Docket No. ER08–682 | Entergy Services. Inc. |
| Docket No. EL08–72 | *NRG Energy, Inc.* v. *Entergy Services, Inc.* |

These meetings are open to the public.

For more information, contact Doug Roe, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–6566 or *douglas.roe@ferc.gov.*

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17282 Filed 7–28–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 13179–000; Project No. 13180–000]**

## FFP Missouri; FFP Missouri 2, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

July 22, 2008.

On April 18, 2008, FFP Missouri 1, LLC and FFP Missouri 2, LLC (Free Flow Power Corporation) each filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Missouri River 1 and the Missouri River 2 Projects, to be located in the Missouri River in St. Charles and St. Louis Counties, Missouri.

The proposed Missouri River 1 project consists of: (1) 2,760 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 55.2-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River 1 Project would have an average annual generation of 241,776-gigawatt-hours and be sold to a local utility.

The proposed Missouri River 2 project consists of: (1) 3,180 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 63.6-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River Project 2 would have an average annual generation of 278,568-gigawatt-hours and be sold to a local utility.

*Applicant Contact:* Mr. Daniel R. Irwin, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930, phone: 978–232–3536.

*FERC Contact:* Patricia W. Gillis (202) 502–8735.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's website under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13179 or P–13180) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17284 Filed 7–28–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13188–000; Project No. 13189–000]**

### FFP Missouri 10, LLC, FFP Missouri 11, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

July 22, 2008.

On April 18, 2008, FFP Missouri 10, LLC and FFP Missouri 11, LLC (Free Flow Power Corporation) each filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Missouri River 10 and the Missouri River 11 Projects, to be located in the Missouri River in Warren and Franklin Counties, Missouri.

*The proposed Missouri River 10 project consists of:* (1) 4,620 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 92.4-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River 10 Project would have an average annual generation of 404,712-gigawatt-hours and be sold to a local utility.

*The proposed Missouri River 11 project consists of:* (1) 3,720 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 72-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River 11 Project would have an average annual generation of 404,712-gigawatt-hours and be sold to a local utility.

*Applicant Contact:* Mr. Daniel R. Irwin, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930, phone: 978–232–3536.

*FERC Contact:* Patricia W. Gillis (202) 502–8735.

*Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications:* 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13188 or P–13189) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17289 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13181–000; Project No. 13182–000]**

### FFP Missouri 3, LLC, FFP Missouri 4, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

July 22, 2008.

On April 18, 2008, FFP Missouri 3, LLC and FFP Missouri 4, LLC (Free Flow Power Corporation) each filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Missouri River 3 and the Missouri River 4 Projects, to be located in the Missouri River in St. Charles and St. Louis Counties, Missouri.

*The proposed Missouri River 3 project consists of:* (1) 2,520 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 50.4-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River Project 3 would have an average annual generation of 220,752-gigawatt-hours and be sold to a local utility.

*The proposed Missouri River 4 project consists of:* (1) 2,820 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 56.4-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River Project 4 would have an average annual generation of 247,032-gigawatt-hours and be sold to a local utility.

*Applicant Contact:* Mr. Daniel R. Irwin, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930, phone: 978–232–3536.

*FERC Contact:* Patricia W. Gillis (202) 502–8735.

*Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications:* 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, FederalEnergy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13181 or P–13182) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17285 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

July 22, 2008.

| | Project No. |
|---|---|
| FFP Missouri 5, LLC ..... | 13183–000 |
| FFP Missouri 6, LLC ..... | 13184–000 |

On April 18, 2008, FFP Missouri 5, LLC and FFP Missouri 6, LLC (Free Flow Power Corporation) each filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Missouri River 5 and the Missouri River 6 Projects, to be located in the Missouri River in St. Charles and St. Louis Counties, Missouri.

The proposed Missouri River 5 project consists of: (1) 3,420 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 68.4-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River Project 5 would have an average annual generation of 299,592-gigawatt-hours and be sold to a local utility.

The proposed Missouri River 6 project consists of: (1) 2,280 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 45.6-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River Project 4 would have an average annual generation of 199,728-gigawatt-hours and be sold to a local utility.

*Applicant Contact:* Mr. Daniel R. Irwin, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930, phone: 978–232–3536.

*FERC Contact:* Patricia W. Gillis (202) 502–8735.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13183 or P–13184) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17286 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13185–000]**

### FFP Missouri 7, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

July 22, 2008.

On April 18, 2008, FFP Missouri 7 (Free Flow Power Corporation) filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Missouri River 7 Project, to be located in the Missouri River in St. Charles and St. Louis Counties, Missouri.

The proposed Missouri River 7 project consists of: (1) 2,220 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 44.4-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River Project 5 would have an average annual generation of 199,728-gigawatt-hours and be sold to a local utility.

*Applicant Contact:* Mr. Daniel R. Irwin, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930, phone: 978–232–3536.

*FERC Contact:* Patricia W. Gillis (202) 502–8735.

*Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications:* 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13185) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17287 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13186–000; Project No. 13187–000]**

### FFP Missouri 8, LLC, FFP Missouri 9, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

July 22, 2008.

On April 18, 2008, FFP Missouri 8, LLC and FFP Missouri 9, LLC (Free Flow Power Corporation) each filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Missouri River 8 and the Missouri River 9 Projects, to be located in the Missouri River in St. Charles and Franklin Counties, Missouri.

*The proposed Missouri River 8 project consists of:* (1) 1,920 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 38.4-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River Project 8 would have an average annual generation of 168,192-gigawatt-hours and be sold to a local utility.

*The proposed Missouri River 9 project consists of:* (1) 3,720 proposed 20-kilowatt Free Flow generating units having a total installed capacity of 74.4-megawatts, (2) a mooring system, (3) a proposed transmission line, and (4) appurtenant facilities. The proposed Missouri River Project 9 would have an average annual generation of 325,872-gigawatt-hours and be sold to a local utility.

*Applicant Contact:* Mr. Daniel R. Irwin, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930, phone: 978–232–3536.

*FERC Contact:* Patricia W. Gillis (202) 502–8735.

*Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications:* 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically

via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13186 or P–13187) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17288 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. IS05–230–000]**

### SFPP, L.P.; Notice of Suspension of Procedural Schedule

July 22, 2008

On July 17, 2008 all parties in the above-captioned proceeding filed pursuant to Rule 212 of the Commissions Rules of Practice and Procedure, a Joint Motion to Suspend Paper Hearing Procedural Schedule and Request for Expedited Action. That filing advised the Commission that a limited settlement had been reached on the return on equity issues in the above-captioned proceeding. The parties also stated that therefore there was no further need to proceed with the hearing schedule that had been established in the above-captioned proceeding and requested that the hearing schedule be suspended. Notice is hereby given that the hearing schedule established in Docket No. IS05–230–000 is suspended until further action by the Commission.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17281 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. OR96–2–012; Docket Nos. OR96–10–008; Docket Nos. OR96–17–005; Docket No. IS98–1–000]**

### Texaco Refining and Marketing Inc. v. SFPP, L.P.; ARCO Products Company, Mobil Oil Corporation v. SFPP, L.P.; Ultramar Inc. v. SFPP, L.P.; SFPP, L.P.; Notice of Suspension of Procedural Schedule

July 22, 2008.

On July 17, 2008, all parties in the above-captioned proceeding filed pursuant to Rule 212 of the Commissions Rules of Practice and Procedure, a Joint Motion to Suspend Paper Hearing Procedural Schedule and Request for Expedited Action. That filing advised the Commission that a limited settlement had been reached on the return on equity issues in the above-captioned proceeding. The parties also stated that therefore there was no further need to proceed with the hearing schedule that had been established in the above-captioned proceeding and requested that the hearing schedule be suspended. Notice is hereby given that the hearing schedule established in Docket No. OR96–2–012, *et al.*, is suspended until further action by the Commission.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17283 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. CP07–44–004; CP07–45–003]**

### Southeast Supply Header, LLC; Notice of Third Amendment Application

July 22, 2008.

On July 18, 2008, Southeast Supply Header, LLC (SESH) filed an application requesting an amendment to the certificate of public convenience and necessity issued on September 20, 2007, in Docket Nos. CP07–44–000 and CP07–45–000 pursuant to section 7(c) of the Natural Gas Act, as amended, and section 157 Subpart A of the Federal Energy Regulatory Commission's (Commission) regulations. Specifically, SESH requests approval for increased rates. SESH requests that the Commission issue a final order granting it all necessary authorizations by September 1, 2008.

Any initial question regarding this application should be directed to Brian D. O'Neill, at Dewey & LeBoeuf LLP, 1101 New York Avenue, NW., Suite 1100, Washington, DC 20005–4213 or by calling 202–346–8000.

Any person desiring to intervene or to protest in the above proceeding must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. (EST) on the specified comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time August 4, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–17290 Filed 7–28–08; 8:45 am]

BILLING CODE 6717–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8698–6; Docket ID No. EPA–HQ–ORD–2008–0461]**

### Draft Toxicological Review of Tetrachloroethylene (Perchloroethylene): In Support of Summary Information on the Integrated Risk Information System (IRIS)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of listening session.

**SUMMARY:** EPA is announcing a listening session to be held on August 18, 2008, during the public comment period for the external review draft document entitled, ''Draft Toxicological Review of Tetrachloroethylene (Perchloroethylene): In Support of Summary Information on the Integrated Risk Information System (IRIS).'' This listening session is a new step in EPA's revised process, announced on April 10, 2008, for development of human health assessments for inclusion on IRIS. The purpose of the listening session is to allow interested parties to present scientific and technical comments on draft IRIS health assessments to EPA and other interested parties during the public comment period and prior to the external peer review meeting. EPA welcomes the scientific and technical comments that will be provided to the Agency by the listening session participants. The comments will be considered by the Agency as it revises the draft assessment in response to the independent external peer review and public comments. All presentations will become part of the official and public record.

The EPA's draft assessment and peer review charge are available via the Internet on the National Center for Environmental Assessment's (NCEA) home page under the Recent Additions and the Data and Publications menus at *http://www.epa.gov/ncea*.

**DATES:** The listening session on the tetrachloroethylene draft IRIS health assessment will be held on August 18, 2008, beginning at 9 a.m. and ending at 3 p.m., Eastern Daylight Time. All participants should register by August 11, 2008. At the time of registration, participants wishing to make oral comments should indicate their intention to speak, the length of the intended presentation, and if audio-visual aid (e.g., computer and projector) will be required. Each oral presentation should be no more than 15 minutes in length. If, however, the total time of presentations exceeds the allotted session time, the time limit for each presentation will be adjusted accordingly. An agenda for the listening session will be made available at the meeting. If no speakers have registered by August 11, 2008, the listening session will be cancelled and EPA will notify those registered of the cancellation.

The public comment period for review of this draft assessment was announced previously in the **Federal Register** (FR) (73 FR 36321) on June 26, 2008. As stated in that FR notice, the public comment period began on June 26, 2008, and ends September 24, 2008. Listening session participants who wish to have their comments available to the external peer reviewers should also submit written comments during the public comment period according to the procedures included in the aforementioned FR notice (June 26, 2008). Comments submitted to the docket prior to the end of the public comment period will be submitted to the external peer reviewers and considered by EPA.

**ADDRESSES:** The listening session on the draft tetrachloroethylene assessment will be held at the EPA offices at Two Potomac Yard (North Building), 4th Floor, 2733 South Crystal Drive, Arlington, Virginia, 22202. To attend the listening session, register by August 11, 2008 by providing your name, title, affiliation, full address and contact information via e-mail to *ross.christine@epa.gov* (subject line: ''Tetrachloroethylene listening session''), by fax to 703–347–8689 (please reference ''Tetrachloroetheylene listening session'') or by phone to 703–347–8592. Please note that in order to gain access to the meeting site, attendees must present government-issued photo identification and must register at the guard's desk in the building lobby. The guard will retain your photo identification, issue a visitor's badge, and contact an EPA employee to meet you in the reception area and escort you to the meeting room. Your photo identification will be returned when you exit the building.

A teleconference line will also be available for registered attendees/speakers beginning at 8:45 a.m. on August 18, 2008. The teleconference number is 866–299–3188 and the access code is 1068186199#. All teleconference participants will be asked to provide their name, title and affiliation at the beginning of the teleconference.

*Information on Services for Individuals with Disabilities*: For information on access or services for individuals with disabilities, please contact Christine Ross at 703–347–8592 or *ross.christine@epa.gov*. To request accommodation of a disability, please notify EPA at least 10 days prior to the meeting.

**FOR FURTHER INFORMATION CONTACT:** For information on the public listening session or the draft tetrachloroethylene assessment, contact Christine Ross at 703–347–8592 or *ross.christine@epa.gov*.

**SUPPLEMENTARY INFORMATION:** This listening session is a new step in EPA's revised process, announced on April 10, 2008, for development of human health assessments for inclusion on IRIS. The new process is posted on the NCEA home page under the Recent Additions menu at *http://www.epa.gov/ncea*. Two listening sessions are scheduled under the new IRIS process. The first is during the public review of the draft assessment that includes only qualitative discussion. The second session is during the public review of the externally peer-reviewed draft assessment; if feasible, this draft will include both qualitative and quantitation elements (i.e., a ''complete draft''). All IRIS assessments that are at the document development stage will follow the revised process, which includes the two listening sessions. However, when EPA initiated the new IRIS process, the tetrachloroethylene draft assessment had already completed document development and been through multiple rounds of internal review. Therefore, EPA will only hold one listening session during the public review and comment period.

Dated: July 21, 2008.

**Rebecca Clark,**

*Deputy Director, National Center for Environmental Assessment.*

[FR Doc. E8–17345 Filed 7–28–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8698–5]**

### Environmental Laboratory Advisory Board (ELAB) Meeting Dates, and Agenda

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Teleconference Meetings.

**SUMMARY:** The Environmental Protection Agency's Environmental Laboratory Advisory Board (ELAB), as previously announced, will have teleconference meetings on August 20, 2008 at 1 p.m. ET; September 17, 2008 at 1 p.m. ET;

October 15, 2008 at 1 p.m. ET; November 19, 2008 at 1 p.m. ET; and December 17, 2008 at 1 p.m. ET to discuss the ideas and views presented at the previous ELAB meetings, as well as new business. Items to be discussed by ELAB over these coming meetings include: (1) Expanding the number of laboratories seeking National Environmental Laboratory Accreditation Conference (NELAC) accreditation; (2) proficiency testing; (3) ELAB support to the Agency's Forum on Environmental Measurements (FEM); (4) implementing the performance approach; and (5) follow-up on some of ELAB's past recommendations and issues. In addition to these teleconferences, ELAB will be hosting their next face-to-face meeting on August 11, 2008 at the Hyatt Regency Washington on Capitol Hill in Washington, DC at 1:30 p.m. (ET).

Written comments on laboratory accreditation issues and/or environmental monitoring issues are encouraged and should be sent to Ms. Lara P. Autry, DFO, U.S. EPA (E243–05), 109 T. W. Alexander Drive, Research Triangle Park, NC 27709, faxed to (919) 541–4261, or e-mailed to *autry.lara@epa.gov*. Members of the public are invited to listen to the teleconference calls, and time permitting, will be allowed to comment on issues discussed during this and previous ELAB meetings. Those persons interested in attending should call Lara P. Autry at (919) 541–5544 to obtain teleconference information. The number of lines for the teleconferences, however, are limited and will be distributed on a first come, first serve basis. Preference will be given to a group wishing to attend over a request from an individual. For information on access or services for individuals with disabilities, please contact Lara P. Autry at the number above. To request accommodation of a disability, please contact Lara P. Autry, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

**George M. Gray,**

*Science Advisor, Office of the Science Advisor.*

[FR Doc. E8–17342 Filed 7–28–08; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget, Comments Requested

July 22, 2008.

**SUMMARY:** As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). 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. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB control number.

**DATES:** Written PRA comments should be submitted on or before August 28, 2008. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Submit your comments to Nicholas A. Fraser, Office of Management and Budget (e-mail address: *nfraser@omb.eop.gov*), and to the Federal Communications Commission's PRA mailbox (e-mail address: *PRA@fcc.gov*). Include in the emails the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below or, if there is no OMB control number, the Title as shown in the **SUPPLEMENTARY INFORMATION** section. If you are unable to submit your comments by e-mail contact the person listed below to make alternate arrangements.

**FOR FURTHER INFORMATION CONTACT:** For additional information contact Leslie F. Smith via e-mail at *PRA@fcc.gov* or at (202) 418–0217. To view or obtain a copy of an information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA 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, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of the ICR you want to view (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0395.

*Title:* The ARMIS USOA Report (ARMIS Report 43–02); the ARMIS Service Quality Report (ARMIS Report 43–05); and the ARMIS Infrastructure Report (ARMIS Report 43–07). Report Numbers.

*Form Number:* FCC Reports 43–02, 43–05 and 43–07.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents and Responses:* 47 respondents; 61 responses.

*Estimated Time per Response:* 319.14 hours.

*Obligation to Respond:* Mandatory—The ARMIS reporting requirements were established by the Commission in 1987 to facilitate the timely and efficient analysis of carrier operating costs and rates of return, to provide an improved basis for audits and other oversight functions, and to enhance the Commission's ability to quantify the effects of alternative policy proposals. Additional ARMIS Reports were added in 1991 and 1992. Incumbent LECs must submit the ARMIS reports to the Commission annually on or before April 1. *See* Reporting Requirements of Certain Class A and Tier I Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), Order, 2 FCC Rcd 5770 (1987), modified on recon, 3 FCC Rcd 6375 (1988) (*ARMIS Order*). Also, *see* 47 CFR Part 43, Section 43.21.

*Frequency of Response:* Annual reporting requirements.

*Total Annual Burden:* 19,468 hours.

*Total Annual Cost:* $0.00.

*Privacy Act Impact Assessment:* No impacts.

*Nature of Extent of Confidentiality:* This collection addresses information of a confidential nature for two of these reports. Respondents have requested and filed for confidential treatment of information they believe should be withheld from public inspection under 47 CFR Section 0.459 of the Commission's rules.

*Needs and Uses:* FCC Report 43–02 contains company-wide data for each account specified in the Uniform System of Accounts (USOA). It provides the annual operating results of the carriers' activities for every account in the USOA. In this report, we are adjusting the number of carriers filing the 43–02 ARMIS report from 28 respondents to 26 to reflect the sale of two respondents. We are also increasing the burden hours to reflect the Commission's requirement in its *Report and Order and Memorandum Opinion and Order (MOO)* released August 31, 2007. The Commission required AT&T, Qwest, and Verizon to include the imputation charges it debits to account 5280 accompanied by an explanatory footnote for each line item identifying the amount imputed in three ARMIS report filings. The *MOO* required this information in FCC Reports 43–01, ARMIS Annual Summary Report; 43–02, ARMIS USOA Report; and, 43–03, ARMIS Joint Cost Report.

ARMIS Report 43–05 collects data at the study level and holding company level and is designed to capture trends in service quality under price cap regulation. It provides service quality information in the areas of interexchange access service installation and repair intervals, local service installation and repair intervals, trunk blockage, and total switch downtime for price cap companies. We are adjusting the number of respondents submitting the 43–05 from 15 to 14 to reflect the merger of two respondents and the spin-off of their landline business.

ARMIS Report 43–07 is designed to capture trends in telephone industry infrastructure development under price cap regulation. It provides switch deployment and capabilities data. The information is also part of the data necessary to support the Commission's audit and other oversight functions. The data provide the necessary detail to enable the Commission to fulfill its regulatory responsibility. There are no changes to the ARMIS Report 43–07.

*OMB Control Number:* 3060–0410.

*Title:* Forecast of Investment Usage Report, FCC Report 495A; and Actual Usage of Investment Report. Report Number, FCC Reports 495B.

*Form Numbers:* FCC Reports 495–A and 495–B.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents and Responses:* 70 respondents; 140 responses.

*Estimated Time per Response:* 40 hours.

*Obligation to Respond:* Mandatory—The ARMIS reporting requirements were established by the Commission in 1987 to facilitate the timely and efficient analysis of carrier operating costs and rates of return, to provide an improved basis for audits and other oversight functions, and to enhance the Commission's ability to quantify the effects of alternative policy proposals. Additional ARMIS Reports were added in 1991 and 1992. Incumbent LECs must submit the ARMIS reports to the Commission annually on or before April 1. *See* Reporting Requirements of Certain Class A and Tier I Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), Order, 2 FCC Rcd 5770 (1987), modified on recon, 3 FCC Rcd 6375 (1988) (*ARMIS Order*). Also, *see* 47 CFR Part 43, Section 43.21.

*Frequency of Response:* Annual reporting requirement.

*Total Annual Burden:* 5,600 hours.

*Total Annual Cost:* $0.00.

*Privacy Act Impact Assessment:* No impacts.

*Nature of Extent of Confidentiality:* This collection addresses information of a confidential nature. Respondents have requested and filed for confidential treatment of information they believe should be withheld from public inspection under 47 CFR Section 0.459 of the Commission's rules.

*Needs and Uses:* The 495A Report provides the forecast and resulting investment allocation incorporated in a carrier's cost support for its access tariff. The 495B Report enables the Commission's staff to monitor actual and forecasted investment use. These reports help ensure that the regulated operations of the carriers do not subsidize the nonregulated operations of those same carriers. This information is also a part of the data necessary to support the Commission's audit and other oversight functions. The data provide the necessary detail to enable the Commission to fulfill it regulatory responsibility. There are no changes to the ARMIS Reports 495A and 495B.

On April 24, 2008, the Commission granted AT&T's and BellSouth's petitions for forbearance from, among other things, certain ARMIS reporting requirements, conditioned upon Commission approval of an AT&T compliance plan describing how it will continue to fulfill its statutory and regulatory obligations and the conditions of the order. *See Petition of AT&T Inc. for Forbearance Under 47 U.S.C. 160 From Enforcement of Certain of the Commission's Cost Assignment Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, FCC 08–120 (rel. April 24, 2008). As a result, upon approval of the compliance plan, AT&T and BellSouth no longer will be required to file ARMIS Report 43–04, and FCC Forms 492, 495A and 495B. *Id.* at para.. 12 n.36. Subsequently, on May 23, 2008, Verizon and Qwest requested that the Commission grant the same forbearance to them. The Commission has sought comment on that request, with comments filed June 26, 2008, and replies filed July 7, 2008. *See Comment Dates Set On Request of Verizon and Qwest to Extend Forbearance Relief from Cost Assignment Rules*, DA 08–1361 (rel. June 6, 2008).

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E8–17346 Filed 7–28–08; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Agency Information Collection Activities: Proposed Collection Renewals (0022; 0027; 0029; 0061; 0113); Comment Request

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice and request for comment.

**SUMMARY:** The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comments concerning the following collections of information titled: (1) Uniform Application/Uniform Termination for Municipal Securities Principal or Representative; (2) Request for Deregistration for Registered Transfer Agents; (3) Notification of Performance of Bank Services; (4) Summary of Deposits; and (5) External Audits.

**DATES:** Comments must be submitted on or before September 29, 2008.

**ADDRESSES:** Interested parties are invited to submit written comments to Herbert J. Messite, Counsel, 202–898–6834, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. All comments should refer to (1) Uniform Application/Uniform Termination for Municipal Securities Principal or Representative; (2) Request for Deregistration for Registered Transfer Agents; (3) Notification of Performance of Bank Services; (4) Summary of Deposits or (5) External Audits. Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. [FAX number 202–898–3838; e-mail address: *comments@fdic.gov*]. Comments may be inspected and photocopied in the FDIC Public Information Center, 801 17th Street, NW., Room 100, Washington, DC, between 9 a.m. and 4:30 p.m. on business days.

A copy of the comments may also be submitted to the OMB desk officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Herbert J. Messite, at the address identified above.

**SUPPLEMENTARY INFORMATION:**

**Proposal To Renew the Following Currently Approved Collections of Information**

1. *Title:* Uniform Application/ Uniform Termination for Municipal Securities Principal or Representative.
*OMB Number:* 3064–0022.
*Form Number:* MSD–4; MSD–5
*Frequency of Response:* On occasion.
*Affected Public:* Business or other financial institutions.
*Estimated Number of Respondents:* 75.
*Estimated Time per Response:* 1 hour.
*Total Annual Burden:* 75 hours.
*General Description of Collection:* An insured state nonmember bank which serves as a municipal securities dealer must file Form MSD–4 or MSD–5, as applicable, to permit an employee to become associated or to terminate the association with the municipal securities dealer. FDIC uses the form to ensure compliance with the professional requirements for municipal securities dealers in accordance with the rules of the Municipal Securities Rulemaking Board.

2. *Title:* Request for Deregistration for Registered Transfer Agents.
*OMB Number:* 3064–0027.
*Frequency of Response:* On occasion.
*Affected Public:* Business or other financial institutions.
*Estimated Number of Respondents:* 15.
*Estimated Time per Response:* .42 hours.
*Total Annual Burden:* 6.3 hours.
*General Description of Collection:* An insured nonmember bank or a subsidiary of such a bank that functions as a transfer agent may withdraw from registration as a transfer agent by filing a written notice of withdrawal with the FDIC as provided by 12 CFR 341.5.

3. *Title:* Notification of Performance of Bank Services
*OMB Number:* 3064–0029.
*Form Number:* FDIC 6120/06.
*Frequency of Response:* On occasion.
*Affected Public:* Business or other financial institutions.
*Estimated Number of Respondents:* 412.
*Estimated Time per Response:* 1/2 hour.
*Total Annual Burden:* 206 hours.
*General Description of Collection:* Insured state nonmember banks are required to notify the FDIC, under section 7 of the Bank Service Corporation Act (12 U.S.C. 1867), of the relationship with a bank service corporation. Form FDIC 6120/06 (Notification of Performance of Bank Services) may be used by banks to satisfy the notification requirement.

4. *Title:* Summary of Deposits.
*OMB Number:* 3064–0061.
*Form Number:* 8020/05 (7–95).
*Frequency of Response:* Annually.
*Affected Public:* All insured financial institutions.
*Estimated Number of Respondents:* 6,000.
*Average Estimated Time per Response:* 3 hours.
*Total Annual Burden:* 18,000 hours.
*General Description of Collection:* The Summary of Deposits annual survey obtains data about the amount of deposits held at each office of all insured banks with branches in the United States. The survey data provides a basis for measuring the competitive impact of bank mergers and has additional use in banking research.

5. *Title:* External Audits.
*OMB Number:* 3064–0113.
*Frequency of Response:* annually.
*Affected Public:* All insured financial institutions with total assets of $500 Million or more, and other insured financial institutions with total assets of less than $500 Million that voluntarily choose to comply.
*Estimated Number of Respondents:* 5,243.
*Average Estimated Time per Response:* (a) Financial institutions with assets of $1 Billion or more: 69.63 hours; (b) financial institutions with assets of $500 Million, but less than $1 Billion: 8.42 hours; (c) financial institutions with total assets less than $500 Million: 30 minutes.
*Total Annual Burden:* 65,612 hours.
*General Description of Collection:* FDIC's regulations at 12 CFR 363 establish annual independent audit and reporting requirements for financial institutions with total assets of $500 Million or more. The requirements include the submission of an annual report on their financial statements, recordkeeping about management deliberations regarding external auditing and reports about changes in auditors. The information collected is used to facilitate early identification of problems in financial management at financial institutions.

*Request for Comment*

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the collection should be modified prior to submission to OMB for review and approval. Comments submitted in response to this notice also will be summarized or included in the FDIC's requests to OMB for renewal of these collections. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. E8–17256 Filed 7–28–08; 8:45 am]

BILLING CODE 6714–01–P

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank

Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 13, 2008.

**A. Federal Reserve Bank of Minneapolis** (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

*1. David J. Schornack, and Denise N. Schornack*, both of Perham, Minnesota; Daniel R. Welter, and Bonnie S. Welter, both of New York Mills, Minnesota, to acquire voting shares of Quality Bankshares, Inc., and thereby indirectly acquire voting shares of Quality Bank, both of Fingal, North Dakota.

**B. Federal Reserve Bank of Kansas City** (Todd Offenbacker, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

*1. Robyn E. Batson*, Broken Bow, Oklahoma, as trustee of the Linda Lake Young Irrevocable Trust, the Lori Lee Young Irrevocable Trust, and the Robyn Elizabeth Batson Irrevocable Trust, to acquire voting shares of Southeastern Bancshares, Inc., and thereby indirectly acquire voting shares of 1st Bank & Trust, both in Broken Bow, Oklahoma.

**C. Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

*1. John Mangan*, San Antonio, Texas, as independent trustee of the LCK 1993 Trust, LCK Dynasty Trust, LCK Legacy Trust, the Katz Millennium Trust, and LCK Trust Number 2, to acquire voting shares of First Community Bancshares, Inc., Houston, Texas, and thereby indirectly acquire voting shares of First National Bank Texas, Killeen, Texas, and Fort Hood National Bank, Fort Hood, Texas.

Board of Governors of the Federal Reserve System, July 24, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–17355 Filed 7–28–08; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL RESERVE SYSTEM

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** Board of Governors of the Federal Reserve System.

**TIME AND DATE:** 12:00 p.m., Monday, August 4, 2008.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

**FOR FURTHER INFORMATION CONTACT:** Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

**SUPPLEMENTARY INFORMATION:** You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, July 25, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 08–1476 Filed 7–25–08; 2:14 pm]

**BILLING CODE 6210–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the National Coordinator for Health Information Technology; American Health Information Community Consumer Empowerment Workgroup Meeting

**ACTION:** Announcement of meeting.

**SUMMARY:** This notice announces the 28th meeting of the American Health Information Community Consumer Empowerment Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

**DATES:** August 19, 2008, from 1 p.m. to 4 p.m. [Eastern]

**ADDRESSES:** Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 1114. Please bring photo ID for entry to a Federal building.

**FOR FURTHER INFORMATION CONTACT:** *http://www.hhs.gov/healthit/ahic/consumer/.*

**SUPPLEMENTARY INFORMATION:** The Workgroup will continue its discussion on how to encourage the widespread adoption of a personal health record that is easy-to-use, portable, longitudinal, affordable, and consumer-centered.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/consumer/ce_instruct.html.*

**Judith Sparrow,**

*Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.*

[FR Doc. E8–17297 Filed 7–28–08; 8:45 am]

**BILLING CODE 4150–45–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the National Coordinator for Health Information Technology; American Health Information Community Quality Workgroup Meeting

**ACTION:** Announcement of meeting.

**SUMMARY:** This notice announces the 19th meeting of the American Health Information Community Quality Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

**DATES:** August 5, 2008, from 1 p.m. to 4 p.m. [Eastern].

**ADDRESSES:** Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 1114. Please use the C Street entrance closest to 3rd Street and bring photo ID for entry to a Federal building.

**FOR FURTHER INFORMATION CONTACT:** *http://www.hhs.gov/healthit/ahic/quality/.*

**SUPPLEMENTARY INFORMATION:** The Workgroup will continue its discussion on how health information technology can provide the data needed for the development of quality measures that are useful to patients and others in the health care industry, automate the measurement and reporting of a comprehensive current and future set of quality measures, and accelerate the use of clinical decision support that can improve performance on those quality measures.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/quality/quality_instruct.html*.

**Judith Sparrow,**

*Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.*

[FR Doc. E8–17298 Filed 7–28–08; 8:45 am]

**BILLING CODE 4150–45–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the National Coordinator for Health Information Technology; American Health Information Community Confidentiality, Privacy, & Security Workgroup Meeting

**ACTION:** Announcement of meeting.

**SUMMARY:** This notice announces the 22nd meeting of the American Health Information Community Confidentiality, Privacy, & Security Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

**DATES:** August 21, 2008, from 1 p.m. to 5 p.m. [Eastern Time].

**ADDRESSES:** Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 1114. Please use the C Street entrance closest to 3rd Street and bring photo ID for entry to a Federal building.

**FOR FURTHER INFORMATION CONACT:** *http://www.hhs.gov/healthit/ahic/confidentiality/*.

**SUPPLEMENTARY INFORMATION:** The Workgroup Members will continue discussing and evaluating the confidentiality, privacy, and security protections and requirements for participants in electronic health information exchange environments.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/cps_instruct.html*.

**Judith Sparrow,**

*Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.*

[FR Doc. E8–17313 Filed 7–28–08; 8:45 am]

**BILLING CODE 4150–45–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the National Coordinator for Health Information Technology; American Health Information Community Population Health and Clinical Care Connections Workgroup Meeting

**ACTION:** Announcement of meeting.

**SUMMARY:** This notice announces the 29th meeting of the American Health Information Community Population Health and Clinical Care Connections Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.).

**DATES:** August 20, 2008, from 2 p.m. to 5 p.m. [Eastern Time].

**ADDRESSES:** Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 1114. Please use the C Street entrance closest to 3rd Street and bring photo ID for entry to a Federal building.

**FOR FURTHER INFORMATION CONTACT:** *http://www.hhs.gov/healthit/ahic/population/*.

**SUPPLEMENTARY INFORMATION:** The Workgroup will continue its discussion on how to facilitate the flow of reliable health information among population health and clinical care systems necessary to protect and improve the public's health. The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/population/pop_instruct.html*.

**Judith Sparrow,**

*Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.*

[FR Doc. E8–17314 Filed 7–28–08; 8:45 am]

**BILLING CODE 4150–45–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0389]**

### Food and Drug Administration Amendments Act of 2007; Prohibition Against Food to Which Drugs or Biological Products Have Been Added; Request for Comments

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; request for comments.

**SUMMARY:** The Food and Drug Administration (FDA) is requesting comments relevant to the implementation of section 912 of the Food and Drug Administration Amendments Act of 2007 (FDAAA). Section 912 of FDAAA establishes section 301(ll) in the Federal Food, Drug, and Cosmetic Act (the act), which prohibits the interstate shipment of certain foods to which an approved drug or a licensed biological product has been added. Section 301(ll) also prohibits the interstate shipment of foods containing an added drug or a biological product that has been the subject of substantial clinical investigations, the existence of which has been made public. FDA requests that interested persons submit data, information, and comments that will help provide a context for the agency's decisions on implementation of this provision. To encourage responsive comments, FDA is including a series of questions for interested persons to consider in preparing comments.

**DATES:** Submit written or electronic comments by October 27, 2008.

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

**FOR FURTHER INFORMATION CONTACT:** Catherine L. Copp, Center for Food Safety and Applied Nutrition (HFS–4), Food and Drug Administration, 301–436–1589, e-mail: *catherine.copp@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Background

On September 27, 2007, the Food and Drug Administration Amendments Act of 2007 (Public Law 110–85) (FDAAA) was enacted. Section 912 of FDAAA establishes section 301(ll) in the Federal Food, Drug, and Cosmetic Act (the act), 21 U.S.C. 331(ll), which adds the following prohibited act to section 301.21 U.S.C. 331:

The introduction or delivery for introduction into interstate commerce of any food to which has been added a drug approved under section 505, a biological product licensed under section 351 of the Public Health Service Act, or a drug or a biological product for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public, unless--

(1) such drug or such biological product was marketed infood before any approval of the drug under section 505, beforelicensure of the biological product under such section 351, andbefore any substantial clinical

investigations involving thedrug or the biological product have been instituted;(2) the Secretary, in the Secretary's discretion, hasissued a regulation, after notice and comment, approving the useof such drug or such biological product in the food;(3) the use of the drug or the biological product in thefood is to enhance the safety of the food to which the drug orthe biological product is added or applied and not to haveindependent biological or therapeutic effects on humans, and theuse is in conformity with--

(A) a regulation issued under section 409prescribing conditions of safe use in food;(B) a regulation listing or affirming conditionsunder which the use of the drug or the biologicalproduct in food is generally recognized as safe;(C) the conditions of use identified in anotification to the Secretary of a claim of exemptionfrom the premarket approval requirements for foodadditives based on the notifier's determination that theuse of the drug or the biological product in food isgenerally recognized as safe, provided that theSecretary has not questioned the general recognition ofsafety determination in a letter to the notifier;(D) a food contact substance notification that iseffective under section 409(h); or(E) such drug or biological product had beenmarketed for smoking cessation prior to the date of theenactment of the Food and Drug Administration AmendmentsAct of 2007; or

(4) the drug is a new animal drug whose use is not unsafeunder section 512.

Section 301(ll) makes it a prohibited act to ship in interstate commerce certain foods to which an approved drug or a licensed biological product has been added. Section 301(ll) also prohibits the interstate shipment of certain foods containing an added drug or a biological product that has been the subject of substantial clinical investigations, the existence of which has been made public. Under the act, persons who commit a prohibited act may be enjoined, 21 U.S.C. 332, or prosecuted criminally, 21 U.S.C. 333. In addition, a food which may not, under the provisions of section 301(ll), be introduced or delivered for introduction into interstate commerce, is subject to seizure and forfeiture, 21 U.S.C. 334, and under 21 U.S.C. 381, a food offered for import into the United States that appears to be prohibited from introduction or delivery for introduction into interstate commerce under section 301(ll) is subject to refusal of admission.

The language of section 301(ll) has a number of parallels to, as well as significant differences from, the language of a similar provision in section 201(ff)(3)(B) (21 U.S.C. 321(ff)(3)(B)), which is part of the act's definition of ''dietary supplement.'' Although there is legislative history of FDAAA, including a report from the House committee with jurisdiction (H. Rep. No. 225, 110th Cong., 2d Sess. (2007)), section 301(ll) is not addressed in that legislative history.

The Secretary of Health and Human Services has delegated to the Commissioner of Food and Drugs the principal responsibility for administering the act. As the administering agency, it is FDA's responsibility generally to implement amendments to the act, including the amendments made by section 912 of FDAAA.

Section 301(ll) presents a number of questions of statutory interpretation for FDA to consider. The scope of the agency's discretion to interpret section 301(ll) is defined by the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if the language of a statute makes Congressional intent on a particular question clear and unambiguous, the agency charged with administering the statute must give effect to that intent. *Chevron*, 467 U.S. at 842–43. If the statute is silent or ambiguous on the question, however, the agency is permitted to give the statute a reasonable construction, *Chevron*, 467 U.S. at 844–845, and that construction is entitled to deference. *Chevron*, 467 U.S. at 844.

## II. Questions Presented

FDA believes that a fuller understanding of the impact of various interpretations of section 301(ll) would be beneficial as the agency considers how to implement this new provision. Accordingly, FDA is requesting that interested persons submit data, information, and other comments regarding possible approaches to implementation. To guide those submissions and responses, the agency has prepared the following questions. FDA suggests that, in preparing responses to this request for comments, interested persons consider the following:

### *A. Food*

Section 301(ll) prohibits the introduction or delivery for introduction into interstate commerce of certain ''food.'' Under section 201(f), ''food'' means articles used for food or drink for man or other animals, chewing gum, and articles used for components of such articles. Food includes human food, including infant formula, medical foods, and dietary supplements; food contact substances, including food packaging; and animal feed, including pet food and feed ingredients. Consistent with the broad definition of ''food'' in section 201(f), FDA seeks information about the impact of section 301(ll) on food in all its forms, including food ingredients, categories of food, and finished food products.

1. What types or categories of food would likely be subject to the prohibition of section 301(ll)? What types or categories are likely to be unaffected by section 301(ll)? If possible, please provide specific examples of these foods.

2. What is the likely impact of applying section 301(ll) to infant formula? Are there substances used or potentially used in infant formula that would be prohibited from such use by section 301(ll)?

3. What is the likely impact of applying section 301(ll) to dietary supplements? Are there substances used or potentially used in or as dietary supplements that would be prohibited from such use by section 301(ll)? What would be the advantages and disadvantages of applying both section 301(ll) and section 201(ff)(3)(B) to dietary supplements? Would such an approach lead to more effective regulation or less effective regulation of these products, and why?

4. What is the likely impact of applying section 301(ll) to animal feed? Are there substances used or potentially used in animal feed, including pet food and feed ingredients, that would be prohibited from such use by section 301(ll)?

5. What is the likely impact of interpreting ''food'' in section 301(ll) to include food contact substances, including packaging components that meet the definition of a food additive? Are there substances used or potentially used in food packaging or other food contact substances that would be prohibited from such use by section 301(ll)?

### *B. Previously Marketed Foods Now Barred from Interstate Commerce*

Section 301(ll) identifies a category of foods that can no longer be introduced or delivered for introduction into interstate commerce although these foods were allowed in interstate commerce before the enactment of FDAAA. Specifically, if a food contains a substance that is an approved drug, that is a licensed biological product, or that has been the subject of substantial clinical investigations that have been made public, and if the substance was added to the food to have an independent biological or therapeutic effect on the person consuming it, rather than to enhance the safety of the food, the food is now barred from interstate commerce if any substantial clinical investigations of the substance were instituted, or the drug was approved or

the biologic was licensed, prior to the first marketing of the substance in food. FDA seeks information on foods in this category that were legally marketed prior to the enactment of FDAAA but that are now barred from interstate commerce.

1. How many and what types of foods would be affected? What would be the impact on businesses that produce and sell these foods?

2. What would be the impact on consumers who currently use the products?

3. If possible, please provide specific examples of affected foods.

*C. Drug*

Section 301(ll) prohibits the introduction or delivery for introduction into interstate commerce of food to which has been added a ''drug approved under section 505.''

Implementing section 301(ll)'s restrictions on adding approved drugs to food will require FDA to consider how the identity of a ''drug'' is to be determined for purposes of section 301(ll).

1. What would be the impact of deeming two substances to be identical if they are chemically identical?

2. Are there approved drugs that cannot be identified by their chemical structure? If so, what would be a scientifically accurate and technically feasible way for FDA to determine the identity of the ''drug approved under section 505'' or ''drug * * * for which substantial clinical investigations have been instituted'' and consider whether that drug was marketed in food before the drug's approval by FDA or before the initiation of the substantial clinical investigations? Which drugs or classes of drugs cannot be identified by their chemical structure?

*D. Biological Product*

Section 301(ll) prohibits the introduction or delivery for introduction into interstate commerce of food to which has been added a ''biological product licensed under section 351 of the Public Health Service Act.'' Under section 351(i) of the Public Health Service Act (PHS Act) (42 U.S.C. 262(i)), a ''biological product'' means ''a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, or analogous product, or arsphenamine or derivative of arsphenamine (or any other trivalent organic arsenic compound), applicable to the prevention, treatment, or cure of a disease or condition of human beings.''

• What are the special concerns, if any, related to determining whether a biological product that is added to food has previously been licensed under section 351 of the PHS Act?

*E. Clinical Investigations*

Section 301(ll) prohibits the introduction or delivery for introduction into interstate commerce of food to which has been added a ''drug'' or a ''biological product'' for which ''substantial clinical investigations have been instituted'' and for which ''the existence of such investigations has been made public,'' unless the drug or the biological product was ''marketed in food * * * before any substantial clinical investigations involving the drug or the biological product have been instituted.''

1. What is the likely impact of interpreting ''clinical investigations'' to refer exclusively to studies in humans?

2. What is the likely impact of interpreting the existence of substantial clinical investigations of a substance in humans to prevent the addition of such substance to animal feed, including pet food and feed ingredients?

3. What factors should FDA consider in deciding whether clinical investigations of a substance are ''substantial?''

4. What factors should FDA consider in determining whether substantial clinical investigations ''involv[ed] the drug or the biological product?''

5. Could this provision operate as a disincentive to conduct clinical studies of substances intended for use in products to be marketed as conventional foods or dietary supplements? If so, is there an approach to implementation that could minimize or eliminate this disincentive?

6. To the extent that this provision discourages clinical investigations of substances added to food and the public disclosure of such investigations, what is the likely impact of this provision on so-called self-determinations of the general recognition of safety (GRAS) of substances added to food?

*F. Marketed*

Under section 301(ll)(1), a food containing an approved drug or a licensed biological product may be shipped in interstate commerce if the drug or the biological product was ''marketed in food'' prior to the approval of the drug, the licensing of the biological product, or the initiation of substantial clinical investigations of the drug or biological product. Section 201(ff) contains a similar provision. Section 201(ff) uses the phrase ''marketed as a dietary supplement or as a food,'' however, while section 301(ll) uses the phrase ''marketed in food.'' In the context of section 201(ff), FDA has evaluated whether a substance has been ''marketed'' within the meaning of that provision by considering: (1) Whether the substance itself has been sold or offered for sale, either as a finished product or as an ingredient; (2) for substances that are not sold separately but are components present in a marketed product, whether the component itself was marketed to prospective purchasers through, e.g., labeling or advertising for the product that made claims about the component or otherwise highlighted its presence. *See Pharmanex* v. *Shalala*, 2001 WL 741419, at *4 & n.5 (D. Utah March 30, 2001).

1. What would be the likely impact of interpreting the term ''marketed'' the same way in section 301(ll) as in section 201(ff)? What could be the regulatory significance, if any, of the differing phrases ''marketed in food'' (section 301(ll)) and ''marketed as a dietary supplement or as a food'' (section 201(ff))?

2. What could be the significance, if any, of the marketing in food of an approved drug or a licensed biological product outside the United States?

3. What factors should be considered the indicia of being ''marketed in food?'' What types of evidence should FDA consider in deciding whether a substance has been ''marketed in food?''

*G. Enhance The Safety of The Food Supply*

Section 301(ll)(3) provides an exception to the prohibition of adding a drug or biological product to a food if use of the drug or biological product is ''to enhance the safety of the food * * * and not to have independent biological or therapeutic effects on humans.''

1. What factors should FDA consider in determining whether the use of a substance in food is to ''enhance the safety of the food'' within the meaning of section 301(ll)?

2. What would be the likely impact of each of the following possible interpretations of what kinds of uses ''enhance the safety of the food?''

• The addition of a substance to a food enhances the safety of the food only if such addition reduces a risk not inherent in the food itself, such as the risk of microbial or other contamination.

• The addition of a substance to a food enhances the safety of the food if such addition reduces either a risk inherent to the food itself, such as inherent toxicity or a risk that derives from the nutritional content of the food (e.g., high saturated fat content), or a risk not inherent in the food itself, such as the risk of microbial or other contamination.

*H. Independent biological or therapeutic effects on humans*

As noted, section 301(ll)(3) provides an exception to the prohibition of adding a drug or biological product to a food if use of the drug or biological product is ''to enhance the safety of the food * * * and not to have independent biological or therapeutic effects on humans.''

1. What factors should FDA consider in determining whether the use of a substance in food is to have a ''biological'' effect on humans?

2. What factors should FDA consider in determining whether the use of a substance in food is to have a biological effect on humans that is ''independent?''

3. What factors should FDA consider in determining whether the use of a substance in food is to have a ''therapeutic'' effect on humans?

4. What factors should FDA consider in determining whether the use of a substance in food is to have a therapeutic impact on humans that is ''independent?''

*I. In the Secretary's Discretion*

Section 301(ll)(2) permits the addition of a drug or biological product to a food ''if the Secretary, in the Secretary's discretion, has issued a regulation after notice and comment, approving the use * * * in food.'' As noted, the Secretary has delegated his authority under the act to the Commissioner of Food and Drugs.

1. What factors should the Commissioner consider in exercising his discretion under section 301(ll)(2)?

2. What should be the impact, if any, on the exercise of the Commissioner's discretion where use of the drug or biological product in food has been the subject of another statutory or administrative process (e.g., a food contact substance notification that is effective under section 409(h))?

**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. 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 only through FDMS at *http://www.regulations.gov*.

Dated: July 22, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–17356 Filed 7–28–08; 8:45 am]

**BILLING CODE 4160–01–S**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2007–P–0300] (formerly 2007P–0326)**

### Determination That SANOREX (Mazindol) Tablets 1 and 2 Milligrams Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness; Correction

**AGENCY:** Food and Drug Administration. HHS.

**ACTION:** Notice; correction.

**SUMMARY:** The Food and Drug Administration is correcting a notice that appeared in the **Federal Register** of July 15, 2008 (73 FR 40582). The document announced the determination that SANOREX (mazindol) Tablets, 1 and 2 milligrams (mg), were not withdrawn from sale for reasons of safety or effectiveness. The document was published with an incorrect docket number. This document corrects that error.

**FOR FURTHER INFORMATION CONTACT:** Joyce Strong, Office of Policy and Planning (HF–27), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7010.

**SUPPLEMENTARY INFORMATION:** In FR Doc. E8–15998, appearing on page 40582 in the **Federal Register** of Tuesday, July 15, 2008, the following correction is made:

1. On page 40582, in the third column, in the headings section of the document, ''[Docket No. FDA–2007–P–0326]'' is corrected to read ''[Docket No. FDA–2007–P–0300] (formerly 2007P–0326)''.

Dated: July 22, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–17303 Filed 7–28–08; 8:45 am]

**BILLING CODE 4160–01–S**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–D–0406]**

### Draft Information Sheet Guidance for Sponsors, Clinical Investigators, and Institutional Review Boards on Frequently Asked Questions—Statement of Investigator (Form FDA 1572); Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft information sheet guidance entitled ''Information Sheet Guidance for Sponsors, Clinical Investigators, and IRBs; Frequently Asked Questions—Statement of Investigator (Form FDA 1572).'' This guidance is intended to assist institutional review boards (IRBs), clinical investigators, and sponsors involved in clinical investigations of investigational drugs and biologics in completing the Statement of Investigator form (Form FDA 1572). FDA developed this draft information sheet guidance in response to numerous questions from the research community regarding Form FDA 1572. This draft information sheet guidance provides FDA's responses to the most frequently asked questions.

**DATES:** Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comments on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft information sheet guidance by September 29, 2008.

**ADDRESSES:** Submit written comments on this draft information sheet guidance 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 draft information sheet guidance document.

**FOR FURTHER INFORMATION CONTACT:** Patricia M. Beers Block, Office of Science and Health Coordination/Good Clinical Practice Program (HF–34), Food and Drug Administration, 5600 Fishers Lane, Rockville MD 20857, 301–827–3340.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA is announcing the availability of a draft information sheet guidance for sponsors, clinical investigators, and IRBs entitled ''Frequently Asked Questions—Statement of Investigator (Form FDA 1572).'' This guidance is intended to assist IRBs, clinical investigators, and sponsors involved in clinical investigations of investigational drugs and biologics in complying with the requirement that each investigator complete and sign a Form FDA 1572 before participating in an investigation. It describes how to complete the Statement of Investigator form (Form FDA 1572).

FDA developed this draft information sheet guidance in response to numerous questions from the research community regarding Form FDA 1572. In this draft guidance, we provide answers to frequently asked questions concerning the purpose of this form, when this form needs to be completed and signed by the investigator, how to best complete the various blocks within the form, and when the form might need to be updated. In addition, we clarify questions related to the use of Form FDA 1572 by clinical investigators participating in studies conducted outside the United States that may or may not be under an investigational new drug application.

This information sheet guidance is part of the Information Sheet Guidance Initiative announced in the **Federal Register** of February 3, 2006 (71 FR 5861), which describes FDA's intention to update the process for developing, issuing, and making available guidances intended for IRBs, clinical investigators, and sponsors. Known as ''Information Sheets,'' these guidances have provided recommendations to IRBs, clinical investigators, and sponsors to help them fulfill their responsibilities to protect human subjects who participate in research regulated by the FDA since the early 1980s. The Information Sheet Guidance Initiative is intended to ensure that the Information Sheets are consistent with the FDA's good guidance practices (GGPs). As part of the initiative, which will be ongoing, the agency plans to rescind Information Sheets that are obsolete, revise and reissue Information Sheet Guidances that address current issues, and develop new Information Sheet Guidances as needed.

This draft information sheet guidance is being issued consistent with FDA's GGPs regulation (21 CFR 10.115). The draft information sheet guidance, when finalized, will represent the agency's current thinking on completing Form FDA 1572. 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. The Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information for Form FDA 1572 have been approved under OMB Control No. 0910–0014.

## 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 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 only through FDMS at *http://www.regulations.gov*.

## IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/oc/gcp/draft.html* or *http://www.regulations.gov*.

Dated: July 21, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–17305 Filed 7–28–08; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0038]**

### Blood Products Advisory Committee; Notice of Meeting

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

*Name of Committee*: Blood Products Advisory Committee.

*General Function of the Committee*: To provide advice and recommendations to the agency on FDA's regulatory issues.

*Date and Time*: The meeting will be held on September 10, 2008, from 8 a.m. to 5:45 p.m. and on September 11, 2008, from 8 a.m. to 3 p.m.

*Location*: Hilton Hotel, Washington, DC/Rockville Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852.

*Contact Person*: Donald W. Jehn or Pearline K. Muckelvene, Center for Biologics Evaluation and Research (CBER) (HFM–71), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–0314, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014519516. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

*Agenda*: On the morning of September 10, 2008, the Committee will hear an update on the May 29 to 30, 2008, meeting of the Department of Health and Human Services Advisory Committee on Blood Safety and Availability. Following this update, the Committee will discuss strategies to enhance bacterial safety of 7 day platelets for transfusion. In the afternoon, the Committee will discuss iron status in blood donors. On September 11, 2008, the Committee will hear updates on the following topics: (1)

April 29 to 30, 2008, workshop on hemoglobin based oxygen carriers; (2) July 10 to 11, 2008, blood establishment computer software conference; (3) the development of an automated Biologics License Application submission system; and (4) Draft Guidance for Industry: Re-qualification Method for Re-entry of Blood Donors Deferred Because of Reactive Test Results for Antibody to Hepatitis B Core Antigen (Anti-HBc). Following these updates, the Committee will discuss options for blood donor screening and re-entry for malaria. FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2008 and scroll down to the appropriate advisory committee link.

*Procedure*: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before September 2, 2008. Oral presentations from the public will be scheduled between approximately 10:45 a.m. and 11:30 a.m. and between approximately 4 p.m. and 4:30 p.m. on September 10, 2008, and between approximately 9:15 a.m. and 9:45 a.m. and between approximately 1:30 p.m. and 2 p.m. on September 11, 2008. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before August 22, 2008. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by August 25, 2008.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Donald W. Jehn or Pearline K. Muckelvene at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: July 17, 2008.

**Randall W. Lutter,**

*Deputy Commissioner for Policy.*

[FR Doc. E8–17359 Filed 7–28–08; 8:45 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0038]**

### Risk Communication Advisory Committee; Notice of Meeting

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public. All attendees should bring some form of government-issued photo identification, such as a driver's license.

*Name of Committee*: Risk Communication Advisory Committee.

*General Function of the Committee*: To provide advice and recommendations to the agency on effective risk communication.

*Date and Time*: The meeting will be held on August 14, 2008, from 8 a.m. to 5 p.m. and August 15, 2008, from 8 a.m. to 2 p.m.

*Location*: Food and Drug Administration, Center for Drug Evaluation and Research Advisory Committee Conference Room, rm. 1066, 5630 Fishers Lane, Rockville, MD.

*Contact Person*: Lee L. Zwanziger, Office of the Commissioner, Office of Policy, Planning and Preparedness, Office of Planning (HFP–60), Food and Drug Administration, 5600 Fishers Lane (for express delivery: rm 15–22), Rockville, MD 20857, 301–827–2895, FAX: 301–827–3285, Food and Drug Administration, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 8732112560. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

*Agenda*: On August 14 and 15, 2008, the committee will meet for presentations and discussion of the scientific basis for translating principles of risk communication into practice in situations of emerging and uncertain risk.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is or will be available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2008 and scroll down to the appropriate advisory committee link.

*Procedure*: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before August 11, 2008. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. on August 14th and 10:30 to 11:30 on August 15th. Those desiring to make formal oral presentations should notify the contact person and should submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before August 7, 2008. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will

notify interested persons regarding their request to speak by August 8, 2008.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Lee L. Zwanziger at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: July 17, 2008.

**Randall W. Lutter,**

*Deputy Commissioner for Policy.*

[FR Doc. E8–17304 Filed 7–28–08; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

**Proposed Project: Sickle Cell Disease Treatment Demonstration Program (SCDTDP), Health Resources and Services Administration (HRSA): NEW**

In 2004 Congress enacted and the President signed into law Public Law 108–357, the American Jobs Creation Act of 2004. Section 712 of Public Law 108–357 authorized a demonstration program for the prevention and treatment of Sickle Cell Disease. The legislation was enacted to (1) create an optional medical assistance program for individuals with Sickle Cell Diseases for treatment and education, genetic counseling and other services to prevent mortality and decrease morbidity from Sickle Cell Disease, and (2) create a demonstration program, the SCDTDP, under HRSA. The SCDTDP provides grants to federally-qualified and nonprofit health care providers to establish geographically distributed regional networks that will work with comprehensive Sickle Cell Disease centers and community-based support organizations to provide coordinated, comprehensive, culturally competent, and family-centered care to families with Sickle Cell Disease. In fiscal year 2006, HRSA awarded four, 4-year grants to the Illinois Sickle Cell Association Network, Alabama Network for Sickle Cell Care, Access, Prevention, and Education, Carolina Partnership for Sickle Cell Treatment Continuum of Care, and the Cincinnati Sickle Cell Network.

Under the authorizing legislation, a National Coordinating Center (NCC) was established to (1) collect, coordinate, monitor, and distribute data, best practices and findings regarding the activities of the demonstration program, (2) identify a model protocol for eligible entities with respect to the prevention and treatment of Sickle Cell Disease, (3) identify educational materials regarding the prevention and treatment of Sickle Cell Disease, and (4) prepare a final report on the efficacy of the demonstration program based on evaluation findings.

As part of the evaluation, pre and post utilization and satisfaction data and quality of life assessments will be collected from the demonstration clients during various phases of their participation. These data will be collected through medical record abstractions and self-report using hard copy questionnaires and submitted to the NCC for processing and analysis.

The total burden estimate per participant is shown below:

| Type of respondent | Form name | Number of respondents | Responses per respondent | Total responses | Hours per response | Total burden hours |
|---|---|---|---|---|---|---|
| Sickle Cell Disease clients or caregivers. | Utilization Questionnaire (pre-demonstration). | 400 | 1 | 400 | .75 | 300 |
| Sickle Cell Disease clients or caregivers. | Utilization Questionnaire (post demonstration). | 400 | 1 | 400 | .50 | 200 |
| Sickle Cell Disease clients or caregivers. | SF–36 Health Survey for adults over 18 years of age. | 280 | 2 | 560 | .25 | 140 |
| Parents of Sickle Cell Disease clients. | PedsQL for parents | 120 | 2 | 240 | .25 | 60 |
| Sickle Cell Disease clients age 18 and younger. | PedsQL for children and adolescents. | 100 | 2 | 200 | .25 | 50 |
| Sickle Cell Disease clients or caregivers. | The Medical Home Family Index (Health Care Satisfaction). | 400 | 2 | 800 | .25 | 200 |
| Total | | 500 | | 2,600 | | 950 |

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to the desk officer for HRSA, either by e-mail to *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. Please direct all correspondence to the ''attention of the desk officer for HRSA.''

Dated: July 23, 2008.

**Alexandra Huttinger,**

*Director, Division of Policy Review and Coordination.*

[FR Doc. E8–17354 Filed 7–28–08; 8:45 am]

BILLING CODE 4165–15–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel Member Conflict: Health Risks, Interventions and Outcomes.

*Date:* August 5, 2008.

*Time:* 11 a.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

*Contact Person:* Michael Micklin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3136, MSC 7759, Bethesda, MD 20892, (301) 435–1258, *micklinm@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, Microcirculation and Renovascular Hypertension.

*Date:* August 21, 2008.

*Time:* 2 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

*Contact Person:* Olga A. Tjurmina, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4030B, MSC 7814, Bethesda, MD 20892, (301) 451–1375, *ot3d@nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, Cardiac Fibrillation and Defibrillation.

*Date:* September 5, 2008.

*Time:* 2 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

*Contact Person:* Maqsood A. Wani, PhD, DVM, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2114, MSC 7814, Bethesda, MD 20892, 301–435–2270, *wanimaqs@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel, NIH Rapid Access to Interventional Development Review.

*Date:* September 17–18, 2008.

*Time:* 8 a.m. to 8 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

*Contact Person:* James J. Li, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, 301–435–2417, *lijames@csr.nih.gov*.

*Name of Committee:* Oncological Sciences Integrated Review Group, Developmental Therapeutics Study Section.

*Date:* September 18–19, 2008.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Doubletree Hotel, 1515 Rhode Island Avenue, NW., Washington, DC 20005.

*Contact Person:* Sharon K. Gubanich, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804,Bethesda, MD 20892, (301) 435–1767, *gubanics@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: July 21, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–17166 Filed 7–28–08; 8:45 am]

BILLING CODE 4140–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; 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 Alcohol Abuse and AlcoholismSpecial Emphasis Panel; Applications in Response to PAR–07–157.

*Date:* August 19, 2008.

*Time:* 1 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Room 3146, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Katrina L Foster, PhD, Scientific Review Officer, National Inst on Alcohol Abuse & Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm. 3042,Rockville, MD 20852, 301–443–4032, *Katrina@mali.ruh.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: July 18, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–17165 Filed 7–28–08; 8:45 am]

BILLING CODE 4140–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; 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 Alcohol Abuse and Alcoholism, Special Emphasis Panel, Review of Specialized (P50) and Comprehensive (P60) Alcohol Research Centers.

*Date:* August 26, 2008.

*Time:* 1:30 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5365 Fishers Lane, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Abraham P. Bautista, PhD, Chief, Extramural Project Review Branch, National Institute on Alcohol Abuse & Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm. 3039, Rockville, MD 20852, 301–443–9737, *bautista@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: July 18, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–17167 Filed 7–28–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Library of Medicine; 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 the following meeting.

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 portions of the meeting devoted to the review and evaluation of journals for potential indexing by the National Library of Medicine will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended. Premature disclosure of the titles of the journals as potential titles to be indexed by the National Library of Medicine, the discussions, and the presence of individuals associated with these publications could significantly frustrate the review and evaluation of individual journals.

*Name of Committee:* Literature Selection Technical Review Committee.

*Date:* October 23–24, 2008.

*Open:* October 23, 2008, 9 a.m. to 11 a.m.

*Agenda:* Administrative reports and program discussion.

*Place:* National Library of Medicine, Building 38, Board Room, 2 Floor, 8600 Rockville Pike, Bethesda, MD 20894.

*Closed:* October 23, 2008, 11 a.m. to 5 p.m.

*Agenda:* To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

*Place:* National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20894.

*Closed:* October 24, 2008, 8:30 a.m. to 2 p.m.

*Agenda:* To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

*Place:* National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20894.

*Contact Person:* Sheldon Kotzin, MLS, Associate Director, Division of Library Operations, National Library of Medicine, 8600 Rockville Pike, Bldg 38/Room 2W06, Bethesda, MD 20894, 301–496–6921, *Sheldon Kotzin@nlm.nih.gov*.

Any interested person may file written comments with the Committee by forwarding the statement to the Contact Person listed on this Notice. The statement should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance into the building by nongovernment employees. Persons without a government ID. will need to show a photo ID. and sign in at the security desk upon entering the building.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: July 18, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy, NIH.*

[FR Doc. E8–17044 Filed 7–28–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Agency Information Collection Activities Under Emergency Review by the Office of Management and Budget

The Substance Abuse and Mental Health Services Administration (SAMHSA) has submitted the following request (see below) for emergency OMB review under the Paperwork Reduction Act (44 U.S.C. Chapter 35). OMB approval has been requested by August 8, 2008. A copy of the information collection plans may be obtained by calling the SAMHSA Reports Clearance Officer on (240) 276–1243.

*Title:* Minority AIDS Initiative for Collaboration for Prevention and Treatment Improvement for American Indians and Alaska Natives at Risk for Substance Use and HIV/AID, (MIA) Rapid HIV Testing Clinical Information Form—NEW.

*OMB Number:* 0930–New.

*Frequency:* One-time-only

*Affected Public:* Tribes, Non-Profit Tribal Organization and Urban Indian Health Centers.

The Substance Abuse and Mental Health Services Administration's (SAMHSA) Center Substance Abuse Treatment (CSAT), is requesting an emergency OMB review and approval of the Minority AIDS Initiative for Collaboration for Prevention and Treatment Improvement for American Indians and Alaska Natives at Risk for Substance Use and HIV/AID, (MIA) Rapid HIV Testing Clinical Information Form. The MAI HIV Rapid Testing Clinical Information Form would allow SAMHSA/CSAT to collect essential clinical information that will be used for quality assurance, quality performance, and product monitoring on approximately 50,000 Rapid HIV Test Kits to be provided to American Indian and Alaska Native (AI/AN) communities at no cost to the recipient provider organizations. This Program is authorized under section 509 of the Public Health Service (PHs) Act [42 U.S.C. 290bb–2] .

The purpose of the MAI is to increase HIV/Screening to American Indians and Alaska Natives at risk for substance use and thus HIV/AIDS in 13 States; build and or strengthen tribes, tribal organizations and urban Indian health centers capacity to provide HIV/AIDS education and prevention services to American Indians and Alaska Natives; reduce the stigma associated with HIV/AIDS screening through outreach and

education and increase the number of American Indians and Alaska Natives who know their HIV/AIDS status.

The target population for the initiative is tribes, tribal organizations, and urban Indian organizations that reside in Alaska, Arizona, California, Florida, Michigan, Nevada, New Mexico, New York, North Carolina, Oklahoma, Texas, Utah and Washington who are at risk for substance use and HIV/AIDS. The selected states are those with the highest concentration of AI/AN population based on United States Census 2000. It should be noted that 6 of these states (California, Florida, Nevada, North Carolina, and New York) are also designated Block Grant HIV State-aside states (reported 10 HIV cases per 100,000 to CDC). Additionally, the top five AI/AN AIDS Case states are—California, Oklahoma, Washington, Arizona and Alaska, which also are part of the target population.

Given the history, SAMHSA could not have anticipated the need for the MAI Rapid HIV Testing Clinical Information Form earlier and is requesting an emergency OMB approval. Due to the six month shelf-life of the Rapid HIV Test Kits it is unlikely that SAMHSA will be able to distribute the kits and collect the essential clinical information prior to the expiration of the existing 20,000 Rapid HIV Test Kits without the emergency OMB approval. Emergency OMB approval will make available the immediate distribution of up to 50,000 no cost Rapid HIV Test kits to American Indian and Alaska Native communities. The MAI Rapid HIV Testing Clinical Information Form would support quality of care, provide minimum but adequate clinical and product monitoring, and provide appropriate safeguards against fraud, waste and abuse of Federal funds. SAMHSA's approach would avoid unnecessary delay in informing any person potentially adversely affected by a test kit recall or public health advisory.

The following table is the estimated hour burden:

| Number of respondents | Responses/ respondent | Burden hours | Total burden hours |
|---|---|---|---|
| 50,000 | 1 | .167 | 8,350 |

Written comments and recommendations concerning the proposed information collection should be sent within 30 Days of this notice to: John Kraemer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–6974.

Date: July 24, 2008.

**Christine Chen,**

*Director, Division of Grants Management.*

[FR Doc. E8–17336 Filed 7–28–08; 8:45 am]

**BILLING CODE 4162–20–P**

## DEPARTMENT OF HOMELAND SECURITY

### Office of Health Affairs; BioWatch Filter Holder Log

**AGENCY:** Office of Health Affairs, Weapons of Mass Destruction (WMD) and Biodefense, Chem/Bio Early Detection Division, DHS.

**ACTION:** 30-Day Notice and request for comments; New Information Collection Request 1601–NEW.

**SUMMARY:** The Department of Homeland Security, Office of Health Affairs, WMD and Biodefense, has submitted the following information collection request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). The Office of Health Affairs, WMD and Biodefense are soliciting comments concerning a new information collection request, Bio Watch Filter Holder Log Form 9500. DHS previously published this information collection request (ICR) in the **Federal Register** on April 4, 2008 at 73 FR 18542, for a 60-day public comment period. No comments were received by DHS. The purpose of this notice is to allow additional 30-days for public comments.

**DATES:** Comments are encouraged and will be accepted until August 28, 2008. This process is conducted in accordance with 5 CFR 1320.1.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to OMB Desk Officer for the Department of Homeland Security, Office of Health Affairs, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

**FOR FURTHER INFORMATION CONTACT:** If additional information is required contact: the Department of Homeland Security, Office of Health Affairs, WMD and Biodefense, Chem/Bio Early Detection Division, Washington, DC 20528. Attn: Division Director, Dr. Jeffrey Stiefel, 703–647–8056 or 202–254–6076.

**SUPPLEMENTARY INFORMATION:** The Department of Homeland Security (DHS), Office of Health Affairs, WMD and Biodefense, Chem/Bio Early Detection Division requires the collection of information by BioWatch jurisdictions. The BioWatch Program operates aerosol collector equipment in approximately 30 U.S. jurisdictions to monitor for the presence of organisms that may be related to the deliberate release of a select subset of biological threat agents. Information is collected in writing by a representative of a BioWatch jurisdiction (either an employee, or a contractor) responsible for installing and removing filters from aerosol collection devices and transporting them to local laboratories for sample analysis. A standard filter holder log is completed for each sample and is archived by the BioWatch jurisdiction for a year. The DHS BioWatch Program provides financial support to the participating jurisdictions

for the cost of collection and laboratory analysis activities, including the preparation of the filter holder log and other documentation. The Federal Bureau of Investigation (FBI) has instructed the BioWatch Program to maintain a written record for each collected filter sample to support law enforcement activities, including criminal prosecution in the case of a deliberate release of a biological agent. Collection of written records establishing chain of custody for samples containing biological agents and toxins for the purpose of evidence in a criminal proceeding is consistent with the ''Best Evidence Rule'', Section 1002, of the federal Rules of Evidence. The FBI instruction to the BioWatch program is consistent with Section 7 of the FBI Quality Assurance Guidelines for Laboratories Performing Microbial Forensic Work, produced by the members of the Scientific Working Group on Microbial Genetics and Forensics (SWGMGF). Such record keeping supports mandatory reporting requirements directed by The APHIS Interim Final Rule 7 CFR Part 331, Possession, Use, and Transfer of Biological Agents and Toxins; and the CDC Interim Final Rule 42 CFR Part 73 Possession, Use, and Transfer of Select Agents and Toxins, *inter alia.*

**Analysis**

*Agency:* Department of Homeland Security, Office of Health Affairs, WMD and Biodefense, Chem/Bio Early Detection Division.

*Title:* BioWatch Filter Holder Log.

*DHS Form:* 9500 (5/07).

*OMB Number:* 1601–NEW.

*Frequency:* Once daily.

*Affected Public:* State, Local, and Tribal Governments.

*Number of Respondents:* 522.

*Estimated Time per Respondent:* 1 minute.

*Total Burden Hours:* 3,182 annual burden hours.

*Total Burden Cost (capital/startup):* $0.00.

*Total Burden Cost (operating/maintaining):* $144,770.

Dated: July 17, 2008.

**Richard Mangogna,**

*Chief Information Officer.*

[FR Doc. E8–17338 Filed 7–28–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R4–ES–2008–N0183; 40120–1113–0000–C4]**

### Endangered and Threatened Wildlife and Plants; 5-Year Status Review of 20 Southeastern Species

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) is initiating 5-year status reviews of the slender chub (*Erimystax cahni*), blackside dace (*Phoxinus cumberlandensis*), vermillion darter (*Etheostoma chermocki*), pygmy madtom (Noturus stanauli), palezone shiner (*Notropis albizonatus*), fanshell (*Cyprogenai stegaria*), inflated heelsplitter (*Potamilus inflatus*), pink mucket (*Lampsilis abrupta*), spruce-fir moss spider (*Microhexura montivaga*), cave crayfish (*Cambarus aculabrum*), Pyne's ground plum (*Astragalus bibulatus*), small-anthered bittercress (*Cardamine micranthera*), leafy prairie clover (*Dalea foliosa*), smooth coneflower (*Echinacea laevigata*), spreading avens (*Geum radiatum*), Roan Mountain bluet (*Hedyotis purpurea var. montana*), rough-leaved loosestrife (*Lysimachia asperulaefolia*), Michaux's sumac (*Rhus michauxii*), Alabama canebrake pitcher plant (*Sarracenia rubra* ssp. *alabamensis*), and Blue Ridge goldenrod (*Solidago spithamaea*), under section 4(c)(2) of the Endangered Species Act of 1973, as amended (Act). The purpose of reviews conducted under this section of the Act is to ensure that the classification of species as threatened or endangered on the List of Endangered and Threatened Wildlife and Plants (50 CFR 17.11 and 17.12) is accurate. A 5-year review is an assessment of the best scientific and commercial data available at the time of the review.

**DATES:** To allow us adequate time to conduct this review, information submitted for our consideration must be received on or before September 29, 2008. However, we will continue to accept new information about any listed species at any time.

**ADDRESSES:** Information submitted on the slender chub, pygmy madtom, Pyne's groundplum, and leafy prairie clover should be sent to Geoff Call, Tennessee Field Office, U.S. Fish and Wildlife Service, 446 Neal Street, Cookeville, TN 38501, fax 931–528–7075. Information on the palezone shiner, blackside dace, and fanshell should be sent to Mike Floyd, Kentucky Field Office, U.S. Fish and Wildlife Service, 330 W. Broadway, Rm. 265, Frankfort, KY 40601, fax 502–695–1024. Information on the smooth coneflower, Michaux's sumac, and rough-leaved loosestrife should be sent to Dale Suiter, Raleigh Field Office, U.S. Fish and Wildlife Service, P.O. Box 33726, Raleigh, NC 27636, fax 919–856–4556. Information on the pink mucket, spruce fir moss spider, spreading avens, Blue Ridge goldenrod, Roan Mountain bluet, and small-anthered bittercress should be sent to Field Supervisor, Asheville Field Office, U.S. Fish and Wildlife Service, 160 Zillicoa St., Asheville, NC 28801, fax 828–258–5330. Information on the vermillion darter, inflated heelsplitter, and Alabama canebrake pitcher plant should be sent to Cary Norquist, Mississippi Field Office, U.S. Fish and Wildlife Service, 6578 Dogwood View Pkwy., Jackson, MS 39213, fax 601–965–4340. Information on the cave crayfish should be sent to David Kampwerth, Arkansas Field Office, 110 South Amity Road, Suite 300, Conway, AR 72032, fax 501–513–4480. Information received in response to this notice of review will be available for public inspection by appointment, during regular business hours, at the same addresses.

**FOR FURTHER INFORMATION CONTACT:** Geoff Call at Cookeville, Tennessee address above for the slender chub, pygmy madtom, Pyne's groundplum and leafy prairie clover (telephone, 931/528–6481 ext. 213, e-mail *geoff_call@fws.gov*); Mike Floyd at the Frankfort, Kentucky, address above for the palezone shiner, blackside dace, and fanshell (telephone, 502/695–0468 ext. 102, e-mail *mike_floyd@fws.gov*); Dale Suiter at the Raleigh, North Carolina address above for the smooth coneflower, Michaux's sumac, and rough-leaved loosestrife (telephone, 919/856–4520 ext. 18, e-mail *dale_suiter@fws.gov*); Bob Butler at Asheville, North Carolina address above for the pink mucket (telephone, 828/258–3939 ext. 235, e-mail *robert_butler@fws.gov*); John Fridell at the Asheville, North Carolina for the spruce fir moss spider (telephone, 828/258–3939 ext. 225, e-mail *john_fridell@fws.gov*); Carolyn Wells at Asheville, North Carolina for the spreading avens, Blue Ridge goldenrod, Roan Mountain bluet, and small-anthered bittercress (telephone, 828/258–3939 ext. 231, *carolyn_wells@fws.gov*); Cary Norquist at Jackson, Mississippi address above for the vermillion darter, inflated heelsplitter, and Alabama canebrake pitcher plant (telephone, 601/321–1128,

e-mail *cary_norquist@fws.gov*); and David Kampwerth at Conway, Arkansas for the cave crayfish (telephone, 501–501–4477, e-mail *david_kampwerth@fws.gov*).

**SUPPLEMENTARY INFORMATION:** Under the Act (16 U.S.C. 1531 *et seq.*), the Service maintains a list of endangered and threatened wildlife and plant species at 50 CFR 17.11 (for wildlife) and 17.12 (for plants) (collectively referred to as the List). Section 4(c)(2)(A) of the Act requires that we conduct a review of listed species at least once every 5 years. Then, on the basis of such reviews, under section 4(c)(2)(B), we determine whether or not any species should be removed from the List (delisted), or reclassified from endangered to threatened or from threatened to endangered. Delisting a species must be supported by the best scientific and commercial data available and only considered if such data substantiate that the species is neither endangered nor threatened for one or more of the following reasons: (1) The species is considered extinct; (2) the species is considered to be recovered; and/or (3) the original data available when the species was listed, or the interpretation of such data, were in error. Any change in Federal classification would require a separate rulemaking process. Amendments to the List through final rules are published in the **Federal Register** .

The regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species currently under active review. This notice announces our active review of the following species that are currently listed as endangered: vermillion darter, pygmy madtom, palezone shiner, fanshell, pink mucket, spruce-fir moss spider, cave crayfish, Pyne's groundplum, small-anthered bittercress, leafy prairie clover, smooth coneflower, spreading avens, Roan Mountain bluet, rough-leaved loosestrife, Michaux's sumac, and Alabama canebrake pitcher plant. The other four species in this notice are currently listed as threatened. The List is also available on our Internet site at *http://endangered.fws.gov/wildlife.html#Species.*

**What information is considered in the review?**

A 5-year review considers the best scientific and commercial data that have become available since the current listing determination or most recent status review of each species, such as:

A. Species biology, including but not limited to population trends, distribution, abundance, demographics, and genetics;

B. Habitat conditions, including but not limited to amount, distribution, and suitability;

C. Conservation measures that have been implemented to benefit the species;

D. Threat status and trends (see five factors under heading ''How do we determine whether a species is endangered or threatened?''); and

E. Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

**Definitions Related to This Notice**

We provide the following definitions to assist individuals submitting information regarding the species being reviewed:

A. *Species* includes any species or subspecies of fish, wildlife, or plant, and any distinct population segment of any species of vertebrate which interbreeds when mature.

B. *Endangered* means any species that is in danger of extinction throughout all or a significant portion of its range.

C. *Threatened* means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

**How do we determine whether a species is endangered or threatened?**

Section 4(a)(1) of the Act establishes that we determine whether a species is endangered or threatened based on one or more of the following five factors:

A. The present or threatened destruction, modification, or curtailment of its habitat or range;

B. Overutilization for commercial, recreational, scientific, or educational purposes;

C. Disease or predation;

D. The inadequacy of existing regulatory mechanisms; or

E. Other natural or manmade factors affecting its continued existence.

**What could happen as a result of this review?**

If we find that there is new information concerning any of these 20 species indicating that a change in classification may be warranted, we may propose a new rule that could do one of the following: (a) Reclassify the species from endangered to threatened (downlist); (b) reclassify the species from threatened to endangered (uplist); or (c) delist the species. If we determine that a change in classification is not warranted, then the species will remain on the List under their current status.

**Public Solicitation of New Information**

We request any new information concerning the status of any of these 20 species. See ''What information is considered in the review?'' heading for specific criteria. Information submitted should be supported by documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses, etc., but if you wish us to withhold this information, you must state this prominently at the beginning of your comments. In addition, you must present a rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional, documental circumstances, this information will be released. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

**Authority**

This document is published under the authority of the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

Dated: June 30, 2008.

**Cynthia K. Dohner,**

*Acting Regional Director.*

[FR Doc. E8–17368 Filed 7–28–08; 8:45 am]

**BILLING CODE 4310–55–P**

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WY–050–08–1310–DB]**

### Notice of Intent To Prepare an Environmental Impact Statement for the Beaver Creek Coal Bed Natural Gas Development Project, Wyoming

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of intent.

**SUMMARY:** The Bureau of Land Management (BLM) Lander Field Office intends to prepare an Environmental

Impact Statement (EIS) for a proposed coal bed natural gas (CBNG) development approximately 9 miles southeast of Riverton, Wyoming. The proposed development project is known as the Beaver Creek Coal Bed Natural Gas Development Project (Project), located in Fremont County, Wyoming.

**DATES:** The BLM will announce public scoping meetings hosted in Lander and Riverton, Wyoming to identify relevant issues through local media, newsletters, individual mailings, and the BLM Web site at *www.blm.gov/wy/st/en/info/NEPA/lfodocs/beavercreek_cbng.html* at least 15 days prior to each meeting. We will provide additional opportunities for public participation upon publication of the Draft EIS, including a minimum 45-day public comment period.

**ADDRESSES:** You may submit your issues and comments related to the Beaver Creek Coal Bed Natural Gas Development Project EIS by any of the following methods:

- *Web Site: www.blm.gov/wy/st/en/info/NEPA/lfodocs/beavercreek_cbng.html.*
- *E-mail: Curtis_Bryan@blm.gov.*
- *Fax:* 307–332–8444.
- *Mail:* Lander Field Office, 1335 Main Street, Lander, WY 82520.

Documents pertinent to this proposal may be examined at the Lander Field Office.

**FOR FURTHER INFORMATION CONTACT:** For further information, contact Curtis Bryan, Telephone (307) 332–8400; E-mail: *Curtis_Bryan@blm.gov.*

**SUPPLEMENTARY INFORMATION:** This document provides notice that the BLM Lander Field Office, Lander, Wyoming, intends to prepare an EIS on the potential impacts of a proposed natural gas field development, ancillary facilities, pipelines, and roads. The Beaver Creek Project area is located 9 miles southeast of the town of Riverton in Fremont County, Wyoming. The proposed Project is within the Beaver Creek Unit in Township 33 North, Range 96 West, in all or portions of Sections 1–4, 9–16, 21–23, and 28–29; Township 34, Range 96 West, in all or portions of Sections 20–28 and 33–36 (6th Principal Meridian). The Beaver Creek Project area encompasses approximately 16,515 acres. Approximately 82 percent of the Project area is public lands and Federal mineral estate administered by the BLM, with some interspersed State and private lands and other mineral estate.

The Proponent, Devon Energy Production Co. LP (Devon) has submitted a proposal to drill up to 228 natural gas wells, of which 208 would produce CBNG and about 20 would produce conventional natural gas. The estimated drilling and completion period would occur over the course of 5 to 10 years and the life of the project is anticipated to be between 20 and 40 years. Devon proposes to drill the CBNG wells at a density of one well every 40 acres. The proposed CBNG wells are expected to be drilled vertically and would be completed in the Mesa Verde formation, while the proposed conventional gas wells would likely be completed in the Madison and Phosphoria formations. Because the target formations are located in different geologic formations, conventional gas wells may overlap with the CBNG well density. Facilities associated with the proposed project include access roads, pipelines, overhead power lines, central production facilities, four water disposal (re-injection) wells, two evaporation ponds, and equipment storage areas. The Beaver Creek Unit has experienced extensive gas development over the last 50 years, and the Proponent would utilize existing roads and facilities to the extent practical. During the short-term, while well pads are in construction, pad size is expected to be about 2.5 acres for each the CBNG wells and about 3 acres for conventional wells. This would result in an estimated total short-term well pad disturbance of about 565 acres. Following reclamation, an estimated 390 acres of surface from well pads would be left without vegetation and disturbance. Approximately 24 miles of new access roads would be constructed with most new roads developed as laterals off existing roads. Total disturbance associated with the construction of access roads is estimated to be approximately 117 acres. These roads would be open for the life of the project. In the short-term, construction and installation of approximately 66 miles of new pipelines and overhead powerlines would disturb approximately 550 acres, most of which would be reclaimed for the long-term.

Produced water from the wells would be disposed of into four proposed water disposal (re-injection) wells and two proposed evaporation ponds. The injection wells would serve as the primary method of produced water disposal. No surface discharge of produced water is proposed.

During the drilling phase of the proposed project, Devon estimates that the total short-term surface disturbance would be approximately 1,280 acres. After reclamation and for the life of the proposed project, Devon estimates that the long-term surface disturbance would be about 550 acres.

Major issues identified at this time include: Potential impacts to air quality; disposal of produced waste water; and the potential effects of development and production on surface resources including vegetation, cultural resources, and wildlife habitat.

In addition to the proposed action and the no action alternatives, other alternatives may be developed. These may include: An alternative that considers less than 228 wells; an alternative that considers re-injection of some or all produced water; and an alternative that would eliminate the need for overhead power lines by requiring the proponent to bury all power lines.

**Martin G. Griffith,**

*Acting State Director.*

[FR Doc. E8–17327 Filed 7–28–08; 8:45 am]

**BILLING CODE 4310–22–P**

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[ID–300–1020–PH; DDG080004]**

### Notice of Public Meeting, Idaho Falls District Resource Advisory Council Meeting

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public meetings.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Idaho Falls District Resource Advisory Council (RAC), will meet as indicated below.

**DATES:** The RAC will next meet in Dubois and Idaho Falls, Idaho on September 10–11, 2008 for a two day field tour. The group will meet at the new Dubois Fire Station, Clark Ave, Dubois, Idaho starting at 10 a.m. The second day the group will be meeting at the Idaho Falls BLM Office, 1405 Hollipark Drive, Idaho Falls, Idaho at 8 a.m. followed by a tour to the desert. Meeting topics include noxious weeds, power line corridors, Snake River Activity Operations Plan, Upper Snake RMP and fire. Other topics will be scheduled as appropriate. All meetings are open to the public.

**SUPPLEMENTARY INFORMATION:** The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues

associated with public land management in the BLM Idaho Falls District (IFD), which covers eastern Idaho.

All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations, should contact the BLM as provided below.

**FOR FURTHER INFORMATION CONTACT:** Joanna Wilson, RAC Coordinator, Idaho Falls District, 1405 Hollipark Dr., Idaho Falls, ID 83401. Telephone (208) 524–7550. E-mail: *Joanna_Wilson@blm.gov*.

Dated: July 23, 2008.

**Joanna Wilson,**

*RAC Coordinator, Public Affairs Specialist.*

[FR Doc. E8–17330 Filed 7–28–08; 8:45 am]

**BILLING CODE 4310–GG–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[CO–922–08–1310–FI; COC70365]**

### Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of proposed reinstatement of terminated oil and gas lease.

**SUMMARY:** Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement of oil and gas lease COC70365 from Hunt Petroleum (AEC), Inc., for lands in Rio Blanco County, Colorado. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

**FOR FURTHER INFORMATION CONTACT:** Bureau of Land Management, Milada Krasilinec, Land Law Examiner, Branch of Fluid Minerals Adjudication, at 303.239.3767.

**SUPPLEMENTARY INFORMATION:** The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the MineralLands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease COC70365 effective July 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Dated: July 23, 2008.

**Milada Krasilinec,**

*Land Law Examiner.*

[FR Doc. E8–17317 Filed 7–28–08; 8:45 am]

**BILLING CODE 4310–JB–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 332–350 and 332–351]**

### Monitoring of U.S. Imports of Tomatoes; Monitoring of U.S. Imports of Peppers

**AGENCY:** United States International Trade Commission

**ACTION:** Notice of opportunity to submit information for 2008 monitoring reports.

**SUMMARY:** Pursuant to statute (see below), the Commission monitors U.S. imports of fresh or chilled tomatoes and fresh or chilled peppers, other than chili peppers, for the purpose of expediting an investigation under certain U.S. safeguard laws, should an appropriate petition be filed. As part of that monitoring, the Commission has instituted investigations under section 332 of the Tariff Act of 1930 (19 U.S.C. 1332) for the purpose of compiling data on trade and the domestic industry. The Commission is in the process of preparing its reports for the period ending June 30, 2008, and is seeking input from interested members of the public. The Commission expects to make its reports available to the public in electronic form on the Commission's Web site in November 2008.

**DATES:** September 11, 2008: Deadline for filing written submissions and other information. November 21, 2008: Anticipated posting of Commission report.

**ADDRESSES:** All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street, SW., Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://www.usitc.gov/secretary/edis.htm*.

**FOR FURTHER INFORMATION CONTACT:** Brendan Lynch (202–205–3313, *brendan.lynch@usitc.gov*) or Jonathan Coleman (202–205–3465, *jonathan.coleman@usitc.gov*), Agriculture and Fisheries Division, Office of Industries, for general information, or William Gearhart (202–205–3091, *william.gearhart@usitc.gov*), Office of the General Counsel, for information on legal aspects. The media should contact Margaret O'Laughlin (202–205–1819 or *margaret.olaughlin@usitc.gov*), Office of External Relations. Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

*Background:* Section 316 of the North American Free-Trade Agreement Implementation Act (NAFTA Implementation Act) (19 U.S.C. 3881) requires that the Commission monitor U.S. imports of fresh or chilled tomatoes (HTS heading 0702.00) and fresh or chilled peppers, other than chili peppers (HTS subheading 0709.60.00), until January 1, 2009, for purposes of expediting an investigation concerning provisional relief under section 202 of the Trade Act of 1974 or section 302 of the NAFTA Implementation Act. Section 316 does not require that the Commission publish reports on this monitoring activity or otherwise make the information available to the public. However, the Commission maintains current data files on tomatoes and peppers in order to conduct an expedited investigation should a request be received. Following enactment of section 316, the Commission instituted investigation No. 332–350, *Monitoring of U.S. Imports of Tomatoes* (59 FR 1763), and investigation No. 332–351, Monitoring of U.S. *Imports of Peppers* (59 FR 1762).

The Commission will continue to make its reports available to the public in electronic form (with the exception of any confidential business information (CBI)), and will maintain electronic copies of its reports on its Web site until one year after the monitoring requirement expires on January 1, 2009. The most recent Commission

monitoring reports in this series were published in November 2007 and are available on the Commission's Web site.

*Written Submissions:* The Commission does not plan to hold a public hearing in connection with preparation of these reports. However, interested persons are invited to submit written statements containing data and other information concerning the matters to be addressed. All submissions should be addressed to the Secretary, and should be received no later than the close of business on September 11, 2008. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 requires that a signed original (or a copy so designated) and fourteen (14) copies of each document be filed. In the event that confidential treatment of a document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules authorize the filing of submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the *Commission's Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

The Commission will not publish such confidential business information in the monitoring reports it posts on its Web site in a manner that would reveal the operations of the firm supplying the information. However, the Commission may include such information in any report it sends to the President under section 202 of the Trade Act of 1974 or section 302 of the NAFTA Implementation Act, if it is required to conduct an investigation involving these products under either of these statutory authorities.

By order of the Commission.

Issued: July 23, 2008.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E8–17311 Filed 7–28–08; 8:45 am]

BILLING CODE 7020–02–P

## INTERNATIONAL TRADE COMMISSION

### [Investigation No. 731–TA–1010 (Review)]

### Lawn and Garden Steel Fence Posts from China

**AGENCY:** United States International Trade Commission.

**ACTION:** Termination of five-year review.

**SUMMARY:** The subject five-year review was initiated in May 2008 to determine whether revocation of the antidumping duty order on lawn and garden steel fence posts from China would be likely to lead to continuation or recurrence of material injury. On July 18, 2008, the Department of Commerce published notice that it was revoking the order effective June 12, 2008, ''{b}ecause the domestic interested parties did not participate in the sunset review * * *'' (73 FR 41316). Accordingly, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), the subject review is terminated.

**DATES:** *Effective Date:* June 12, 2008.

**FOR FURTHER INFORMATION CONTACT:** Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*).

**Authority:** This review is being terminated under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.69 of the Commission's rules (19 CFR 207.69).

By order of the Commission.

Issued: July 23, 2008.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E8–17312 Filed 7–28–08; 8:45 am]

BILLING CODE 7020–02–P

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—American Society of Mechanical Engineers

Notice is hereby given that, on July 2, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), American Society of Mechanical Engineers (''ASME'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, since March 6, 2008, ASME has established one new standards-writing committee, disbanded two standards-writing committees, published five new standards, and initiated three new standards activities within the general nature and scope of ASME's standards development activities, as specified in its original notification. More detail regarding these changes can be found at *http://www.asme.org.*

On September 15, 2004, ASME filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 13, 2004 (69 FR 60895).

The last notification was filed with the Department on March 6, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 7, 2008 (73 FR 18812).

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. E8–17043 Filed 7–28–08; 8:45 am]

BILLING CODE 4410–11–M

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on Clean Diesel V

Notice is hereby given that, on June 24, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on Clean Diesel V (''Clean Diesel V'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Caterpillar, Inc., Mossville, IL; Toyota Motor Corp., Shizuoka, JAPAN and its subsidiary, Hino Motors, Ltd., Tokyo, JAPAN; EASF Catalysts LLC, Iselin, NJ; Chrysler, LLC, Auburn Hills, MI; and Shell Global Solutions (US), Inc., Houston, TX, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Clean Diesel V intends to file additional written notifications disclosing all changes in membership.

On January 10, 2008, Clean Diesel V filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 25, 2008 (73 FR 10064).

The last notification was filed with the Department on April 23, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 5, 2008 (73 FR 32051).

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. E8–17042 Filed 7–28–08; 8:45 am]

BILLING CODE 4410–11–M

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—LiMo Foundation

Notice is hereby given that, on June 12, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), LiMo Foundation (''LiMo'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Verizon Communications Inc., Basking Ridge, NJ; Texas Instruments, Dallas, TX; and Red Bend Software, Inc., Hod Hasharon, ISRAEL, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of this group research project. Membership in this group research project remains open, and LiMo intends to file additional written notifications disclosing all changes in membership.

On March 1, 2007, LiMo filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on April 9, 2007 (72 FR 17583).

The last notification was filed with the Department on March 27, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 9, 2008 (73 FR 26414).

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. E8–17041 Filed 7–28–08; 8:45 am]

BILLING CODE 4410–11–M

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Recreational Off-Highway Vehicle Organization

Notice is hereby given that, on June 23, 2008, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), the Recreational Off-Highway Vehicle Organization (ROVO) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: Recreational Off-Highway Vehicle Organization, Irvine, CA. The nature and scope of ROVO's standards development activities are: The development of a proposed voluntary standard (ANSI/ROVO–1–200_) addressing the design, configuration and performance aspects of Recreational Off-Highway Vehicles (ROVs).

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. E8–17040 Filed 7–28–08; 8:45 am]

BILLING CODE 4410–11–M

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### Delegation of Authority

**AGENCY:** National Endowment for the Arts.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given of the order of succession in the absence of the Chairman of the National Endowment for the Arts.

**DATES:** Upon publication.

**FOR FURTHER INFORMATION CONTACT:** Craig McCord, Director of Human Resources, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Room 627, Washington, DC 20506, (202) 682–5473.

In the absence of the Chairman, those listed below are designated to exercise the duties of the Chairman: Senior Deputy Chairman, or if the incumbent is unavailable, Deputy Chairman for Management and Budget, or if the incumbent is unavailable, Deputy Chairman for Grants and Awards, or if the incumbent is unavailable, Deputy Chairman for States, Regions, and Local Arts Agencies, or if the incumbent is unavailable, Director of the Office of Government Affairs, or if the incumbent is unavailable, Chief Information Officer, or if the incumbent is unavailable, Director of the Office of Research and Analysis.

This delegation will remain in effect until revoked or otherwise superseded.

**Kathleen Edwards,**

*Director of Administrative Services, National Endowment for the Arts.*

[FR Doc. E8–17240 Filed 7–28–08; 8:45 am]

BILLING CODE 7537–01–P

## NUCLEAR REGULATORY COMMISSION

### Application for a License To Export High-Enriched Uranium

Pursuant to 10 CFR 110.70 (b)(2) ''Public Notice of Receipt of an Application,'' please take notice that the Nuclear Regulatory Commission (NRC) has received the following request for an export license. Copies of the request can be accessed through the Public Electronic Reading Room (PERR) link *http://www.nrc.gov/reading-rm/adams.html* at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within 30 days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

A request for a hearing or petition for leave to intervene may be filed with the NRC electronically in accordance with NRC's E-Filing rule promulgated in August 2007, 72 Fed. Reg 49139 (Aug. 28, 2007). Information about filing electronically is available on timely electronic filing, at least five days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV*, or by calling (301) 415–1677, to request a digital ID certificate and allow for the creation of an electronic docket.

In addition to a request for hearing or petition for leave to intervene, written comments, in accordance with 10 CFR 110.81, should be submitted within thirty (30) days after publication of this notice in the **Federal Register** to Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications.

The information concerning this license application follows.

NRC EXPORT LICENSE APPLICATION

| Name of applicant date of application date received Application No. Docket No. | Description of Material | | End use | Recipient country |
|---|---|---|---|---|
| | Material type | Total quantity | | |
| DOE/NNSA—Y–12 National Security Complex—July 11, 2008, July 14, 2008, XSNM3545, 11005747. | High-Enriched Uranium (93.35%). | Up to 17.5 kilograms uranium (16.33 kilograms U–235). | To fabricate targets for irradiation in the National Research Universal (NRU) Reactor to produce medical isotopes. | Canada. |

Dated this 23rd day of July 2008 at Rockville, Maryland.

For the Nuclear Regulatory Commission.

**Scott W. Moore,**

*Deputy Director, Office of International Programs.*

[FR Doc. E8–17315 Filed 7–28–08; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

### Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

### I. Background

Pursuant to section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from July 3, 2008 to July 16, 2008. The last biweekly notice was published on July 15, 2008 (73 FR 40629).

### Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–

0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the Internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/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 proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/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 is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing 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 documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically 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 a 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.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

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 submission.

For further details with respect to this amendment action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov.*

*Dominion Nuclear Connecticut, Inc., Docket Nos. 50–336 and 50–423, Millstone Power Station, Unit Nos. 2 and 3, New London County, Connecticut*

*Date of amendment request:* March 25, 2008.

*Description of amendment request:* The proposed amendment would revise the reactor coolant system (RCS) specific activity to utilize a new indicator, Dose Equivalent Xenon-133 and only take into account the noble gas activity in the primary coolant, instead of the current indicator, average disintegration energy (E Bar). Specifically, the current Technical Specification 3.4.8, ''Specific Activity,'' limit on RCS gross specific activity would be replaced with a new limit on RCS noble gas specific activity. This change was proposed by the industry's Technical Specification Task Force (TSTF) and is designated TSTF–490, ''Deletion of E Bar Definition and Revision to RCS Specific Activity Tech. Spec. [Technical Specification].'' The Nuclear Regulatory Commission (NRC) staff issued a notice of opportunity for comment in the **Federal Register** on November 20, 2006 (71 FR 67170), on possible amendments concerning TSTF–490, including a model safety evaluation and model no significant hazards (NSHC) determination, using the consolidated line item improvement process. The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on March 15, 2007 (72 FR 12217). Dominion Nuclear Connecticut, Inc., affirmed the applicability of the following NSHC determination in its application dated March 25, 2008.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below, with NRC staff annotations:

*Criterion 1*—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated.

Reactor coolant specific activity is not an initiator for any accident previously evaluated. The Completion Time when primary coolant gross activity is not within limit is not an initiator for any accident previously evaluated. The current variable limit on primary coolant iodine concentration is not an initiator to any accident previously evaluated. As a result, the proposed change does not significantly increase the probability of an accident. The proposed change will limit primary coolant noble gases to concentrations consistent with the accident analyses. The proposed change to the Completion Time has no impact on the consequences of any design basis accident since the consequences of an accident during the extended Completion Time are the same as the consequences of an accident during the Completion Time. As a result, the consequences of any accident previously evaluated are not significantly increased.

*Criterion 2*—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident from any Accident Previously Evaluated.

The proposed change in specific activity limits does not alter any physical part of the plant nor does it affect any plant operating parameter [besides the allowable specific activity in the RCS.] [The change which impacts the allowable specific activity in the RCS is consistent with the accident analyses.] [Therefore] [t]he change does not create the potential for a new or different kind of accident from any previously calculated.

*Criterion 3*—The Proposed Change Does Not Involve a Significant Reduction in [a] Margin of Safety.

The proposed change revises the limits on noble gas radioactivity in the primary coolant. [The proposed change will have no impact on the radiological consequences of a design basis accident because it will limit the RCS noble gas specific activity to be consistent with the accident analysis.] The proposed change is consistent with the assumptions in the safety analyses [and will ensure the monitored values protect the initial assumptions in the safety analyses.] [Therefore the change does no involve a reduction in a margin of safety.]

Based upon the reasoning presented above and the previous discussion of the amendment request, the requested change

does not involve a significant hazards consideration.

The NRC staff has reviewed the licensee's analysis, with consideration of the NRC staff annotations, and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for licensee:* Lillian M. Cuoco, Esquire, Senior Nuclear Counsel, Dominion Resources Services, Inc., Building 475, 5th Floor, Rope Ferry Road, Waterford, CT 06385.

*NRC Branch Chief:* Harold K. Chernoff.

*Florida Power and Light Company, Docket Nos. 50–250 and 50–251, Turkey Point Plant, Units 3 and 4, Miami-Dade County, Florida*

*Date of amendment request:* September 5, 2007.

*Description of amendment request:* The proposed amendment would remove notes associated with License Amendment No. 221 regarding the inoperability of the Unit 4 Rod Position Indication (RPI) system for control rod F–8 in Shutdown Bank B and Amendment No. 230 from associated notes regarding the inoperability of the Unit 3 RPI system for control rod M–6 in Control Bank C.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Will operation of the facility in accordance with this proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

No. The proposed amendments do not involve a significant increase in the probability or consequences of an accident previously evaluated because the proposed amendments are purely administrative in nature. The proposed amendments do not make substantive changes to the Technical Specifications and do not affect any assumptions contained in plant safety analyses, the physical design and/or operation of the plant; and they do not affect the Technical Specifications that preserve safety analysis assumption.

Therefore, the proposed changes do not affect the probability or consequences of accidents previously analyzed.

2. Does the proposed change create the probability of a new or different accident from any accident previously evaluated?

No. The proposed administrative changes to the Technical Specifications do not create the possibility of a new or different kind of accident from any previously evaluated, since the proposed amendments will not change the physical plant or the modes of plant operation defined in the facility operating licenses. No new failure mode is introduced due to the proposed administrative changes, since the proposed changes do not involve the addition or modification of equipment, nor do they alter the design or operation of affected plant systems, structures, or components.

Therefore, operation of the facility in accordance with the proposed amendments would not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

No. The operating limits and functional capabilities of the affected systems, structures, and components are unchanged by the proposed amendment. The changed Technical Specifications remove notes which are no longer in effect and do not reduce any of the margins of safety.

Therefore, operation of the facility in accordance with the proposed amendments would not involve a significant reduction in the margin of safety.

Based upon the reasoning presented above it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for licensee:* M.S. Ross, Attorney, Florida Power & Light, P.O. Box 14000, Juno Beach, Florida 33408–0420.

*NRC Branch Chief:* Thomas H. Boyce.

*Pacific Gas and Electric Company, Docket Nos. 50–275 and 50–323, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2, San Luis Obispo County, California*

*Date of amendment requests:* April 3, 2008.

*Description of amendment requests:* The proposed amendments would revise Technical Specification (TS) 3.7.5, ''Auxiliary Feedwater System,'' to remove Surveillance Requirement 3.7.5.6, and revise TS 3.7.6, ''Condensate Storage Tank (CST) and Fire Water Storage Tank (FWST),'' to remove the FWST level requirements, revise the CST level requirements, and revise TS 3.7.6 to be consistent with the NUREG–1431 Standard Technical Specifications.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes would revise TS 3.7.5, ''Auxiliary Feedwater System,'' to remove SR 3.7.5.6, and revise TS 3.7.6, ''Condensate Storage Tank (CST) and Fire Water Storage Tank (FWST),'' to remove the FWST level requirements, revise the CST level requirements, and revise TS 3.7.6 to be consistent with the NUREG–1431 Standard Technical Specifications. The proposed changes reflect a design change to the CST that enables the CST to provide the entire required source of usable volume of safety grade water to the AFW System pumps to remove decay and sensible heat from the Reactor Coolant System (RCS).

The CST and AFW System pumps are not accident initiators, and are credited to mitigate accidents and events. The changes have no impact on the method by which the CST or AFW system performs its functions or the required AFW system pump flowrate to be provided. With the changes, a sufficient quantity of water will continue to be supplied by the CST to the AFW pumps to remove heat from the RCS in the event of a loss of normal feedwater to the SGs, and thus the FWST volume is no longer required to be contained in the TS.

With the change, the overall quantity of water required by TS 3.7.6 to be available for the AFW pumps is reduced. This reduction in available AFW supply is acceptable based on revised plant-specific CST minimum storage volume calculations, which incorporate the design of the replacement Westinghouse Model Delta 54 Steam Generators, and the design change in Unit 2 to a $T_{cold}$ upper head design.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different accident from any accident previously evaluated?

Response: No.

The CST and AFW pumps are not accident initiators, and are credited to mitigate accidents and events. The changes have no impact on the method by which the CST or AFW system performs its functions or the required AFW system pump flowrate to be provided.

The increase in the available CST volume enables the CST for each unit to provide the required volume for the limiting natural circulation cooldown event without reliance on the FWST. The FWST will no longer need to be manually transferred to the AFW System pump suction when CST inventory is depleted following a natural circulation cooldown event.

Therefore, the proposed change does not create the possibility of a new or different accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The accident analyses credit CST inventory to meet RCS design pressure, containment design pressure, 10 CFR 100 dose limits, and 10 CFR 50.36 peak cladding temperature limits. The increase in the TS 3.7.6 available CST volume enables the CST for each unit to

provide the required volume for the limiting natural circulation cooldown event without reliance on the FWST. The CST volume for the natural circulation cooldown event is greater than that required to mitigate accidents. Thus the CST will provide the entire required source of usable volume of safety grade water to the AFW System pumps to remove decay and sensible heat from the RCS.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

*Attorney for licensee:* Jennifer Post, Esq., Pacific Gas and Electric Company, P.O. Box 7442, San Francisco, California 94120.

*NRC Acting Branch Chief:* Balwant K. Singal.

*PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey*

*Date of amendment request:* April 25, 2008.

*Description of amendment request:* The proposed amendment would revise the Technical Specifications (TSs) to remove the current restriction on operation of the hydrogen water chemistry (HWC) system at low power levels. Currently, the TSs state that the HWC system shall not be placed in service until reactor power reaches 20% of rated thermal power. The original restriction on HWC operation was intended to prevent increases in main steamline (MSL) radiation background levels before the MSL radiation monitors (MSLRM) setpoints were adjusted because it was assumed that the MSL radiation would increase significantly with HWC operation. The licensee's application stated that the present HWC injection rate does not cause an appreciable increase in MSL radiation, therefore, the reason for prohibiting HWC operation below 20% of rated thermal power no longer exists.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Hope Creek Generating Station (HCGS) proposes to amend Technical Specification (TS) 3/4.3.2 to remove a limitation on operation of the Hydrogen Water Chemistry (HWC) System below 20% of rated thermal power. The original HWC system injected hydrogen into the condensate system at levels that caused significant increases in the main steamline radiation background. As a consequence, it was necessary to also increase the Main Steamline Radiation Monitor (MSLRM) setpoints to prevent undesirable MSLRM alarms and reactor water sample line isolations. However, the MSLRM is credited with mitigating the consequences of a Control Rod Drop Accident (CRDA) that is of concern only below 10% power. An increase in setpoint would reduce the sensitivity of the MSLRM to fuel failures resulting from a CRDA. Therefore, increasing the MSLRM setpoints is permitted only above 20% of rated thermal power where a control rod drop was analyzed not to create fuel failures. As a result of a revised system application, the HWC injection rate is now much lower than that applied originally, and main steamline radiation does not increase significantly when HWC is placed in service. Consequently there is no impact on the MSLRM setpoints at low power (below 20%).

HWC injection itself is not associated with any accident or operational occurrence analyzed in the Updated Final Safety Analysis Report (UFSAR). The purpose of HWC is to reduce Intergranular Stress Corrosion Cracking (IGSCC) in the reactor coolant system. IGSCC can lead to a loss of coolant accident. Lowering the power level at which HWC injection is initiated will increase the time that hydrogen is injected and improve IGSCC prevention. Low power operation is recommended, by EPRI [Electric Power Research Institute], to increase the time that HWC is in service. EPRI has evaluated HWC operation on plant safety systems and concluded that there are no adverse effects associated with HWC injection at low power. The implementation of low power HWC operation will follow the guidelines in BWRVIP–156 [Boiling Water Reactor Vessel and Internals Project 156 (BWRVIP–156), ''Generic Guidelines for Improvement in HWC System Availability,'' EPRI Report No. 1011706] to ensure reliable operation of the HWC system.

The [CRDA] is the only accident applicable to the MSLRM isolation actuation function. This accident can result in fuel failures if it occurs below 10% of rated thermal power but is not of concern above 10% power. The MSLRM trips the two Mechanical Vacuum Pumps (MVP) and isolates reactor water sample lines on high main steamline radiation. The MSLRM is credited with fuel failure detection and MVP trips in the CRDA Analysis. The MVPs are secured prior to reaching 5% of rated thermal power. The proposed change does not alter the present TS requirement prohibiting MSLRM setpoint increases below 20% of rated thermal power and thereby does not change the plant response assumed in the CRDA Analysis.

In conclusion, the proposed change will not significantly increase the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated[?]

Response: No.

The HWC injects hydrogen into the secondary condensate pump suction lines and injects oxygen into the Offgas system. The existing TS prohibits HWC operation at power levels below 20% of rated thermal power. The proposed change would permit HWC at any power level. Operating procedures would begin the HWC injection at approximately 5% power when sufficient condensate flow is available to transport the hydrogen in the reactor coolant system. Injection of hydrogen into the reactor coolant system has proven to be beneficial to the reactor vessel and recirculation system piping components. The implementation of low power HWC operation will follow the guidelines in BWRVIP–156 [ ] to ensure reliable operation of the HWC system. The TS requirements for the MSLRM Isolation Actuation functions will remain unchanged. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the change involve a significant reduction in a margin of safety?

Response: No.

The safety margin applicable to this change is the MSLRM setpoint to main steamline radiation assumed in the CRDA Analysis. The MSLRM trip of the MVPs is credited in the CRDA Analysis. The MSLRM setpoint requirements are not changed by this proposed license amendment; both the existing and proposed footnotes associated with the MSLRM Isolation Actuation TS permit increasing the MSLRM setpoints only if the plant is operated above 20% of thermal power. This is outside the power range at which the CRDA is of concern. There is no other safety margin associated with operation of HWC. Therefore, there is no reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, with changes in the areas noted above, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for licensee:* Jeffrie J. Keenan, Esquire, Nuclear Business Unit—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

*NRC Branch Chief:* Harold K. Chernoff.

*Virginia Electric and Power Company, Docket Nos. 50–280 and 50–281, Surry Power Station, Unit Nos. 1 and 2, Surry County, Virginia*

*Date of amendment request:* June 9, 2008.

*Description of amendment request:* The proposed changes would revise action statements in Technical Specification (TS) 3.12 for insertion

limit and shutdown margin requirements, revise the applicability for the operability of the rod position indication and bank demand position indication systems, revise/add action statements for rod position indication, and add action statements for group step demand counters. These revisions enhance completeness of the Surry TS and are consistent with NUREG–1431, Revision 3.0, ''Standard Technical Specifications, Westinghouse Plants.''

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change is being made to enhance the completeness of the Surry TS and to achieve consistency with NUREG–1431 with respect to requirements and action statements for insertion limits, SDM, rod position indication, and group step demand counters. The proposed change does not add or modify any plant systems, structures or components (SSCs). Thus, the proposed change does not affect initiators of analyzed events or assumed mitigation of accident or transient events. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed). Although the proposed change revises the applicability of the operability requirements for the Rod Position Indication and Bank Demand Position Indication Systems, it does not involve a change in methods governing plant startup, operation, or shutdown. The proposed change does not adversely affect accident initiators or precursors, nor does it alter the design assumptions, conditions, or configuration of the facility. The proposed change does not alter or prevent the ability of SSCs to perform their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does this change involve a significant reduction in a margin of safety?

Response: No.

The proposed change does not result in plant operation in a configuration outside the analyses or design basis, nor does it alter the condition or performance of equipment or systems used in accident mitigation or assumed in any accident analysis. Therefore, the proposed TS change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for licensee:* Lillian M. Cuoco, Esq., Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

*NRC Branch Chief:* Melanie C. Wong.

*Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing*

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

*FPL Energy Duane Arnold, LLC, Docket No. 50–331, Duane Arnold Energy Center, Linn County, Iowa*

*Date of amendment request:* February 19, 2008.

*Brief description of amendment request:* The proposed amendment revises the technical specification Actions for the Emergency Diesel Generators (EDG) to remove the conditional surveillance requirement to test the alternate EDG whenever one EDG is taken out of service for pre-planned preventive maintenance and testing.

*Date of publication of individual notice in* ***Federal Register:*** June 13, 2008 (73 FR 33853).

*Expiration date of individual notice:* August 12, 2008.

*Notice of Issuance of Amendments to Facility Operating Licenses*

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov*.

*AmerGen Energy Company, LLC, Docket No. 50–461, Clinton Power Station, Unit No. 1, DeWitt County, Illinois*

*Date of application for amendment:* January 26, 2006, as supplemented by letters dated June 6, October 11, 2007, and April 10, 2008.

*Brief description of amendment:* The proposed changes would revise TS 3.3.1.1, ''Reactor Protection System (PRS) Instrumentation,'' Table 3.3.1.1–1, ''Reactor Protection System Instrumentation,'' Function 8, ''Scram Discharge Volume [SDV] Water Level—High,'' item b, ''Float Switch,'' by

replacing SR 3.3.1.1.9 with SR 3.3.1.1.12. This change will effectively revise the surveillance frequency for the SDV level float switch from every 92 days to every 24 months.

*Date of issuance:* June 30, 2008.

*Effective date:* As of the date of issuance and shall be implemented within 60 days.

*Amendment No.:* 179.

*Facility Operating License No. NPF–62:* The amendment revised the Technical Specifications and License.

*Date of initial notice in* ***Federal Register:*** May 22, 2007 (72 FR 28719).

The June 6, October 11, 2007, and April 10, 2008 supplements contained clarifying information and did not change the NRC staff's initial proposed finding of no significant hazards consideration.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 30, 2008.

No significant hazards consideration comments received: No.

*Dominion Energy Kewaunee, Inc., Docket No. 50–305, Kewaunee Power Station, Kewaunee County, Wisconsin*

*Date of application for amendment:* July 2, 2007.

*Brief description of amendment:* The proposed amendment would delete operating license (OL) condition 2.C (5), ''Fuel Burnup,'' which restricts maximum rod average burnup to 60 giga-watt days per metric ton uranium (GWD/MTU). Deletion of the OL condition will provide the opportunity to increase maximum rod average burnup to as high as 62 GWD/MTU and allow fuel management flexibility.

*Date of issuance:* July 2, 2008.

*Effective date:* As of the date of issuance and shall be implemented within 60 days.

*Amendment No.:* 198.

*Facility Operating License No. DPR–43:* Amendment revised the Technical Specifications.

*Date of initial notice in* ***Federal Register:*** August 28, 2007 (72 FR 49571).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 2, 2008.

No significant hazards consideration comments received: No.

*Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington*

*Date of application for amendment:* July 30, 2007.

*Brief description of amendment:* The amendment revises the Technical Specification (TS) requirements related to control room envelope habitability in accordance with TS Task Force (TSTF) traveler TSTF–448–A, ''Control Room Habitability,'' Revision 3.

*Date of issuance:* June 30, 2008.

*Effective date:* As of its date of issuance and shall be implemented within 150 days from the date of issuance.

*Amendment No.:* 207.

*Facility Operating License No. NPF–21:* The amendment revised the Facility Operating License and Technical Specifications.

*Date of initial notice in* ***Federal Register:*** August 28, 2007 (72 FR 49573).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 30, 2008.

No significant hazards consideration comments received: No.

*Entergy Operations, Inc., Docket No. 50–313, Arkansas Nuclear One, Unit No. 1, Pope County, Arkansas*

*Date of amendment request:* March 13, 2008.

*Brief description of amendment:* The amendment revises Surveillance Requirement (SR) 3.6.5.8 to require verification that the reactor building spray nozzles are unobstructed following maintenance that could result in nozzle blockage, in lieu of the current SR of performing the test every 10 years.

*Date of issuance:* July 9, 2008.

*Effective date:* As of the date of issuance and shall be implemented within 90 days from the date of issuance.

*Amendment No.:* 233.

*Renewed Facility Operating License No. DPR–51:* Amendment revised the Technical Specifications/license.*Date of initial notice in* ***Federal Register:*** May 6, 2008 (73 FR 25038).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 9, 2008.

No significant hazards consideration comments received: No.

*Southern Nuclear Operating Company, Inc., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant, Units 1 and 2, Burke County, Georgia*

*Date of application for amendments:* January 9, 2008, as supplemented on February 6, 2008, March 5, 2008 and May 22, 2008.

*Brief description of amendments:* The amendments revised Technical Specifications (TSs) 3.3.2, ''Engineered Safety Feature Actuation System (ESFAS) Instrumentation,'' Table 3.3.2–1, ''Engineered Safety Feature Actuation System Instrumentation,'' Function 7.b, and TS 3.5.4, ''Refueling Water Storage Tank (RWST),'' Surveillance Requirement (SR) 3.5.4.2. The proposed change to TS 3.3.2 lowered the nominal trip setpoint and corresponding allowable value of the refueling water storage tank (RWST) Level-Low Low at which the semi-automatic switchover from the RWST to the containment emergency sump occurs.

*Date of issuance:* July 7, 2008.

*Effective date:* As of the date of issuance and shall be implemented within 30 days from the date of issuance.

*Amendment Nos.:* Unit 1—151; Unit 2—132.

*Facility Operating License Nos. NPF–68 and NPF–81:* Amendments revised the licenses and the technical specifications.

*Date of initial notice in* ***Federal Register:*** January 29, 2008 (73 FR 5230).

The supplements dated February 6, 2008, March 5, 2008 and May 22, 2008, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 7, 2008.

No significant hazards consideration comments received: No.

*Virginia Electric and Power Company, et al., Docket Nos. 50–280 and 50–281, Surry Power Station, Units 1 and 2, Surry County, Virginia*

*Date of application for amendments:* July 13, 2007, as supplemented on August 20, 2007.

*Brief description of amendments:* These amendments revised the Technical Specifications (TSs) requirements related to main control room and emergency switchgear room envelope habitability. These changes are consistent with the Nuclear Regulatory Commission (NRC)-approved Revision 3 of Technical Specification Task Force (TSTF) Standard Technical Specifications (STS) Change Traveler TSTF–448, ''Control Room Habitability.''

*Date of issuance:* July 7, 2008.

*Effective date:* As of the date of issuance and shall be implemented within 90 days.

*Amendment Nos.:* 260, 260.

*Renewed Facility Operating License Nos. DPR–32 and DPR–37:* Amendments changed the licenses and the technical specifications.

*Date of initial notice in* ***Federal Register:*** August 14, 2007 (72 FR 45463).

The supplement dated August 20, 2007, provided additional information

that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 7, 2008.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 17th day of July 2008.

For the Nuclear Regulatory Commission.

**Joseph G. Giitter,**

*Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. E8–17102 Filed 7–28–08; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Sunshine Federal Register Notice

**DATES:** Weeks of July 28, August 4, 11, 18, 25, September 1, 2008.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

**Week of July 28, 2008**

*Wednesday, July 30, 2008.*

1:30 p.m.
Discussion of Management Issues (Closed—Ex. 2).

**Week of August 4, 2008—Tentative**

There are no meetings scheduled for the week of August 4, 2008.

**Week of August 11, 2008—Tentative**

*Tuesday, August 12, 2008.*

1:30 p.m.
Meeting with FEMA and State and Local Representatives on Offsite Emergency Preparedness Issues (Public Meeting) (Contact: Lisa Gibney, 301–415–8376).

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

*Thursday, August 14, 2008.*

1:30 p.m.
Meeting with Organization of Agreement States (OAS) and Conference of Radiation Control Program Directors (CRCPD) (Public Meeting) (Contact: Andrea Jones, 301–415–2309).

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

**Week of August 18, 2008—Tentative**

There are no meetings scheduled for the week of August 18, 2008.

**Week of August 25, 2008—Tentative**

There are no meetings scheduled for the week of August 25, 2008.

**Week of September 1, 2008—Tentative**

There are no meetings scheduled for the week of September 1, 2008.

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html*.

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *REB3@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov*.

Dated: July 24, 2008.

**Rochelle C. Bavol,**

*Office of the Secretary.*

[FR Doc. 08–1473 Filed 7–25–08; 11:12 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2008–0413]**

### Possible Improvements to the Level of Openness and Transparency of Information Associated With NRC Security Inspection and Security Performance Assessment of NRC Licensees

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Request for comments.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is seeking comment from all interested persons on options for improving the level of openness and transparency associated with security-related information obtained from the conduct of NRC inspection and licensee performance assessments.

**DATES:** Submit comments by September 5, 2008. Comments received after this date will be considered only if it is practical to do so.

**ADDRESSES:** Comments may be submitted electronically through *http://www.regulations.gov* or mailed to Michael T. Lesar, Chief, Rulemaking, Directives and Editing Branch, Office of Administration (Mail Stop: T6–D59), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Comments may also be hand delivered to Mr. Lesar at 11545 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Publicly-available documents referenced for this action are available electronically through the NRC's Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm.html*. From this site the public can also access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of the NRC's public documents. For more information, contact the NRC's Public Document Room (PDR) reference staff at 301–415–4737 or 800–397–4209, or by e-mail at *pdr.resource@nrc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Paul W. Harris, Senior Program Manager, Reactor Security Oversight Branch, Division of Security Operations, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone: (301) 415–1169; fax number (301) 415–6077; e-mail: *Paul.Harris@NRC.gov*.

**SUPPLEMENTARY INFORMATION:**

### Background

The NRC views nuclear regulation as the public's business and, as such, believes it should be transacted as openly and candidly as possible to maintain and enhance the public's confidence in the regulatory process. Ensuring appropriate openness explicitly recognizes that the public must be informed about, and have a reasonable opportunity to participate meaningfully in the NRC's regulatory processes. At the same time, the NRC must also control sensitive information so that security goals are met. This vision is described in the NRC's Strategic Plan for Fiscal Years 2008–

2013, NUREG–1614, Volume 4, February 2008 (*http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1614/v4/*).

The NRC has traditionally given the public access to a significant amount of information about facilities and materials the agency regulates. This information has included, but has not been limited to, licensee performance assessments, inspection findings, and details regarding escalated enforcement actions. To help ensure openness, the agency provides accurate and timely information to the public about the risks associated with radioactive material and the safety performance of the licensees regulated by the NRC. This strategy enables a fair, timely, and meaningful stakeholder involvement in NRC regulated activities without disclosing classified, safeguards, proprietary, and sensitive unclassified information, and results in early communications with stakeholders on issues of substantial interest.

**Recent Changes to the Publicly-Available Security-Related Information**

Prior to the terrorist events of September 11, 2001, almost all information regarding the inspection and assessment of security activities at NRC licensees was publicly available. Only information specifically requiring protection, such as that described in the background information under ''Security Inspection and Licensee Performance Assessment Openness Initiative'' located at *http://www.nrc.gov/public-involve/doc-comment.html#3,* was withheld from the public. Therefore, most security-related licensee performance information was documented in NRC inspection reports, reviews of licensee performance, and enforcement determinations. Most of these documents (that were designated as non-sensitive or non-safeguards information) were made available for public inspection at the NRC's PDR accessible locally in Rockville, Maryland or through the Internet via the NRC's electronic reading room at *http://www.nrc.gov/reading-rm.html.* Furthermore, specific commercial power reactor licensee performance information, such as descriptions of violations, inspection findings, NRC annual assessments of licensee performance, and performance indicators for individual power facilities was publicly accessible at *http://www.nrc.gov/reactors/ql-reactors.html#over.*

At the preceding NRC Web site, non-safeguards information, summaries of all security and non-security inspection findings, and performance assessments for nuclear power plants used to be available for public review. This allowed a member of the public to ascertain specific licensee performance information and compare that performance to other similar facilities. The inspection process also made available NRC inspection schedules and its meetings with licensees involving NRC-regulated activities. Although some security-related information was publicly available, the preponderance of all information that the NRC made available to the public dealt with the design and operation of NRC-regulated facilities, and not with the physical security of these facilities or radioactive materials.

In the aftermath of September 11, 2001, the NRC assessed and revised controls on withholding from public disclosure security-related NRC inspection and licensee performance information that might be useful to persons planning hostile acts against licensees. As a result, the amount of publicly-available security-related information was reduced. Currently, the cover letters to security inspection reports are publicly available providing general information without revealing any specifics regarding any particular inspection finding. This information includes, but is not limited to: the dates of the inspection, whether there was a finding, and whether the finding involved a cross cutting aspect (human performance, problem identification and resolution, and safety conscious working environment). The security-related inspection information that is currently available for public review can be viewed at *http://www.nrc.gov/reactors/ql-reactors.html#over.*

**Staff Options To Enhance Openness and Transparency of Security Inspection Information**

To improve stakeholder satisfaction with the way NRC communicates security inspection information, the staff is considering a number of approaches that would increase the public awareness and openness of the NRC's security inspection findings and licensee performance assessment, such as adding additional detail to: (1) The annual public report to Congress on security oversight of operating power reactors and fuel cycle facilities by providing a brief description and significance of security inspection findings; (2) the public cover letters for security inspection reports by providing more details, including significance of security inspection findings; and, (3) the NRC public Web site by making more information available, such as some security inspection procedures and inspection manual chapters. Further, similar to that done for NRC safety assessments of licensee performance, the staff is considering whether to conduct public meetings in the vicinity of commercial power reactors, fuel facilities, and any NRC-regulated facility that had a significant [1] security-related performance problem during the performance review period. These meetings would be held to present NRC's assessment of that particular licensee's security performance (without divulging sensitive information) and respond to public questions regarding licensee performance and regulatory oversight. In other words, the NRC is assessing whether to conduct public meetings on a periodicity commensurate with licensee performance.

Regarding material licensees [2], Agreement States and the Commission cooperated in the development of enhanced security measures and the adoption of a policy in which these licensees would protect certain sensitive information. Agreement States and the Commission have also agreed to withhold the names of the licensees that are implementing these enhanced security requirements—publishing a licensee name could potentially make that entity a target for hostile action. Furthermore, some security inspection results, licensee performance assessments, inspection procedures, and inspection manual chapters will not be available to the public because of special considerations associated with the particular facility; however, the staff endeavors to apply a consistent level of openness to these inspection results as well.

**Availability of Inspection-Related Information on NRC Web Site**

The NRC places a large amount of inspection and licensee performance information on its external Web site to inform stakeholders and to enable public participation in the regulatory process. Program descriptions detailing how the NRC staff implements its inspection programs are described at *http://www.nrc.gov/reading-rm/doc-collections/insp-manual/manual-chapter/index.html.* For power reactors, inspection-related information is posted

[1] As used in this document, the term ''significant'' means a deficiency or a combination of deficiencies that results in a programmatic increase in NRC regulatory oversight of a facility.

[2] Material licensees are, for examples, large panoramic irradiators, manufacturer and distributor licensees, licensees that transfer large quantities of radioactive material, and materials licensees that possess risk-significant quantities of radioactive material (i.e., hospitals, universities, radiographers, and well loggers).

at *http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/pim_summary.html*, with cover letters for security inspection reports found at *http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/listofrpts_body_security.html*. The information on these web links is updated every quarter, however, the actual safety report or security cover letter is publicly available in ADAMS shortly after the reports are approved and signed. For NRC inspection and licensee performance assessment of fuel cycle facilities see *http://www.nrc.gov/reading-rm.html*. Lastly, the NRC continues to enable public access to various reports produced by the NRC staff, public meeting and workshop summaries, and media-type information in ADAMS and may release other information to the public in response to formal or informal requests.

*Summary*

Considering the various reviews, legislation, and other changes since September 11, 2001, the NRC staff believes that enhancement of its current procedures and policies regarding publicly-available information summarizing security inspection, enforcement results, and licensee performance assessment could serve in the public interest. Therefore, the NRC seeks public comments on ways to improve regulatory openness and transparency of its security oversight activities. Improving openness and transparency will enhance public satisfaction by: (1) Enhancing public awareness of the NRC's independent role in protecting public health and safety, the environment, and the common defense and security; (2) providing accurate and timely information to the public about regulatory activities at NRC licensees; (3) providing fair, timely, and meaningful stakeholder involvement in NRC regulated activities without disclosing classified, safeguards, proprietary, or sensitive information; and (4) initiating early communication with stakeholders on issues of substantial interest. To support this endeavor and to better understand public satisfaction in how the NRC communicates security-related information, comments are requested on, but need not be limited to, the topics below:

(1) In addition to the information currently in publicly-available cover letters for the majority of NRC security inspections, what additional information would be effective in informing the public about licensee security performance? For example, what specific details would increase the public's level of satisfaction in NRC regulatory oversight of licensed facilities?

(2)(a) At what stage in the inspection process is interaction with the public most effective and beneficial? For example, immediately upon closure of an inspection when a finding is identified, but may be withheld from public disclosure or some time after licensee correction of the finding, when it may be possible to release additional security-related inspection information?

(b) At what stage in the NRC's licensee performance assessment process is interaction with the public most effective and beneficial? For example, upon NRC determination that licensee performance changed from one Action Matrix column[3] to another or during NRC's mid-cycle or end-of-cycle licensee performance reviews.

(3) What method of public interaction is most preferred? For example, is the conduct of a public meeting, a redacted inspection report, additional information in NRC's annual report to Congress regarding security inspections, or additional information posted on the NRC Web site the most beneficial (efficient, effective, or informative) method of informing the public?

(4) How useful are the above methods for communicating NRC security-related inspection and licensee performance information to all stakeholders?

(5) What are the reasons why various stakeholders desire security-related information? For example, is this information necessary to build confidence in NRC regulatory oversight or understand current licensee performance?

(6) What level of public participation in any substantial and future revision of the security oversight process (e.g., changes made to performance indicators, significance determination process, etc.) would be beneficial? What constraints and considerations on such participation would be necessary to protect the details of sensitive security information?

The public may view background information, express additional thought, comment, and describe other means and methods to enhance openness and transparency at ''Security Inspection and Licensee Performance Assessment Openness Initiative'' located at *http://www.nrc.gov/public-involve/doc-comment.html#3*.

Dated this 22nd day of July 2008, at Rockville, Maryland.

For the Nuclear Regulatory Commission.

**Roy P. Zimmerman,**

*Director, Office of Nuclear Security and Incident Response.*

[FR Doc. E8–17324 Filed 7–28–08; 8:45 am]

**BILLING CODE 7590–01–P**

[3] See NRC Inspection Manual Chapter 0320, ''Operating Reactor Security Assessment Program,'' page E2–1, located at *http://www.nrc.gov/reading-rm/doc-collections/insp-manual/*.

## POSTAL REGULATORY COMMISSION

**[Docket No. MC2008–5; Order No. 90]**

## Express Mail

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** This document announces the Postal Service's filing of a notice concerning the addition of an Express Mail contract to the competitive product list. It also announces a related Commission review.

**DATES:** Comments due July 31, 2008.

**ADDRESSES:** Submit documents 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:** On July 21, 2008, the Postal Service filed a request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 to modify the Mail Classification Schedule by adding Express Mail Contract 1 to the competitive product list. The Postal Service asserts that Express Mail Contract 1 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3).[1] A redacted version of the Governors' Decision establishing the price and classification and a certification of the Governors' vote is included as Attachment A to the filing. The requested changes in the Mail Classification Schedule product list are included in the filing as Attachment B with the new product shown in brackets.[2] The statement of supporting justification required by 39 CFR 3020.32 is included as Attachment C to the filing.

In the same July 21, 2008 filing, the Postal Service gives notice, pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5,

[1] Request of the United States Postal Service to Add Express Mail Contract to Competitive Product List and Notice of Establishment of Rates and Class Not of General Applicability, July 21, 2008 (Request).

[2] The draft Mail Classification Schedule remains under review. The Commission anticipates providing interested persons an opportunity to comment on the draft Mail Classification Schedule in the near future.

that the Governors have established prices and classifications not of general applicability for Express Mail Contract 1. Request at 2.

In support of its Request, the Postal Service has also filed materials under seal, including an unredacted version of an explanation and justification in the Governors' Decision and an unredacted analysis. Also filed under seal are the cost and revenue data and the certification of compliance with 39 U.S.C. 3633(a)(1) and (3). The Postal Service asserts ''that the contract, related financial information, the customer's name and the portions of the Governors' Decision and accompanying analysis that provides prices, terms, and conditions should remain confidential.'' *Id.*

In Order No. 43, the Commission issued regulations establishing a modern system of rate regulation, including a list of competitive products. PRC Order No. 43, October 29, 2007, paras. 3061, 4013. Among other things, the Commission determined that each negotiated service agreement would initially be classified as a separate product. The specific Express Mail agreement filed in this docket will be classified as a new product.

As noted above, the Postal Service filing in this docket was made pursuant to rule 3015.5 and rule 3020.30. As a consequence, the Commission will review the filing under both rule 3015 and part 3020, subpart B.

Interested persons may express views and offer comments on whether the planned changes are consistent with the policies of 39 U.S.C. 3632, 3633 and/or 3642. Comments are due no later than July 31, 2008.

Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in the captioned docket.

*It is Ordered:*

1. Comments on issues in this proceeding are due no later than July 31, 2008.

2. The Commission appoints Paul L. Harrington as Public Representative to represent the interests of the general public in this proceeding.

3. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Issued July 23, 2008.

**Steven W. Williams,**

*Secretary.*

[FR Doc. E8–17301 Filed 7–28–08; 8:45 am]

**BILLING CODE 7710–FW–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on July 31, 2008 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B), and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Walter, as duty officer, voted to consider the items listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting scheduled for July 31, 2008 will be: Formal orders of investigation; institution and settlement of injunctive actions; institution and settlement of administrative proceedings of an enforcement nature; resolution of litigation claims; and other matters related to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: July 24, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–17414 Filed 7–28–08; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–58207; File No. SR–CBOE–2008–26]**

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving a Proposed Rule Change To List and Trade Options on the BXM Index (1/10th Value)

July 22, 2008.

**I. Introduction**

On June 2, 2008, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade options on the BXM Index (1/10th value). The proposed rule change was published for comment in the **Federal Register** on June 18, 2008.[3] The Commission received no comments regarding the proposal. This order approves the proposed rule change.

**II. Description of the Proposal**

CBOE proposes to list and trade cash-settled, European-style options on an index that is equal to 1/10th of the value of the CBOE S&P 500 BuyWrite Index (''BXM'' or ''BXM Index'').[4]

*Index Design*

The BXM Index measures the total rate of return of a hypothetical ''covered call'' strategy applied to the S&P 500 Composite Price Index (the ''S&P 500 Index''). This strategy, referred to as the ''BXM covered call strategy,'' consists of a hypothetical portfolio consisting of a ''long'' position indexed to the S&P 500 Index on which are deemed sold a succession of one-month, at-the-money call options on the S&P 500 Index listed on the Exchange. This hypothetical portfolio is referred to as the ''covered S&P 500 Index portfolio.''

The BXM Index provides a benchmark measure of the total return performance of this hypothetical portfolio. Dividends paid on the component stocks underlying the S&P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57946 (June 10, 2008), 73 FR 34811 (''Notice'').

[4] The Exchange is not currently proposing to list and trade options that overlie the full-value BXM Index.

CBOE Futures Exchange, LLC (''CFE'') currently lists and trades CBOE S&P 500 BuyWrite Index future contracts, which commenced trading on October 2, 2006.

500 Index and the dollar value of option premium deemed received from the sold call options are functionally ''re-invested'' in the covered S&P 500 Index portfolio. The BXM Index is based on the cumulative gross rate of return of the covered S&P 500 Index portfolio since the inception of the BXM Index on June 1, 1988, when it was set to an initial value of 100.00.

The BXM covered call strategy requires that each S&P 500 Index call option in the hypothetical portfolio be held to maturity, generally the third Friday of each month. The call option is settled against the Special Opening Quotation (''SOQ'') of the S&P 500 Index used as the final settlement price of S&P 500 Index call options.[5] The SOQ is a special calculation of the S&P 500 Index that is compiled from the opening prices of component stocks underlying the S&P 500 Index that is performed when all 500 stocks underlying the S&P 500 Index have opened for trading, and is usually determined before 10 a.m. Chicago time.[6] The final settlement price of the call option at maturity is the greater of 0 and the difference between the SOQ minus the strike price of the expiring call option.

Subsequent to the settlement of the expiring call option, a new at-the-money call option expiring in the next month is then deemed written, or sold, a transaction commonly referred to as a ''roll.'' The strike price of the new call option is the S&P 500 Index call option listed on CBOE with the closest strike price above the last value of the S&P 500 Index reported before 10 a.m. Chicago time.[7] Once the strike price of the new call option has been identified, the new call option is deemed sold at a price equal to the volume-weighted average of the traded prices (''VWAP'') of the new call option during the half-hour period beginning at 10:30 a.m. Chicago time. CBOE calculates the VWAP in a two-step process: First, CBOE excludes trades in the new call option between 10:30 a.m. and 11 a.m. Chicago time that are identified as having been executed as part of a ''spread,'' and then CBOE calculates the weighted average of all remaining transaction prices of the new call option between 10:30 a.m. and 11 a.m. Chicago time, with weights equal to the fraction of total non-spread volume transacted at each price during this period. The source of the transaction prices used in the calculation of the VWAP is CBOE's Market Data Retrieval (''MDR'') System.[8] If no transactions occur in the new call option between 10:30 a.m. and 11 a.m. Chicago time, then the new call option is deemed sold at the last bid price reported before 11 a.m. Chicago time. The value of option premium deemed received from the new call option is functionally ''reinvested'' in the portfolio.

*Index Calculation*

The BXM Index is calculated in real-time by CBOE every 15 seconds during each trading day, excluding roll dates (for the respective components of the covered S&P 500 Index portfolio). The BXM Index calculation is disseminated through OPRA and is publicly available through most price quote vendors.[9] The BXM Index is a chained index, *i.e.* , its value is equal to 100 times the cumulative product of gross daily rates of return of the covered S&P 500 Index portfolio since the inception date of the BXM Index.[10]

*Options Trading*

BXM options will be quoted in terms of the underlying BXM Index (1/10th value). Both options prices and cash index levels will be stated in decimal format and one point will equal $100. The minimum tick size for series trading below 3.00 will be 0.05 point ($5.00), and the minimum tick for series trading at and above 3.00 will be 0.10 point ($10.00). In accordance with Rule 24.9(a)(2), the Exchange will typically list three near-term expiration months and three additional expiration months from the March quarterly cycle (March, June, September and December).

The minimum strike price interval for BXM options will be 0.01 point ($1.00). The Exchange will initially list at least two strike prices above and two strike prices below the current value of the BXM Index (1/10th value) at or about the time a series is opened for trading on the Exchange. As part of this initial listing, the Exchange will list strike prices that are within 5 points from the closing value of the BXM Index (1/10th value) on the preceding day.

The Exchange proposes to add additional series when the Exchange deems it necessary to maintain an orderly market, to meet customer demand, or when the underlying BXM Index (1/10th value) moves substantially from the initial exercise price or prices. To the extent that any additional strike prices are listed by the Exchange, such additional strike prices shall be within 30 percent above or below the closing value of the BXM Index (1/10th value). The Exchange will also be permitted to open additional strike prices that are more than 30 percent above or below the current BXM Index (1/10th value) provided that customer interest for such series is demonstrated and expressed by institutional, corporate or individual customers or their brokers. Market-Makers trading for their own account would not be considered when determining customer interest. In addition to the initial listed series, the Exchange may list up to 60 additional series per expiration month for each series in BXM options. In addition, the Exchange proposes that it shall not list LEAPS on BXM options at intervals less than $5.

The Exchange also proposes to set forth a delisting policy with respect to BXM options. Specifically, the Exchange will, on a monthly basis, review series that are outside a range of five strikes above and five strikes below the current value of the BXM Index (1/10th value) and delist series with no open interest in both the put and the call series having a: (i) Strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or call series for a given expiration month. Notwithstanding the proposed delisting policy, customer requests to add strikes and/or maintain strikes in BXM options in series eligible for delisting will be granted.[11]

*Exercise and Settlement*

The proposed options will expire on the Saturday following the third Friday of the expiration month. Trading in the expiring contract month will normally cease at 3:15 p.m. Chicago time on the

[5] If the third Friday of the month is an exchange holiday, the call option will be settled against the SOQ on the previous business day and the new call option will be selected on that day as well.

[6] If one or more stocks in the S&P 500 Index do not open on the day the SOQ is calculated, the final settlement price for SPX options is determined in accordance with the Rules and By-Laws of The Options Clearing Corporation (''OCC'').

[7] If the last value of the S&P 500 Index reported before 10 a.m. Chicago time is exactly equal to a listed S&P 500 Index call option strike price, then the new call option is the S&P 500 Index call option with that exact at-the-money strike price.

[8] Time and sales information from CBOE's MDR System is disseminated through the Options Price Reporting Authority (''OPRA'') and is publicly available through most price quote vendors.

[9] Information regarding the BXM Index may be found on CBOE's Web site at the following Internet address: *www.cboe.com/micro/bxm.*

[10] *See* Notice, *supra* note 3 for further discussion of the BXM Index calculation.

[11] The Exchange also proposes to add new Interpretation and Policy .11 to Rule 5.5, *Series of Option Contracts Open for Trading,* which would be an internal cross reference stating that the intervals between strike prices for BXM option series would be determined in accordance with proposed new Interpretation and Policy .01(f) to Rule 24.9.

business day preceding the last day of trading (ordinarily the Thursday before expiration Saturday, unless there is an intervening holiday). When the last trading day is moved because of an Exchange holiday (such as when CBOE is closed on the Friday before expiration), the last trading day for expiring options will be Wednesday and the SOQ of the BXM Index will be calculated on Thursday.

Exercise will result in delivery of cash on the business day following expiration. BXM options will be A.M.-settled. As described above, the exercise settlement value of a BXM option shall be a SOQ of the BXM Index (1/10th value). The exercise-settlement amount is equal to the difference between the exercise-settlement value and the exercise price of the option, multiplied by $100.

If the exercise settlement value is not available or the normal settlement procedure cannot be utilized due to a trading disruption or other unusual circumstance, the settlement value will be determined in accordance with the rules and bylaws of the OCC.

*Surveillance*

The Exchange states that it will use the same surveillance procedures currently utilized for each of the Exchange's other index options to monitor trading in BXM options. The Exchange further represents that these surveillance procedures shall be adequate to monitor trading in options on these option products. For surveillance purposes, the Exchange will have complete access to information regarding trading activity in the pertinent underlying securities (*i.e.*, S&P 500 Index component securities).

*Position and Exercise Limits; Reporting of Positions*

The Exchange is not proposing to establish any position and exercise limits for BXM options. Because the BXM Index (1/10th value) is calculated using values of the S&P 500 Index, the Exchange believes that the position and exercise limits for this new product should be the same as those for broad-based index options (*e.g.* SPX) for which there are no position limits.

BXM options will be subject to the same reporting and other requirements triggered for other options dealt in on the Exchange.[12]

*Exchange Rules Applicable*

Except as modified herein, the rules in Chapters I through XIX, XXIV, XXIVA, and XXIVB will equally apply to BXM options. BXM options will be margined as ''broad-based index'' options, and under CBOE rules, especially, Rule 12.3(c)(5)(A), the margin requirement for a short put or call shall be 100% of the current market value of the contract plus up to 15% of the respective underlying indicator value. Additional margin may be required pursuant to Exchange Rule 12.10.

The Exchange proposes to designate BXM options as eligible for trading as Flexible Exchange Options as provided for in Chapters XXIVA (Flexible Exchange Options) and XXIVB (FLEX Hybrid Trading System).

*Capacity*

CBOE represents that it believes the Exchange and the OPRA have the necessary systems capacity to handle the additional traffic associated with the listing of new series that would result from the introduction of BXM options.

**III. Discussion**

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[13] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[14] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the BXM Index (1/10th value) options should provide investors with a potentially useful investment choice. The Commission believes that permitting $1.00 strike price intervals for BXM option series will provide investors with added flexibility in the trading of BXM options and further the public interest by allowing investors to establish positions that are better tailored to meet their investment objectives. Further, the Commission notes that it has previously approved Exchange rules that permit the Exchange to list series at $1.00 or lower strike price intervals in similar option products.[15] The Commission also believes that the proposal strikes a reasonable balance between the Exchange's desire to accommodate market participants by offering a wider array of investment opportunities and the need to avoid unnecessary proliferation of options series and the corresponding increase in quotes. The Commission notes that the delisting policy proposed by the Exchange is designed to mitigate the number of options series with no open interest, which would reduce quote traffic accordingly.

The Commission notes that the BXM Index is calculated in real time by CBOE every 15 seconds during each trading day. The BXM Index calculation is disseminated through OPRA, and is publicly available through most price quote vendors.

Because the BXM Index is calculated using values of the S&P 500 Index, the Commission believes it is appropriate that the position and exercise limits for BXM options be the same as for other broad-based index options, which similarly have no position and exercise limits. Further, the Commission notes that the margin requirements for broad-based index options will also apply to BXM options.

The Commission also believes that the Exchange's proposal to allow BXM options to be eligible for trading as FLEX options is consistent with the Act. The Commission previously approved rules relating to the listing and trading of FLEX Options on CBOE, which gives investors and other market participants the ability to individually tailor, within specified limits, certain terms of those options.[16] The current proposal incorporates BXM (1/10th value) options that trade as FLEX Options into these existing rules and regulatory framework.

The Commission notes that CBOE represented that it had an adequate surveillance program to monitor trading of options on the BXM Index (1/10th Value) and intends to apply its existing

[12] *See e.g.,* Rule 4.13, *Reports Related to Position Limits.* For purposes of calculating reportable positions, the Exchange has employed a contract factor of 10 for determining reporting and other requirements for BXM options. For example, the reporting requirements of Rule 24.4.03 for BXM options will be triggered when an end of day aggregate position exceeds 1 million contracts.

[13] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f(b)(5).

[15] Rule 24.9.01(b) permits the CBOE to list series on options based on one-one hundredth (1/100th) of the value of the Dow Jones Industrial Average Index at no less than $0.50 intervals. *See* Securities Exchange Act Release No. 39011 (September 3, 1997), 62 FR 47840 (September 11, 1997) (SR–CBOE–1997–26). Rule 24.9.11 allows the Exchange to list strike price intervals at no less than $1 for the Mini-SPX option, which is based on 1/10th the value of the S&P 500 Index. *See* Securities Exchange Act Release Nos. 52625 (October 18, 2005), 70 FR 61479 (October 24, 2005) (SR–CBOE–2005–81) and 57049 (December 27, 2007), 73 FR 528 (January 3, 2008) (SR–CBOE–2007–125).

[16] *See* Securities Exchange Act Release No. 31910 (February 23, 1993), 58 FR 12056 (March 2, 1993).

surveillance program to support the trading of these options. In approving the proposed rule change, the Commission has also relied upon the Exchange's representation that it has the necessary systems capacity to support new options series that will result from this proposal. The Commission expects the Exchange to continue to monitor for option series with little or no open interest and trading activity and, consistent with the delisting policy approved today as part of this proposed rule change, to act promptly to delist such options.

## IV. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[17] that the proposed rule change (SR–CBOE–2008–26) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–17310 Filed 7–28–08; 8:45 am]

**BILLING CODE 8010–01–P**

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–58209; File No. SR–NASDAQ–2008–064]**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Allow The NASDAQ Options Market To Participate in the Quarterly Options Series Pilot Program

July 22, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 18, 2008, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by NASDAQ. NASDAQ has designated the proposed rule change as constituting a non-controversial rule change under Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to allow the NASDAQ Options Market (''NOM'') to participate in the Quarterly Options Series pilot program on the terms and conditions that currently apply to other national securities exchanges that trade standardized options. The text of the proposed rule change is available on NASDAQ's Web site *(http://nasdaqomx.cchwallstreet.com)*, at NASDAQ's principal office, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange is proposing to establish, until July 10, 2009, a pilot program to list options series that would expire at the close of business on the last business day of a calendar quarter (''Quarterly Options Pilot Program''). Under the proposal, the Exchange could select up to five approved options classes on which Quarterly Options series could be opened. A series could be opened on any business day and would expire at the close of business on the last business day of a calendar quarter. The Exchange also could list and trade Quarterly Options series on any options class that is selected by another exchange that employs a similar pilot program. For each class selected for the Pilot Program, the Exchange could list series that expire at the end of the next four consecutive calendar quarters, as well as the fourth quarter of the following calendar year. NASDAQ's Pilot Program will cover exchange traded fund (''ETF'') options only.[5]

Quarterly Options series listed on currently approved options classes would be P.M. settled and, in all other respects, would settle in the same manner as do the monthly expiration series in the same options class. The strike price for each series would be fixed at a price per share, with two strike prices above and two strike prices below the value of the underlying security at about the time that a Quarterly Options series is opened for trading on the Exchange. The interval between strike prices on Quarterly Options series would be the same as the interval between strike prices for series in the same options class that expire in accordance with the normal monthly expiration cycles. Series listed by the Exchange under the Pilot Program at the time of initial listing would have strike prices that are within $5.00 from the closing price of the underlying security on the preceding trading day.

The proposal would permit the Exchange to open for trading additional Quarterly Options series of the same class when the Exchange deems it necessary to maintain an orderly market, to meet customer demand, or when the market price of the underlying security moves substantially from the initial exercise price or prices.

On August 7, 2007, the Chicago Board Options Exchange (''CBOE'') filed a proposal to revise the terms of their Quarterly Options Series Pilot Program. As part of this filing, the CBOE proposed to implement new policies related to the listing and delisting of additional strike prices for Quarterly Options Series. The proposal was approved, as amended, by the Commission on March 3, 2008.[6]

Nasdaq proposes to adopt the revised terms of the CBOE's Pilot Program, for use in its own Pilot Program. Specifically, Nasdaq proposes to amend Chapter IV, Section 6 and Commentary.04 to permit the Exchange to list additional strike prices for Quarterly Option Series in ETF options that fall within a percentage range (30%) above and below the price of the underlying ETF.

Additionally, upon demonstrated customer interest, the Exchange also will be permitted to open additional strike prices of Quarterly Option Series in ETF options that are more than 30% above or below the current price of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* electronic mail sent July 21, 2008 from Jeffrey Davis, Exchange, to Heidi Pilpel, Attorney, Division of Trading and Markets, Commission.

[6] *See* Securities Exchange Act Release No. 57410 (March 3, 2008), 73 FR 12483 (March 7, 2008) (SR–CBOE–2007–96).

underlying ETF. Market Makers trading for their own account will not be considered when determining customer interest under this provision. In addition to the initial listed series, the proposal will permit the Exchange to list up to sixty (60) additional series per expiration month for each Quarterly Option Series in ETF options. The proposed policies regarding the listing of new strikes are identical to those in place as part of the CBOE's Quarterly Options Series Pilot Program.

The Exchange also proposes to amend Chapter IV, Section 6, Commentary .04 in order to adopt the same policy presently in place at the CBOE, regarding the delisting of inactive strikes in Quarterly Options Series. Under the proposed delisting policy, the Exchange will, on a monthly basis, review Quarterly Option Series that are outside a range of five (5) strikes above and five (5) strikes below the current price of the underlying ETF, and delist series with no open interest in both the put and the call series having a strike price: (i) higher than the highest strike price with open interest in the put and/or call series for a given expiration month; or (ii) lower than the lowest strike price with open interest in the put and/or call series for a given expiration month. Notwithstanding the proposed delisting policy, the Exchange will grant customer requests to add strikes and/or maintain strikes in Quarterly Options Series eligible for delisting.

The delisting policy proposed by the Exchange is designed to mitigate the number of options series with no open interest, which would reduce quote traffic accordingly. If during the life of the Pilot Program the Exchange identifies series for delisting, the Exchange will notify other options exchanges with similar delisting polices, and shall work with such other exchanges to develop a uniform list of securities to be delisted, also as to help to ensure uniform series delisting of multiply listed Quarterly Options Series in ETF options.

Lastly, the Exchange notes that the delisting policy, once approved, would become part of the Pilot Program and, going forward, would be considered by the Commission when the Exchange seeks to renew or make permanent the Pilot Program in the future. The proposed policies regarding the delisting of inactive strikes are identical to those in place as part of the CBOE's Quarterly Options Series Pilot Program.

In support of this proposed rule change, and as currently in place for the Pilot Program as approved for other exchanges, the Exchange will submit to the Commission a report (the ''Quarterly Options Series Pilot Program Report'') detailing the Exchange's experience with the Quarterly Options Pilot Program. Specifically, the Quarterly Options Series Pilot Program Report submitted by current exchange participants contains data and written analysis regarding the five options classes included in the Quarterly Options Pilot Program.[7]

The Exchange believes there is sufficient investor interest and demand to adopt the Quarterly Options Pilot Program for the coming year. The Exchange further believes that the Quarterly Options Series Pilot Program has provided investors with a flexible and valuable tool to manage risk exposure, minimize capital outlays, and the ability to more closely tailor their investment strategies and decisions to the movement of the underlying security. The Exchange notes that no participating exchange has detected any material proliferation of illiquid options series resulting from the introduction of the Quarterly Options Pilot Program. Finally, the Exchange represents that it has the necessary systems capacity to support new options series that result from the continued listing and trading of Quarterly Options series.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general and with Section 6(b)(5) of the Act,[9] in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.

The proposed changes are consistent with the statute in that they are designed to facilitate transactions in options on the Nasdaq Options Market by encouraging participants to provide liquidity in Quarterly Options Series. If the proposal succeeds in attracting liquidity, Nasdaq expects that quoted spreads in Quarterly Options Series will decrease and execution speeds and efficiency will increase.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the proposal is designed to enhance competition and is based upon the rules of another national securities exchange that trades standardized options.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has designated the proposed rule change as one that: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and subparagraph (f)(6) of Rule 19b–4 thereunder.[11]

[7] Specifically, the Exchange acknowledges that its Quarterly Options Pilot Program Report shall include: (1) Data and written analysis on the open interest and trading volume in the classes for which Quarterly Options Series were opened; (2) an assessment of the appropriateness of the option classes selected for the Pilot; (3) an assessment of the impact of the Pilot on the capacity of Nasdaq, OPRA, and on market data vendors (to the extent data from market data vendors is available); (4) any capacity problems or other problems that arose during the operation of the Pilot and how Nasdaq addressed such problems; (5) any complaints that Nasdaq received during the operation of the Pilot and how Nasdaq addressed them; (6) any additional information that would assist in assessing the operation of the Pilot; (7) the impact of additional series on the Exchange's market and quote capacity; and (8) the implementation and effects of the delisting policy, including the number of series eligible for delisting during the period covered by the report, the number of series actually delisted during that period (pursuant to the delisting policy or otherwise), and documentation of any customer requests to maintain Quarterly Options Series strikes that were otherwise eligible for delisting. *See* electronic mail sent July 21, 2008 from Jeffrey Davis, Exchange, to Heidi Pilpel, Attorney, Division of Trading and Markets, Commission.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

The Exchange has asked the Commission to waive the operative delay to permit the proposed rule change to become operative prior to the 30th day after filing. The Commission has determined that waiving the 30-day operative delay of the Exchange's proposal is consistent with the protection of investors and the public interest and will promote competition because such waiver will allow Nasdaq to begin immediately to list and trade Quarterly Options Series in competition with the other exchanges that trade Quarterly Options Series under similar pilot programs.[12] The Commission notes that Nasdaq has represented that it expects its entry into the Quarterly Options Pilot Program to benefit investors by narrowing spreads and increasing execution speed and efficiency. Therefore, the Commission designates the proposal operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–NASDAQ–2008–064 on the subject line.

*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 SR–NASDAQ–2008–064. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NASDAQ–2008–064 and should be submitted on or before August 19, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–17309 Filed 7–28–08; 8:45 am]

**BILLING CODE 8010–01–P**

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–58208; File No. SR–NYSEArca–2008–77]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To List and Trade the Barclays Middle East Equities (MSCI GCC) Non Exchange Traded Notes Due 2038

July 22, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 17, 2008, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca''), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the Barclays Middle East Equities (MSCI GCC) Non Exchange Traded Notes due 2038 (''Notes''), which are linked to the MSCI Gulf Cooperation Council (GCC) Countries ex-Saudi Arabia Net Total Return Index℠ (U.S. dollar) (''Index''). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to list and trade the Notes, which are linked to the Index, under NYSE Arca Equities Rule 5.2(j)(6), which includes the Exchange's listing standards for Equity Index-Linked Securities.[3] The Notes are senior unsecured debt obligations of Barclays Bank PLC (''Barclays''). The Index is comprised of all of the equity securities (each an ''Index Component'' and, collectively, the ''Index Components'') that are included in the following five individual country indices (each a ''Country Index'' and, collectively, the ''Country Indices''): MSCI Bahrain Index℠, MSCI Kuwait Index℠, MSCI Oman Index℠, MSCI Qatar Index℠, and MSCI United Arab Emirates Index℠. Each Country Index is a free float-adjusted market capitalization

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Equity Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes of equity securities (''Equity Reference Asset'').

index that is designed to measure the market performance, including price performance and income from dividend payments, of equity securities in the country it represents. The Index and the Country Indices are calculated and maintained by MSCI, Inc. (''MSCI'').

The Exchange is submitting this proposed rule change because the Index does not meet all of the ''generic'' listing requirements of NYSE Arca Equities Rule 5.2(j)(6) applicable to the listing of Equity Index-Linked Securities. The Index meets all such requirements except for those set forth in NYSE Arca Equities Rules 5.2(j)(6)(B)(I)(1)(b)(ii)[4] and (vi).[5] The Exchange represents that: (1) Except for NYSE Arca Equities Rules 5.2(j)(6)(B)(I)(1)(b)(ii) and (vi), the Notes currently satisfy all of the generic listing standards under NYSE Arca Equities Rule 5.2(j)(6) applicable to Equity Index-Linked Securities; (2) the continued listing standards under NYSE Arca Equities Rules 5.2(j)(6) applicable to Equity Index-Linked Securities shall apply to the Notes; and (3) Barclays is required to comply with Rule 10A–3 under the Act[6] for the initial and continued listing of the Notes. In addition, the Exchange represents that the Notes will comply with all other requirements applicable to Equity Index-Linked Securities including, but not limited to, requirements relating to the dissemination of key information such as the Equity Reference Asset value and Intraday Indicative Value, rules and policies governing the trading of equity securities, trading hours, trading halts, surveillance, firewalls, and Information Bulletin to ETP Holders, as set forth in prior Commission orders approving the generic listing rules applicable to the listing and trading of Index-Linked Securities, generally, and Equity Index-Linked Securities, in particular.[7]

The Index Components are all components of the Country Indices, as described below. As of April 25, 2008, there were 103 stocks in the Index of which: 5 were included in the MSCI Bahrain Index SM, 47 were included in the MSCI Kuwait Index SM, 9 were included in the MSCI Oman Index SM, 16 were included in the MSCI Qatar Index SM, and 26 were included in the MSCI United Arab Emirates Index SM. Each Index Component is included in the Index at a weight that reflects the ratio of its free float-adjusted market capitalization (*i.e.*, free public float *multiplied by* price) to the free float-adjusted market capitalization of all the Index Components.

As of April 25, 2008, the market capitalization of the Index was approximately $125.176 billion of which: 1.28% was represented by components of the MSCI Bahrain Index SM, 49.23% was represented by components of the MSCI Kuwait Index SM, 3.56% was represented by components of the MSCI Oman Index SM, 15.00% was represented by components of the MSCI Qatar Index SM, and 30.94% was represented by components of the MSCI United Arab Emirates Index SM, traded on the Bahrain Stock Exchange, Kuwait Stock Exchange, Muscat Securities Market, Doha Securities Market, and the Dubai Financial Market or Abu Dhabi Securities Market (collectively, ''Middle East Exchanges''), respectively.

With respect to NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(vi), which requires that at least 80% of the component stock trade on markets that are members of ISG or parties to comprehensive surveillance sharing agreements with the Exchange, the Exchange has attempted to, but to date has not been able to, enter into comprehensive surveillance sharing agreements with the Middle East Exchanges. Currently, the Middle East Exchanges are not members of ISG. Accordingly, the Exchange may not be able to obtain surveillance information from the Middle East Exchanges regarding the component stocks.

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products to monitor trading in the Notes. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Notes in all trading sessions and to deter and detect violations of Exchange rules. The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange may obtain information via ISG from other exchanges who are members of ISG.[8]

Notwithstanding the Notes' inability to meet the requirements of NYSE Arca Equities Rules 5.2(j)(6)(B)(I)(1)(b)(ii) and (vi),[9] the Exchange believes that the Index is sufficiently broad-based in scope and, as such, is less susceptible to potential manipulation: the Index contains 105 companies, listed in five countries with no one Middle East Exchange listing greater than 50% of the Index Components. The Exchange further believes that no one Index Component dominates the underlying Index, thereby serving to protect the public interest and promote capital formation.

Detailed descriptions of the Notes, the Index (including the methodology used to determine the composition of the Index), fees, redemption procedures and payment at redemption, payment at maturity, taxes, and risk factors relating to the Notes will be available in the Prospectus[10] or on the Web site for the Notes (*http://www.barclays.com*), as applicable.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

[4] NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(ii) provides that each component security of the underlying index shall have trading volume in each of the last six months of not less than 1,000,000 shares per month, except that for each of the lowest dollar weighted component securities in the index that, in the aggregate, account for no more than 10% of the dollar weight of the index, the trading volume shall be at least 500,000 shares per month in each of the last six months. In each of the last six months, 87.995% of the Index had a trading volume of 1,000,000 shares, and 8.79% of the bottom 10% of the Index had a trading volume of 500,000 shares.

[5] NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(vi) provides that all component securities of the underlying index shall be either (A) securities (other than foreign country securities and American Depositary Receipts (''ADRs'')) that are (x) issued by an Act reporting company or by an investment company registered under the Investment Company Act of 1940, which in each case is listed on a national securities exchange, and (y) an ''NMS stock'' (as defined in Rule 600 of Regulation NMS) or (B) foreign country securities or ADRs, provided that foreign country securities or foreign country securities underlying ADRs having their primary trading market outside the United States on foreign trading markets that are not members of the Intermarket Surveillance Group (''ISG'') or parties to comprehensive surveillance sharing agreements with the Exchange will not, in the aggregate, represent more than 20% of the dollar weight of the index. Subject to the pending approval of a separate rule filing (Securities Exchange Act Release No. 58142 (July 11, 2008), 73 FR 41147 (July 17, 2008) (SR–NYSEArca–2008–70)), this subsection will be renumbered as NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(v).

[6] 17 CFR 240.10A–3.

[7] *See e.g.*, Securities Exchange Act Release Nos. 56637 (October 10, 2007), 72 FR 58704 (October 16, 2007) (SR–NYSEArca–2007–92); 57132 (January 11, 2008), 73 FR 3300 (January 17, 2008) (SR–NYSEArca–2007–125); 56838 (November 26, 2007), 72 FR 67774 (November 30, 2007) (SR–NYSEArca–2007–118); 56879 (December 3, 2007) 72 FR 69271 (December 7, 2007) (SR–NYSEArca–2007–110); 52204 (August 3, 2005), 70 FR 46559 (August 10, 2005) (SR–PCX–2005–63).

[8] For a list of the current members and affiliate members of ISG, see *http://www.isgportal.com.*

[9] E-mail from Timothy J. Malinowski, Director, NYSE Euronext, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated July 21, 2008 (confirming the requirements of NYSE Arca Equities Rule 5.2(j)(6) applicable to Equity Index-Linked Securities that the Notes do not satisfy).

[10] *See* Barclay's Prospectus, as amended, filed pursuant to Rule 424(b)(2) under the Act (File No. 333–145845).

Section 6(b) of the Act,[11] in general, and Section 6(b)(5),[12] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that it has developed adequate trading rules, procedures, surveillance programs, and listing standards for the initial and continued listing and trading of the Notes, which promote investor protection in the public interest.[13] In addition, the Notes satisfy all of the requirements of NYSE Arca Equities Rule 5.2(j)(6), with the two exceptions noted above.[14]

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–NYSEArca–2008–77 on the subject line.

*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 SR–NYSEArca–2008–77. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2008–77 and should be submitted on or before August 19, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–17307 Filed 7–28–08; 8:45 am]

**BILLING CODE 8010–01–P**

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] E-mail from Timothy J. Malinowski, Director, NYSE Euronext, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated July 21, 2008 (confirming the Exchange's statutory basis for the proposed rule change).

[14] *See id.*

[15] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–58212; File No. SR–NYSEArca–2008–56]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend the Pilot Program Expiring on November 30, 2008 for Listing Standards To Provide That Currently Traded Issuers Will Be Required To Meet Each of the $5 Per Share Closing Price Requirement and the $150 Million Market Value of Listed Securities Requirement on the Basis of a 90 Trading Day Average of the Closing Price of the Issuer's Common Stock Prior To Applying for Initial Listing

July 23, 2008.

## I. Introduction

On May 28, 2008, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its pilot program for listing standards expiring on November 30, 2008 (''Pilot'')[3] for initial listing standards applicable to currently traded issuers. The proposed rule change, as modified by Amendment No. 1, was published in the **Federal Register** on June 20, 2008.[4] The Commission received no comments on the proposal. This order approves the proposed rule change.

## II. Description of the Proposal

The Exchange proposes to amend NYSE Arca Equities Rule 5.2(c) to provide that a currently traded issuer will be required to, among other things, have: (1) Met each of the $5 closing

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission initially approved the Pilot for six months, until May 29, 2007. *See* Securities Exchange Act Release No. 54796 (November 20, 2006), 71 FR 69166 (November 29, 2006) (SR–NYSEArca–2006–85). The Pilot was subsequently extended for an additional six months, until November 30, 2007. *See* Securities Exchange Act Release No. 55838 (May 31, 2007), 72 FR 31642 (June 7, 2007) (SR–NYSEArca–2007–51). The Pilot was then extended for an additional six months, until May 31, 2008. *See* Securities Exchange Act Release No. 56885 (December 3, 2007), 72 FR 69272 (December 7, 2007) (SR–NYSEArca–2007–123). The Pilot was most recently extended for an additional six months, until November 30, 2008. *See* Securities Exchange Act Release No. 57922 (June 4, 2008), 73 FR 33137 (June 11, 2008) (SR–NYSEArca–2008–55).

[4] *See* Securities Exchange Act Release No. 57958 (June 12, 2008), 73 FR 35184.

price requirement[5] and the $150 million market value of listed securities requirement[6] on the basis of a 90 trading day average of the closing price of the issuer's common stock prior to applying for listing on the Exchange; (2) at least $5 closing price and $150 market value at the time it applies for listing;[7] and (3) a closing price of at least $1 per share in each day of the 90 trading day period.[8]

### III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of section 6(b) of the Act and the rules and regulations thereunder. Specifically, the Commission finds that the proposal is consistent with section 6(b)(5) of the Act,[9] which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest, and to not permit unfair discrimination between customers, issuers, brokers, or dealers.[10]

The development and enforcement of adequate standards governing the initial listing of securities on an exchange is an activity of critical importance to financial markets and the investing public. Listing standards, among other things, serve as a means for an exchange to screen issuers and to provide listed status only to bona fide companies that have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets. Adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market.

Under the proposal, issuers with currently listed securities on other markets would have to meet the proposed standards to list their common stock on the Exchange. First, instead of meeting the closing price per share of $5 or more for 90 consecutive trading days prior to applying for listing, the closing price per share must be met over a 90 trading day average prior to applying for listing. In addition, instead of meeting the market value of listed securities of $150 million or more for 90 consecutive trading days prior to applying for listing, the market value of listed securities must be met over a 90 trading day average prior to applying for listing. Second, the common stock must have at least $5 closing price and the $150 million market value at the time the issuer applies for listing. Finally, the issuers must have closing price per share of $1 or more for 90 consecutive trading days prior to applying for listing.

Originally, the Commission approved the Pilot's initial listing standards, with three alternative listing standards, based on similarity to the Nasdaq Global Market initial listing standards.[11] The Exchange subsequently amended the Pilot's initial listing standards to eliminate two alternative listing standards and, among other things, increase the market value of listed securities from $75 million to $150 million.[12] The Nasdaq Global Market—Entry Standard 3, which forms the foundation of the Exchange's Pilot initial listing standards, requires, among other things, a currently traded issuer to have a market value of listed securities of $75 million for 90 consecutive trading days and a bid price per share of $5 or more.[13] The Commission notes that the proposed initial listing standards are substantially similar to the Nasdaq Global Market initial listing standards.[14]The Exchange's proposed market value of listed securities requirement, albeit calculated differently, remains higher than Nasdaq's comparable standard.[15]

The Commission notes that under the proposal, while the closing price could fall below $5 per share during the 90 trading day period before applying for listing, it cannot fall below $1 per share. In addition, the closing price must be at least $5 per share at the time the issuer applies to list on the Exchange. The Commission believes that the combination of the $1 per share floor and $5 per share at the time of applying to list should help to ensure that currently traded issuers have some meaningful minimum price history to qualify for listing. In addition, the Commission notes that under the proposal, while the market value could fall below $150 million during the 90 trading day period before applying for listing, it must be at least $150 million at the time the issuer applies to list. The Commission believes that the proposed market value requirements are sufficient to demonstrate meaningful depth and liquidity for these securities.

Based on the above, the Commission believes the proposed rule change is reasonable and should continue to provide only for the listing of securities with sufficient depth and liquidity to maintain fair and orderly markets. Accordingly, the Commission believes that the changes are consistent with the requirements of the Act.

### IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[16] that the proposed rule change, as modified by Amendment No. 1 (SR–NYSEArca–2008–56) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–17308 Filed 7–28–08; 8:45 am]

**BILLING CODE 8010–01–P**

[5] *See* proposed NYSE Arca Equities Rule 5.2(c)(ii).

[6] *See* proposed NYSE Arca Equities Rule 5.2(c)(vi).

[7] *See* proposed NYSE Arca Equities Rules 5.2(c)(ii) and 5.2(c)(vi).

[8] *See* proposed NYSE Arca Equities Rule 5.2(c)(iii).

[9] 15 U.S.C. 78f(b)(5).

[10] In approving this proposed rule change, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] *See* Securities Exchange Act Release No. 54796 (November 20, 2006), 71 FR 69166 (November 29, 2006) (SR–NYSEArca–2006–85). *See also* Nasdaq Rule 4420(a)–(c).

[12] *See* Securities Exchange Act Release No. 56606 (October 3, 2007), 72 FR 57982 (October 11, 2007) (SR–NYSEArca–2007–69).

[13] *See* Nasdaq Rule 4420(c).

[14] *See* Nasdaq Rule 4420(c).

[15] In addition, the Commission notes that the Exchange requires a higher amount of public float ($45 million) versus the comparable Nasdaq standard ($20 million). *See* NYSE Arca Equities Rule 5.2(c)(iv) and Nasdaq Rule 4420(c)(2).

[16] 15 U.S.C. 78s(b)(2).

[17] 17 CFR 200.30–3(a)(12).

## SMALL BUSINESS ADMINISTRATION

### Delegation of Authority

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice of delegation of authority.

**SUMMARY:** This document provides the public notice of the delegation of authority for certain investment activities by the Administrator of the Small Business Administration (SBA) to the Deputy Administrator, the Chief of Staff and the Agency Licensing Committee.

**FOR FURTHER INFORMATION CONTACT:** A. Joseph Shepard, Associate Administrator for Investment, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416; telephone number: (202) 205–6565,

facsimile number: (202) 481–2893; and electronic mail: *joseph.shepard@sba.gov*.

**SUPPLEMENTARY INFORMATION:** This document provides the public notice of the Administrator's delegation of authority with respect to the Administrator's approval of applications for licenses to operate as a small business investment company under the Small Business Investment Act of 1958, as amended, and issuance of licenses for such operation. This delegation of authority reads as follows:

Pursuant to the authority vested in me pursuant to section 301 of the Small Business Investment Act of 1958, as amended, the following authority relating to investment activities is delegated to the specific positions indicated herein as follows:

A. *To the Deputy Administrator*: the authority to approve applications for a license to operate as a small business investment company under the Small Business Investment Act of 1958, as amended; provided, that, during any period in which the Deputy Administrator is serving as the Acting Administrator, or the position of Deputy Administrator is vacant, or the Deputy Administrator is absent from the office (as defined in SBA Standard Operating Procedure 00 01 2), such authority is delegated to the Chief of Staff.

B. *To the Agency Licensing Committee*: the authority to take any and all actions necessary to review applications for licensing under section 301 of the Small Business Investment Act of 1958, as amended, and to recommend to the Deputy Administrator which such applications should be approved.

*The Agency Licensing Committee shall be composed of the following members:* Associate Administrator for Capital Access, Chair, Associate Administrator for Investment, General Counsel, Deputy General Counsel, Chief Financial Officer.

This authority revokes all other authorities granted by the Administrator to recommend and approve applications for a license to operate as a small business investment company under the Small Business Investment Act of 1958, as amended. This authority may not be re-delegated; however, in the event that the person serving in one of the positions listed as a member of the Agency Licensing Committee is absent from the office, as defined in SBA Standard Operating Procedure 00 01 2, or is unable to perform the functions and duties of his or her position, the individual serving in an acting capacity, pursuant to a written and established line of succession, shall serve on the Committee during such absence or inability. This authority will remain in effect until revoked in writing by the Administrator or by operation of law.

Dated: July 7, 2008.

**Jovita Carranza,**

*Acting Administrator.*

[FR Doc. E8–17361 Filed 7–28–08; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF STATE

**[Public Notice 6291]**

### Shipping Coordinating Committee; Notice of Subcommittee Meeting

The Shipping Coordinating Committee (SHC), through its Subcommittee on Standards of Training, Certification and Watchkeeping, will conduct an open meeting at 9:30 a.m. on Wednesday, August 20, 2008. The meeting will be held in Room 10–623/0718 of Jemal's Riverside Building, 1900 Half Street, SW., Washington, DC 20593. The purpose of the SHC subcommittee meeting is to prepare for the intersessional meeting of the International Maritime Organization (IMO) Subcommittee on Standards of Training and Watchkeeping (STW) that will address the comprehensive review of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW Convention), and the Seafarer's Training Certification and Watchkeeping Code (STCW Code). The STW intersessional meeting will be held at IMO Headquarters in London, England, on September 8–12, 2008.

The comprehensive review of the STCW Convention and the STCW Code is the primary item for discussion for the STW intersessional meeting. At the STW meeting, amendments to the following chapters of the Convention will be considered:

- Chapter I—General Provisions;
- Chapter II—Master and deck department;
- Chapter III—Engine department;
- Chapter IV—Radiocommunication and radio personnel;
- Chapter V—Special training requirements for personnel on certain types of ships;
- Chapter VI—Emergency, occupational safety, security, medical care and survival functions;
- Chapter VII—Alternative Certification; and
- Chapter VIII—Watchkeeping.

Please note that printed copies of documents associated with the STW intersessional meeting will not be available at this meeting. The documents will be available at the meeting in portable document format (.pdf) on CD–ROM. To request documents before the meeting please write to the address provided below, and include your name, address, phone number, and electronic mail address. Copies of the papers will be sent via electronic mail to the address provided.

Members of the public may attend the meeting up to the seating capacity of the room. Interested persons may seek information by writing: Mayte Medina, U.S. Coast Guard (CG–5221), Room 1210, 2100 Second Street, SW., Washington, DC 20593–0001 or by e-mail, *Mayte.Medina2@uscg.mil*.

Dated: July 11, 2008.

**Mark Skolnicki,**

*Executive Secretary, Shipping Coordinating Committee, Department of State.*

[FR Doc. E8–17347 Filed 7–28–08; 8:45 am]

**BILLING CODE 4710–09–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Notice of Final Federal Agency Actions on a Proposed U.S. Highway Project in California

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of limitation on claims for judicial review of actions by FHWA and other Federal agencies.

**SUMMARY:** This notice announces actions taken by the FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(l)(1). These actions relate to the proposed replacement of the existing non-standard connector, from the southbound San Diego Freeway (Interstate-405 PM 39.4/40.5) to the northbound Ventura Freeway (U.S. Highway-101 PM 17.0/19.4), with an upgraded connector. The new 50 mph two-lane connector would replace the current 20 mph single-lane connector. The project area is located in the communities of Encino and Sherman Oaks, in the City of Los Angeles, in the County of Los Angeles, in the State of California.

**DATES:** By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the project will be barred unless the claim is filed on or before January 26, 2009. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such a

claim, then that shorter time period still applies.

**FOR FURTHER INFORMATION CONTACT:** Eduardo Aguilar, Branch Chief, Division of Environmental Planning, (213) 897–8492, *eduardo_aguilar@dot.ca.gov*.

**SUPPLEMENTARY INFORMATION:** Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed environmental responsibilities for this project pursuant to 23 U.S.C. 327. Caltrans prepared an Environmental Assessment on a proposal to replace the existing non-standard connector, from the southbound San Diego Freeway (Interstate-405 PM 39.4/40.5) to the northbound Ventura Freeway (U.S. Highway-101 PM 17.0/19.4), with an upgraded connector, in the City of Los Angeles, in the County of Los Angeles, in the State of California.

The existing non-standard connector experiences extensive congestion, delays, and queue lengths throughout the day. The purpose of the project is to improve safety, operation, capacity, and traffic flow through the interchange by replacing the existing 20-mph single-lane connector, with a new 50-mph two-lane connector.

The anticipated permits include: Section 404 Individual Permit pursuant to the Clean Water Act (U.S. Army Corps of Engineers), Section 401 Water Quality Certification pursuant to the Clean Water Act (Regional Water Quality Control Board).

A public meeting was held on May 14, 2008 at Valley Beth Shalom, located at 15739 Ventura Boulevard, in the community of Encino, in the City of Los Angeles, CA. The Environmental Assessment, Finding of No Significant Impact (FONSI), which was approved on June 30, 2008 and other documents are available for public and agency review at Caltrans: 100 S. Main St., Los Angeles, CA 90012.

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

*General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal Aid-Highway Act [23 U.S.C. 109].

*Land:* Landscape and Scenic Enhancement (Wildflowers) [23 U.S.C. 219].

*Air:* Clean Air Act 42 U.S.C. 7401–7671(q).

*Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and section 1536], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712]. Section 4(f) of the U.S. Department of Transportation Act of 1966 [49 U.S.C. 303].

*Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(aa)–11]; Archaeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archaeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

*Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d) (1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209]; The Uniform Relocation Assistance Act and Real Property Acquisition Policies Act of 1970, as amended.

*Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675; Superfund Amendments and Reauthorization Act of 1986 (SARA); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992 (k).

*Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. 139(l) (1).

Issued on: July 23, 2008.

**Nancy E. Bobb,**

*Director, State Programs.*

[FR Doc. E8–17367 Filed 7–28–08; 8:45 am]

BILLING CODE 4910–RY–P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From the Requirements of Regulations

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroad has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

[Docket Number FRA–2008–0079]

*Applicant:* Portland and Western Railroad, Inc., Mr. Paul A. Zalec, Vice President Passenger Operations, 650 Hawthorne Avenue, SE., Suite 220, Salem, Oregon 97301.

The Portland and Western Railroad, Inc. (PWRR) seeks relief from the requirements of the Rules, Standards, and Instructions, Title 49 CFR Part 236, section 236.310, Signal Governing Approach to Home Signal, for its planned Wilsonville to Beaverton commuter rail project, to the extent that PWRR be permitted to utilize a cab signal in place of a roadway approach signal. The location of the request is from Wilsonville, Oregon, on the former Oregon Electric Railway, Oregon Electric Subdivision milepost 42.8 to Beaverton, Oregon, Tillamook District, milepost 755.50, a distance of approximately 15.3 route miles.

*Applicant's justification for relief:* It is proposed that the visibility of cab signals is superior to that of roadway signals and that cab signals also permit automatic enforcement of speed limits and govern the proper approach to the home signal.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and it shall contain a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning these proceedings should be identified by Docket Number FRA–2008–0079 and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation,1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC on July 23, 2008.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E8–17294 Filed 7–28–08; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Notice of Informational Filing

In accordance with Section 236.913 of Title 49 of the Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received an informational filing from the Marquette Rail, LLC to permit field testing of the TrackAccess System. The informational filing is described below, including the requisite docket number where the informational filing and any related information may be found. The document is also available for public inspection; however, FRA is not accepting public comments.

**Marquette Rail, LLC**

[Waiver Petition Docket Number FRA–2008–0081]

The Marquette Rail, LLC has submitted an informational filing to permit field testing of the software-based dispatch system for low density lines identified as TrackAccess System. The informational filing addresses the requirements under 49 CFR 236.913(j)(1). Specifically, the informational filing contains a description of the TrackAccess product and an operational concept document, pursuant to 49 CFR 36.913(j)(1).

TrackAccess is an electronic track occupancy system similar to the conventional block register. It is designed to protect the area of exclusive track occupancy given to roadway workers or train crew members by excluding the possibility of electronic issuance of the conflicting track occupancy authorities. TrackAccess aims to reduce the potential for human errors associated with issuance of track occupancy authorities to roadway workers and train crews by the dispatcher. In its autonomous mode of operation, the TrackAccess System assumes electronic delivery of track occupancy authorities to roadway workers and train crews.

The Marquette Rail, LLC desires to commence factory testing of the product on or about August 15, 2008, and conduct a field testing as soon as practicable, thereafter, contingent upon FRA's acceptance and approval of their informational filing. The Marquette Rail, LLC intends to test TrackAccess Systems on it railroad in Michigan.

Interested parties are invited to review the informational filing and associated documents at DOT's Docket Management facility during regular business hours (9 a.m.–5 p.m.) at 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590. All documents in the public docket are available for inspection and copying on the Internet at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications received into any of our dockets by name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC July 23, 2008.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E8–17295 Filed 7–28–08; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

**City of Menasha, Wisconsin**

[Waiver Petition Docket Number FRA–2008–0082]

The City of Menasha, Wisconsin (City), seeks a permanent waiver of compliance from certain provisions of the Use of Locomotive Horns at Highway-Rail Grade Crossings, 49 CFR Part 222. The City intends to establish Pre-Rule Quiet Zones that it had previously continued under the provisions of 49 CFR Part 222.41(c)(1). The City is seeking a waiver to extend: (1) The mailing date for a Notice of Intent as provided in 49 CFR Part 222.41(c)(2)(i)(a) which states that the Notice of Intent must be mailed by February 24, 2008 and (2) the filing date for a Detailed Plan as provided in 49 CFR Part 222.41(c)(2)(i)(b) which states that the Detailed Plan must be filed with FRA by June 24, 2008. The waiver petition requests that the City be allowed an unspecified amount of additional time to submit its Notice of Intent and Detailed Plan due to confusion regarding its five existing pre-rule quiet zones which the City is trying to consolidate into two quiet zones.

The City states that when it started to review the requirements for continuation of its Pre-Rule Quiet Zones, it discovered that the descriptions and locations of the five quiet zones were somewhat confusing. For example, there was a single crossing quiet zone on a mainline that was between two other crossings identified in a separate quiet zone. Two other quiet zones included crossings that were

not contiguous with each other and, in some cases, were very remote from the remainder of the crossings in that particular quiet zone. Upon consultation with one of FRA's Regional Crossing Managers who also spoke with the Canadian National Railroad Company (CN) about the situation, it was determined that consolidating the five pre-rule quiet zones into two was appropriate. Because of the confusion regarding its five existing quiet zone and objectives to consolidate those into two quiet zones, the City was unable to confidently and timely prepare its Notice of Intent and Detailed Plan by the required dates.

The City states that it is committed to promptly submitting its Notice of Intent and Detailed Plan. The commitment extends further to the goal of reaching compliance with the FRA safety level established for Pre-Rule Quiet Zones, realizing there may be significant costs required to implement necessary improvements.

The City seeks the waiver in order to continue the restrictions on routine sounding of locomotive horns along its five quiet zone corridors, with the possibility that these five quiet zones might be combined into two quiet zones in the future with the CN's approval.

The City states that it made a good faith effort to obtain CN's support for the waiver but failed to reach an agreement and thus was unable to file a joint waiver. The City had several good faith discussions with CN but was unable to reach an accord due to CN's requirement that the Appleton Street Crossing be closed as a condition of its support. The City offered several alternatives to the closing of Appleton Street including the permanent closure of another street, a commitment to install future supplemental safety measures (most likely a four quadrant gate system) at two major crossings (Racine Street and Plank Road), and closing Appleton Street to vehicular traffic but allowing pedestrian and bicycle traffic. The City does not feel that the closure of Appleton Street would contribute significantly to public safety. A church and school that is on the street would still need to be accessed, and it is believed that pedestrians would still attempt to cross at the location and expose themselves to train traffic. Additionally, traffic would be diverted to adjacent crossings that are approximately 850 feet from Appleton Street. Both adjacent streets are high volume arterial streets, and users would be subjected to higher traffic volumes and fewer traffic gaps.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2008–0082) and may be submitted by any of the following methods:

1. *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.

2. *Fax:* 202–493–2251.

3. *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.

4. *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC on July 23, 2008.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E8–17293 Filed 7–28–08; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

**City of Waukesha, Wisconsin**

[Waiver Petition Docket Number FRA–2008–0067]

The City of Waukesha, Wisconsin (City) seeks a permanent waiver of compliance from certain provisions of 49 CFR part 222, which pertain to the establishment of Pre-Rule Quiet Zones. The City intends to establish a Pre-Rule Quiet Zone that it had previously continued under the provisions of 49 CFR 222.41(c)(1). The City is seeking a waiver to extend: (1) the mailing date for a Notice of Intent as provided in 49 CFR 222.41(c)(2)(i)(A) that states that the Notice of Intent must be mailed by February 24, 2008, and (2) the filing date for a Detailed Plan as provided in 49 CFR 222.41(c)(2)(i)(B) that states that the detailed plan must be filed with FRA by June 24, 2008. The waiver petition also requests that the City be allowed to resubmit its Notice of Intent that was originally filed on March 4, 2008, in order to correct data errors in its original submission.

The City states that it made an honest attempt to prepare the Notice of Intent which was mailed on March 4, 2008. However, after a diagnostic meeting was held on May 8, 2008, it was discovered that the Notice of Intent contained a number of errors and the calculation of risk levels should be revised. The City has now retained a consultant with national quiet zone experience and requests the time extension in order to prepare an updated Notice of Intent which will accurately present risk levels so correct treatments can be planned to protect public safety.

The City seeks the waiver in order to continue the restrictions on routine sounding of locomotive horns along the current Main Line Quiet Zone (from Moreland Boulevard, MP 98.59 to Sunset Drive, MP 95.94). The City included a letter from the Wisconsin Central Ltd. Railroad (WCL) dated May 15, 2008, indicating the railroad's

support of the waiver petition to extend the deadlines for filing a Notice of Intent and providing a Detailed Plan. However, subsequent correspondence from WCL dated June 23, 2008, indicates that WCL has withdrawn its support for the City's waiver petition, based upon the failure of the City and WCL to come to agreement on the terms of the public safety enhancements for the affected highway-rail grade crossings.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. In particular, the City is invited to provide additional written information about the steps that it has taken to reach agreement with WCL on the City's request to extend the deadlines contained in 49 CFR 222.41(c)(2), as well as a written explanation as to why application of the joint submission requirement contained in 49 CFR 222.15(a) would not be likely to contribute significantly to public safety.

FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2008–0067) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 20 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC on July 23, 2008.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

[FR Doc. E8–17394 Filed 7–28–08; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

July 22, 2008.

The Department of the Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

*Dates:* Written comments should be received on or before August 28, 2008 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–1946.

*Type of Review:* Extension.

*Title:* PS–262–82 (Final) Definition of an S Corporation.

*Description:* Section 1503(d) denies the use of the losses of one domestic corporation by another affiliated domestic corporation where the loss corporation is also subject to the income tax of a foreign country. This final regulation permits the domestic use of the loss if the loss has not been used in the foreign country provided a domestic use agreement is filed with the income tax return of the domestic affiliated group or domestic owner agreeing to recapture the loss into income upon a future foreign use of the loss.

*Respondents:* Businesses or other for-profit institutions.

*Estimated Total Burden Hours:* 2,740 hours.

*OMB Number:* 1545–1947.

*Type of Review:* Extension.

*Title:* REG–105346–03 (NPRM)—Partnership Equity For Services.

*Form:* 8609.

*Description:* The regulations provide that the transfer of a partnership interest in connection with the performance of services is subject to section 83 of the Code and provide rules for coordinating section 83 with partnership taxation principles.

*Respondents:* Businesses or other for-profit institutions.

*Estimated Total Burden Hours:* 112,500 hours.

*OMB Number:* 1545–0854.

*Type of Review:* Extension.

*Title:* LR–1214 (Final) Discharge of Liens.

*Description:* The Internal Revenue Service needs this information to determine if the taxpayer has equity in the property. This information will be used to determine the amount, if any, to which the tax lien attaches.

*Respondents:* Businesses or other for-profit institutions.

*Estimated Total Burden Hours:* 200 hours.

*OMB Number:* 1545–1244.

*Type of Review:* Extension.

*Title:* PS–39–89 Limitation on Passive Activity Losses and Credits—Treatment on Self-Charged Items of Income and Expense.

*Description:* The IRS will use this information to determine whether the entity has made a proper timely election and to determine that taxpayers are complying with the election in the taxable year of the election and subsequent taxable years.

*Respondents:* Businesses or other for-profit institutions.

*Estimated Total Burden Hours:* 150 hours.

*OMB Number:* 1545–1771.

*Type of Review:* Extension.

*Title:* Revenue Procedure 2002–15, Automatic Relief for Late Initial Entity Classification Elections—Check the Box.

*Description:* 26 CFR Sec. 301.9100–1 and Sec. 301–9100–3 provide the Internal Revenue Service with authority to grant relief for late entity classification elections. This revenue procedure provides that, in certain circumstances, taxpayers whose initial entity classification election was filed late can obtain relief by filing Form 8832 and attaching a statement explaining that the requirements of the revenue procedure have been met.

*Respondents:* Businesses or other for-profit institutions.

*Estimated Total Burden Hours:* 100 hours.

*OMB Number:* 1545–0863.

*Type of Review:* Extension.

*Title:* LR–218–78 (Final) Product Liability Losses and Accumulations for Product Liability Losses.

*Description:* Generally, a taxpayer who sustains a product liability loss must carry the loss back 10 years. However, a taxpayer may elect to have such losses treated as a regular net operating loss under section 172. If desired, such election is made by attaching a statement to the tax return. This statement will enable the IRS to monitor compliance with the statutory requirements.

*Respondents:* Businesses or other for-profit institutions.

*Estimated Total Burden Hours:* 2,500 hours.

*OMB Number:* 1545–1945.

*Type of Review:* Extension.

*Title:* Revenue Procedure 2001–21 Debt Roll-Ups.

*Description:* This revenue procedure provides for an election that will facilitate the consolidation of two or more outstanding debt instruments into a single debt instrument. Under the election, taxpayers can treat certain exchanges of debt instruments as realization events for federal income tax purposes even though the exchanges do not result in significant modifications under Sec. 1.1001–33 of the Income Tax Regulations.

*Respondents:* Businesses and other for-profit institutions.

*Estimated Total Burden Hours:* 75 hours.

*OMB Number:* 1545–0897.

*Type of Review:* Extension.

*Title:* IA–62–91 (Final and Temporary) Capitalization and Inclusion in Inventory of Certain Costs.

*Description:* The paperwork requirements are necessary to determine whether taxpayers comply with the cost allocation rules of section 263A and with the requirements for changing their methods of accounting. The information will be used to verify taxpayers' changes in methods of accounting.

*Respondents:* Businesses or other for-profit institutions.

*Estimated Total Burden Hours:* 100,000 hours.

*OMB Number:* 1545–0897.

*Type of Review:* Extension.

*Title:* REG–208156–91 (Final) Accounting for Long-Term Contracts.

*Description:* The information collected is required to notify the Commissioner of a taxpayer's decision to sever or aggregate one or more long-term contracts under the regulations. The statement is needed so the Commissioner can determine whether the taxpayer properly severed or aggregated its contract(s). The regulations affect any taxpayer that manufactures or constructs property under long-term contracts.

*Respondents:* Businesses or other for-profit institutions.

*Estimated Total Burden Hours:* 12,500 hours.

*Clearance Officer:* Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

*OMB Reviewer:* Alexander T. Hunt, (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Robert Dahl,**

*Treasury PRA Clearance Officer.*

[FR Doc. E8–17267 Filed 7–28–08; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

July 23, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the publication date of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before August 28, 2008 to be assured of consideration.

**Community Development Financial Institutions Fund**

*OMB Number:* 1559–0028.

*Type of Review:* Extension.

*Title:* The Community Development Financial Institutions Program—Certification Application.

*Form:* CDFI–0005.

*Description:* The certification application will be used to determine whether an entity seeking CDFI certification or recertification meets the Fund's requirements for such certification as set forth in 12 CFR 1805.201.

*Respondents:* Not-for-profit institutions.

*Estimated Total Burden Hours:* 12,600 hours.

*Clearance Officer:* Ashanti McCallum, (202) 622–9018, Community Development Financial Institutions Fund, Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005.

*OMB Reviewer:* Alexander T. Hunt, (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Robert Dahl,**

*Treasury PRA Clearance Officer.*

[FR Doc. E8–17350 Filed 7–28–08; 8:45 am]

BILLING CODE 4810–70–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

July 23, 2008.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before August 28, 2008 to be assured of consideration.

**Financial Management Service (FMS)**

*OMB Number:* 1510–0052.

*Type of Review:* Extension.

*Title:* Financial Institution Agreement and Application Forms for Designation as a Treasury Tax and Loan Depositary and Resolution.

*Form:* FMS–458 and –459.

*Description:* Financial institutions are required to complete an Agreement and Application to participate in the Federal Tax Deposit/Treasury Tax and Loan Program. The approved application designates the depositary as an authorized recipient of taxpayers' deposits for Federal taxes.

*Respondents:* Businesses or other for-profit institutions.

*Estimated Total Burden Hours:* 225 hours.

*Clearance Officer:* Wesley Powe (202) 874–7662, Financial Management Service, Room 135, 3700 East-West Highway, Hyattsville, MD 20782.

*OMB Reviewer:* Alexander T. Hunt (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Robert B. Dahl,**

*Treasury PRA Clearance Officer.*

[FR Doc. E8–17351 Filed 7–28–08; 8:45 am]

**BILLING CODE 4810–35–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 990–EZ; Correction

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Correction to notice and request for comments.

**SUMMARY:** This document contains corrections to a notice and request for comments, that was published in the **Federal Register** on Tuesday, July 8, 2008 (73 FR 39089) inviting the general public and other Federal Agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)) and as part of its continuing effort to reduce paperwork and respondent burden by the Department of the Treasury. Currently, the IRS is soliciting comments concerning Form 990–EZ, Short Form Return of Organization Exempt From Income Tax.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the forms and instructions should be directed to Carolyn N. Brown, (202) 622–6688, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Carolyn.N.Brown@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Background

The notice and request for comments that is the subject of the corrections is required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

#### Need for Correction

As published, the notice and request for comments for Proposed Collection; Comment Request for Form 990–EZ contains errors that may prove to be misleading and are in need of clarification.

#### Correction of Publication

Accordingly, the publication of the notice and request for comments for Proposed Collection; Comment Request for Form 990–EZ, which were the subjects of FR Doc. E8–15462, is corrected as follows:

1. On page 39089, column 3, under the caption **SUPPLEMENTARY INFORMATION:**, lines 8 and 9 of the paragraph under ''*Abstract:*'', the language ''$100,000 and whose total assets at the end of the year are less than $250,000'' is corrected to read ''$1,000,000 and whose total assets at the end of the year are less than $2,500,000''.

2. On page 39089, column 3, under the caption **SUPPLEMENTARY INFORMATION:** line 3 of the paragraph under ''*Current Actions:*'', the language ''Schedules A, C, E, G, L and N of the'' is corrected to read ''Schedules A, B, C, E, G, L and N of the''.

**LaNita Van Dyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).*

[FR Doc. E8–17253 Filed 7–28–08; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

**[No. OTS–2008–0009]**

### OTS Minority Depository Institutions Advisory Committee

**AGENCY:** Office of Thrift Supervision, Treasury (OTS).

**ACTION:** Notice of intent to establish; request for nominations.

**SUMMARY:** The Director of the Office of Thrift Supervision has determined that the establishment of a Minority Depository Institutions Advisory Committee is necessary and in the public interest in order to preserve minority institutions and encourage their creation. OTS is seeking nominations of individuals to be considered for selection as Committee members and the names of professional and public interest groups that should be represented on the Committee.

**DATES:** Nomination must be received on or before August 19, 2008.

**ADDRESSES:** Nominations should be sent to *nominations@ots.treas.gov* or mailed to: Montrice Godard Yakimov, Managing Director, Compliance and Consumer Protection, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**FOR FURTHER INFORMATION CONTACT:** Cassandra McConnell, Director, Consumer and Community Affairs, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; (202) 906–5750.

**SUPPLEMENTARY INFORMATION:** The Director of the Office of Thrift Supervision (OTS) has determined that the establishment of the Minority Depository Institutions Advisory Committee is necessary and in the public interest. The Committee is established in accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 2, § 9 (c). The Committee will advise OTS on ways to meet the goals established by section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Public Law 101–73, Title III, 103 Stat. 353, 12 U.S.C.A. § 1463 note. The goals of section 308 are to preserve the present number of minority institutions, preserve the minority character of minority-owned institutions in cases involving mergers or acquisitions, provide technical assistance, and encourage the creation of new minority institutions.The Minority Depository Institutions Advisory Committee will help OTS meet those goals by providing informed advice and recommendations regarding a range of issues involving minority depository institutions.

Nominations should describe and document the proposed member's qualifications for Committee membership. In addition to individual nominations, OTS is soliciting the names of professional and public interest groups that should have representatives participating on the Committee. Committee members are not compensated for their time, but are eligible for reimbursement of travel expenses in accordance with applicable Federal law and regulations.

Dated: July 23, 2008.

By the Office of Thrift Supervision.

**Montrice Godard Yakimov,**

*Managing Director, Compliance and Consumer Protection.*

[FR Doc. E8–17370 Filed 7–28–08; 8:45 am]

**BILLING CODE 6720–01–P**

## U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

### Notice of Open Meetings To Prepare Report to Congress

*Advisory Committee:* U.S.-China Economic and Security Review Commission.

**ACTION:** Notice of open meetings to prepare 2008 Annual Report to Congress—August 14, 2008, September 24–25, 2008, October 6–7, 2008 and October 20–22, 2008 in Washington, DC.

**SUMMARY:** Notice is hereby given of meetings of the U.S.-China Economic and Security Review Commission.

*Name:* Larry Wortzel, Chairman of the U.S.-China Economic and Security Review Commission.

The Commission is mandated by Congress to investigate, assess, evaluate and report to Congress annually on the U.S.-China economic and security relationship. The mandate specifically charges the Commission to prepare a report to the Congress ''regarding the national security implications and impact of the bilateral trade and economic relationship between the United States and the People's Republic of China [that] shall include a full analysis, along with conclusions and recommendations for legislative and administrative actions * * *''

*Purpose of Meetings:* Pursuant to this mandate, the Commission will meet in Washington, DC on August 14, September 24–25, October 6–7, and October 20–22, 2008, to consider the first and later rounds of drafts of material for its 2008 Annual Report to Congress that have been prepared for its consideration by the Commission staff, and to make modifications to those drafts that Commission members believe are needed.

*Topics to be Discussed:* The Commissioners will be considering draft Report sections addressing the following topics:

- The United States-China trade and economic relationship, including the relationship's current status; significant changes during 2008; the control of China's economy by its government, and the effect of that control on the United States.
- The implications of China's Sovereign Wealth Fund; seafood imports from China into Louisiana and the U.S. Gulf Coast; and R&D activities in China and resulting technology transfers to China for the U.S. economy and security.
- China's Activities Directly Affecting U.S. Security Interests, including China's proliferation policies and practices and China's space and cyber activities.
- China's Energy and Environmental Policies and Activities, including bilateral and multilateral energy and environment agreements; and China's efforts pertaining to climate change.
- China's Foreign and Regional Activities and Relationships in East Asia including those pertaining to Taiwan, Japan, and South Korea, and to its own special administrative region of Hong Kong.
- China's Media and Information Controls
- China's Compliance with the U.S.-China Memorandum of Understanding on China's Use of Prison Labor

*Dates and Times (Eastern Daylight Time)*

—Thursday, August 14, 2008 (10 a.m. to 4 p.m.)
—Wednesday, September 24, 2008 (1 p.m. to 5 p.m.)
—Thursday, September 25, 2008 (10 a.m. to 4 p.m.);
—Monday and Tuesday, October 6–7, 2008 (10 a.m. to 4 p.m.);
—Monday, October 20, 2008 (12 p.m. to 4 p.m.)
—Tuesday and Wednesday, October 21–22, 2008 (10 a.m. to 4 p.m.).

**ADDRESSES:** All meetings will be held in Conference Room 333 (3rd floor), except the meeting on September 25 will be held in Conference Room 231 (2nd floor), of The Hall of the States located at 444 North Capitol Street, NW., Washington, DC 20001. Public seating is limited, and will be available on a ''first-come, first-served'' basis. Advance reservations are not required. All participants must register at the front desk of the lobby.

*Required Accessibility Statement:* The entirety of these Commission editorial and drafting meetings will be open to the public. The Commission may recess the public editorial/drafting meetings to address administrative issues in closed session.

**FOR FURTHER INFORMATION CONTACT:** Kathy Michels, Associate Director, U.S.-China Economic and Security Review Commission, 444 North Capitol Street, NW., Suite 602, Washington DC 20001; phone 202–624–1409; e-mail *kmichels@uscc.gov.*

**Authority:** Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Public Law 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Public Law 108–7), as amended by Public Law 109–108 (November 22, 2005).

Dated: July 23, 2008.

**Kathleen J. Michels,**

*Associate Director, U.S.-China Economic and Security Review Commission.*

[FR Doc. E8–17299 Filed 7–28–08; 8:45 am]

BILLING CODE 1137–00–P

Federal Register

Tuesday,
July 29, 2008

# Part II

## Department of the Treasury

**Office of the Comptroller of the Currency**

**12 CFR Part 3**

## Federal Reserve System

**12 CFR Parts 208 and 225**

## Federal Deposit Insurance Corporation

**12 CFR Part 325**

## Department of the Treasury

**Office of Thrift Supervision**

**12 CFR Part 567**

**Risk-Based Capital Guidelines; Capital Adequacy Guidelines: Standardized Framework; Proposed Rule**

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 3**

**[Docket ID: OCC–2008–0006]**

**RIN 1557–AD07**

**FEDERAL RESERVE SYSTEM**

**12 CFR Parts 208 and 225**

**[Regulations H and Y; Docket No. R–1318]**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 325**

**RIN 3064–AD29**

**DEPARTMENT OF THE TREASURY**

**Office of Thrift Supervision**

**12 CFR Part 567**

**[No. 2008–002]**

**RIN 1550–AC19**

## Risk-Based Capital Guidelines; Capital Adequacy Guidelines: Standardized Framework

**AGENCIES:** Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; and Office of Thrift Supervision, Treasury.

**ACTION:** Joint notice of proposed rulemaking.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and Office of Thrift Supervision (OTS) (collectively, the agencies) propose a new risk-based capital framework (standardized framework) based on the standardized approach for credit risk and the basic indicator approach for operational risk described in the capital adequacy framework titled ''International Convergence of Capital Measurement and Capital Standards: A Revised Framework'' (New Accord) released by the Basel Committee on Banking Supervision. The standardized framework generally would be available, on an optional basis, to banks, bank holding companies, and savings associations (banking organizations) that apply the general risk-based capital rules.

**DATES:** Comments on this joint notice of proposed rulemaking must be received by October 27, 2008.

**ADDRESSES:** Comments should be directed to:

*OCC:* Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by e-mail, if possible. Please use the title ''Risk-Based Capital Guidelines; Capital Adequacy Guidelines: Standardized Framework; Proposed Rule and Notice'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- Federal eRulemaking Portal—''Regulations.gov'': Go to *http://www.regulations.gov*, under the ''More Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select OCC–2008–0006 to submit or view public comments and to view supporting and related materials for this notice of proposed rulemaking. The ''How to Use This Site'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- *E-mail: regs.comments@occ.treas.gov.*
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 1–5, Washington, DC 20219.
- *Fax:* (202) 874–4448.
- *Hand Delivery/Courier:* 250 E Street, SW., Attn: Public Information Room, Mail Stop 1–5, Washington, DC 20219.

*Instructions:* You must include ''OCC'' as the agency name and ''Docket Number OCC–2008–0006'' in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this [insert type of rulemaking action] by any of the following methods:

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov*, under the ''More Search Options'' tab click next to the ''Advanced Document Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2008–0006'' to view public comments for this rulemaking action.
- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–5043. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.
- *Docket:* You may also view or request available background documents and project summaries using the methods described above.

*Board:* You may submit comments, identified by Docket No. R–1318, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include docket number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Street, NW.) between 9 a.m. and 5 p.m. on weekdays.

*FDIC:* You may submit by any of the following methods:

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

- *Agency Web site: http://www.FDIC.gov/regulations/laws/federal/propose.html.*
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivered/Courier:* The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.
- *E-mail: comments@FDIC.gov.*
- *Public Inspection:* Comments may be inspected and photocopied in the FDIC Public Information Center, Room E–1002, 3502 Fairfax Drive, Arlington, VA 22226, between 9 a.m. and 5 p.m. on business days.

*Instructions:* Submissions received must include the Agency name and title for this notice. Comments received will be posted without change to *http://www.FDIC.gov/regulations/laws/federal/propose.html*, including any personal information provided.

*OTS:* You may submit comments, identified by OTS–2008–0002, by any of the following methods:

- *Federal eRulemaking Portal:* ''Regulations.gov'': Go to *http://www.regulations.gov*, under the ''more Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Office of Thrift Supervision'' from the agency dropdown menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OTS–2008–0002'' to submit or view public comments and to view supporting and related materials for this proposed rulemaking. The ''How to Use This Site'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: OTS–2008–0002.
- *Facsimile:* (202) 906–6518.
- *Hand Delivery/Courier:* Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel's Office, Attention: OTS–2008–0002.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking.

All comments received will be entered into the docket and posted on Regulations.gov without change, including any personal information provided. Comments, including attachments and other supporting materials received are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov*, select ''Office of Thrift Supervision'' from the agency drop-down menu, then click ''Submit.'' Select Docket ID ''OTS–2008–0002'' to view public comments for this notice of proposed rulemaking.
- *Viewing Comments On-Site:* You may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–6518. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

**FOR FURTHER INFORMATION CONTACT:**

*OCC:* Margot Schwadron, Senior Risk Expert, (202) 874–6022, Capital Policy Division; Carl Kaminski, Attorney; or Ron Shimabukuro, Senior Counsel, Legislative and Regulatory Activities Division, (202) 874–5090; Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

*Board:* Barbara Bouchard, Associate Director, (202) 452–3072; or William Tiernay, Senior Supervisory Financial Analyst, (202) 872–7579, Division of Banking Supervision and Regulation; or Mark E. Van Der Weide, Assistant General Counsel, (202) 452–2263; or April Snyder, Counsel, (202) 452–3099, Legal Division. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263–4869.

*FDIC:* Nancy Hunt, Senior Policy Analyst, (202) 898–6643; Ryan Sheller, Capital Markets Specialist, (202) 898–6614; or Bobby R. Bean, Chief, Policy Section, Capital Markets Branch, (202) 898–3575, Division of Supervision and Consumer Protection; or Benjamin W. McDonough, Senior Attorney, (202) 898–7411, or Michael B. Phillips, Counsel, (202) 898–3581, Supervision and Legislation Branch, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

*OTS:* Michael Solomon, Director, Capital Policy Division, (202) 906–5654; or Teresa Scott, Senior Project Manager, Capital Policy Division, (202) 906–6478, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

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## I. Background

In 1989, the agencies implemented a risk-based capital framework for U.S. banking organizations (general risk-based capital rules).[1] The agencies based the framework on the ''International Convergence of Capital Measurement and Capital Standards'' (Basel I), released by the Basel Committee on Banking Supervision (Basel Committee)[2] in 1988. The general risk-based capital rules established a uniform risk-based capital system that was more risk sensitive and addressed several shortcomings in the capital regimes the agencies used prior to 1989.

In June 2004, the Basel Committee introduced a new capital adequacy framework, the New Accord,[3] that is designed to promote improved risk measurement and management processes and better align minimum risk-based capital requirements with risk. The New Accord includes three options for calculating risk-based capital requirements for credit risk and three options for operational risk. For credit risk, the three approaches are: standardized, foundation internal ratings-based, and advanced internal ratings-based. For operational risk, the three approaches are: basic indicator (BIA), standardized, and advanced measurement (AMA). The advanced internal ratings-based approach and the AMA together are referred to as the ''advanced approaches.''

On September 25, 2006, the agencies issued a notice of proposed rulemaking to implement the advanced approaches in the United States (advanced approaches NPR).[4] Many of the commenters on the advanced approaches NPR requested that the agencies harmonize certain provisions of the agencies' proposal with the New Accord and offer the standardized approach in the United States. A number of these commenters supported making the standardized approach available for all U.S. banking organizations.

On December 7, 2007, the agencies issued a final rule implementing the advanced approaches (advanced approaches final rule).[5] The advanced approaches final rule is mandatory for certain banking organizations and voluntary for others. In general, the advanced approaches final rule requires a banking organization that has consolidated total assets of $250 billion or more, has consolidated on-balance sheet foreign exposure of $10 billion or more, or is a subsidiary or parent of an organization that uses the advanced approaches (core banking organization) to implement the advanced approaches. The implementation of the advanced approaches has created a bifurcated regulatory capital framework in the United States: one set of risk-based capital rules for banking organizations using the advanced approaches (advanced approaches organizations), and another set for banking organizations that do not use the advanced approaches (general banking organizations).

On December 26, 2006, the agencies issued a notice of proposed rulemaking (Basel IA NPR), which proposed modifications to the general risk-based capital rules for general banking organizations.[6] One objective of the Basel IA NPR was to enhance the risk sensitivity of the risk-based capital rules without imposing undue regulatory burden. Specifically, the agencies proposed to increase the number of risk-weight categories, expand the use of external ratings for assigning risk weights, broaden recognition of collateral and guarantors, use loan-to-value ratios (LTV ratios) to risk weight most residential mortgages, increase the credit conversion factor for various short-term commitments, assess a risk-based capital requirement for early amortizations in securitizations of revolving retail exposures, and remove the 50 percent risk-weight limit for derivative transactions. The Basel IA NPR also sought comment on the extent to which certain advanced approaches organizations should be permitted to use approaches other than the advanced approaches in the New Accord.

Most commenters on the Basel IA NPR supported the agencies' goal to make the general risk-based capital rules more risk sensitive without adding undue regulatory burden. However, a number of the commenters representing a broad range of U.S. banking organizations and trade associations urged the agencies to implement the New Accord's standardized approach for credit risk in the United States. These commenters generally stated that the standardized approach is more risk sensitive than the Basel IA NPR and would more appropriately address the industry's concerns regarding domestic and international competitiveness. Most of these commenters requested that the U.S. implementation of the standardized approach closely follow the New Accord. Certain commenters also requested that the agencies make some or all of the other options for credit risk and operational risk in the New Accord available in the United States. For example, some commenters preferred implementation of the standardized approach without a separate capital requirement for operational risk. Other commenters supported including one or more of the approaches in the New Accord for operational risk.

## II. Proposed Rule

After considering the comments on both the Basel IA and the advanced approaches NPRs, the agencies have decided not to finalize the Basel IA NPR and to propose instead a new risk-based capital framework that would implement the standardized approach for credit risk, the BIA for operational

[1] 12 CFR part 3, Appendix A (OCC); 12 CFR parts 208 and 225, Appendix A (Board); 12 CFR part 325, Appendix A (FDIC); and 12 CFR part 567, subpart B (OTS). The risk-based capital rules generally do not apply to bank holding companies with less than $500 million in assets. 71 FR 9897 (February 28, 2006).

[2] The Basel Committee was established in 1974 by central banks and governmental authorities with bank supervisory responsibilities. Current member countries are Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

[3] ''International Convergence of Capital Measurement and Capital Standards, A Revised Framework, Comprehensive Version,'' the Basel Committee on Banking Supervision, June 2006. The text is available on the Bank for International Settlements Web site at *http://www.bis.org/publ/bcbs128.htm*.

[4] 71 FR 55830 (September 25, 2006).

[5] 72 FR 69288 (December 7, 2007).

[6] 71 FR 77446 (December 26, 2006).

risk, and related disclosure requirements (collectively, this NPR or this proposal). This NPR generally parallels the relevant approaches in the New Accord. This NPR, however, diverges from the New Accord where the U.S. markets have unique characteristics and risk profiles, notably the proposal for risk weighting residential mortgage exposures. The agencies have also sought to make this NPR consistent where relevant with the advanced approaches final rule.

This NPR would not modify how a banking organization that uses the standardized framework would calculate its leverage ratio requirement.[7] Banking organizations face risks other than credit and operational risks that neither the New Accord nor this NPR addresses. The leverage ratio is a straightforward measure of solvency that supplements the risk-based capital requirements. Consequently, the agencies continue to view the tier 1 leverage ratio and other prudential safeguards such as Prompt Corrective Action as important components of the regulatory capital regime.

*Question 1a: The agencies seek comments on all aspects of this proposal, including risk sensitivity, regulatory burden, and competitive impact.*

The agencies' general risk-based capital rules permit the use of external ratings issued by a nationally recognized statistical rating organization (NRSRO) to assign risk weights to recourse obligations, direct credit substitutes, certain residual interests, and asset- and mortgage-backed securities. The New Accord permits a banking organization to use external ratings to determine risk weights for a broad range of exposures, including sovereign, bank, corporate, and securitization exposures. It also provides, within certain limitations, for the use of both inferred ratings and issuer ratings. As discussed in more detail later in this preamble, the agencies propose that external, issuer, and inferred ratings be used to risk weight various exposures. While the agencies believe that the use of ratings proposed in this NPR can contribute to a more risk-sensitive framework, they are aware of the limitations associated with using credit ratings for risk-based capital purposes and, thus, are particularly interested in comments on the use of such ratings for those purposes.

Numerous bank supervisory groups and committees, including the Basel Committee on Banking Supervision, the Financial Stability Forum, and the Senior Supervisors Group, have undertaken work to better understand the causes for and possible responses to the recent market events, discussing, among numerous other issues, the role of credit ratings. In addition, in March, the President's Working Group on Financial Markets (PWG) issued its report titled ''Policy Statement on Financial Market Developments,'' providing an analysis of the underlying factors contributing to the recent market stress and a set of recommendations to address identified weaknesses. Among its recommendations, the PWG encouraged regulators, including the Federal banking agencies, to review the current use of credit ratings in the regulation and supervision of financial institutions. In this regard, the PWG policy statement noted that certain investors and asset managers failed to obtain sufficient information or to conduct comprehensive risk assessments, with some investors relying exclusively on credit ratings for valuation purposes. More generally, the PWG statement also noted market participants, including originators, underwriters, asset managers, credit rating agencies, and investors, failed to obtain sufficient information or to conduct comprehensive risk assessments on complex instruments, including securitized credits and their underlying asset pools.

The PWG policy statement also acknowledged the steps already taken by credit rating agencies to improve the performance of credit ratings and encouraged additional actions, potentially including the publication of sufficient information about the assumptions underlying their credit rating methodologies; changes to the credit rating process to clearly differentiate ratings for structured products from ratings for corporate and municipal securities; and ratings performance measures for structured credit products and other asset-backed securities readily available to the public in a manner that facilitates comparisons across products and credit ratings.

Most directly relevant to this NPR, the agencies were encouraged to reinforce steps taken by the credit rating agencies through revisions to supervisory policy and regulation, including regulatory capital requirements that use ratings. At a minimum, regulators were urged to distinguish, as appropriate, between ratings of structured credit products and ratings of corporate and municipal bonds in regulatory and supervisory policies.

*Question 1b: The agencies seek comment on the advantages and disadvantages of the use of external credit ratings in risk-based capital requirements for banking organizations and whether identified weakness in the credit rating process suggests the need to change or enhance any of the proposals in this NPR. The agencies also seek comment on whether additional refinements to the proposals in the NPR should be considered to address more broadly the prudent use of credit ratings by banking organizations. For example, should there be operational conditions for banking organizations to make use of credit ratings in determining risk-based capital requirements, enhancements to minimum capital requirements, or modifications to the supervisory review process?*

The agencies also note that efforts are underway by the BCBS to review the treatment in the New Accord for certain off-balance sheet conduits, resecuritizations, such as collateralized debt obligations referencing asset-backed securities, and other securitization-related risks. The agencies are fully committed to working with the BCBS in this regard and also intend to review the agencies' current approach to securitization transactions to assess whether modifications might be needed. This review will take into account lessons learned from recent market-related events and may result in additional proposals for modification to the risk-based capital rules.

*Question 1c: The agencies seek commenters' views on what changes to the approaches set forth in this NPR, if any, should be considered as a result of recent market events, particularly with respect to the securitization framework described in this NPR.*

*A. Applicability of the Standardized Framework*

Most commenters on the Basel IA NPR favored its opt-in approach, whereby a banking organization could voluntarily decide whether or not to use the proposed rules. They supported the flexibility of the opt-in provision and the ability of a general banking organization to remain under the general risk-based capital rules. Commenters observed that many banking organizations choose to hold capital well in excess of regulatory minimums and would not necessarily benefit from a more risk-sensitive capital rule. For these commenters, limiting regulatory burden was a higher priority than increasing the risk

[7] 12 CFR 3.6(b) and (c)(OCC); 12 CFR part 208, Appendix B and 12 CFR part 225, Appendix D (Board); 12 CFR 325.3 (FDIC); and 12 CFR 567.8 (OTS).

sensitivity of their risk-based capital requirements.

The agencies acknowledge this concern and propose to make the standardized framework optional for banking organizations that do not use the advanced approaches final rule to calculate their risk-based capital requirements.[8] Under this NPR, a banking organization that opts to use the standardized framework generally would have to notify its primary Federal supervisor in writing of its intent to use the new rules at least 60 days before the beginning of the calendar quarter in which it first uses the standardized framework. This notice must include a list of any affiliated depository institutions or bank holding companies, if applicable, that seek supervisory exemption from the use of the standardized framework. Before it notifies its primary Federal supervisor, the banking organization should review its ability to implement the proposed rule and evaluate the potential impact on its regulatory capital.

Under this proposal, a banking organization that opts to use this standardized framework could return to the general risk-based capital rules by notifying its primary Federal supervisor in writing at least 60 days before the beginning of the calendar quarter in which it intends to opt out of the standardized framework. The banking organization would have to include in its notice an explanation of its rationale for ceasing to use the standardized framework and identify the risk-based capital framework it intends to use. The primary Federal supervisor would review this notice to ensure that the use of the general risk-based capital rules would be appropriate for that banking organization.[9] The agencies expect that a banking organization would not alternate between the general risk-based capital rules and this standardized framework.

Any general banking organization could generally continue to calculate its risk-based capital requirements using the general risk-based capital rules without notifying its primary Federal supervisor. The primary Federal supervisor would, however, have the authority to require a general banking organization to use a different risk-based capital rule if that supervisor determines that a particular capital rule is appropriate in light of the banking organization's asset size, level of complexity, risk profile, or scope of operations.

Under section 1(b) of the proposed rule, if a bank holding company opts in to the standardized framework, its subsidiary depository institutions also would apply the standardized framework. Similarly, if a depository institution opts in to the standardized framework, its parent bank holding company (where applicable) and any subsidiary depository institutions of the parent holding company generally would be required to apply the standardized rules as well. Savings and loan holding companies, however, are not subject to risk-based capital rules. Accordingly, if a savings association opts in to the proposed rule, the proposed rule would not apply to the savings and loan holding company or to a subsidiary depository institution of that holding company, unless the subsidiary depository institution is directly controlled by the savings association.

The agencies believe that this approach serves as an important safeguard against regulatory capital arbitrage among affiliated banking organizations. The agencies recognize, however, that there may be infrequent situations where the use of the standardized rules could create undue burden at individual depository institutions within a corporate family. Therefore, under section 1(c) of the proposed rule, a banking organization that would otherwise be required to apply the standardized rule because a related banking organization has elected to apply it may instead use the general risk-based capital rules if its primary Federal supervisor determines in writing that that application of the standardized framework is not appropriate in light of the banking organization's asset size, level of complexity, risk profile, or scope of operations. When seeking such a determination, the banking organization should provide a rationale for its request. The primary Federal supervisor may consider potential capital arbitrage issues within a corporate structure in making its determination.

*Question 2: The agencies seek comment on the proposed applicability of the standardized framework and in particular on the degree of flexibility that should be provided to individual depository institutions within a corporate family, keeping in mind regulatory burden issues as well as ways to minimize the potential for regulatory capital arbitrage.*

In the advanced approaches final rule, the agencies require core banking organizations to use only the most advanced approaches provided in the New Accord. As proposed, the standardized framework generally would be available only for banking organizations that are not core banking organizations.

*Question 3: The agencies seek comment on whether or to what extent core banking organizations should be able to use the proposed standardized framework.*

*B. Reservation of Authority*

Under this NPR, a primary Federal supervisor could require a banking organization to hold an amount of capital greater than would otherwise be required if that supervisor determines that the risk-based capital requirements under the standardized framework are not commensurate with the banking organization's credit, market, operational, or other risks. In addition, the agencies expect that there may be instances when the standardized framework would prescribe a risk-weighted asset amount for one or more exposures that was not commensurate with the risks associated with the exposures. In such a case, the banking organization's primary Federal supervisor would retain the authority to require the banking organization to assign a different risk-weighted asset amount for the exposures or to deduct the amount of the exposures from regulatory capital. Similarly, this NPR proposes to authorize a banking organization's primary Federal supervisor to require the banking organization to assign a different risk-weighted asset amount for operational risk if the supervisor were to find that the risk-weighted asset amount for operational risk produced by the banking organization under this NPR is not commensurate with the operational risks of the banking organization.

*C. Principle of Conservatism*

The agencies believe that in some cases it may be reasonable to allow a banking organization not to apply a provision of the proposed rule if not doing so would yield a more conservative result. Under section 1(f) of the proposed rule, a banking organization may choose not to apply a provision of the rule to one or more exposures provided that: (i) The banking organization can demonstrate on an ongoing basis to the satisfaction of its primary Federal supervisor that not applying the provision would, in all

[8] The agencies are not proposing in this NPR to make this standardized framework available to banking organizations for which the application of the advanced approaches final rule is mandatory, unless such a banking organization is exempted in writing from the advanced approaches final rule by its primary Federal supervisor.

[9] The primary Federal supervisor may waive the 60-day notice period for opting in to the standardized framework and for returning to the general risk-based capital rules.

circumstances, unambiguously generate a risk-based capital requirement for each exposure greater than that which would otherwise be required under the rule; (ii) the banking organization appropriately manages the risk of those exposures; (iii) the banking organization provides written notification to its primary Federal supervisor prior to applying this principle to each exposure; and (iv) the exposures to which the banking organization applies this principle are not, in the aggregate, material to the banking organization.

The agencies emphasize that a conservative capital requirement for a group of exposures does not reduce the need for appropriate risk management of those exposures. Moreover, the principle of conservatism applies to the determination of capital requirements for specific exposures; it does not apply to the disclosure requirements in section 71 of the proposed rule.

*D. Merger and Acquisition Transition Provisions*

A banking organization that uses the standardized framework and that merges with or acquires another banking organization operating under different risk-based capital rules may not be able to quickly integrate the acquired organization's exposures into its risk-based capital system. Under this NPR, a banking organization that uses the standardized framework and that merges with or acquires a banking organization that uses the general risk-based capital rules could continue to use the general risk-based capital rules to calculate the risk-based capital requirements for the merged or acquired banking organization's exposures for up to 12 months following the last day of the calendar quarter during which the merger or acquisition is consummated. The risk-weighted assets of the merged or acquired company calculated under the general risk-based capital rules would be included in the banking organization's total risk-weighted assets. Deductions associated with the exposures of the merged or acquired company would be deducted from the banking organization's tier 1 capital and tier 2 capital.

Similarly, where both banking organizations calculate their risk-based capital requirements under the standardized framework, but the merged or acquired banking organization uses different aspects of the framework, the banking organization may continue to use the merged or acquired banking organization's own systems to determine its organization's risk-weighted assets for, and deductions from capital associated with, the merged or acquired banking organization's exposures for the same time period.

A banking organization that merges with or acquires an advanced approaches banking organization may use the advanced approaches risk-based capital rules to determine the risk-weighted asset amounts for, and deductions from capital associated with, the merged or acquired banking organization's exposures for up to 12 months after the calendar quarter during which the merger or acquisition consummates. During the period when the advanced approaches risk-based capital rules apply to the merged or acquired company, any allowance for loan and lease losses (ALLL) associated with the merged or acquired company's exposures must be excluded from the banking organization's tier 2 capital. Any excess eligible credit reserves associated with the merged or acquired banking organization's exposures may be included in that banking organization's tier 2 capital up to 0.6 percent of that banking organization's risk-weighted assets. (Excess eligible credit reserves would be determined according to section 13(a)(2) of the advanced approaches risk-based capital rules.)

If a banking organization relies on these merger provisions, it would be required to disclose publicly the amounts of risk-weighted assets and total qualifying capital calculated under the applicable risk-based capital rules for the acquiring banking organization and for the merged or acquired banking organization.

*E. Calculation of Tier 1 and Total Qualifying Capital*

This NPR would maintain the minimum risk-based capital ratio requirements of 4.0 percent tier 1 capital to total risk-weighted assets and 8.0 percent total qualifying capital to total risk-weighted assets. A banking organization's total qualifying capital is the sum of its tier 1 (core) capital elements and tier 2 (supplemental) capital elements, subject to various limits, restrictions, and deductions (adjustments). The agencies are not restating the elements of tier 1 and tier 2 capital in the proposed rule. Those capital elements generally would be unchanged from the general risk-based capital rules.[10] Deductions or other adjustments would also be unchanged, except for those provisions discussed below.

Under this NPR, a banking organization would make certain other adjustments to determine its tier 1 and total qualifying capital. Some of these adjustments would be made only to tier 1 capital. Other adjustments would be made 50 percent to tier 1 capital and 50 percent to tier 2 capital. If the amount deductible from tier 2 capital exceeds the banking organization's actual tier 2 capital, the banking organization would have to deduct the shortfall amount from tier 1 capital. Consistent with the agencies' general risk-based capital rules, a banking organization would have to have at least 50 percent of its total qualifying capital in the form of tier 1 capital.

Under this NPR, a banking organization would deduct from tier 1 capital any after-tax gain-on-sale resulting from a securitization. Gain-on-sale means an increase in a banking organization's equity capital that results from a securitization, other than an increase in equity capital that results from the banking organization's receipt of cash in connection with the securitization. The agencies included this deduction to offset accounting treatments that produce an increase in a banking organization's equity capital and tier 1 capital at the inception of a securitization, for example, a gain attributable to a credit-enhancing interest-only strip receivable (CEIO) that results from Financial Accounting Standard (FAS) 140 accounting treatment for the sale of underlying exposures to a securitization special purpose entity (SPE).[11] The agencies expect that the amount of the required deduction would diminish over time as the banking organization realizes the increase in equity capital and, thus, tier 1 capital booked at the inception of the securitization, through actual receipt of cash flows.

Under the general risk-based capital rules, a banking organization must deduct CEIOs, whether purchased or retained, from tier 1 capital to the extent that the CEIOs exceed 25 percent of the banking organization's tier 1 capital. Under this NPR, a banking organization would have to deduct CEIOs from tier 1 capital to the extent they represent after-tax gain-on-sale, and would have to deduct any CEIOs that do not constitute an after-tax gain-on-sale 50 percent from tier 1 capital and 50 percent from tier 2 capital.

[10] See 12 CFR part 3, Appendix A, section 2 (national banks); 12 CFR part 208, Appendix A, section II (state member banks); 12 CFR part 225, Appendix A, section II (bank holding companies); 12 CFR part 325, Appendix A, section I (state nonmember banks); and 12 CFR 567.5 (savings associations).

[11] See Statement of Financial Accounting Standards No. 140, ''Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities'' (September 2000).

Under the FDIC, OCC, and Board general risk-based capital rules, a banking organization must deduct from its tier 1 capital certain percentages of the adjusted carrying value of its nonfinancial equity investments. In contrast, OTS general risk-based capital rules require the deduction of most investments in equity securities from total capital.[12] Under this NPR, however, a banking organization would not deduct these investments. Instead, the banking organization's equity exposures generally would be subject to the treatment provided in Part V of this proposed rule.

A banking organization also would have to deduct from total capital the amount of certain unsettled transactions and certain securitization exposures. These deductions are provided in section 21, section 38, and Part IV of this proposed rule.

Consistent with the advanced approaches final rule, for bank holding companies with consolidated insurance underwriting subsidiaries that are functionally regulated (or subject to comparable supervision and minimum regulatory capital requirements in their home jurisdiction), the following treatment would apply. The assets and liabilities of the subsidiary would be consolidated for purposes of determining the bank holding company's risk-weighted assets. The bank holding company, however, would deduct 50 percent from tier 1 capital and 50 percent from tier 2 capital an amount equal to the insurance underwriting subsidiary's minimum regulatory capital requirement as determined by its functional (or equivalent) regulator. For U.S. regulated insurance subsidiaries, this amount generally would be 200 percent of the subsidiary's Authorized Control Level as established by the appropriate state insurance regulator. Under the general risk-based capital rules, such subsidiaries typically are fully consolidated with the bank holding company.

While the elements of tier 1 and tier 2 capital are the same across the general risk-based capital rules, the advanced approaches final rule, and this NPR, the deductions from those elements are different for each of the three risk-based capital frameworks. As a result, each framework has a distinct definition of tier 1, tier 2, and total qualifying capital.

Securitization-related deductions create a significant difference in the calculation of tier 1 and tier 2 capital across the three frameworks. Under the general risk-based capital rules, only certain CEIOs must be deducted from capital; all other high-risk exposures for which dollar-for-dollar capital must be held may be ''grossed-up'' in accordance with the regulatory reporting instructions, effectively increasing the denominator of the risk-based capital ratio but not affecting the numerator. In contrast, under the advanced approaches final rule and this NPR, certain high risk securitization exposures must be deducted directly from total capital. Other significant differences in the definition of tier 1, tier 2, and total qualifying capital across the three frameworks include the treatment of nonfinancial equity investments for banks and bank holding companies, certain equity investments for savings associations, certain unsettled transactions, consolidated insurance underwriting subsidiaries of bank holding companies, and the ALLL/eligible credit reserves.

The different definitions of tier 1, tier 2, and total capital across the risk-based capital frameworks raise a number of issues. The agencies clarified in the preamble to the advanced approaches rule that a banking organization's tier 1 capital and tier 2 capital for all non-regulatory-capital supervisory and regulatory purposes (for example, lending limits and Regulation W quantitative limits) is the banking organization's tier 1 capital and tier 2 capital as calculated under the risk-based capital framework to which it is subject. The agencies did not specifically state a position regarding the numerator of the leverage ratio. One potential approach is for each banking organization to use its applicable risk-based definition of tier 1 capital for determining both the risk-based and leverage capital ratios. Another potential approach is to define a numerator for the tier 1 leverage ratio that would be the same for all banking organizations. This approach could require banks to calculate one measure of tier 1 capital for risk-based capital purposes and another measure of tier 1 capital for leverage ratio purposes.[13]

*Question 4: Given the potential for three separate definitions of tier 1 capital under the three frameworks, the agencies solicit comment on all aspects of the tier 1 leverage ratio numerator, including issues related to burden and competitive equity.*

*F. Calculation of Risk-Weighted Assets*

(1) Total Risk-Weighted Assets

Under this NPR, a banking organization's total risk-weighted assets would be the sum of its total risk-weighted assets for general credit risk, unsettled transactions, securitization exposures, equity exposures, and operational risk. Banking organizations that use the market risk rule (MRR) would supplement their capital calculations with those provisions.[14]

(2) Calculation of Risk-Weighted Assets for General Credit Risk

For each of its general credit risk exposures (that is, credit exposures that are not unsettled transactions subject to section 38 of the proposed rule, securitization exposures, or equity exposures), a banking organization must first determine the exposure amount and then multiply that amount by the appropriate risk weight set forth in section 33 of the proposed rule. General credit risk exposures include exposures to sovereign entities; exposures to supranational entities and multilateral development banks; exposures to public sector entities; exposures to depository institutions, foreign banks, and credit unions; corporate exposures; regulatory retail exposures; residential mortgage exposures; pre-sold construction loans; statutory multifamily mortgage exposures; and other assets.

Generally, the exposure amount for the on-balance sheet component of an exposure is the banking organization's carrying value for the exposure. If the exposure is classified as a security available for sale, however, the exposure amount is the banking organization's carrying value of the exposure adjusted for unrealized gains and losses. The exposure amount for the off-balance sheet component of an exposure is typically determined by multiplying the

[12] OTS general risk-based capital rules require savings associations to deduct all ''equity investments'' from total capital. 12 CFR 567.5(c)(2)(ii). ''Equity investments'' are defined to include: (i) Investments in equity securities (other than investments in subsidiaries, equity investments that are permissible for national banks, indirect ownership interests in certain pools of assets (for example, mutual funds), Federal Home Loan Bank stock and Federal Reserve Bank stock); and (ii) investments in certain real property. 12 CFR 567.1. The proposed treatment of investments in equity securities is discussed above. Equity investments in real estate would continue to be deducted to the same extent as under the general risk-based capital rules.

[13] To the extent that the agencies decide to change the numerator of the leverage ratio, they would propose such changes in a separate rulemaking. As a related matter, the OTS advanced approaches final rule incorrectly states that the leverage ratio is calculated using the revised definition of tier 1 and tier 2 capital. This NPR would remove this provision until the agencies conclusively resolve this matter.

[14] 12 CFR part 3, Appendix B (national banks); 12 CFR part 208, Appendix E (state member banks); 12 CFR part 225, Appendix E (bank holding companies); and 12 CFR part 325, Appendix C (state nonmember banks). OTS intends to codify a market risk capital rule for savings associations at 12 CFR part 567, Appendix D.

notional amount of the off-balance sheet component by the appropriate credit conversion factor (CCF) under section 34 of the proposed rule. The exposure amount for over-the-counter (OTC) derivative contracts is determined under section 35 of the proposed rule. Exposure amounts for collateralized OTC derivative contracts, repo-style transactions, or eligible margin loans may be determined under particular rules in section 37 of the proposed rule.

(3) Calculation of Risk-Weighted Assets for Unsettled Transactions, Securitization Exposures, and Equity Exposures

(a) Unsettled Transactions

Risk-weighted assets for specified unsettled and failed securities, foreign exchange, and commodities transactions are calculated according to paragraph (f) of section 38 of the proposed rule.[15]

(b) Securitization Exposures

Risk-weighted assets for securitization exposures are calculated according to Part IV of the proposed rule. Generally, a banking organization would calculate the risk-weighted asset amount of a securitization exposure by multiplying the amount of the exposure as determined in section 42 of the proposed rule by the appropriate risk weight in section 43 of this NPR.

Part IV of the proposed rule provides a hierarchy of approaches for calculating risk-weighted assets for securitization exposures. Among the approaches included in Part IV is a ratings-based approach (RBA), which calculates the risk-weighted asset amount of a securitization exposure by multiplying the amount of the exposure by risk-weights that correspond to the applicable external or applicable inferred rating of the securitization. Part IV provides other treatments for specific types of securitization exposures including deduction from capital for certain exposures, and different risk-weighted asset computations for certain securitizations exposures that do not qualify for the RBA and for securitizations that have an early amortization provision.

(c) Equity Exposures

Risk-weighted assets for equity exposures are calculated according to the rules in Part V of the proposed rule. Generally, risk-weighted assets for equity exposures that are not exposures to investment funds would be calculated according to the simple risk-weight approach (SRWA) in section 52 of this proposed rule. Risk-weighted assets for equity exposures to investment funds would, with certain exceptions, be calculated according to one of three look-through approaches or, if the investment fund qualifies, calculated according to the money market fund approach. These approaches are described in section 53 of the proposed rule.

(4) Calculation of Risk-Weighted Assets for Operational Risk

Risk-weighted assets for operational risk are calculated under the BIA provided in section 61 of this proposed rule.

*G. External and Inferred Ratings*

(1) Overview

The agencies' general risk-based capital rules permit the use of external ratings issued by a nationally recognized statistical rating organization (NRSRO) to assign risk weights to recourse obligations, direct credit substitutes, residual interests (other than a credit-enhancing interest-only strip), and asset- and mortgage-backed securities.[16] Under the ratings-based approach in the general risk-based capital rules, a banking organization must use the lowest NRSRO external rating if multiple ratings exist. The approach also requires one rating for a traded exposure and two ratings for a non-traded exposure and allows the use of inferred ratings within a securitization structure. When the agencies revised their general risk-based capital rules to permit the use of external ratings issued by an NRSRO for these exposures, the agencies acknowledged that these ratings eventually could be used to determine the risk-based capital requirements for other types of debt instruments, such as externally rated corporate bonds.

The New Accord would permit a banking organization to use external ratings to determine risk weights for a broad range of exposures. It also provides for the use of both inferred and, within certain limitations, issuer ratings, but discourages the use of unsolicited ratings. Generally consistent with the New Accord, and in response to favorable comments on the Basel IA NPR's proposal to expand the use of external ratings, the agencies propose that external, issuer, and inferred ratings be used to risk weight various exposures.

This proposed use of ratings is a more risk-sensitive approach than relying on membership in the Organization for Economic Cooperation and Development (OECD)[17] to differentiate the risk of exposures to sovereign entities, depository institutions, foreign banks, and credit unions. The proposed approach also would use a greater number of risk weights than the general risk-based capital rules, which would further improve the risk sensitivity of a banking organization's risk-based capital requirements.

Consistent with the agencies' general risk-based capital rules and the advanced approaches final rule, the agencies propose to recognize only credit ratings that are issued by an NRSRO. For the purposes of this NPR, NRSRO means an entity registered with the U.S. Securities and Exchange Commission (SEC) as an NRSRO under section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7).[18]

(2) Use of External Ratings

Under this NPR, a banking organization would use the applicable external rating of an exposure (for certain exposures that have external ratings) to determine its risk weight. Additionally, consistent with the New Accord, the banking organization would infer a rating for certain exposures that do not have external ratings from the issuer rating of the obligor or from the external rating of another specific issue of the obligor. The agencies' proposal for the use of external and inferred ratings, however, differs in some respects from the New Accord, as described below.

(a) External Ratings

Under this NPR, an external rating means a credit rating that is assigned by an NRSRO to an exposure, provided that the credit rating fully reflects the entire amount of credit risk with regard to all payments owed to the holder of the exposure. If, for example, a holder is

[15] Certain transaction types are excluded from the scope of section 38, as provided in paragraph (b) of section 38.

[16] Some synthetic structures also may be subject to the external rating approach. For example, certain credit-linked notes issued from a synthetic securitization are risk weighted according to the rating given to the notes. 66 FR 59614, 59622 (November 29, 2001).

[17] The OECD-based group of countries comprises all full members of the OECD, as well as countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow. The list of OECD countries is available on the OECD Web site at *http://www.oecd.org.*

[18] See 17 CFR 240.17g–1. On September 29, 2006, the President signed the Credit Rating Agency Reform Act of 2006 (''Reform Act'') (Pub. L. 109–291) into law. The Reform Act requires a credit rating agency that wants to represent itself as an NRSRO to register with the SEC. The agencies may review their risk-based capital rules, guidance and proposals from time to time to determine whether any modification of the agencies' definition of an NRSRO is appropriate.

owed principal and interest on an exposure, the credit rating must fully reflect the credit risk associated with timely repayment of principal and interest. If a holder is owed only principal on an exposure, the credit rating must fully reflect only the credit risk associated with timely repayment of principal. Furthermore, a credit rating would qualify as an external rating only if it is published in an accessible form and is or will be included in the transition matrices made publicly available by the NRSRO that summarize the historical performance of positions rated by the NRSRO. An external rating may be either solicited or unsolicited by the obligor issuing the rated exposure. This definition is consistent with the definition of ''external rating'' in the advanced approaches final rule.

Under this NPR, a banking organization would determine the risk weight for certain exposures with external ratings based on the applicable external ratings of the exposures. If an exposure to a sovereign or public sector entity (PSE), a corporate exposure, or a securitization exposure has only one external rating, that rating is the applicable external rating. If such an exposure has multiple external ratings, the applicable external rating would be the lowest external rating. This approach for determining the applicable external rating differs from the New Accord. In the New Accord, if an exposure has two external ratings, a banking organization would apply the lower rating to the exposure to determine the risk weight. If an exposure has three or more external ratings, the banking organization would use the second lowest external rating to risk weight the exposure. The agencies believe that the proposed approach, which is designed to mitigate the potential for external ratings arbitrage, more reliably promotes safe and sound banking practices.

(b) Inferred Ratings

Consistent with the New Accord, the agencies propose that a banking organization must, subject to certain conditions, infer a rating on an exposure to a sovereign entity or a PSE or on a corporate exposure that does not have an applicable external rating (unrated exposure).[19] An inferred rating may be based on the issuer rating of the sovereign, PSE, or corporate obligor or based on another externally rated exposure of that obligor. Exposures with an inferred rating would be treated the same as exposures with an identical external rating.

(i) Determining Inferred Ratings

To determine the risk weight for an unrated exposure to a sovereign entity or a PSE, or for an unrated corporate exposure, a banking organization must first determine if, within the framework established in this NPR, the exposure has one or more inferred ratings. An unrated exposure may have inferred ratings based both on the issuer ratings of the obligor and the external ratings of specific issues of the obligor. A banking organization would not be able to use an external rating assigned to an obligor or specific issues of the obligor to infer a rating for an exposure to the obligor's affiliate.

(A) Inferred Rating Based on an Issuer Rating

Under this NPR, a senior unrated exposure to a sovereign entity or a PSE, or a senior unrated corporate exposure where the corporate issuer has one or more issuer ratings, has inferred ratings based on those issuer ratings. For purposes of inferring a rating from an issuer rating, a senior exposure would be an exposure that ranks at least pari passu (that is, equal) with the obligor's general creditors in the event of bankruptcy, insolvency, or other similar proceeding. This NPR defines an issuer rating as a credit rating assigned by an NRSRO to the obligor that reflects the obligor's capacity and willingness to satisfy all of its financial obligations, and is published in an accessible form and is or will be included in the transition matrices made publicly available by the NRSRO that summarize the historical performance of the NRSRO's ratings.

(B) Inferred Rating Based on a Specific Issue Rating

Under this NPR, an unrated exposure to a sovereign entity or a PSE, or an unrated corporate exposure may have one or more inferred ratings based on external ratings assigned to another exposure issued by the obligor. An unrated exposure would have an inferred rating equal to the external rating of another exposure issued by the same obligor and secured by the same collateral (if any), if the externally rated exposure: (i) Ranks pari passu with the unrated exposure (or at the banking organization's option, is subordinated in all respects to the unrated exposure); (ii) has a long-term rating; (iii) does not benefit from any credit enhancement that is not available to the unrated exposure, (iv) has an effective remaining maturity that is equal to or longer than that of the unrated exposure, and (v) is denominated in the same currency as the unrated exposure. The currency requirement would not apply where the unrated exposure that is denominated in a foreign currency arises from a participation in a loan extended by a multilateral development bank or is guaranteed by a multilateral development bank against convertibility and transfer risk. If the banking organization's participation is only partially guaranteed against convertibility and transfer risk, the banking organization could use the external rating for the portion of the participation that benefits from the multilateral development bank's participation. If the externally rated exposure does not meet these requirements, it cannot be used to infer a rating for the unrated exposure.

The inferred rating approach provides a special treatment for inferred ratings from low-quality ratings (ratings that correspond to a risk weight of 100 percent or greater for an exposure to a PSE and 150 percent for an exposure to a sovereign entity or a corporate exposure). An unrated exposure would have inferred rating(s) equal to the long-term external rating(s) of exposures with low-quality ratings that are issued by the same obligor and that are senior in all respects to the unrated exposure.

This approach for inferred ratings differs from the New Accord, which would require that any low-quality rating of an exposure issued by an obligor be assigned to any unrated exposure to the obligor. The agencies have concluded that this treatment could result in an inappropriately high capital charge in some circumstances. For example, an obligor for business reasons may choose to issue subordinated debt that receives a low-quality rating. The New Accord suggests this low-quality rating should be assigned to unrated senior exposures of the obligor, even if the unrated senior exposures are also senior to exposures with a high-quality rating. Under this NPR, a banking organization in that situation could assign the high-quality rating to the unrated senior secured exposure.

(ii) Determining the Applicable Inferred Rating

Once a banking organization has determined all the inferred ratings for an unrated exposure, it must determine the applicable inferred rating for the exposure. Under this NPR, the applicable inferred rating for an exposure that has only one inferred rating would be the inferred rating. If the unrated exposure has two or more

[19] The treatment of inferred ratings for securitization exposures is discussed in section M.(4) of this preamble.

inferred ratings, the applicable inferred rating would be the lowest inferred rating.

The agencies believe that this approach for determining the applicable inferred rating for an unrated exposure is appropriately risk sensitive and consistent with the principles for use of external ratings in this NPR and the advanced approaches final rule. The agencies are aware, however, that the proposed use of unsolicited external ratings in this NPR may raise certain issues. The New Accord suggests that banking organizations generally should use solicited ratings and expresses concern that NRSROs might potentially use unsolicited ratings to put pressure on issuers to obtain solicited ratings.

*Question 5: The agencies seek comment on the use of solicited and unsolicited external ratings as proposed in this NPR.*

*H. Risk-Weight Categories*

(1) Exposures to Sovereign Entities

The agencies' general risk-based capital rules generally assign a risk weight to an exposure to a sovereign entity based on the type of exposure and membership of the sovereign in the OECD. Consistent with the New Accord, the agencies propose to risk weight an exposure to a sovereign entity based on the exposure's applicable external or applicable inferred rating (see Table 1).[20]

For purposes of this NPR, sovereign entity means a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government. In the United States, this definition would include the twelve Federal Reserve Banks. The definition would not include commercial enterprises owned by the central government that are engaged in activities involving trade, commerce, or profit, which are generally conducted or performed in the private sector.

Where a sovereign entity's banking supervisor allows a banking organization under its jurisdiction to apply a lower risk weight to the same exposure to that sovereign than Table 1 provides, a U.S. banking organization would be able to assign that lower risk weight to its exposures to that sovereign entity provided the exposure is denominated in that sovereign entity's domestic currency, and the banking organization has at least the equivalent amount of liabilities in that currency.

TABLE 1.—EXPOSURES TO SOVEREIGN ENTITIES

| Applicable external or applicable inferred rating for an exposure to a sovereign entity | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | AAA | 0 |
| Second-highest investment grade rating | AA | 0 |
| Third-highest investment grade rating | A | 20 |
| Lowest investment grade rating | BBB | 50 |
| One category below investment grade | BB | 100 |
| Two categories below investment grade | B | 100 |
| Three categories or more below investment grade | CCC | 150 |
| No applicable rating | N/A | 100 |

(2) Exposures to Certain Supranational Entities and Multilateral Development Banks

Consistent with the New Accord's treatment of exposures to supranational entities, the agencies propose to assign a zero percent risk weight to exposures to the Bank for International Settlements, the European Central Bank, the European Commission, and the International Monetary Fund.

Generally consistent with the New Accord, the agencies also propose that an exposure to a multilateral development bank (MDB) receive a zero percent risk weight. This proposed risk weight would apply only to those MDBs listed below and is based on the generally high credit quality of these MDBs, their strong shareholder support, and a shareholder structure comprised of a significant proportion of sovereign entities with high quality issuer ratings. In this NPR, MDB means the International Bank for Reconstruction and Development, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, and any other multilateral lending institution or regional development bank in which the U.S. government is a shareholder or contributing member or which the primary Federal supervisor determines poses comparable credit risk. Exposures to regional development banks and multilateral lending institutions that do not meet these requirements would generally be treated as corporate exposures.

(3) Exposures to Depository Institutions, Foreign Banks, and Credit Unions

The agencies' general risk-based capital rules assign a risk weight of 20 percent to all exposures to U.S. depository institutions, foreign banks, and credit unions incorporated in an OECD country. Short-term exposures to such entities incorporated in a non-OECD country receive a 20 percent risk weight and long-term exposures to such entities in these countries receive a 100 percent risk weight.

Since this NPR eliminates the OECD/non-OECD distinction, the agencies propose that exposures to a depository institution, a foreign bank, or a credit union receive a risk weight based on the lowest issuer rating of the entity's sovereign of incorporation. In this NPR, sovereign of incorporation means the country where an entity is incorporated, chartered, or similarly established. In general, exposures to a depository institution, foreign bank, or credit union would receive a risk weight one category higher than the risk weight assigned to an exposure to the entity's sovereign of incorporation. For exposures to a depository institution, foreign bank, or credit union where the sovereign of incorporation is rated one or two categories below investment grade or is unrated, the risk weight

[20] The ratings examples used throughout this document are illustrative and do not express any preferences or determinations on any NRSRO.

would be 100 percent. If the sovereign of incorporation is rated three or more categories below investment grade, these exposures would receive a risk weight of 150 percent. Table 2 illustrates the proposed risk weights for exposures to depository institutions, foreign banks, and credit unions. A depository institution is defined as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), and foreign bank means a foreign bank as defined in section 211.2 of the Federal Reserve Board's Regulation K (12 CFR 211.2) other than a depository institution.

TABLE 2.—EXPOSURES TO DEPOSITORY INSTITUTIONS, FOREIGN BANKS, AND CREDIT UNIONS

| Lowest issuer rating of the sovereign of incorporation | Example | Exposure risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | AAA | 20 |
| Second-highest investment grade rating | AA | 20 |
| Third-highest investment grade rating | A | 50 |
| Lowest investment grade rating | BBB | 100 |
| One category below investment grade | BB | 100 |
| Two categories below investment grade | B | 100 |
| Three categories or more below investment grade | CCC | 150 |
| No issuer rating | N/A | 100 |

Consistent with the general risk-based capital rules and the New Accord, exposures to a depository institution or foreign bank that are includable in the regulatory capital of that institution would receive a risk weight no lower than 100 percent unless the exposure is subject to deduction as a reciprocal holding.[21]

The proposal outlined above is consistent with one of the two options available in the New Accord for risk weighting claims on banks. The alternative approach, which the agencies propose for exposures to PSEs, risk weights exposures based on the applicable external or applicable inferred rating of the exposures. This alternative approach for exposures to PSEs is described below.

*Question 6: The agencies seek comment on this proposed approach, as well as on the appropriateness of applying the alternative approach to exposures to depository institutions, credit unions, and foreign banks.*

(4) Exposures to Public Sector Entities (PSEs)

The agencies' general risk-based capital rules assign a 20 percent risk weight to general obligations of states and other political subdivisions of OECD countries.[22] Exposures to entities that rely on revenues from specific projects, rather than general revenues (for example, revenue bonds), receive a risk weight of 50 percent. Generally, other exposures to state and political subdivisions of OECD countries (including industrial revenue bonds) and exposures to political subdivisions of non-OECD countries receive a risk weight of 100 percent.

Consistent with the New Accord, the agencies propose that an exposure to a PSE receive a risk weight based on the applicable external or applicable inferred rating of the exposure. This approach would apply to both general obligation and revenue bonds. In no case, however, may an exposure to a PSE receive a risk weight that is lower than the risk weight that corresponds to the lowest issuer rating of a PSE's sovereign of incorporation (see Table 1 for risk weights for exposures to sovereign entities).

The proposed rule defines a PSE as a state, local authority, or other governmental subdivision below the level of a sovereign entity. This definition would not include commercial companies owned by a government that engage in activities involving trade, commerce, or profit, which are generally conducted or performed in the private sector. Table 3 illustrates the risk weights for exposures to PSEs.

TABLE 3.—EXPOSURES TO PUBLIC SECTOR ENTITIES: LONG-TERM CREDIT RATING

| Applicable external or applicable inferred rating of an exposure to a PSE | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | AAA | 20 |
| Second-highest investment grade rating | AA | 20 |
| Third-highest investment grade rating | A | 50 |
| Lowest investment grade rating | BBB | 50 |
| One category below investment grade | BB | 100 |
| Two categories below investment grade | B | 100 |
| Three categories or more below investment grade | CCC | 150 |
| No applicable rating | N/A | 50 |

The New Accord also suggests that a national supervisor may permit a banking organization to assign a risk weight to an exposure to a PSE as if it were an exposure to the sovereign entity in whose jurisdiction the PSE is established. The agencies are not proposing to risk weight exposures to PSEs in the United States in this manner. In certain cases, however, the agencies have allowed a banking organization to rely on the risk weight

[21] 12 CFR part 3, Appendix A, section 2(c)(6)(ii) (OCC); 12 CFR parts 208 and 225, Appendix A, section II.B.3 (FRB); 12 CFR part 325, Appendix A, I.B.(4) (FDIC); and 12 CFR 567.5(c)(2)(i) (OTS).

[22] Political subdivisions of the United States include a state, county, city, town or other municipal corporation, a public authority, and generally any publicly owned entity that is an instrument of a state or municipal corporation.

that a foreign banking supervisor assigns to its own PSEs. Therefore, the agencies propose to allow a banking organization to risk weight an exposure to a foreign PSE according to the risk weight that the foreign banking supervisor assigns. In no event, however, could the risk weight for an exposure to a foreign PSE be lower than the lowest risk weight assigned to that PSE's sovereign of incorporation.

The New Accord contains an alternative approach to risk weight exposures to a PSE, which is based on the lowest issuer rating of the PSE's sovereign of incorporation. The agencies are proposing this approach for exposures to depository institutions, foreign banks, and credit unions as described in the previous section.

*Question 7: The agencies seek comment on the pros and cons of the proposed approach for risk weighting exposures to PSEs as well as on the appropriateness of applying, instead, the approach proposed in this NPR for depository institutions.*

The New Accord does not incorporate the use of short-term ratings for exposures to PSEs. The agencies recognize, however, that an NRSRO may assign a short-term municipal rating to an exposure to a PSE that has a maturity of up to three years (for example, a bond anticipation note). Further, the agencies understand that there are different techniques for comparing these short-term ratings to other types of ratings, both short-term and long-term. The agencies are considering whether to permit the use of these short-term ratings for risk weighting short-term exposures to PSEs using the risk weights in Table 4.

TABLE 4.—PUBLIC SECTOR ENTITIES: SHORT-TERM RATINGS

| Applicable external rating of an exposure to a PSE | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade | SP–1/MIG–1 | 20 |
| Second-highest investment grade | SP–2/MIG–2 | 50 |
| Third-highest investment grade | SP–3/MIG–3 | 100 |
| Below investment grade | Non-prime | 150 |
| No applicable external rating | N/A | 50 |

*Question 8: The agencies solicit comment on the use of short-term ratings for exposures to PSEs generally and specifically on the ratings and related risk weights in Table 4.*

(5) Corporate Exposures

Under the agencies' general risk-based capital rules, most corporate exposures receive a risk weight of 100 percent. Exposures to securities firms incorporated in the United States or in an OECD country may receive a 20 percent risk weight if they meet certain requirements, and exposures to U.S. government-sponsored agencies or entities (GSEs) may also receive a 20 percent risk weight. GSEs include an agency or corporation originally established or chartered by the U.S. Government to serve public purposes specified by the U.S. Congress, but whose obligations are not explicitly guaranteed by the full faith and credit of the U.S. Government.

In this NPR, corporate exposure means a credit exposure to a natural person or a company (including an industrial development bond, an exposure to a GSE, or an exposure to a securities broker or dealer) that is not an exposure to: a sovereign entity, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, an MDB, a depository institution, a foreign bank, a credit union, or a PSE; a regulatory retail exposure; a residential mortgage exposure; a pre-sold construction loan; a statutory multifamily mortgage; a securitization exposure; or an equity exposure.

Consistent with the New Accord, the agencies propose to permit a banking organization to elect one of two methods to risk weight corporate exposures. Regardless of the method a banking organization chooses, it would have to use that approach consistently for all corporate exposures. First, a banking organization could risk weight all of its corporate exposures at 100 percent without regard to external ratings. Second, a banking organization could risk weight a corporate exposure based on its applicable external or applicable inferred rating. Table 5 provides the proposed risk weights for corporate exposures with applicable external or applicable inferred ratings based on long-term credit ratings. Table 6 provides the proposed risk weights for corporate exposures with applicable external ratings based on short-term credit ratings.

If a corporate exposure has no external rating, that exposure could not receive a risk weight lower than the risk weight that corresponds to the lowest issuer rating of the obligor's sovereign of incorporation in Table 1. In addition, if an obligor has any exposure with a short-term external rating that corresponds to a risk weight of 150 percent under Table 6, a banking organization would assign a 150 percent risk weight to any corporate exposure to that obligor that does not have an external rating and that ranks pari passu with or is subordinated to the externally rated exposure.

TABLE 5.—CORPORATE EXPOSURES: LONG-TERM CREDIT RATING

| Applicable external or applicable inferred rating | Example | Exposure risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | AAA | 20 |
| Second-highest investment grade rating | AA | 20 |
| Third-highest investment grade rating | A | 50 |
| Lowest investment grade rating | BBB | 100 |
| One category below investment grade | BB | 100 |
| Two categories below investment grade | B | 150 |
| Three categories or more below investment grade | CCC | 150 |
| No applicable rating | N/A | 100 |

TABLE 6.—CORPORATE EXPOSURES: SHORT-TERM CREDIT RATING

| Applicable external rating | Example | Exposure risk weight (in percent) |
|---|---|---|
| Highest investment grade | A–1/P–1 | 20 |
| Second-highest investment grade | A–2/P–2 | 50 |
| Third-highest investment grade | A–3/P–3 | 100 |
| Below investment grade | B, C, and non-prime | 150 |
| No applicable external rating | N/A | 100 |

As provided in the New Accord, this NPR (outside of the securitization framework) would not allow a banking organization to infer a rating from an exposure based on a short-term external rating. Consistent with this position, this NPR does not include the New Accord provision that assigns a risk weight of at least 100 percent to all unrated short-term exposures of an obligor if any rated short-term exposure of that obligor receives a 50 percent risk weight.

*Question 9: The agencies seek comment on the appropriateness of including either or both of these aspects of the New Accord in any final rule implementing the standardized framework.*

The New Accord would treat securities firms that meet certain requirements like depository institutions. The agencies propose, however, to risk weight exposures to securities firms as corporate exposures, parallel with the treatment of bank holding companies and savings association holding companies.

The agencies also propose that exposures to GSEs be treated as corporate exposures and risk weighted based on the NRSRO credit ratings. These ratings on individual GSE exposures are often based in part on the NRSRO assessments of the extent to which the U.S. government might come to the financial aid of a GSE. The agencies believe that risk-weight determinations should not be based on the possibility of U.S. government financial assistance, except where the U.S. government has legally committed to provide such assistance.

In addition to the credit ratings on individual GSE exposures, the NRSROs also publish issuer ratings that evaluate the financial strength of some GSEs without respect to any implied financial assistance from the U.S. government. These financial strength ratings are monitored by the issuing NRSROs but are not included in the NRSROs' transition matrices. Accordingly, the financial strength ratings would not meet the definition of an external rating in this NPR. Further, the use of these ratings is also problematic because NRSROs provide financial strength ratings for issuers, but not for specific issues, and do not provide the same level of differentiation between short- and long-term debt and various levels of subordination as NRSRO ratings of specific exposures. In addition, NRSROs have not published financial strength ratings for all GSEs.

*Question 10: The agencies seek comment on the use of financial strength ratings to determine risk weights for exposures to GSEs, and seek comment on how such ratings might be applied. The agencies also seek input on how subordination and maturity of exposures could be embodied in such an approach, and what requirements should be developed for recognizing ratings assigned to GSEs.*

(6) Regulatory Retail Exposures

The general risk-based capital rules generally assign a risk weight of 100 percent to non-mortgage retail exposures, secured or unsecured, including personal, auto, and credit card loans. Consistent with the New Accord, the agencies propose that a banking organization apply a 75 percent risk weight to regulatory retail exposures that meet the following criteria: (i) A banking organization's aggregate exposure to a single obligor does not exceed $1 million; (ii) the exposure is part of a well diversified portfolio; and (iii) the exposure is not an exposure to a sovereign entity, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, an MDB, a PSE, a depository institution, a foreign bank, or a credit union; an acquisition, development and construction loan; a residential mortgage exposure; a pre-sold construction loan; a statutory multifamily mortgage; a securitization exposure; an equity exposure; or a debt security. Examples of regulatory retail exposures would include a revolving credit or line of credit (including credit card and overdraft lines of credit), a personal term loan or lease (including an installment loan, auto loan or lease, student or educational loan, personal loan), and a facility or commitment to a company.

Any retail exposure that does not meet these requirements generally would be considered a corporate exposure and would receive a risk weight based on the risk-weight tables for corporate exposures (see Tables 5 and 6).

*Question 11: The agencies seek comment on whether a specific numerical limit on concentration should be incorporated into the provisions for regulatory retail exposures. For example, the New Accord suggests a 0.2 percent limit on an aggregate exposure to one obligor as a measure of concentration within the regulatory retail portfolio. The agencies solicit comment on the appropriateness of a 0.2 percent limit as well as on other types of measures of portfolio concentration that may be appropriate.*

(7) Residential Mortgage Exposures

The general risk-based capital rules assign exposures secured by one-to-four family residential properties to either the 50 percent or 100 percent risk weight category. Most exposures secured by a first lien on a one-to-four family residential property meet the criteria to receive a 50 percent risk weight.[23] The New Accord applies a similarly broad treatment to residential mortgages. It provides a risk weight of 35 percent for most first-lien residential mortgage exposures that meet prudential criteria such as the existence of a substantial margin of additional security over the amount of the loan.

In the Basel IA NPR, the agencies proposed to assign a risk weight for one-to-four family residential mortgage exposures based on the LTV ratio. The agencies noted that the LTV ratio is a meaningful indicator of potential loss and borrower default. Commenters on the Basel IA NPR generally supported

[23] 12 CFR part 3, Appendix A, section 3(c)(iii) (OCC); 12 CFR parts 208 and 225, Appendix A, section III.C.3 (Board); 12 CFR part 325, Appendix A, section II.C.3 (FDIC); and 12 CFR 567.1 (definition of "qualifying mortgage loan") and 12 CFR 567.6(a)(1)(iii)(B) (50 percent risk weight) (OTS).

this LTV ratio approach. In this NPR, the agencies propose substantially the same treatment for residential mortgage exposures as was proposed in the Basel IA NPR. Given the characteristics of the U.S. residential mortgage market, the agencies believe that the risk weights in the New Accord do not reflect the appropriate spectrum of risk for these assets. The agencies believe the wider range of risk weights that the agencies proposed in the Basel IA NPR is more appropriate for the U.S. residential mortgage market.

The agencies believe that an LTV ratio approach to residential mortgage exposures would not impose a significant burden on banking organizations because LTV information is readily available and is commonly used in the underwriting process. Use of LTV ratios to assign risk weights to residential mortgage exposures would not substitute for, or otherwise release a banking organization from, its responsibility to have prudent loan underwriting and risk management practices consistent with the size, type, and risk of its mortgage business.[24] Through the supervisory process, the agencies would continue to assess a banking organization's underwriting and risk management practices consistent with supervisory guidance and safety and soundness. The agencies would continue to use their supervisory authority to require a banking organization to hold additional capital for residential mortgage exposures where appropriate.

The proposed rule defines a residential mortgage exposure as an exposure (other than a pre-sold construction loan) that is primarily secured by a one-to-four family residential property. The proposed rule identifies two types of residential mortgage exposures (first-lien residential mortgage exposures and junior-lien residential mortgage exposures), and provides a separate treatment for each type of exposure. A first-lien residential mortgage exposure is a residential mortgage exposure secured by a first lien or a residential mortgage exposure secured by first and junior lien(s) where no other party holds an intervening lien. This treatment is similar to the treatment of mortgage exposures under the general risk-based capital rules. A junior-lien residential mortgage exposure is a residential mortgage exposure that is secured by a junior lien and that is not a first-lien residential mortgage exposure.

(a) Exposure Amount

The proposed rule provides that a banking organization would hold capital for both the funded and the unfunded portions of residential mortgage exposures. For the funded portion of a residential mortgage exposure, the banking organization would assign a risk weight to the carrying value of the exposure (that is, the principal amount of the exposure). For the unfunded portion of a residential mortgage exposure (for example, potential exposure from a negative amortization feature or a home equity line of credit (HELOC)), a banking organization would risk weight the notional amount of the exposure (that is, the maximum contractual commitment) multiplied by the appropriate credit conversion factor. For a residential mortgage exposure that has both funded and unfunded components, a banking organization would calculate separate risk-weighted asset amounts for the unfunded and funded portions, based on separately calculated LTV ratios as discussed below.

(b) Risk Weights

The agencies propose that a banking organization risk weight first-lien residential mortgage exposures that meet certain qualifying criteria according to Table 7. The risk weights in Table 7 would apply only to a first-lien residential mortgage exposure that is secured by property that is owner-occupied or rented, is prudently underwritten, is not 90 days or more past due, and is not on nonaccrual. A first-lien residential mortgage exposure that has been restructured may receive a risk weight lower than 100 percent, only if the banking organization updates the LTV ratio at the time of the restructuring and according to the discussion below and in section 33 of the proposed rule. First-lien residential mortgage exposures that do not meet these criteria would receive a 100 percent risk weight if they have an LTV ratio less than or equal to 90 percent, and would receive a 150 percent risk weight if they have an LTV ratio greater than 90 percent.

TABLE 7.—RISK WEIGHTS FOR FIRST-LIEN RESIDENTIAL MORTGAGE EXPOSURES

| Loan-to-value ratio (in percent) | Risk weight (in percent) |
|---|---|
| Less than or equal to 60 | 20 |
| Greater than 60 and less than or equal to 80 | 35 |
| Greater than 80 and less than or equal to 85 | 50 |
| Greater than 85 and less than or equal to 90 | 75 |
| Greater than 90 and less than or equal to 95 | 100 |
| Greater than 95 | 150 |

Under the general risk-based capital rules, a banking organization must assign a risk weight to an exposure secured by a junior lien on residential property at 100 percent, unless the banking organization also holds the first lien and there are no intervening liens. The New Accord does not specifically discuss the treatment of exposures secured by junior liens on residential property.

The agencies continue to believe that stand-alone junior-lien residential mortgage exposures have a different risk profile than first-lien residential mortgage exposures and should be risk weighted accordingly. Under the proposed rule, a banking organization would compute an LTV ratio as described below for a junior-lien residential mortgage exposure that is not 90 days or more past due or on nonaccrual based upon the loan amounts for the junior-lien residential mortgage exposure and all senior exposures as described below. The banking organization would then assign a risk weight to the exposure amount of the junior-lien residential mortgage exposure according to Table 8. This treatment is similar to the Basel IA NPR and recognizes that stand-alone junior-lien residential mortgage exposures generally default at a higher rate than first-lien residential mortgage exposures. A banking organization would risk weight a junior-lien residential mortgage exposure that is 90 days or more past due or on nonaccrual at 150 percent.

TABLE 8.—RISK WEIGHTS FOR JUNIOR-LIEN RESIDENTIAL MORTGAGE EXPOSURES

| Loan-to-value ratio (in percent) | Risk weight (in percent) |
|---|---|
| Less than or equal to 60 | 75 |
| Greater than 60 and less than or equal to 90 | 100 |
| Greater than 90 | 150 |

[24] See, for example, ''Interagency Guidance on Nontraditional Mortgage Product Risks,'' 71 FR 58609 (Oct. 4, 2006) and ''Statement on Subprime Mortgage Lending,'' 72 FR 37569 (July 10, 2007).

(c) Loan-to-Value Ratio Calculation

The agencies propose that a banking organization calculate the LTV ratio on an ongoing basis as described below. The denominator of the LTV ratio, that is, the value of the property, would be equal to the lesser of the acquisition cost for the property (for a purchase transaction) or the estimate of a property's value at the origination of the exposure or, at the banking organization's option, at the time of restructuring. The estimate of value would be based on an appraisal or evaluation of the property in conformance with the agencies' appraisal regulations [25] and should conform to the ''Interagency Appraisal and Evaluation Guidelines'' [26] and the ''Real Estate Lending Guidelines.'' [27] If a banking organization's first-lien residential mortgage exposure consists of both first and junior liens on a property, a banking organization could update the estimate of value at the origination of the junior-lien mortgage.

The numerator of the ratio, that is, the loan amount, would depend on whether the exposure is funded or unfunded, and on whether the exposure is a first-lien residential mortgage exposure or a junior-lien residential mortgage exposure. The loan amount of the funded portion of a first-lien residential mortgage exposure would be the principal amount of the exposure. The loan amount of the funded portion of a junior-lien residential mortgage exposure would be the principal amount of the exposure plus the maximum contractual amounts of all senior exposures secured by the same residential property. Senior unfunded commitments may include negative amortization features and HELOCs.

A banking organization would be required to calculate a separate loan amount and LTV ratio for the unfunded portion of a residential mortgage exposure. The loan amount of the unfunded portion of a residential mortgage exposure would be the loan amount of the funded portion of the exposure, as described above, plus the unfunded portion of the maximum contractual amount of the commitment.

The agencies believe that a banking organization should be able to reflect the risk mitigating effects of loan-level private mortgage insurance (PMI) when calculating the LTV ratio of a residential mortgage exposure. Loan-level PMI is insurance that protects a lender in the event of borrower default up to a predetermined portion of the residential mortgage exposure and that does not have a pool-level cap that could effectively reduce coverage below the predetermined amount of the exposure. Under this proposed rule, a banking organization could reduce the loan amount of a residential mortgage exposure up to the amount covered by loan-level PMI, provided the PMI issuer is a regulated mortgage insurance company, is not an affiliate [28] of the banking organization, and (i) has long-term senior debt (without credit enhancement) that has an external rating that is in at least the third-highest investment grade rating category or (ii) has a claims-paying rating that is in at least the third-highest investment grade rating category. The agencies believe that pool-level PMI generally should not be reflected in the calculation of the LTV ratio, because pool-level PMI is not structured in such a way that a banking organization can determine the LTV ratio for a mortgage loan.

*Question 12: The agencies request comment on all aspects of the proposed treatment of PMI under this framework.*

(d) Example of LTV Ratio Calculation

Assume a banking organization originates a first-lien residential mortgage exposure with a negative amortization feature; the property is valued at $100,000; the original and outstanding principal amount of the exposure is $81,000; and the negative amortization feature has a 10 percent cap and extends for ten years (that is, the mortgage loan balance can contractually negatively amortize to 110 percent of the original balance over the next 10 years). The funded loan amount of $81,000 has an 81 percent LTV ratio, which is risk weighted at 50 percent (based on Table 7). The negative amortization feature is an unfunded commitment with a maximum contractual amount of $8,100. It would receive a 50 percent CCF, resulting in an exposure amount of $4,050. The loan amount of the unfunded portion would be $81,000 funded amount plus the $8,100 maximum contractual unfunded amount, resulting in an LTV of 89.1 percent. The unfunded commitment exposure amount of $4,050 would therefore receive a 75 percent risk weight (based on Table 7). The total risk-weighted assets for the exposure would be $43,538, as illustrated in Table 9:

TABLE 9.—EXAMPLE OF PROPOSED RISK-BASED CAPITAL CALCULATION FOR FIRST-LIEN RESIDENTIAL MORTGAGE EXPOSURES WITH NEGATIVE AMORTIZATION FEATURES

| **Funded Risk-Weighted Assets Calculation** | |
|---|---|
| (1) Amount to Risk Weight | $81,000 |
| (2) Funded LTV Ratio = Funded Loan Amount / Property Value = $81,000/$100,000 = | 81% |
| (3) Risk Weight based on Table 7 | 50% |
| (4) RW Assets for Funded Loan Amount = $81,000 × .50 = | $40,500 |
| **Unfunded Risk-Weighted Assets Calculation** | |
| (1) Exposure Amount = Unfunded Maximum Amount × CCF = $8,100 × .50 = | $4,050 |
| (2) Unfunded LTV Ratio = (Funded Amount + Unfunded Amount)/Property Value = ($81,000 + $8,100)/$100,000 = | 89.1% |
| (3) Risk Weight based on Table 7 | 75% |
| (4) RW Assets for Unfunded Amount = $4,050 × 0.75 | $3,038 |

[25] 12 CFR part 34, subpart C (OCC); 12 CFR part 208, subpart E and part 225, subpart G (Board); 12 CFR part 323 (FDIC); and 12 CFR part 564 (OTS).

[26] ''The Comptroller's Handbook for Commercial Real Estate and Construction Lending'', Appendix E (OCC); SR 94–55 (Board); FIL–74–94 (FDIC); and 12 CFR part 564 (OTS).

[27] 12 CFR part 34, subpart D, Appendix A (OCC); 12 CFR part 208, subpart E, Appendix C and part 225, subpart G (Board); 12 CFR part 365 (FDIC); and 12 CFR 560.100–101 (OTS).

[28] An affiliate of a banking organization is defined as any company that controls, is controlled by, or is under common control with, the banking organization. A person or company controls a company if it: (i) Owns, controls, or holds the power to vote 25 percent or more of a class of voting securities of the company, or (ii) consolidates the company for financial reporting purposes.

TABLE 9.—EXAMPLE OF PROPOSED RISK-BASED CAPITAL CALCULATION FOR FIRST-LIEN RESIDENTIAL MORTGAGE EXPOSURES WITH NEGATIVE AMORTIZATION FEATURES—Continued

| Total Risk-Weighted Assets for a Loan with Negative Amortizing Features | |
|---|---|
| RW Assets for Funded Amount + RW for Unfunded Amount = $40,500 + $3,038 = ..... | $43,538 |

Note: The funded and unfunded amount of the loan will change over time once the loan begins to negatively amortize.

(e) Alternative LTV Ratio Calculation

The agencies are considering an alternative for calculating the LTV ratio and risk-weighted asset amount for residential mortgage exposures with unfunded commitments. This alternative is less complex but may result in different capital implications. Under the alternative, a banking organization would not calculate a separate risk-weighted asset amount for the funded and unfunded portion of the residential mortgage exposure. The alternative calculation would require only the calculation of a single LTV ratio representing a combined funded and unfunded amount when calculating the LTV ratio for a given exposure. Under the alternative, the loan amount of a first-lien residential mortgage exposure would equal the funded principal amount (or combined exposures provided there is no intervening lien) plus the exposure amount of any unfunded commitment (that is, the unfunded amount of the maximum contractual amount of any commitment multiplied by the appropriate CCF). The loan amount of a junior-lien residential mortgage exposure would equal the sum of: (i) The funded principal amount of the exposure, (ii) the exposure amount of any undrawn commitment associated with the junior-lien exposure, and (iii) the exposure amount of any senior exposure held by a third party on the date of origination of the junior-lien exposure. Where a senior exposure held by a third party includes an undrawn commitment, such as a HELOC or a negative amortization feature, the loan amount for a junior-lien residential mortgage exposure would include the maximum contractual amount of that commitment multiplied by the appropriate CCF. The denominator of the LTV ratio would be the same under both alternatives.

*Question 13: The agencies seek comment on the pros and cons associated with the two alternatives for calculating the LTV ratio.*

While the agencies believe risk weighting one-to-four family residential mortgage exposures based on the LTV ratio appropriately captures a large number of mortgage exposures with differing risk, the agencies have considered basing the risk weight for these exposures on other parameters. Examples include using pricing information that the Home Mortgage Disclosure Act (HMDA) requires many banking organizations to report, or borrower credit scores.

*Question 14: The agencies seek industry views on any other risk-sensitive methods that could be used to segment residential mortgage exposures by risk level and solicit comment on how such alternatives might be applied.*

(8) Pre-Sold Construction Loans and Statutory Multifamily Mortgages

The general risk-based capital rules assign 50 percent and 100 percent risk weights to certain one-to-four family residential pre-sold construction loans and multifamily residential loans. The agencies adopted these provisions as a result of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 (RTCRRI Act). The RTCRRI Act mandates that each agency provide in its capital regulations (i) a 50 percent risk weight for certain one-to-four-family residential pre-sold construction loans and multifamily residential loans that meet specific statutory criteria in the RTCRRI Act and any other underwriting criteria imposed by the agencies, and (ii) a 100 percent risk weight for one-to-four-family residential pre-sold construction loans for residences for which the purchase contract is cancelled.

Consistent with the RTCRRI Act, a pre-sold construction loan would be subject to a 50 percent risk weight unless the purchase contract is cancelled. The NPR defines a pre-sold construction loan as any one-to-four family residential pre-sold construction loan for a residence meeting the requirements under section 618(a)(1) or (2) of the RTCRRI Act and under 12 CFR part 3, Appendix A, section 3(a)(3)(iv) (for national banks); 12 CFR part 208, Appendix A, section III.C.3. (for state member banks); 12 CFR part 225, Appendix A, section III.C.3. (for bank holding companies); 12 CFR part 325, Appendix A, section II.C. (for state nonmember banks), and that is not 90 days or more past due or on nonaccrual; or 12 CFR 567.1 (definition of ''qualifying residential construction loan'') (for savings associations), and that is not on nonaccrual.

Also consistent with the RTCRRI Act, under the NPR, a statutory multifamily mortgage would receive a 50 percent risk weight. The NPR defines statutory multifamily mortgage as any multifamily residential mortgage meeting the requirements under section 618(b)(1) of the RTCRRI Act, and under 12 CFR part 3, Appendix A, section 3(a)(3)(v) (for national banks); 12 CFR part 208, Appendix A, section III.C.3. (for state member banks); 12 CFR part 225, Appendix A, section III.C.3. (for bank holding companies); 12 CFR part 325, Appendix A, section II.C.a. (for state nonmember banks); or 12 CFR 567.1 (definition of ''qualifying multifamily mortgage loan'') and 12 CFR 567.6(a)(1)(iii) (for savings associations), and that is not on nonaccrual.[29] A multifamily mortgage that does not meet the definition of a statutory mortgage would be treated as a corporate exposure.

(9) Past Due Loans

Under the general risk-based capital rules, the risk weight of a loan generally does not change if the loan becomes past due, with the exception of certain residential mortgage loans. The New Accord provides risk weights ranging from 50 to 150 percent for loans that are more than 90 days past due, depending on the amount of specific provisions a banking organization has recorded.

Most banking organizations in the United States do not recognize specific provisions. Therefore, the treatment of past due exposures in the New Accord is not applicable for those banking organizations. Accordingly, to reflect impaired credit quality, the agencies propose to risk weight most exposures that are 90 days or more past due or on nonaccrual at 150 percent, except for past due residential mortgage exposures. A banking organization could reduce the risk weight of the exposure to reflect financial collateral or eligible guarantees.

[29] Under these proposed definitions, a loan that is 90 days or more past due or on nonaccrual would not qualify as a pre-sold construction loan or a statutory multifamily mortgage. These loans would be accorded the treatment described in the next section.

*Question 15: The agencies seek comment on whether, for those banking organizations that are required to maintain specific provisions, it would be appropriate to follow the New Accord treatment, that is, the risk weight would vary depending on the amount of specific provisions the banking organization has recorded.*

(10) Other Assets

The agencies propose to use the following risk weights, which are generally consistent with the risk weights in the general risk-based capital rules, for other exposures: (i) A banking organization could assign a zero percent risk weight to cash owned and held in all of its offices or in transit; to gold bullion held in its own vaults, or held in another depository institution's vaults on an allocated basis, to the extent gold bullion assets are offset by gold bullion liabilities; and to derivative contracts that are publicly traded on an exchange that requires the daily receipt and payment of cash-variation margin; (ii) a banking organization could assign a 20 percent risk weight to cash items in the process of collection; and (iii) a banking organization would have to apply a 100 percent risk weight to all assets not specifically assigned a different risk weight under this NPR (other than exposures that are deducted from tier 1 or tier 2 capital).

*I. Off-Balance Sheet Items*

Under the general risk-based capital rules, a banking organization generally determines the risk-based asset amount for an off-balance sheet exposure using a two-step process. The banking organization applies a CCF to the off-balance sheet amount to obtain an on-balance sheet credit equivalent amount and then applies the appropriate risk weight to that amount.

In general, the agencies propose to calculate the exposure amount of an off-balance sheet item by multiplying the off-balance sheet component, which is usually the notional amount, by the applicable CCF. The agencies also propose to retain most of the CCFs in the general risk-based capital rules.[30] Consistent with the New Accord, however, the agencies propose that a banking organization apply a 20 percent CCF to all commitments with an original maturity of one year or less (short-term commitments) that are not unconditionally cancelable rather than the zero percent in the general risk-based capital rules. The agencies believe that a 20 percent CCF for these short-term commitments better reflects the risk of these exposures.

For purposes of this NPR, a commitment means any legally binding arrangement that obligates a banking organization to extend credit or to purchase assets. In this NPR, unconditionally cancelable means, with respect to a commitment, that a banking organization may, at any time, with or without cause, refuse to extend credit under the facility (to the extent permitted under applicable law). In the case of a residential mortgage exposure that is a line of credit, a banking organization is deemed able to unconditionally cancel the commitment if it can, at its option, prohibit additional extensions of credit, reduce the credit line, and terminate the commitment to the full extent permitted by applicable law.

Under this NPR, if a banking organization commits to provide a commitment on an off-balance sheet item, that is, a commitment to make a commitment, the agencies propose that a banking organization apply the lower of the two applicable CCFs. If a banking organization provides a commitment that is structured as a syndication, it would only be required to calculate the exposure amount for its pro rata share of the commitment.

There is no reference to note issuance facilities (NIFs) and revolving underwriting facilities (RUFs) in the proposed rule as the agencies are not aware that any such transactions exist in the United States.

Under the agencies' general risk-based capital rules, capital is required against any on-balance sheet exposures that arise from securities financing transactions (that is, repurchase agreements, reverse repurchase agreements, securities lending transactions, and securities borrowing transactions); for example, capital is required against the cash receivable that a banking organization generates when it borrows a security and posts cash collateral to obtain the security. A banking organization faces counterparty credit risk on securities financing transactions, however, regardless of whether the transaction generates an on-balance sheet exposure. In contrast to the general risk-based capital rules, this NPR requires a banking organization to hold risk-based capital against all securities financing transactions. Similar to other exposures, a banking organization would determine the exposure amount of a securities financing transaction and then risk weight that amount based on the counterparty or, if applicable, collateral or guarantee.

In general, a banking organization must apply a 100 percent CCF to the off-balance sheet component of a repurchase agreement or securities lending or borrowing transaction. The off-balance sheet component of a repurchase agreement equals the sum of the current market values of all positions the banking organization has sold subject to repurchase. The off-balance sheet component of a securities lending transaction is the sum of the current market values of all positions the banking organization has lent under the transaction. For securities borrowing transactions, the off-balance sheet component is the sum of the current market values of all non-cash positions the banking organization has posted as collateral under the transaction. In certain circumstances, a banking organization may instead determine the exposure amount of the transaction as described in the collateralized transaction section of this preamble and in section 37 of the proposed rule.

*J. OTC Derivative Contracts*

(1) Background

Under the general risk-based capital rules for over-the-counter (OTC) derivative contracts, a banking organization must hold risk-based capital for counterparty credit risk.[31] To determine the capital requirement, a banking organization must first compute a credit equivalent amount for a contract and then apply to that amount a risk weight based on the obligor, counterparty, eligible guarantor, or recognized collateral. For an OTC derivative contract that is not subject to a qualifying bilateral netting contract, the credit equivalent amount is the sum of (i) the greater of the current exposure (mark-to-market value) or zero and (ii) an estimate of the potential future credit exposure (PFE). PFE is the notional principal amount of the contract multiplied by a credit conversion factor.

Under the general risk-based capital rules for OTC derivative contracts subject to a qualifying bilateral netting contract, the credit equivalent amount is calculated by adding the net current exposure of the netting contract and the sum of the estimates of PFE for the individual contracts. The net current

[30] The discussion of the risk-based capital treatment for off-balance sheet securitization exposures, including liquidity facilities for asset-backed commercial paper, is presented in Part IV of the proposed rule. Equity commitments are discussed in Part V of the proposed rule.

[31] OTS rules on the calculation of credit equivalent amounts for derivative contracts differ from the rules of the other agencies. That is, OTS rules address only interest rate and foreign exchange rate contracts and include certain other differences. Accordingly, the description of the current provisions in this preamble primarily reflects the other banking agencies' rules.

exposure is the sum of all positive and negative mark-to-market values of the individual contracts but not less than zero. A banking organization recognizes the effects of the bilateral netting contract on the gross potential future exposure of the contracts by calculating an adjusted add-on amount based on the ratio of net current exposure to gross current exposure, either on a counterparty-by-counterparty basis or on an aggregate basis.

(2) Treatment of OTC Derivative Contracts

Consistent with the treatment in the New Accord and the general risk-based capital rules, the proposed rule defines an OTC derivative contract as a derivative contract that is not traded on an exchange that requires the daily receipt and payment of cash-variation margin. A derivative contract would be defined as a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts would include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivatives, and any other instrument that poses similar counterparty credit risks. The proposed rule also defines derivative contracts to include unsettled securities, commodities, and foreign exchange trades with a contractual settlement or delivery lag that is longer than the normal settlement period (which the proposed rule defines as the lesser of the market standard for the particular instrument and five business days). This includes, for example, mortgage-backed securities transactions that the GSEs conduct in the To-Be-Announced market.

The current exposure method for determining the exposure amount for single OTC derivative contracts contained in the New Accord is similar to the method in the agencies' general risk-based capital rules. The agencies propose to retain this risk-based capital treatment for OTC derivative contracts.

Under the agencies' general risk-based capital rules, a banking organization must obtain a written and well-reasoned legal opinion for each of its bilateral qualifying master netting agreements that cover OTC derivative contracts to recognize the netting benefit. In this NPR, the agencies propose that to use netting treatment for multiple OTC derivative contracts, the contracts must be subject to a qualifying master netting agreement.

In this NPR, a qualifying master netting agreement means any written, legally enforceable bilateral netting agreement, provided that (i) the agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default, including bankruptcy, insolvency or similar proceeding, of the counterparty; (ii) the agreement provides the banking organization the right to accelerate, terminate, and close out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of default, including upon an event of bankruptcy, insolvency, or similar proceeding, of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions; (iii) the banking organization has conducted sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that the agreement meets the requirements of part (ii) of this definition and that, in the event of legal challenge (including one resulting from default, bankruptcy, insolvency, or similar proceeding), the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions; (iv) the banking organization establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of the definition of a qualifying master netting agreement; and (v) the agreement does not contain a walkaway clause.

In some cases, the legal review requirement could be met by reasoned reliance on a commissioned legal opinion or an in-house counsel analysis. In other cases, for example, those involving certain new derivative transactions or derivative counterparties in atypical jurisdictions, the banking organization would need to obtain an explicit, written legal opinion from external or internal legal counsel addressing the particular situation.

If an OTC derivative contract is collateralized by financial collateral, a banking organization would first determine the exposure amount of the OTC derivative contract as described above and in section 35 of this proposed rule. To take into account the risk-reducing effects of the financial collateral, a banking organization could recognize the credit risk mitigation benefits of the financial collateral using the simple approach for collateralized transactions provided in section 37(b) of this proposed rule. Alternatively, a banking organization could, if the financial collateral is marked-to-market on a daily basis and subject to a daily margin maintenance requirement, adjust the exposure amount of the contract using the collateral haircut approach provided in section 37(c) of this proposed rule.

(3) Counterparty Credit Risk for Credit Derivatives

A banking organization that purchases a credit derivative that is recognized under section 36 of the proposed rule as a credit risk mitigant for an existing exposure that is not a covered position under the MRR would not have to compute a separate counterparty credit risk capital requirement for the credit derivative in section 31 of the proposed rule. If a banking organization chose not to hold risk-based capital against the counterparty credit risk of such credit derivative contracts, it would have to do so consistently for all such credit derivative contracts. Further, where the contracts are subject to a qualifying master netting agreement, the banking organization would either include them all or exclude them all from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes.

Where a banking organization provides protection through a credit derivative that is not treated as a covered position under the MRR, it would treat the credit derivative as an exposure to the reference obligor and compute a risk-weighted asset amount for the credit derivative under section 31 of the proposed rule. The banking organization need not compute a counterparty credit risk capital requirement for the credit derivative, as long as it does so consistently for all such credit derivatives and either includes all or excludes all such credit derivatives that are subject to a qualifying master netting contract from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes. Where the banking organization provides protection through a credit derivative treated as a covered position under the MRR, it would compute a counterparty credit risk capital requirement using an amount determined under the OTC derivative contracts section of this NPR. However, the PFE of the protection provider would be capped at the net present value of the amount of unpaid premiums.

(4) Counterparty Credit Risk for Equity Derivatives

Under this NPR, a banking organization would be required to treat an equity derivative contract as an equity exposure and compute a risk-weighted asset amount for that exposure. A banking organization could choose not to hold risk-based capital against the counterparty credit risk of such equity contracts unless the banking organization treats the contract as a covered position under the MRR. However, it would have to do so consistently for all such equity derivative contracts. Furthermore, where the contracts are subject to a qualifying master netting agreement, the banking organization would have to either include or exclude all the contracts from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes. (The approach for equity exposures is provided in Part V of the proposed rule.)

(5) Risk Weight for OTC Derivative Contracts

Under the general risk-based capital rules, a banking organization must risk weight the credit equivalent amount of an OTC derivative exposure by applying the risk weight of the counterparty or, where applicable, guarantor or collateral, to the credit equivalent amount of the contract(s). The risk weight is limited to 50 percent even if the counterparty or guarantor would otherwise receive a higher risk weight.

The agencies limited the risk weight assigned to OTC derivative contracts to 50 percent when they finalized the derivatives counterparty credit risk rule in 1995.[32] At that time, most derivatives counterparties were highly rated and were generally financial institutions. The agencies noted, however, that they intended to monitor the quality of credits in the interest rate and exchange rate markets to determine whether some transactions might merit a 100 percent risk weight.

Consistent with the New Accord, the agencies propose that the risk weight for OTC derivative transactions would not be subject to any specific ceiling. As the market for derivatives has developed, the types of counterparties acceptable to participants have expanded to include counterparties that the agencies believe merit a risk weight greater than 50 percent.

*K. Credit Risk Mitigation (CRM)*

Banking organizations use a number of techniques to mitigate credit risks. For example, a banking organization may collateralize exposures by first-priority claims, in whole or in part, with cash or securities; a third party may guarantee a loan exposure; or a banking organization may buy a credit derivative to offset an exposure's credit risk. Additionally, a banking organization may agree to net exposures to a counterparty against reciprocal exposures from that counterparty. This section describes how a banking organization could recognize for risk-based capital purposes the risk-mitigation effects of guarantees, credit derivatives, financial collateral, and, in limited cases, non-financial collateral.

To recognize credit risk mitigants for risk-based capital purposes, a banking organization should have in place operational procedures and risk management processes that ensure that all documentation used in collateralizing or guaranteeing a transaction is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions. The banking organization should have conducted sufficient legal review to reach a well-founded conclusion that the documentation meets this standard and should reconduct such a review as necessary to ensure continuing enforceability.

Although the use of credit risk mitigants may reduce or transfer credit risk, it simultaneously may increase other risks, including operational, liquidity, and market risks. Accordingly, it is imperative that a banking organization employ robust procedures and processes to control risks, including roll-off risk and concentration risk, arising from the banking organization's use of credit risk mitigants and to monitor the implications of using credit risk mitigants for the banking organization's overall credit risk profile.

(1) Guarantees and Credit Derivatives

(a) Eligibility Requirements

The agencies' general risk-based capital rules generally recognize third-party guarantees provided by central governments, U.S. government-sponsored entities, public-sector entities in OECD countries, multilateral lending institutions and regional development banks, depository institutions, and qualifying securities firms in OECD countries. Consistent with the New Accord, the agencies propose to allow a banking organization to use a substitution approach similar to the approach in the agencies' general risk-based capital rules and recognize a wider range of guarantors.

This NPR defines an eligible guarantor as any of the following entities: (i) a sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation (Farmer Mac), an MDB, a depository institution, a foreign bank, a credit union, a bank holding company (as defined in section 2 of the Bank Holding Company Act (12 U.S.C. 1841)), or a savings and loan holding company (as defined in 12 U.S.C. 1467a) provided all or substantially all of the holding company's activities are permissible for a financial holding company under 12 U.S.C. 1843(k); or (ii) any other entity (other than a securitization special purpose entity (SPE)) if at the time the entity issued the guarantee or credit derivative or at any time thereafter, the entity has issued and has outstanding an unsecured long-term debt security without credit enhancement that has a long-term applicable external rating.

For recognition under this proposed rule, consistent with the advanced approaches final rule, guarantees and credit derivatives would have to meet specific eligibility requirements. This proposed rule defines an eligible guarantee as a guarantee from an eligible guarantor that: (i) is written; (ii) is either unconditional, or a contingent obligation of the United States Government or its agencies, the validity of which to the beneficiary is dependent upon some affirmative action on the part of the beneficiary of the guarantee or a third party (for example, servicing requirements); (iii) covers all or a pro rata portion of all contractual payments of the obligor on the reference exposure; (iv) gives the beneficiary a direct claim against the protection provider; (v) is not unilaterally cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary; (vi) is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced; (vii) requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligor on the reference exposure in a timely manner without the beneficiary first having to take legal actions to pursue the obligor for payment; (viii) does not increase the beneficiary's cost of credit protection on the guarantee in response to deterioration in the credit quality of the reference exposure; and (ix) is not provided by an affiliate of the

[32] 60 FR 46169–46185 (September 5, 1995).

banking organization, unless the affiliate is an insured depository institution, foreign bank, securities broker or dealer, or insurance company that does not control the banking organization; and is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities brokers or dealers, or insurance companies (as the case may be).

In this NPR, consistent with the advanced approaches final rule, eligible credit derivative means a credit derivative in the form of a credit default swap, $n^{th}$-to-default swap, total return swap, or any other form of credit derivative approved by the primary Federal supervisor, provided that:

(i) The contract meets the requirements of an eligible guarantee and has been confirmed by the protection purchaser and the protection provider;

(ii) Any assignment of the contract has been confirmed by all relevant parties;

(iii) If the credit derivative is a credit default swap or $n^{th}$-to-default swap, the contract includes the following credit events: (A) failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and (B) bankruptcy, insolvency, or inability of the obligor on the reference exposure to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(iv) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(v) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(vi) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract must provide that any required consent to transfer may not be unreasonably withheld;

(vii) If the credit derivative is a credit default swap or nth-to-default swap, the contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event; and

(viii) If the credit derivative is a total return swap and the banking organization records net payments received on the swap as net income, the banking organization records offsetting deterioration in the value of the hedged exposure (through reductions in fair value).

Under this NPR, which is consistent with the advanced approaches final rule, a banking organization would be permitted to recognize an eligible credit derivative that hedges an exposure that is different from the credit derivative's reference exposure used for determining the derivative's cash settlement value, deliverable obligation, or occurrence of a credit event only if: (i) The reference exposure ranks pari passu or subordinated to the hedged exposure and (ii) the reference exposure and the hedged exposure are exposures to the same legal entity, and legally enforceable cross-default or cross-acceleration clauses are in place to assure protection payments under the credit derivative are triggered when the obligor fails to pay under the terms of the hedged exposure.

(b) Substitution Approach

Under the substitution approach in this NPR, if the protection amount (as defined below) of the eligible guarantee or eligible credit derivative is greater than or equal to the exposure amount of the hedged exposure, a banking organization could substitute the risk weight associated with the guarantee or credit derivative for the risk weight of the hedged exposure. If the protection amount of the eligible guarantee or eligible credit derivative is less than the exposure amount of the hedged exposure, the banking organization would have to treat the hedged exposure as two separate exposures (protected and unprotected) to recognize the credit risk mitigation benefit of the guarantee or credit derivative on the protected exposure. A banking organization would calculate the risk-weighted asset amount for the protected exposure under section 36 of this NPR (using a risk weight associated with the guarantee or credit derivative and an exposure amount equal to the protection amount of the guarantee or credit derivative). The banking organization would calculate its risk-weighted asset amount for the unprotected exposure under section 36 of this NPR (using the risk weight assigned to the exposure and an exposure amount equal to the exposure amount of the original hedged exposure minus the protection amount of the guarantee or credit derivative). If the banking organization determines that substitution of the guarantee or credit derivative's risk weight would lead to an inappropriate degree of risk mitigation, it may substitute a higher risk weight.

The protection amount of an eligible guarantee or eligible credit derivative would be the effective notional amount of the guarantee or credit derivative reduced by any applicable haircuts for maturity mismatch, lack of restructuring coverage, and currency mismatch (each described below). The effective notional amount of an eligible guarantee or eligible credit derivative would be the lesser of the contractual notional amount of the credit risk mitigant and the exposure amount of the hedged exposure, multiplied by the percentage coverage of the credit risk mitigant. For example, the effective notional amount of a guarantee that covers, on a pro rata basis, 40 percent of any losses on a $100 bond would be $40.

(c) Maturity Mismatch Haircut

A banking organization that seeks to reduce the risk-weighted asset amount of an exposure by recognizing an eligible guarantee or eligible credit derivative would have to adjust the effective notional amount of the credit risk mitigant downward to reflect any maturity mismatch between the hedged exposure and the credit risk mitigant. A maturity mismatch occurs when the residual maturity of a credit risk mitigant is less than that of the hedged exposure(s). When a banking organization has a group of hedged exposures with different residual maturities that are covered by a single eligible guarantee or eligible credit derivative, a banking organization would treat each hedged exposure as if it were fully covered by a separate eligible guarantee or eligible credit derivative. To determine whether any of the hedged exposures has a maturity mismatch with the eligible guarantee or credit derivative, the banking organization would assess whether the residual maturity of the eligible guarantee or eligible credit derivative is less than that of the hedged exposure.

The residual maturity of a hedged exposure would be the longest possible remaining time before the obligor is scheduled to fulfill its obligation on the exposure. Embedded options that may reduce the term of the credit risk mitigant would be taken into account so that the shortest possible residual maturity for the credit risk mitigant would be used to determine the

potential maturity mismatch. Where a call is at the discretion of the protection provider, the residual maturity of the eligible guarantee or eligible credit derivative would be at the first call date. If the call is at the discretion of the banking organization purchasing the protection, but the terms of the arrangement at the origination of the eligible guarantee or eligible credit derivative contain a positive incentive for the banking organization to call the transaction before contractual maturity, the remaining time to the first call date would be the residual maturity of the credit risk mitigant. For example, where there is a step-up in the cost of credit protection in conjunction with a call feature or where the effective cost of protection increases over time even if credit quality remains the same or improves, the residual maturity of the credit risk mitigant would be the remaining time to the first call.

Under the proposed rule, a banking organization would only recognize an eligible guarantee or an eligible credit derivative with a maturity mismatch if the original maturity is equal to or greater than one year and the residual maturity is greater than three months.

When a maturity mismatch exists, a banking organization would have to apply the following maturity mismatch adjustment to the effective notional amount of the guarantee or credit derivative adjusted for maturity mismatch:

$$Pm = E \times (t - 0.25) / (T - 0.25),$$

Where:

(i) Pm = effective notional amount of the guarantee or credit derivative adjusted for maturity mismatch;
(ii) E = effective notional amount of the guarantee or credit derivative;
(iii) t = lesser of T or residual maturity of the guarantee or credit derivative, expressed in years; and
(iv) T = lesser of 5 or residual maturity of the hedged exposure, expressed in years.

(d) Restructuring Haircut

A banking organization that seeks to recognize an eligible credit derivative that does not include a restructuring as a credit event that triggers payment under the derivative would have to reduce the recognition of the credit derivative by 40 percent. For these purposes, a restructuring involves forgiveness or postponement of principal, interest, or fees that result in a credit loss event (that is, a charge off, specific provision, or other similar debit to the profit and loss account).

In other words, the effective notional amount of the credit derivative adjusted for lack of restructuring credit event (and maturity mismatch, if applicable) would be:

$$Pr = Pm \times 0.60,$$

Where:

(i) Pr = effective notional amount of the credit derivative, adjusted for lack of restructuring credit event (and maturity mismatch, if applicable); and
(ii) Pm = effective notional amount of the credit derivative (adjusted for maturity mismatch, if applicable).

(e) Currency Mismatch Haircut

Where the eligible guarantee or eligible credit derivative is denominated in a currency different from that in which any hedged exposure is denominated, the effective notional amount of the guarantee or credit derivative adjusted for currency mismatch (and maturity mismatch and lack of restructuring credit event, if applicable) would be calculated as:

$$Pc = Pr \times (1 - Hfx),$$

Where:

(i) Pc = effective notional amount of the guarantee or credit derivative, adjusted for currency mismatch (and maturity mismatch and lack of restructuring credit event, if applicable);
(ii) Pr = effective notional amount of the guarantee or credit derivative (adjusted for maturity mismatch and lack of restructuring credit event, if applicable); and
(iii) Hfx = haircut appropriate for the currency mismatch between the guarantee or credit derivative and the hedged exposure.

Except as provided below, a banking organization would be required to use a standard supervisory haircut of 8.0 percent for Hfx (based on a ten-business day holding period and daily marking-to-market and remargining). Alternatively, a banking organization could use internally estimated haircuts for Hfx based on a ten-business day holding period and daily marking-to-market and remargining if the banking organization qualifies to use the own-estimates haircuts, or the simple VaR method as provided in section 37(d) of this NPR. The banking organization would scale these haircuts up using the square root of time formula if the banking organization revalues the guarantee or credit derivative less frequently than once every ten business days. The applicable haircut (HM) is calculated using the following square root of time formula:

$$H_M = H_N \sqrt{\frac{T_M}{T_N}},$$

Where:

(i) $T_M$ = greater of ten and the number of days between revaluations of the credit derivative or guarantee;
(ii) $T_N$ = holding period used by the banking organization to derive $H_N$; and
(iii) $H_N$ = haircut based on the holding period $T_N$.

(f) Multiple Credit Risk Mitigants

If multiple credit risk mitigants (for example, two eligible guarantees) cover a single exposure, the CRM section in the New Accord provides that a banking organization must disaggregate the exposure into portions covered by each credit risk mitigant (for example, the portion covered by each guarantee) and must calculate separately the risk-based capital requirement of each portion.[33] The New Accord also indicates that when credit risk mitigants provided by a single protection provider have differing maturities, the mitigants should be subdivided into separate layers of protection.[34] The agencies propose to permit a banking organization to take this approach.

(2) Collateralized Transactions

The general risk-based capital rules recognize limited types of collateral: Cash on deposit; securities issued or guaranteed by central governments of the OECD countries; securities issued or guaranteed by the U.S. government or its agencies; and securities issued by certain multilateral development banks.[35]

(a) Collateral Proposal

In the past, the banking industry has urged the agencies to recognize a wider array of collateral types for purposes of reducing risk-based capital requirements. The agencies agree that their general risk-based capital rules for collateral are restrictive and, in some cases, ignore market practice. Accordingly, the agencies propose to recognize the credit mitigating impact of financial collateral. For purposes of this NPR, financial collateral means collateral in the form of any of the following instruments: (i) Cash on deposit with the banking organization (including cash held for the banking organization by a third-party custodian or trustee); (ii) gold bullion; (iii) long-term debt securities that have an applicable external rating of one category below investment grade or higher (for example, at least BB−); (iv)

[33] New Accord, ¶ 206.

[34] *Id.*

[35] The agencies' rules for collateral transactions, however, differ somewhat as described in the agencies' joint report to Congress. ''Joint Report: Differences in Accounting and Capital Standards among the Federal Banking Agencies,'' 71 FR 16776 (April 4, 2006).

short-term debt instruments that have an applicable external rating of at least investment grade (for example, at least A–3); (v) equity securities that are publicly traded; (vi) convertible bonds that are publicly traded; (vii) money market mutual fund shares and other mutual fund shares if a price for the shares is publicly quoted daily; or (viii) conforming residential mortgage exposures. With the exception of cash on deposit, the banking organization would have to have a perfected, first-priority security interest in the collateral or, outside of the United States, the legal equivalent thereof, notwithstanding the prior security interest of any custodial agent. A banking organization could recognize partial collateralization of the exposure.

The agencies propose to permit a banking organization to recognize the risk-mitigating effects of financial collateral using the simple approach, the collateral haircut approach, and the simple VaR approach. The collateral haircut and simple VaR approaches are the same as the collateral haircut and simple VaR approaches in the advanced approaches final rule. The agencies do not propose, however, to include the internal models method (for example, the expected positive exposure (EPE) method) in this NPR.

The agencies propose to permit a banking organization to use any applicable approach to recognize collateral provided the banking organization uses the same approach for similar exposures. Under this NPR as under the advanced approaches final rule, a banking organization could use the collateral haircut approach only for repo-style transactions, eligible margin loans, collateralized OTC derivative transactions, and single-product netting sets thereof, and the simple VaR approach only for single-product netting sets of repo-style transactions and eligible margin loans.

Table 10 illustrates the CRM methods that would be available for various types of transactions under the proposed rule.

TABLE 10.—APPLICABILITY OF CRM METHODS

| Collateralized exposure | Simple approach | Collateral haircut approach | Simple VaR method |
|---|---|---|---|
| Any exposure | X | | |
| OTC Derivative Contract | X | X | |
| Repo-Style Transaction | X | X | X |
| Eligible Margin Loan | X | X | X |

The proposed rule defines repo-style transaction as a repurchase or reverse repurchase transaction, or a securities borrowing or securities lending transaction (including a transaction in which the banking organization acts as agent for a customer and indemnifies the customer against loss), provided that:

(i) The transaction is based solely on liquid and readily marketable securities, cash, gold, or conforming residential mortgage exposures;

(ii) The transaction is marked-to-market daily and subject to daily margin maintenance requirements;

(iii)(a) The transaction is a ''securities contract'' or ''repurchase agreement'' under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or the Federal Reserve Board's Regulation EE (12 CFR part 231); or (b) if the transaction does not meet the criteria in paragraph (iii)(a) of this definition, then: Either the transaction is executed under an agreement that provides the banking organization the right to accelerate, terminate, and close out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of default (including upon an event of bankruptcy, insolvency, or similar proceeding) of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions; or the transaction is either overnight or unconditionally cancelable at any time by the banking organization and is executed under an agreement that provides the banking organization the right to accelerate, terminate, and close out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of counterparty default; and

(iv) The banking organization has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient documentation of that legal review) that the agreement meets the requirements of paragraph (iii) of this definition and is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

This NPR defines an eligible margin loan as an extension of credit where: (i) the extension of credit is collateralized exclusively by liquid and readily marketable debt or equity securities, gold, or conforming residential mortgage exposures; (ii) the collateral is marked-to-market daily, and the transaction is subject to daily margin maintenance requirements; (iii) the extension of credit is conducted under an agreement that provides the banking organization the right to accelerate and terminate the extension of credit and to liquidate or set off collateral promptly upon an event of default (including upon an event of bankruptcy, insolvency, or similar proceeding) of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions;[36] and (iv) the banking organization has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that the agreement meets the requirements of paragraph (iii) of this definition and is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

(b) Risk Management Guidance for Recognizing Collateral

Before relying on the CRM benefits of collateral to risk weight its exposures, a banking organization should: (i) Conduct sufficient legal review to ensure, at inception and on an ongoing basis, that all documentation used in the

[36] This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute ''securities contracts'' under section 555 of the Bankruptcy code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8), or netting contracts between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or the Federal Reserve Board's Regulation EE (12 CFR part 231).

collateralized transaction is binding on all parties and legally enforceable in all relevant jurisdictions; (ii) consider the correlation between obligor risk of the underlying direct exposure and collateral risk in the transaction; and (iii) fully take into account the time and cost needed to realize the liquidation proceeds and the potential for a decline in collateral value over this time period.

A banking organization also should ensure that: (i) the legal mechanism under which the collateral is pledged or transferred ensures that the banking organization has the right to liquidate or take legal possession of the collateral in a timely manner in the event of the default, insolvency, or bankruptcy (or other defined credit event) of the obligor and, where applicable, the custodian holding the collateral; (ii) the banking organization has taken all steps necessary to fulfill legal requirements to secure its interest in the collateral so that it has and maintains an enforceable security interest; (iii) the banking organization has clear and robust procedures to ensure observation of any legal conditions required for declaring the default of the borrower and prompt liquidation of the collateral in the event of default; (iv) the banking organization has established procedures and practices for conservatively estimating, on a regular ongoing basis, the market value of the collateral, taking into account factors that could affect that value (for example, the liquidity of the market for the collateral and obsolescence or deterioration of the collateral); and (v) the banking organization has in place systems for promptly requesting and receiving additional collateral for transactions whose terms require maintenance of collateral values at specified thresholds.

(c) Simple Approach

The agencies propose to allow a banking organization to apply the simple approach, which is similar to the approach in the agencies' general risk-based capital rules, in a manner generally consistent with the New Accord. Generally, under the simple approach, the collateralized portion of the exposure would receive the risk weight applicable to the collateral. Subject to certain exceptions, the risk weight assigned to the collateralized portion of the exposure may not be less than 20 percent. In most cases, the collateral would have to be financial collateral. For repurchase agreements, reverse repurchase agreements, and securities lending and borrowing transactions, the collateral is the instruments, gold, and cash the banking organization has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction. A banking organization, however, could recognize any collateral for a repo-style transaction that is included in the banking organization's VaR-based measure under the MRR. In all cases, the collateral agreement would have to be for at least the life of the exposure, a banking organization would have to revalue the collateral at least every six months, and the exposure and the collateral (other than gold) would have to be denominated in the same currency.

In certain cases, collateral may be used to reduce the risk weight to less than 20 percent for an exposure. The exceptions to the risk-weight floor of 20 percent are: (i) OTC derivative transactions that are marked-to-market on a daily basis and subject to a daily margin maintenance agreement, which could receive (1) a zero percent risk weight to the extent that they are collateralized by cash on deposit, and (2) a 10 percent risk weight to the extent that they are collateralized by a sovereign security or PSE security that qualifies for a zero percent risk weight under section 33 of this NPR; (ii) the portion of exposures collateralized by cash on deposit could receive a zero percent risk weight; and (iii) the portion of exposures collateralized by a sovereign security or a PSE security denominated in the same currency could receive a zero percent risk weight provided that the banking organization discounts the market value of the collateral by 20 percent.

In the case where a banking organization chooses to recognize collateral in the form of conforming residential mortgages, the banking organization must risk weight the portion of the exposure that is secured by the conforming residential mortgage at 50 percent.

(d) Collateral Haircut and Simple VaR Approaches

The agencies propose to permit a banking organization to use the collateral haircut approach to recognize the risk mitigating effect of financial collateral that secures a repo-style transaction, eligible margin loan, collateralized OTC derivative contract, or single-product netting set of such transactions through an adjustment to the exposure amount. The collateral haircut approach contains two methods for calculating the haircuts: Supervisory haircuts or own-estimates haircuts. Additionally, the banking organization could use the simple VaR approach for single-product netting sets of repo-style transactions or eligible margin loans. In this proposed rule, a netting set means a group of transactions with a single counterparty that are subject to a qualifying master netting agreement.

Although a banking organization could use any combination of supervisory haircuts, own-estimate haircuts, and simple VaR (only for single-product netting sets of repo-style transactions or eligible margin loans) to recognize collateral, it would have to use the same approach for similar exposures. A banking organization could, however, apply a different method to subsets of repo-style transactions, eligible margin loans, or OTC derivatives by product type or geographic location if its application of different methods were designed to separate transactions that do no have similar risk profiles and was not designed for arbitrage purposes. For example, a banking organization could choose to use one method for agency securities lending transactions, that is, repo-style transactions in which the banking organization, acting as agent for a customer, lends the customer's securities and indemnifies the customer against loss, and another method for all other repo-style transactions. The agencies propose to require use of the supervisory haircut approach to recognize the risk-mitigating effect of conforming residential mortgages in exposure amount. Use of the standard supervisory haircut approach for repo-style transactions, eligible margin loans, and OTC derivatives collateralized by conforming mortgages, however, would not preclude a banking organization's use of own estimates haircuts or the simple VaR approach for exposures collateralized by other types of financial collateral.

Consistent with the New Accord and the advanced approaches final rule, a banking organization could also use the collateral haircut approaches to recognize the benefits of any collateral (not only financial collateral) mitigating the counterparty credit risk of repo-style transactions included in a banking organization's VaR-based measure under the MRR. In this instance, a banking organization would not need to apply the supervisory haircut approach to conforming mortgage collateral, but could use one of the other approaches to recognize that collateral.

(e) Exposure Amount for Repo-Style Transactions, Eligible Margin Loans, and Collateralized OTC Derivatives

Under the collateral haircut approach, a banking organization would set the exposure amount equal to the greater of zero and the sum of three quantities:

(i) The value of the exposure less the value of the collateral (for eligible margin loans and repo-style transactions, the value of the exposure is the sum of the current market values of all instruments, gold, and cash the banking organization has lent, sold subject to repurchase, or posted as collateral to the counterparty under the transaction (or netting set); for collateralized OTC derivative contracts, the value of the exposure is the exposure amount that is calculated under section 35(c) or (d) of this proposed rule; the value of the collateral is the sum of the current market values of all instruments, gold and cash the banking organization has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction (or netting set));

(ii) The absolute value of the net position in a given instrument or in gold (where the net position in a given instrument or in gold equals the sum of the current market values of the instrument or gold the banking organization has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current market values of that same instrument or gold the banking organization has borrowed, purchased subject to resale, or taken as collateral from the counterparty) multiplied by the market price volatility haircut appropriate to the instrument or gold; and

(iii) The sum of the absolute values of the net position of any cash or instruments in each currency that is different from the settlement currency multiplied by the haircut appropriate to each currency mismatch.

To determine the appropriate haircuts, a banking organization may choose to use standard supervisory haircuts or, with prior written approval from its primary Federal supervisor, its own estimates of haircuts. After determining the exposure amount, the banking organization would risk weight the exposure amount according to the obligor or guarantor if applicable.

For purposes of the collateral haircut approach, a given instrument would include, for example, all securities with a single Committee on Uniform Securities Identification Procedures (CUSIP) number and would not include securities with different CUSIP numbers, even if issued by the same issuer with the same maturity date.

For purposes of this calculation, the net position in a given currency equals the sum of the current market values of any instruments or cash in the currency the banking organization has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current market values of any instruments or cash in the currency the banking organization has borrowed, purchased subject to resale, or taken as collateral from the counterparty.

(f) Standard Supervisory Haircuts

Under this NPR, if a banking organization chooses to use standard supervisory haircuts, it would use an 8.0 percent haircut for each currency mismatch and use the market price volatility haircut appropriate to each security in Table 11 below. These haircuts are based on the ten-business-day holding period for eligible margin loans and collateralized OTC derivative contracts and may be multiplied by the square root of ½ to convert the standard supervisory haircuts to the five-business-day minimum holding period for repo-style transactions (unless the collateral is conforming residential mortgages, in which case the banking organization must use a minimum ten-business-day holding period). A banking organization would adjust the standard supervisory haircuts upward on the basis of a holding period longer than ten business days for eligible margin loans and collateralized OTC derivative contracts or five business days for repo-style transactions where and as appropriate to take into account the illiquidity of an instrument.

TABLE 11.—STANDARD SUPERVISORY HAIRCUTS BASED ON MARKET PRICE VOLATILITY [1]

| Applicable external rating grade category for debt securities | Residual maturity for debt securities | Sovereign entity issuers [2] | Other issuers |
|---|---|---|---|
| Two highest investment grade rating categories for long-term ratings/highest investment grade rating category for short-term ratings. | ≤ 1 year | .005 | .01 |
| | >1 year, ≤ 5 years | .02 | .04 |
| | >5 years | .04 | .08 |
| Two lowest investment grade rating categories for both short- and long-term ratings. | ≤ 1 year | .01 | .02 |
| | >1 year, ≤ 5 years | .03 | .06 |
| | > 5 years | .06 | .12 |
| One rating category below investment grade | All | .15 | .25 |
| Main index equities [37] (including convertible bonds) and gold | | .15 | .15 |
| Other publicly traded equities (including convertible bonds), conforming residential mortgages, and non-financial collateral. | | .25 | .25 |
| Mutual funds | | (1) Highest haircut applicable to any security in which the fund can invest. | |
| Cash on deposit with the bank (including a certificate of deposit issued by the banking organization) | | 0 | 0 |

[1] The market price volatility haircuts in Table 11 are based on a ten-business-day holding period.
[2] This column includes the haircuts for MDBs and foreign PSEs that would receive a zero percent risk weight.

As an example, if a banking organization that uses standard supervisory haircuts has extended an eligible margin loan of $100 that is collateralized by five-year U.S. Treasury notes with a market value of $100, the value of the exposure less the value of the collateral would be zero, and the net position in the security ($100) times the supervisory haircut (.02) would be $2. There is no currency mismatch.

[37] The proposed rule defines a ''main index'' as the S&P 500 Index, the FTSE All-World Index, and any other index for which the bank demonstrates to the satisfaction of its primary Federal supervisor that the equities represented in the index have comparable liquidity, depth of market, and size of bid-ask spreads as equities in the S&P 500 Index and the FTSE All-World Index.

Therefore, the exposure amount would be $0 + $2 = $2.

(g) Own Estimates of Haircuts

With the prior written approval of the banking organization's primary Federal supervisor, a banking organization could calculate market price volatility and currency mismatch haircuts using its own internal estimates of market price volatility and foreign exchange volatility. The banking organization's primary Federal supervisor would base approval to use internally estimated haircuts on the satisfaction of certain minimum qualitative and quantitative standards. These standards include: (i) The banking organization would use a 99th percentile one-tailed confidence interval and a minimum five-business-day holding period for repo-style transactions and a minimum ten-business-day holding period for all other transactions; (ii) the banking organization would adjust holding periods upward where and as appropriate to take into account the illiquidity of an instrument; (iii) the banking organization would select a historical observation period for calculating haircuts of at least one year; and (iv) the banking organization would update its data sets and compute haircuts no less frequently than quarterly and would update its data sets and compute haircuts whenever market prices change materially. A banking organization would estimate individually the volatilities of the exposure, the collateral, and foreign exchange rates and may not take into account the correlations between them.

A banking organization that uses internally estimated haircuts would have to adhere to the following rules. The banking organization could calculate internally estimated haircuts for categories of debt securities that have an applicable external or applicable inferred rating of at least investment grade. The haircut for a category of securities would have to be representative of the internal volatility estimates for securities in that category that the banking organization has actually lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. In determining relevant categories, the banking organization would at a minimum have to take into account (i) the type of issuer of the security; (ii) the applicable external rating of the security; (iii) the maturity of the security; and (iv) the interest rate sensitivity of the security. A banking organization would calculate a separate internally estimated haircut for each individual debt security that has an applicable external rating below investment grade and for each individual equity security. In addition, a banking organization would estimate a separate currency mismatch haircut for its net position in each mismatched currency based on estimated volatilities for foreign exchange rates between the mismatched currency and the settlement currency where an exposure or collateral (whether in the form of cash or securities) is denominated in a currency that differs from the settlement currency.

When a banking organization calculates an internally estimated haircut on a $T_N$-day holding period, which is different from the minimum holding period for the transaction type, the banking organization would have to calculate the applicable haircut ($H_M$) using the following square root of time formula:

$$H_M = H_N \sqrt{\frac{T_M}{T_N}},$$

Where:

(i) $T_M$ = five for repo-style transactions and ten for eligible margin loans and OTC derivatives;

(ii) $T_N$ = holding period used by the banking organization to derive $H_N$; and

(iii) $H_N$ = haircut based on the holding period $T_N$.

(h) Simple VaR Method

With the prior written approval of its primary Federal supervisor, a banking organization could estimate the exposure amount for repo-style transactions and eligible margin loans subject to a single-product qualifying master netting agreement using a VaR model. Under the simple VaR method, a banking organization's exposure amount for transactions subject to such a netting agreement would be equal to the value of the exposures minus the value of the collateral plus a VaR-based estimate of the PFE. The value of the exposures would be the sum of the current market values of all instruments, gold, and cash the banking organization has lent, sold subject to repurchase, or posted as collateral to a counterparty under the netting set. The value of the collateral would be the sum of the current market values of all instruments, gold, and cash the banking organization has borrowed, purchased subject to resale, or taken as collateral from a counterparty under the netting set. The VaR-based estimate of the PFE would be an estimate of the banking organization's maximum exposure on the netting set over a fixed time horizon with a high level of confidence.

To qualify for the simple VaR approach, a banking organization's VaR model would have to estimate the banking organization's 99th percentile, one-tailed confidence interval for an increase in the value of the exposures minus the value of the collateral ($\Sigma E - \Sigma C$) over a five-business-day holding period for repo-style transactions or over a ten-business-day holding period for eligible margin loans using a minimum one-year historical observation period of price data representing the instruments that the banking organization has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. The main ongoing qualification requirement for using a VaR model is that the banking organization would have to validate its VaR model by establishing and maintaining a rigorous and regular backtesting regime. In this NPR, backtesting means the comparison of a banking organization's internal estimates with actual outcomes during a sample period not used in model development.

(i) Zero H Approach

The New Accord includes an additional approach, the Zero H approach, to recognize the risk mitigating benefits of certain collateral types in repo-style transactions conducted with a limited group of counterparties. The Zero H approach permits a banking organization that uses the collateral haircut approach to apply a haircut of zero percent to financial collateral in repo-style transactions that meet the criteria described below and are conducted with core market participants. Under the New Accord, the definition of core market participants includes sovereign entities, central banks, PSEs, banks and securities firms, other financial companies eligible for a 20 percent risk weight, regulated mutual funds, regulated pension funds, and recognized clearing organizations. A repo-style transaction conducted with a core market participant qualifies for the Zero H approach if: (i) Both the exposure and the collateral are cash or a sovereign or PSE security that qualifies for a zero percent risk weight and are denominated in the same currency; (ii) following a counterparty's failure to remargin, the time required between the last mark-to-market before the failure to remargin and the liquidation [38] of the collateral is no more than four business days; (iii) the

[38] The banking organization does not have to liquidate the collateral, but it would have to be able to do so within the time frame.

transaction is settled across a settlement system proven for that type of transaction; (iv) the documentation covering the agreement is standard market documentation for repo-style transactions in the securities concerned; (v) the transaction is governed by documentation specifying that if the counterparty fails to satisfy an obligation to deliver cash or securities or to deliver margin or otherwise defaults, then the transaction is immediately terminable; and (vi) upon any default event, regardless of whether the counterparty is insolvent or bankrupt, the banking organization has the unfettered, legally enforceable right to immediately seize and liquidate the collateral for its benefit.

The New Accord also includes a variation of the Zero H approach for banking organizations that use the simple approach to recognize financial collateral. For repo-style transactions that meet the Zero H criteria and are conducted with core market participants, the banking organization would assign a risk weight of zero percent. A banking organization would assign a risk weight of 10 percent to repo-style transaction exposures that meet the criteria and are conducted with non-core market participants.

The agencies have decided not to include the Zero H approach and the variation for the simple approach in this proposal because the agencies believe that doing so would add unnecessary complexity. In the New Accord, a banking organization must choose to use either the simple approach or the comprehensive approach [39] for all its collateralized transactions. The agencies have proposed a more flexible treatment that would permit a banking organization to select its approach to collateral based on transaction type. This flexibility allows for more risk sensitivity in the capital calculation for repo-style transactions. For example, a banking organization could choose the collateral haircut or simple VaR approach for repo-style transactions and the simple approach for other transaction types. Additionally, the agencies question whether the capital requirements prescribed by the Zero H approach adequately address the credit risk of repo-style transactions. In both this proposal and the New Accord, banking organizations would be subject to the operational risk capital requirement for these transactions.

*Question 16: The agencies seek comment on whether these Zero H approaches should be included in the standardized framework. Additionally, the agencies seek comment on whether the Zero H approaches would adequately address the credit risk of repo-style transactions that would qualify for those approaches.*

(j) Internal Models Methodology

The advanced approaches final rule includes an internal models methodology for the calculation of the exposure amount for the counterparty credit exposure for OTC derivatives, eligible margin loans, and repo-style transactions. This methodology requires a risk model that captures counterparty credit risk and estimates the exposure amount at the level of a netting set. A banking organization may use the internal models methodology for OTC derivatives, eligible margin loans, and repo-style transactions.

The internal models methodology is fully discussed in the advanced approaches final rule.[40] The specific references in the advanced approaches final rule's preamble and common rule text are: (i) Preamble; [41] (ii) section 22(c) and certain other paragraphs in section 22 of the common rule text,[42] such as paragraphs (a)(2) and (3), (i), (j), and (k), which discuss the qualification requirements for the advanced systems in general and therefore would apply to the expected positive exposure modeling approach (EPE) as part of the internal models methodology; (iii) section 32(c) and (d) of the common rule text; [43] (iv) applicable definitions in Section 2 of the common rule text; [44] and (v) applicable disclosure requirements in Tables 11.6 and 11.7 of the common rule text.[45]

Although the internal models methodology is not part of this proposed rule, the standardized approach in the New Accord does incorporate an internal models methodology for credit risk mitigants. Therefore, the agencies are considering whether to implement the internal models methodology in a final rule consistent with the requirements in the advanced approaches final rule.

*Question 17: The agencies request comment on the appropriateness of including the internal models methodology for calculating exposure amounts for OTC derivatives, eligible margin loans, and repo-style transactions in any final rule implementing the standardized framework. The agencies also requested comment on the extent to which banking organizations contemplating implementing the standardized framework believe they can meet the associated advanced modeling and systems requirements. (For purposes of reviewing the internal models methodology in the advanced approaches final rule, commenters should substitute the term ''exposure amount'' for the term ''exposure at default'' and ''EAD'' each time these terms appear in the advanced approaches final rule.)*

*L. Unsettled Transactions*

Consistent with the New Accord and the advanced approaches final rule, the agencies propose to institute a more risk-sensitive risk-based capital requirement for unsettled and failed securities, foreign exchange, and commodities transactions.

The proposed capital requirement, however, would not apply to certain transaction types, including:

(i) Transactions accepted by a qualifying central counterparty [46] that are subject to daily marking-to-market and daily receipt and payment of variation margin (which do not have a risk-based capital requirement);

(ii) Repo-style transactions;

(iii) One-way cash payments on OTC derivative contracts; and

(iv) Transactions with a contractual settlement period that is longer than the normal settlement period as defined below. (Such transactions would be treated as OTC derivative contracts and assessed a risk-based capital requirement under section 31 of the proposed rule.) This proposed rule also provides that, in the case of a system-wide failure of a settlement or clearing system, the banking organization's primary Federal supervisor could waive risk-based capital requirements for unsettled and failed transactions until the situation is rectified.

This NPR contains separate treatments for delivery-versus-payment

[39] The comprehensive approach in the New Accord includes the collateral haircut approaches, the simple VaR approach, and the internal models approach.

[40] See 72 FR 69288 (December 7, 2007).

[41] Id. at 69346–49 and 69302–21.

[42] Id. at 69407–08.

[43] Id. at 69413–16.

[44] Id. at 69397–405.

[45] Id. at 69443.

[46] Qualifying central counterparty would be defined as a counterparty that: (i) Facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating contracts; (ii) requires all participants in its arrangements to be fully collateralized on a daily basis; and (iii) the banking organization demonstrates to the satisfaction of the agency is in sound financial condition and is subject to effective oversight by a national supervisory authority. The agencies consider a qualifying central counterparty to be the functional equivalent of an exchange and have long exempted exchange-traded contracts from risk-based capital requirements.

(DvP) and payment-versus-payment (PvP) transactions with a normal settlement period, and non-DvP/non-PvP transactions with a normal settlement period. This NPR provides the following definitions of a DvP transaction, a PvP transaction, and a normal settlement period:

- A DvP transaction is a securities or commodities transaction in which the buyer is obligated to make payment only if the seller has made delivery of the securities or commodities and the seller is obligated to deliver the securities or commodities only if the buyer has made payment.
- A PvP transaction is a foreign exchange transaction in which each counterparty is obligated to make a final transfer of one or more currencies only if the other counterparty has made a final transfer of one or more currencies.
- A transaction has a normal settlement period if the contractual settlement period for the transaction is equal to or less than the market standard for the instrument underlying the transaction and equal to or less than five business days.

A banking organization would have to hold risk-based capital against a DvP or PvP transaction with a normal settlement period if the banking organization's counterparty has not made delivery or payment within five business days after the settlement date. The banking organization would determine its risk-weighted asset amount for such a transaction by multiplying the positive current exposure of the transaction for the banking organization by the appropriate risk weight in Table 12. The positive current exposure of a transaction of a banking organization would be the difference between the transaction value at the agreed settlement price and the current market price of the transaction, if the difference results in a credit exposure of the banking organization to the counterparty.

TABLE 12.—RISK WEIGHTS FOR UNSETTLED DVP AND PVP TRANSACTIONS

| Number of business days after contractual settlement date | Risk weight to be applied to positive current exposure (in percent) |
|---|---|
| From 5 to 15 | 100.0 |
| From 16 to 30 | 625.0 |
| From 31 to 45 | 937.5 |
| 46 or more | 1,250.0 |

A banking organization would hold risk-based capital against any non-DvP/non-PvP transaction with a normal settlement period if the banking organization delivered cash, securities, commodities, or currencies to its counterparty but has not received its corresponding deliverables by the end of the same business day. The banking organization would continue to hold risk-based capital against the transaction until the banking organization received its corresponding deliverables. From the business day after the banking organization made its delivery until five business days after the counterparty delivery is due, the banking organization would calculate its risk-based capital requirement for the transaction by risk weighting the current market value of the deliverables owed to the banking organization using the risk weight appropriate for an exposure to the counterparty.

If, in a non-DvP/non-PvP transaction with a normal settlement period, the banking organization has not received its deliverables by the fifth business day after the counterparty delivery due date, the banking organization would deduct the current market value of the deliverables owed to the banking organization 50 percent from tier 1 capital and 50 percent from tier 2 capital.

*M. Risk-Weighted Assets for Securitization Exposures*

Under the agencies' general risk-based capital rules, a banking organization may use external ratings issued by NRSROs to assign risk weights to certain recourse obligations, residual interests, direct credit substitutes, and asset- and mortgage-backed securities. Exposures to securitization transactions may also be subject to capital requirements that can result in effective risk weights of 1,250 percent, or a dollar-for-dollar capital requirement. A banking organization must deduct certain CEIOs from tier 1 capital.[47]

(1) Securitization Overview and Definitions

The securitization framework in this NPR is designed to address the credit risk of exposures that involve the tranching of the credit risk of one or more underlying financial exposures. The agencies believe that requiring all or substantially all of the underlying exposures for a securitization to be financial exposures creates an important boundary between the general credit risk framework and the securitization framework. Examples of financial exposures are loans, commitments, receivables, asset-backed securities, mortgage-backed securities, other debt securities, equity securities, or credit derivatives. Based on their cash flow characteristics, for purposes of this proposal, the agencies would also consider asset classes such as lease residuals and entertainment royalties to be financial assets. The securitization framework is designed to address the tranching of the credit risk of financial exposures and is not designed, for example, to apply to tranched credit exposures to commercial or industrial companies or nonfinancial assets. Accordingly, under this NPR, a specialized loan to finance the construction or acquisition of large-scale projects (for example, airports or power plants), objects (for example, ships, aircraft, or satellites), or commodities (for example, reserves, inventories, precious metals, oil, or natural gas) generally would not be a securitization exposure because the assets backing the loan typically are nonfinancial assets (the facility, object, or commodity being financed).

Consistent with the advanced approaches final rule, this NPR would define a securitization exposure as an on-balance sheet or off-balance sheet credit exposure that arises from a traditional or synthetic securitization (including credit-enhancing representations and warranties). A traditional securitization means a transaction in which: (i) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties other than through the use of credit derivatives or guarantees; (ii) the credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority; (iii) the performance of the securitization exposures depends upon the performance of the underlying exposures; (iv) all or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities); (v) the underlying exposures are not owned by an operating company; (vi) the underlying exposures are not owned by a small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682); and (vii) (a) for banks and bank holding companies, the underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under 12 U.S.C. 24 (Eleventh); or (b) for

[47] 12 CFR part 3, Appendix A, section 4 (OCC); 12 CFR parts 208 and 225, Appendix A, section III.B.3 (Board); 12 CFR part 325, Appendix A section II.B.1 (FDIC); and 12 CFR 567.6(b) (OTS).

savings associations, the underlying exposures are not owned by a firm an investment in which is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or employment.

In this proposed rule, operating companies would not fall under the definition of a traditional securitization (even if substantially all of their assets are financial exposures). For purposes of this proposed rule's definition of a traditional securitization, operating companies generally are companies that produce goods or provide services beyond the business of investing, reinvesting, holding, or trading in financial assets. Examples of operating companies are depository institutions, bank holding companies, securities brokers and dealers, insurance companies, and non-bank mortgage lenders. Accordingly, an equity investment in an operating company, such as a bank, generally would be an equity exposure under the proposed rule. Investment firms, which generally do not produce goods or provide services beyond the business of investing, reinvesting, holding, or trading in financial assets, would not be operating companies for purposes of this proposed rule and would not qualify for this general exclusion from the definition of traditional securitization. Examples of investment firms would include companies that are exempted from the definition of an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)) by either section 3(c)(1) (15 U.S.C. 80a–3(c)(1)) or section 3(c)(7) (15 U.S.C. 80a–3(c)(7)) of the Act.

Under this proposed rule, a primary Federal supervisor of a banking organization would have the discretion to exclude from the definition of traditional securitization transactions in which the underlying exposures are owned by investment firms that exercise substantially unfettered control over the size and composition of their assets, liabilities, and off-balance sheet transactions. The agencies would consider a number of factors in the exercise of this discretion, including the assessment of the investment firm's leverage, risk profile, and economic substance. This supervisory exclusion would give the primary Federal supervisor the discretion to distinguish structured finance transactions, to which the securitization framework was designed to apply, from those of flexible investment firms such as many hedge funds and private equity funds. Only investment firms that can easily change the size and composition of their capital structure, as well as the size and composition of their assets and off-balance sheet exposures, would be eligible for the exclusion from the definition of traditional securitization under this provision. The agencies do not consider managed collateralized debt obligation vehicles, structured investment vehicles, and similar structures, which allow considerable management discretion regarding asset composition but are subject to substantial restrictions regarding capital structure, to have substantially unfettered control. Thus, such transactions would meet the definition of traditional securitization.

The agencies are concerned that the line between securitization exposures and non-securitization exposures may be difficult to draw in some circumstances. In addition to the supervisory exclusion from the definition of traditional securitization described above, a primary Federal supervisor may scope certain transactions into the securitization framework if justified by the economics of the transaction. Similar to the analysis for excluding an investment firm from treatment as a traditional securitization, the agencies would consider the economic substance, leverage, and risk profile of transactions to ensure that the appropriate risk-based capital classification is made. The agencies would consider a number of factors when assessing the economic substance of a transaction including, for example, the amount of equity in the structure, overall leverage (whether on- or off-balance sheet), whether redemption rights attach to the equity investor, and the ability of the junior tranches to absorb losses without interrupting contractual payments to more senior tranches.

A synthetic securitization means a transaction in which: (i) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties through the use of one or more credit derivatives or guarantees (other than a guarantee that transfers only the credit risk of an individual retail exposure); (ii) the credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority; (iii) performance of the securitization exposures depends upon the performance of the underlying exposures; and (iv) all or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities).

Both the designation of exposures as securitization exposures and the calculation of risk-based capital requirements for securitization exposures would be guided by the economic substance of a transaction rather than its legal form. Provided there is a tranching of credit risk, securitization exposures could include, among other things, asset-backed and mortgage-backed securities, loans, lines of credit, liquidity facilities, financial standby letters of credit, credit derivatives and guarantees, loan servicing assets, servicer cash advance facilities, reserve accounts, credit-enhancing representations and warranties, and CEIOs. Securitization exposures also could include assets sold with retained tranches. Mortgage-backed pass-through securities, for example, those guaranteed by Fannie Mae or Freddie Mac, do not meet the proposed definition of securitization exposure because they do not involve a tranching of credit risk. Rather, only those mortgage-backed securities that involve tranching of credit risk would be securitization exposures. Banking organizations are encouraged to consult with their primary Federal supervisor about transactions that require additional guidance.

(2) Operational Requirements

(a) Operational Requirements for Traditional Securitizations

In a traditional securitization, an originating banking organization typically transfers a portion of the credit risk of exposures to third parties by selling them to a securitization special purpose entity (SPE). Under this NPR, a banking organization would be an originating banking organization if it: (i) Directly or indirectly originated or securitized the underlying exposures included in the securitization; or (ii) serves as an asset-backed commercial paper (ABCP) program sponsor to the securitization. Under the proposed rule, a banking organization that engages in a traditional securitization would exclude the underlying exposures from the calculation of risk-weighted assets only if each of the following conditions are met: (i) the transfer is a sale under GAAP; (ii) the originating banking organization transfers to one or more third parties credit risk associated with the underlying exposures; and (iii) any clean-up calls relating to the securitization are eligible clean-up calls (as discussed below). An originating banking organization that meets these

conditions would hold regulatory capital against any securitization exposures it retains in connection with the securitization. An originating banking organization that fails to meet these conditions would instead hold regulatory capital against the transferred exposures as if they had not been securitized and would deduct from tier 1 capital any after-tax gain-on-sale resulting from the transaction.

Consistent with the general risk-based capital rules, the above operational requirements refer specifically to GAAP for the purpose of determining whether a securitization transaction should be treated as an asset sale or a financing. In contrast, the New Accord stipulates guiding principles for determining whether sale treatment is warranted. The agencies believe that the conditions currently outlined under GAAP to qualify for sale treatment are broadly consistent with the guiding principles enumerated in the New Accord. However, if GAAP in this area were to materially change, the agencies would reassess, and possibly revise, the operational standards.

(b) Clean-Up Calls

To satisfy the operational requirements for securitizations and enable an originating banking organization to exclude the underlying exposures from the calculation of its risk-based capital requirements, any clean-up call associated with a securitization must be an eligible clean-up call. The proposed rule defines a clean-up call as a contractual provision that permits an originating banking organization or servicer to call securitization exposures (for example, asset-backed securities) before the stated maturity or call date. In the case of a traditional securitization, a clean-up call is generally accomplished by repurchasing the remaining securitization exposures once the amount of underlying exposures or outstanding securitization exposures falls below a specified level. In the case of a synthetic securitization, the clean-up call may take the form of a clause that extinguishes the credit protection once the amount of underlying exposures has fallen below a specified level.

Under the proposed rule, an eligible clean-up call is a clean-up call that:

(i) Is exercisable solely at the discretion of the originating banking organization or servicer;

(ii) Is not structured to avoid allocating losses to securitization exposures held by investors or otherwise structured to provide credit enhancement to the securitization (for example, to purchase non-performing underlying exposures); and

(iii)(a) For a traditional securitization, is only exercisable when 10 percent or less of the principal amount of the underlying exposures or securitization exposures (determined as of the inception of the securitization) is outstanding; or

(b) For a synthetic securitization, is only exercisable when 10 percent or less of the principal amount of the reference portfolio of underlying exposures (determined as of the inception of the securitization) is outstanding.

Where a securitization SPE is structured as a master trust, a clean-up call with respect to a particular series or tranche issued by the master trust would meet criteria (iii)(a) and (iii)(b) as long as the outstanding principal amount in that series was 10 percent or less of its original amount at the inception of the series.

(c) Operational Requirements for Synthetic Securitizations

In general, the proposed rule's treatment of synthetic securitizations is similar to that of traditional securitizations. The operational requirements for synthetic securitizations, however, are more rigorous to ensure that the originating banking organization has truly transferred credit risk of the underlying exposures to one or more third-party protection providers.

For synthetic securitizations, an originating banking organization would recognize the use of credit risk mitigation to hedge, or transfer credit risk associated with, underlying exposures for risk-based capital purposes only if each of the following conditions were satisfied:

(i) The credit risk mitigant is financial collateral, an eligible credit derivative, or an eligible guarantee.

(ii) The banking organization transfers credit risk associated with the underlying exposures to one or more third parties, and the terms and conditions in the credit risk mitigants do not include provisions that:

(a) Allow for the termination of the credit protection due to deterioration in the credit quality of the underlying exposures;

(b) Require the banking organization to alter or replace the underlying exposures to improve the credit quality of the underlying exposures;

(c) Increase the banking organization's cost of credit protection in response to deterioration in the credit quality of the underlying exposures;

(d) Increase the yield payable to parties other than the banking organization in response to a deterioration in the credit quality of the underlying exposures; or

(e) Provide for increases in a retained first loss position or credit enhancement provided by the banking organization after the inception of the securitization.

(iii) The banking organization obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk mitigant in all relevant jurisdictions.

(iv) Any clean-up calls relating to the securitization are eligible clean-up calls (as discussed above).

Failure to meet the above operational requirements for a synthetic securitization would prevent the originating banking organization from using this securitization framework and would require the originating banking organization to hold risk-based capital against the underlying exposures as if they had not been synthetically securitized. A banking organization that provides credit protection to a synthetic securitization would use the securitization framework to compute risk-based capital requirements for its exposures to the synthetic securitization even if the originating banking organization failed to meet one or more of the operational requirements for a synthetic securitization.

(3) Hierarchy of Approaches

Under the proposed rule a banking organization generally would determine the amount of a traditional or synthetic securitization exposure and then determine the risk-based capital requirement for the securitization exposure according to two general approaches: A ratings-based approach (RBA) and an approach for exposures that do not qualify for the RBA. Although synthetic securitizations typically employ credit derivatives, a banking organization must first apply the securitization framework when calculating risk-based capital requirements for a synthetic securitization exposure. Under this proposed rule, a banking organization could ultimately be redirected to the securitization CRM rules to adjust the securitization framework capital requirement for an exposure to reflect the CRM technique used in the transaction.

(a) Exposure Amount of a Securitization Exposure

Under this proposed rule, the amount of an on-balance sheet securitization exposure that is not a repo-style transaction, eligible margin loan, or OTC derivative contract (other than a credit derivative) would be the banking

organization's carrying value minus any unrealized gains and plus any unrealized losses on the exposure if the exposure were a security classified as available-for-sale, or the banking organization's carrying value if the exposure were not a security classified as available-for-sale.

The amount of an off-balance sheet securitization exposure that is not an eligible ABCP liquidity facility, a repo-style transaction, or an OTC derivative contract (other than a credit derivative) would be the notional amount of the exposure.

This NPR defines an eligible ABCP liquidity facility as a liquidity facility supporting ABCP, in form or in substance, that is subject to an asset quality test at the time of draw that precludes funding against assets that are 90 days or more past due or in default. In addition, if the assets or exposures that an eligible ABCP liquidity facility is required to fund against are externally rated assets or exposures at the inception of the facility, the facility can be used to fund only those assets or exposures with an applicable external rating of at least investment grade at the time of funding. Notwithstanding these eligibility requirements, a liquidity facility will be considered an eligible ABCP liquidity facility if the assets or exposures funded under the liquidity facility and that do not meet the eligibility requirements are guaranteed, either conditionally or unconditionally, by a sovereign entity with an issuer rating in one of the three highest investment grade rating categories.

Consistent with the New Accord, the exposure amount of an eligible ABCP liquidity facility would be the notional amount of the exposure multiplied by (i) a 20 percent CCF, for a facility with an original maturity of one year or less that does not qualify for the RBA; (ii) a 50 percent CCF, for a facility with an original maturity of over one year that does not qualify for the RBA; or (iii) 100 percent, for a facility that qualifies for the RBA. The proposed CCF for eligible ABCP liquidity facilities with an original maturity of less than one year is greater than the 10 percent CCF prescribed under the general risk-based capital rules. The agencies believe the credit risk of eligible ABCP liquidity facilities is similar to that of other short-term commitments to lend or purchase assets, and believe that a 20 percent CCF is appropriate for both eligible ABCP liquidity facilities and non-securitization commitments with an original maturity of one year or less.

Under this proposed rule, when a securitization exposure to an ABCP program is a commitment, such as a liquidity facility, the notional amount could be reduced to the maximum potential amount that the banking organization could be required to fund given the ABCP program's current underlying assets (calculated without regard to the current credit quality of those assets). Thus, if $100 is the maximum amount that could be drawn given the current volume and current credit quality of the program's assets, but the maximum potential draw against these same assets could increase to as much as $200 under some scenarios if their credit quality were to deteriorate, then the exposure amount is $200.

The amount of securitization exposure that is a repo-style transaction, eligible margin loan, or an OTC derivative (other than a credit derivative) would be the exposure amount as calculated in section 35 or 37 of this proposed rule.

(b) Gains-on-Sale and CEIOs

Under the proposed rule, a banking organization would first deduct from tier 1 capital any after-tax gain-on-sale resulting from a securitization and would deduct from total capital any portion of a CEIO that does not constitute an after-tax gain-on-sale, as described in section 21 of the proposed rule. Thus, if the after-tax gain-on-sale associated with a securitization equaled $100 while the amount of CEIOs associated with that same securitization equaled $120, the banking organization would deduct $100 from tier 1 capital and $20 from total capital ($10 from tier 1 capital and $10 from tier 2 capital). The agencies believe these deductions are appropriate given historical supervisory concerns with the subjectivity involved in valuations of gains-on-sale and CEIOs. Furthermore, although the treatments of gains-on-sale and CEIOs can increase an originating banking organization's risk-based capital requirement following a securitization, the agencies believe that such anomalies will be rare where a securitization transfers significant credit risk from the originating banking organization to third parties.

(c) Ratings-Based Approach

If a securitization exposure is not a gain-on-sale or CEIO, a banking organization would apply the RBA to a securitization exposure if the exposure qualifies for the RBA.[48] Generally, an exposure would qualify for the RBA if the exposure has an external rating from an NRSRO or has an inferred rating (that is, the exposure is senior to another securitization exposure in the transaction that has an external rating from an NRSRO).

(d) Securitization Exposures That Do Not Qualify for the RBA

If a securitization exposure is not a gain-on-sale or CEIO and does not qualify for the RBA, a banking organization generally would be required to deduct the exposure from total capital. However, there are several situations in the approach for unrated exposures described below and in section 44 of the proposed rule in which an alternative risk-based capital treatment is permitted.

(e) Exceptions to the General Hierarchy of Approaches

There are four exceptions to the general approach described above that parallel the agencies' general risk-based capital rules. First, an interest-only mortgage-backed security would be assigned a risk weight that is no less than 100 percent. The agencies believe that a minimum risk weight of 100 percent is prudent in light of the uncertainty implied by the substantial price volatility of these securities. Second, a sponsoring banking organization that qualifies as a primary beneficiary and must consolidate an ABCP program as a variable interest entity under GAAP could exclude the consolidated ABCP program assets from risk-weighted assets.[49] In such cases, the banking organization would hold risk-based capital against any of its securitization exposures to the ABCP program. Third, as required by Federal statute, a special set of rules would continue to apply to transfers of small-business loans and leases with recourse by well-capitalized depository institutions.[50] Finally, under this NPR, if a securitization exposure is an OTC derivative contract (other than a credit derivative) that has a first priority claim on the cash flows from the underlying exposures (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments), a banking organization may choose to apply an

[48] A securitization exposure held by an originating bank must have two or more external ratings or inferred ratings to qualify for the RBA.

[49] See Financial Accounting Standards Board, ''Interpretation No. 46(R): Consolidation of Certain Variable Interest Entities'' (December 2003).

[50] See 12 U.S.C. 1835, which places a cap on the risk-based capital requirement applicable to a well-capitalized depository institution that transfers small-business loans with recourse. The final rule does not expressly state that the agencies may permit adequately capitalized banks to use the small business recourse rule on a case-by-case basis because the agencies may do this under the general reservation of authority contained in section 1 of the rule.

effective 100 percent risk weight to the exposure rather than the general securitization hierarchy of approaches. This treatment would be subject to supervisory approval.

(f) Overlapping Exposures

This proposal also includes provisions to limit the double counting of risks in situations involving overlapping securitization exposures. If a banking organization has multiple securitization exposures that provide duplicative coverage to the underlying exposures of a securitization (such as when a banking organization provides a program-wide credit enhancement and multiple pool-specific liquidity facilities to an ABCP program), the banking organization is not required to hold duplicative risk-based capital against the overlapping position. Instead, the banking organization would apply to the overlapping position the applicable risk-based capital treatment under the securitization framework that results in the highest capital requirement. If different banking organizations have overlapping exposures to a securitization, however, each banking organization would hold capital against the entire maximum amount of its exposure. Although duplication of capital requirements will not occur for an individual banking organization, some systemic duplication would occur where multiple banking organizations have overlapping exposures to the same securitization.

(g) Servicer Cash Advances

A traditional securitization typically employs a servicing banking organization that, on a day-to-day basis, collects principal, interest, and other payments from the underlying exposures of the securitization and forwards such payments to the securitization SPE or to investors in the securitization. Such servicing banking organizations often provide a credit facility to the securitization under which the servicing banking organization could advance cash to ensure an uninterrupted flow of payments to investors in the securitization (including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the underlying exposures). These servicer cash advance facilities are securitization exposures.

Under the proposed rule, a servicing banking organization would determine its risk-based capital requirement for any advances under such a facility using either the RBA or the approach for securitization exposures that do not qualify for the RBA as described below. The treatment of the undrawn portion of the facility would depend on whether the facility is an ''eligible'' servicer cash advance facility. An eligible servicer cash advance facility would be defined as a servicer cash advance facility in which: (i) The servicer is entitled to full reimbursement of advances (except that a servicer could be obligated to make non-reimbursable advances for a particular underlying exposure if any such advance is contractually limited to an insignificant amount of the outstanding principal balance of that exposure); (ii) the servicer's right to reimbursement is senior in right of payment to all other claims on the cash flows from the underlying exposures of the securitization; and (iii) the servicer has no legal obligation to, and does not, make advances to the securitization if the servicer concludes the advances are unlikely to be repaid. Consistent with the general risk-based capital rules with respect to residential mortgage servicer cash advances, a servicing banking organization would not be required to hold risk-based capital against the undrawn portion of an eligible servicer cash advance facility. A banking organization that provides a non-eligible servicer cash advance facility would determine its risk-based capital requirement for the undrawn portion of the facility in the same manner as the banking organization would determine its risk-based capital requirement for any other off-balance sheet securitization exposure.

(h) Implicit Support

The proposed rule also specifies the regulatory capital consequence if a banking organization provides support to a securitization in excess of the banking organization's predetermined contractual obligation. First, consistent with the general risk-based capital rules, a banking organization that provides such implicit support would have to hold regulatory capital against all of the underlying exposures associated with the securitization as if the exposures had not been securitized, and would deduct from tier 1 capital any after-tax gain-on-sale resulting from the securitization.[51] Second, the banking organization would have to disclose publicly (i) that it has provided implicit support to the securitization, and (ii) the regulatory capital impact to the banking organization of providing the implicit support. The banking organization's primary Federal supervisor also could require the banking organization to hold regulatory capital against all the underlying exposures associated with some or all of the banking organization's other securitizations as if the exposures had not been securitized, and to deduct from tier 1 capital any after-tax gain-on-sale resulting from such securitizations.

Over the last several years, the agencies have published a significant amount of supervisory guidance to assist banking organizations with the capital treatment of securitization exposures. In general, the agencies expect banking organizations to continue to use this guidance, most of which would remain applicable to the standardized securitization framework.

(4) Ratings-Based Approach

Under this NPR, a banking organization would determine the risk-weighted asset amount for a securitization exposure that is eligible for the RBA by multiplying the exposure amount by the appropriate risk weight provided in Table 13 or Table 14. Banking organizations would deduct from total capital exposures that have applicable long-term ratings of two categories or more below investment grade and applicable short-term ratings below the lowest investment grade rating.

Under the proposal, whether a securitization exposure is eligible for the RBA would depend on whether the banking organization holding the securitization exposure is an originating banking organization or an investing banking organization. An originating banking organization would be required to use the RBA for a securitization exposure if (i) the exposure has two or more external ratings, or (ii) the exposure has two or more external or inferred ratings. In contrast, an investing banking organization would be required to use the RBA for a securitization exposure if the exposure has one or more external or inferred ratings.

[51] ''Interagency Guidance on Implicit Recourse in Asset Securitizations,'' May 23, 2002. OCC Bulletin 2002–20 (OCC); SR02–15 (Board); FIL–52–2002 (FDIC); and CEO Memo No. 162 (OTS).

TABLE 13.—LONG-TERM CREDIT RATING RISK WEIGHTS UNDER THE RBA

| Applicable external rating or applicable inferred rating of a securitization exposure | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | AAA | 20. |
| Second-highest investment grade rating | AA | 20. |
| Third-highest investment grade rating | A | 50. |
| Lowest investment grade rating | BBB | 100. |
| One category below investment grade | BB | 350. |
| Two categories below investment grade | B | Deduction. |
| Three categories or more below investment grade | CCC | Deduction. |

TABLE 14.—SHORT-TERM CREDIT RATING RISK WEIGHTS UNDER THE RBA

| Applicable external or applicable inferred rating of a securitization exposure | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | A–1/P–1 | 20. |
| Second-highest investment grade rating | A–2/P–2 | 50. |
| Lowest investment grade rating | A–3/P–3 | 100. |
| All other ratings | N/A | Deduction. |

Under the proposed rule, securitization exposures with an inferred rating are treated the same as securitization exposures with an identical external rating. However, the proposed rule includes a different provision for determining inferred ratings for securitization exposures than for other types of exposures. A securitization exposure that does not have an external rating (an unrated securitization exposure) would have an inferred rating equal to the external rating of a securitization exposure that is issued by the same issuer and secured by the same underlying exposures and (i) has an external rating; (ii) is subordinate in all respects to the unrated securitization exposure; (iii) does not benefit from any credit enhancement that is not available to the unrated securitization exposure; (iv) has an effective remaining maturity that is equal to or longer than the unrated securitization exposure; and (v) is the most immediately subordinated exposure to the unrated securitization exposure that meets the criteria in (i) through (iv) above. For example, a securitization might issue three tranches of securities designated as senior, mezzanine, and subordinated. If the senior tranche is unrated, the mezzanine tranche is rated A and meets the criteria in (i) through (iv) above, and the subordinated tranche is rated BB, the senior tranche could receive an inferred rating of A based on the rating of the mezzanine tranche, regardless of the rating of the subordinated tranche. If the mezzanine tranche has two ratings, the senior tranche could receive an applicable inferred rating based only on the lowest of the ratings on the mezzanine tranche. If a securitization exposure has multiple inferred ratings, the applicable inferred rating is the lowest inferred rating.

Banking organizations would not be permitted to assign an inferred rating based on the ratings of the underlying exposures in a securitization, even when the unrated securitization exposure is secured by a single, externally rated security. Such an approach would fail to meet the requirements that the rated reference exposure be issued by the same issuer, secured by the same underlying assets, and subordinated in all respects to the unrated securitization exposure.

(5) Exposures That Do Not Qualify for the RBA

A banking organization would generally be required to deduct from total capital securitization exposures that do not qualify for the RBA, with the following exceptions that apply provided that the banking organization knows the composition of the underlying exposures at all times: (i) Eligible ABCP liquidity facilities, (ii) first priority securitization exposures, and (iii) exposures in a second loss position or better to an ABCP program.

(a) Eligible ABCP Liquidity Facilities

In this NPR, consistent with the New Accord, the exposure amount of an eligible ABCP liquidity facility would be assigned to the highest risk weight applicable to any of the underlying individual exposures covered by the liquidity facility.

(b) First-Priority Securitization Exposures

If a first-priority securitization exposure does not qualify for the RBA, a banking organization could determine the risk weight of the exposure by ''looking through'' the exposure to its underlying assets. The risk-weighted asset amount would be the weighted-average risk weight of the underlying exposures multiplied by the exposure amount of the first-priority securitization exposure. If a banking organization is unable to determine the risk weights of the underlying credit risk exposures, the first-priority securitization exposure would be deducted from total capital.

First-priority securitization exposure would be defined as a securitization exposure that has a first-priority claim on the cash flows from the underlying exposures and that is not an eligible ABCP liquidity facility. When determining whether a securitization exposure has a first-priority claim on the cash flows from the underlying exposures, a banking organization would not be required to consider amounts due under interest rate or currency derivative contracts, fees due, or other similar payments. Generally, only the most senior tranche of a securitization would be a first-priority securitization exposure.

(c) Securitization Exposures in a Second Loss Position or Better to an ABCP Program

This NPR would define an ABCP program as a program that primarily issues commercial paper that has an external rating and is backed by underlying exposures held in a bankruptcy-remote securitization SPE. In this NPR, a banking organization would not be required to deduct from total capital a securitization exposure to an ABCP program that does not qualify for the RBA and is not an eligible ABCP

liquidity facility or a first-priority securitization exposure, provided that it satisfies the following requirements: (i) The exposure must be economically in a second loss position or better and the first loss position must provide significant credit protection to the second loss position, (ii) the credit risk associated with the exposure must be the equivalent of investment grade or better,[52] and (iii) the banking organization holding the exposure must not retain or provide the first loss position.

If the exposure meets the above requirements, the risk weight would be the higher of 100 percent or the highest risk weight assigned to any of the individual exposures covered by the ABCP program. The agencies believe that this approach, which is consistent with the New Accord, appropriately and conservatively assesses the credit risk of non-first loss exposures to ABCP programs.

Under the agencies' general risk-based capital rules, certain securitization exposures that are not rated by an NRSRO may be risk weighted based on alternative methods. These methods include internal risk ratings for ABCP programs, program ratings, and computer program ratings and are not included in this NPR.

*Question 18: The agencies solicit comment on the decision not to include internal risk ratings for ABCP programs, program ratings, and computer program ratings in this proposal.*

(6) CRM for Securitization Exposures

The proposed treatment of CRM for securitization exposures differs slightly from the CRM treatment of other exposures. An originating banking organization that has obtained a credit risk mitigant to hedge its securitization exposure to a synthetic or traditional securitization that satisfies the operational criteria in section 41 of the proposed rule could recognize the credit risk mitigant, but only as provided in section 45. An investing banking organization that has obtained a credit risk mitigant to hedge a securitization exposure also could recognize the credit risk mitigant, but only as provided in section 45.

In general, to recognize the risk mitigating effects of financial collateral or an eligible guarantee or an eligible credit derivative for a securitization exposure, a banking organization could use the approaches for collateralized transactions or the substitution treatment for guarantees and credit derivatives described in section 36. However, section 45 of the proposed rule contains specific provisions a banking organization would have to follow when applying those approaches to securitization exposures.

In this NPR, a banking organization that determines its risk-based capital requirement for a securitization exposure based on external or inferred rating(s) that reflect the benefits of a particular credit risk mitigant provided to the associated securitization or that supports some or all of the underlying exposures, could not use the credit risk mitigation rules to further reduce its risk-based capital requirement for the exposure based on the credit risk mitigant. For example, a banking organization that owns an AAA-rated asset-backed security that benefits, along with all the other securities issued by the securitization SPE, from an insurance wrap that is part of the securitization transaction would calculate its risk-based capital requirement for the security strictly using the RBA. No additional credit would be given for the presence of the insurance wrap. In contrast, if a banking organization owns a BBB-rated asset-backed security and obtains a credit default swap from a AAA-rated counterparty to protect the banking organization from losses on the security, the banking organization would be able to apply the securitization CRM rules to recognize the risk mitigating effects of the credit default swap and determine the risk-based capital requirement for the position.

For purposes of this section, a banking organization may only recognize an eligible guarantee or eligible credit derivative from an eligible guarantor if the guarantor: (i) Is a sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, a Federal Home Loan Bank, Farmer Mac, an MDB, a depository institution, a foreign bank, a credit union, a bank holding company, or a savings and loan holding company; or (ii) has issued and has outstanding an unsecured long-term debt security without credit enhancement that has a long-term applicable external rating in one of the three highest investment grade rating categories.

With respect to eligible guarantees and credit derivatives, in the context of a synthetic securitization, when an eligible guarantee or eligible credit derivative covers multiple hedged exposures that have different residual maturities, the banking organization must use the longest residual maturity of any of the hedged exposures as the residual maturity of all the hedged exposures.

(a) Nth-to-Default Credit Derivatives

Credit derivatives that provide credit protection only for the nth defaulting reference exposure in a group of reference exposures (nth-to-default credit derivatives) are similar to synthetic securitizations that provide credit protection only after the first-loss tranche has defaulted or become a loss. A simplified treatment would be available to banking organizations that purchase and provide such credit protection. A banking organization that obtains credit protection on a group of underlying exposures through a first-to-default credit derivative would determine its risk-based capital requirement for the underlying exposures as if the banking organization had synthetically securitized only the underlying exposure with the lowest capital requirement and had obtained no credit risk mitigant on the other (higher capital requirement) underlying exposures. If the banking organization purchased credit protection on a group of underlying exposures through an nth-to-default credit derivative (other than a first-to-default credit derivative), it would only recognize the credit protection for risk-based capital purposes either if it had obtained credit protection on the same underlying exposures in the form of first-through-(n-1)-to-default credit derivatives, or if n-1 of the underlying exposures have already defaulted. In such a case, the banking organization would determine its risk-based capital requirement for the underlying exposures as if the banking organization had only synthetically securitized the n-1 underlying exposures with the lowest capital requirement and had obtained no credit risk mitigant on the other underlying exposures.

A banking organization that provides credit protection on a group of underlying exposures through a first-to-default credit derivative would determine its risk-weighted asset amount for the derivative by applying the risk weights in Table 13 or 14 (if the derivative qualifies for the RBA) or, by setting its risk-weighted asset amount

[52] Interagency guidance on assessing whether a banking organization's internal risk rating system used in measuring risk exposures in ABCP programs is adequate and reasonably corresponds to the NRSRO's rating categories is set forth in ''Interagency Guidance on assisting in the determination of the appropriate risk-based capital treatment to be applied to direct credit substitutes issued in connection with asset-backed commercial paper programs.'' March 31, 2005. OCC Bulletin 2005–12 (OCC); SR 05–6 (Board); FIL–26–2005 (FDIC); and CEO Letter #217, dated April 1, 2005 (OTS).

for the derivative equal to the product of (i) the protection amount of the derivative; and (ii) the sum of the risk weights of the individual underlying exposures, up to a maximum of 1,250 percent.

If a banking organization provides credit protection on a group of underlying exposures through an nth-to-default credit derivative (other than a first-to-default credit derivative), the banking organization would determine its risk-weighted asset amount for the derivative by applying the risk weights in Table 13 or 14 (if the derivative qualifies for the RBA) or, by setting the risk-weighted asset amount for the derivative equal to the product of (i) the protection amount of the derivative and (ii) the sum of the risk weights of the individual underlying exposures (excluding the n-1 underlying exposures with the lowest risk-based capital requirements), up to a maximum of 1,250 percent.

For example, a banking organization provides credit protection in the form of a second-to-default credit derivative on a basket of five reference exposures. The derivative is unrated and the protection amount of the derivative is $100. The risk weights for the underlying exposures are 20 percent, 50 percent, 100 percent, 100 percent, and 150 percent. The risk-weighted asset amount of the derivative would be $100 × (50% + 100% + 100% + 150%) or $400. If the derivative were externally rated one category below investment grade, the risk-weighted asset amount would be $100 × 350% or $350.

(7) Risk-Weighted Assets for Early Amortization Provisions

Many securitizations of revolving credit facilities (for example, credit card receivables) contain provisions that require the securitization to wind down and repay investors if the excess spread falls below a certain threshold.[53] This decrease in excess spread may, in some cases, be caused by deterioration in the credit quality of the underlying exposures. An early amortization event can increase a banking organization's capital needs if the banking organization would have to finance new draws on the revolving credit facilities with on-balance sheet sources of funding. The payment allocations a banking organization uses to distribute principal and finance charge collections during the amortization phase of these transactions also can expose it to greater risk of loss than in other securitization transactions. Consistent with the New Accord, this NPR includes a risk-based capital requirement that, in general, is linked to the likelihood of an early amortization event to address the risks that early amortization of a securitization poses to originating banking organizations.

The proposed rule defines an early amortization as a provision in a securitization's governing documentation that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposure, unless the provision is triggered solely by events not related to the performance of the underlying exposures or the originating banking organization (for example, material changes in tax laws or regulations) or leaves investors exposed to future draws by obligors on the underlying exposures even after the provision is triggered.

Under the NPR, an originating banking organization would hold regulatory capital against its own interest and the investors' interest in a securitization that (i) includes one or more underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed line of credit, and (ii) contains an early amortization provision. Investors' interest means, with respect to a securitization, the exposure amount of the underlying exposures multiplied by the ratio of (i) the total amount of securitization exposures issued by the securitization special purpose entity (SPE); divided by (ii) the outstanding principal amount of the underlying exposures. A banking organization would compute the risk-weighted asset amount for its interest using the hierarchy of approaches for securitization exposures described above. An originating banking organization would calculate the risk-weighted asset amount for the investors' interest in the securitization as the product of (i) the investors' interest, (ii) the appropriate conversion factor (CF), (iii) the weighted-average risk weight that would apply under this NPR to the underlying exposure type if the underlying exposures had not been securitized, and (iv) the proportion of the underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit.

The CF would differ according to whether the securitized exposures are revolving retail credit facilities (for example, credit card receivables) or other revolving credit facilities (for example, revolving corporate credit facilities) and whether the early amortization provision is controlled or non-controlled; and whether the line is committed or uncommitted. A line would qualify as uncommitted if it were unconditionally cancelable to the extent permitted under applicable law.

(a) Controlled Early Amortization

Under the proposed rule, a controlled early amortization provision would have to meet each of the following conditions: (i) The originating banking organization has appropriate policies and procedures to ensure that it has sufficient capital and liquidity available in the event of an early amortization; (ii) throughout the duration of the securitization (including the early amortization period) there is the same pro rata sharing of interest, principal, expenses, losses, fees, recoveries, and other cash flows from the underlying exposures, based on the originating banking organizations' and the investors' relative shares of the underlying exposures outstanding measured on a consistent monthly basis; (iii) the amortization period is sufficient for at least 90 percent of the total underlying exposures outstanding at the beginning of the early amortization period to have been repaid or recognized as in default; and (iv) the schedule for repayment of investor principal is not more rapid than would be allowed by straight-line amortization over an 18-month period. An early amortization provision that does not meet any of the above criteria would be a ''non-controlled'' early amortization provision.

To calculate the appropriate CF for a securitization of uncommitted revolving retail exposures that contains a controlled early amortization provision, a banking organization would compare the three-month average annualized excess spread for the securitization to the point at which the banking organization has to trap excess spread under the securitization transaction. In securitizations that do not require trapping of excess spread, or that specify a trapping point based primarily on performance measures other than the three-month average annualized excess spread, the excess spread trapping point would be 4.5 percent. The banking organization would divide the three-month average excess spread level by the excess spread trapping point and apply the appropriate CF from Table 15.

A banking organization would apply a 90 percent CF for all other revolving

[53] The NPR defines excess spread for a period as gross finance charge collections (including market interchange fees) and other income received by the SPE over the period minus interest paid to holders of securitization exposures, servicing fees, charge-offs, and other senior trust similar expenses of the SPE over the period, all divided by the principal balance of the underlying exposures at the end of the period.

underlying exposures (that is, committed exposures and non-retail exposures) in securitizations with a controlled early amortization provision. The proposed CFs for uncommitted revolving retail credit lines are much lower than for committed retail credit lines or for non-retail credit lines because banking organizations have demonstrated the ability to monitor and, when appropriate, to curtail uncommitted retail credit lines promptly when a customer's credit quality deteriorates. Such account management tools are unavailable for committed lines, and banking organizations may be less proactive about using such tools in the case of uncommitted non-retail credit lines owing to lender liability concerns and the prominence of broad-based, longer-term customer relationships.

TABLE 15.—CONVERSION FACTORS FOR CONTROLLED EARLY AMORTIZATION

| 3-month average excess spread | Uncommitted CF (in percent) | Committed CF (in percent) |
|---|---|---|
| Retail Credit Lines: | | |
| Greater than or equal to 133.33% of trapping point | 0 | 90 |
| Less than 133.33% to 100% of trapping point | 1 | ..... |
| Less than 100% to 75% of trapping point | 2 | ..... |
| Less than 75% to 50% of trapping point | 10 | ..... |
| Less than 50% to 25% of trapping point | 20 | ..... |
| Less than 25% of trapping point | 40 | ..... |
| Non-retail credit lines | 90 | 90 |

(b) Non-Controlled Early Amortization

To calculate the appropriate CF for securitizations of uncommitted revolving retail exposures that contain a non-controlled early amortization provision, a banking organization would have to perform the excess spread calculations described in the controlled early amortization section above and then apply the CFs in Table 16.

A banking organization would use a 100 percent CF for all other revolving underlying exposures (that is, committed exposures and non-retail exposures) in securitizations with a non-controlled early amortization provision. In other words, no risk transference would be recognized for these transactions.

Where a securitization contains a mix of retail and non-retail exposures or a mix of committed and uncommitted exposures, a banking organization could take a pro-rata approach to determining the risk-based capital requirement for the securitization's early amortization provision. If a pro-rata approach were not feasible, a banking organization would treat a securitization with an underlying exposure that is non-retail as a securitization of non-retail exposures and would treat the securitization as a securitization of committed exposures if a single underlying exposure is a committed exposure.

TABLE 16.—CONVERSION FACTORS FOR NON-CONTROLLED EARLY AMORTIZATION

| 3-month average excess spread | Uncommitted CF (in percent) | Committed CF (in percent) |
|---|---|---|
| Retail Credit Lines: | | |
| Greater than or equal to 133.33% of trapping point | 0 | 100 |
| Less than 133.33% to 100% of trapping point | 5 | ..... |
| Less than 100% to 75% of trapping point | 15 | ..... |
| Less than 75% to 50% of trapping point | 50 | ..... |
| Less than 50% of trapping point | 100 | ..... |
| Non-retail credit lines | 100 | 100 |

(c) Revolving Residential Mortgage Exposures

Unlike credit card securitizations, HELOC securitizations in the United States typically do not generate material excess spread and typically are structured with credit enhancements and early amortization triggers based on other factors, such as portfolio loss rates. Under the New Accord, a banking organization would have to hold capital against the potential early amortization of most U.S. HELOC securitizations at their inception, rather than only if the credit quality of the underlying exposures deteriorated. Although the securitization framework in the New Accord does not provide an alternative methodology in such cases, the agencies have concluded that the features of the U.S. HELOC securitization market would warrant an alternative approach. Accordingly, the proposed rule allows a banking organization the option of applying either (i) the CFs in Tables 15 and 16, as appropriate, or (ii) a fixed CF of 10 percent to its securitizations for which all or substantially all of the underlying exposures are revolving residential mortgage exposures. If a banking organization chooses the fixed CF of 10 percent, it would have to use that CF for all securitizations for which all or substantially all of the underlying exposures are revolving residential mortgage exposures.

(8) Maximum Capital Requirement

The total capital requirement for a banking organization's exposures to a single securitization with an early amortization provision is subject to a maximum capital requirement equal to the greater of (i) the capital requirement for the retained securitization exposures or (ii) the capital requirement for the underlying exposures that would apply if the banking organization directly held the underlying exposures on its balance sheet.

*N. Equity Exposures*

(1) Introduction and Exposure Measurement

Under the FDIC, OCC, and Board's general risk-based capital rules, a banking organization must deduct a portion of non-financial equity investments from tier 1 capital. This deduction depends upon the aggregate adjusted carrying value of all non-financial equity investments held directly or indirectly by the banking organization as a percentage of its tier 1 capital. By contrast, OTS rules require the deduction of most equity securities from total capital.[54]

Under this proposed rule, a banking organization would use the simple risk-weight approach (SRWA) for equity exposures that are not exposures to an investment fund. This approach is consistent with the SRWA for equity exposures and investment fund approach provided in the advanced approaches final rule. A banking organization could use the various look-through approaches for equity exposures to an investment fund.

This NPR defines an equity exposure as:

(i) A security or instrument (whether voting or non-voting) that represents a direct or indirect ownership interest in, and is a residual claim on, the assets and income of a company, unless:

(a) The issuing company is consolidated with the banking organization under GAAP;

(b) The banking organization is required to deduct the ownership interest from tier 1 or tier 2 capital under this appendix;

(c) The ownership interest incorporates a payment or other similar obligation on the part of the issuing company (such as an obligation to make periodic payments); or

(d) The ownership interest is a securitization exposure;

(ii) A security or instrument that is mandatorily convertible into a security or instrument described in paragraph (i) of this definition;

(iii) An option or warrant that is exercisable for a security or instrument described in paragraph (i) of this definition; or

(iv) Any other security or instrument (other than a securitization exposure) to the extent the return on the security or instrument is based on the performance of a security or instrument described in paragraph (i) of this definition.

Under the proposed SRWA, a banking organization generally would assign a 300 percent risk weight to publicly traded equity exposures, a 400 percent risk weight to non-publicly traded equity exposures, and a 600 percent risk weight to certain equity exposures to investment firms as described below. Certain equity exposures to sovereign entities, supranational entities, MDBs, PSEs, and others would have a risk weight of zero percent, 20 percent, or 100 percent; and certain community development equity exposures, the effective portion of hedged pairs, and, up to certain limits, non-significant equity exposures would receive a 100 percent risk weight.

The proposed rule defines publicly traded to mean traded on: (i) Any exchange registered with the SEC as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f); or (ii) any non-U.S.-based securities exchange that is registered with, or approved by, a national securities regulatory authority and that provides a liquid, two-way market for the exposure (that is, there are enough independent bona fide offers to buy and sell so that a sales price is reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined promptly and a trade can be settled at such a price within five business days).

A banking organization using the SRWA would determine the adjusted carrying value for each equity exposure. The proposed rule defines the adjusted carrying value of an equity exposure as: (i) For the on-balance sheet component of an equity exposure, the banking organization's carrying value of the exposure reduced by any unrealized gains on the exposure that are reflected in such carrying value but excluded from the banking organization's tier 1 and tier 2 capital;[55] and (ii) for the off-balance sheet component of an equity exposure that is not an equity commitment, the effective notional principal amount of the exposure, the size of which is equivalent to a hypothetical on-balance sheet position in the underlying equity instrument that would evidence the same change in fair value (measured in dollars) for a given small change in the price of the underlying equity instrument, minus the adjusted carrying value of the on-balance sheet component of the exposure as calculated above in (i).

For an unfunded equity commitment that is unconditional, the adjusted carrying value is the effective notional principal multiplied by a 100 percent conversion factor. If the unfunded equity commitment is conditional, the adjusted carrying value is the effective notional principal amount of the commitment multiplied by a 20 percent conversion factor for a commitment with a maturity of one year or less or multiplied by a 50 percent conversion factor to the effective notional principal amount for a commitment with a maturity of over one year.

The agencies created the concept of the effective notional principal amount of the off-balance sheet portion of an equity exposure to provide a uniform method for banking organizations to measure the on-balance sheet equivalent of an off-balance sheet exposure. For example, if the value of a derivative contract referencing the common stock of company X changes the same amount as the value of 150 shares of common stock of company X, for a small (for example, 1.0 percent) change in the value of the common stock of company X, the effective notional principal amount of the derivative contract is the current value of 150 shares of common stock of company X regardless of the number of shares the derivative contract references. The adjusted carrying value of the off-balance sheet component of the derivative is the current value of 150 shares of common stock of company X minus the adjusted carrying value of any on-balance sheet amount associated with the derivative.

(2) Hedge Transactions

The agencies are proposing specific rules for recognizing hedged equity exposures. For purposes of determining risk-weighted assets under the SRWA, a banking organization may identify hedge pairs, which would be defined as two equity exposures that form an effective hedge provided each equity exposure is publicly traded or has a return that is primarily based on a publicly traded equity exposure. A banking organization may risk weight only the effective and ineffective portions of a hedge pair rather than the entire adjusted carrying value of each exposure that makes up the pair. Two equity exposures form an effective hedge if the exposures either have the same remaining maturity or each has a remaining maturity of at least three months; the hedge relationship is documented formally before the banking organization acquires at least one of the equity exposures; the documentation specifies the measure of effectiveness (E) (defined below) the banking organization would use for the hedge relationship throughout the life of the transaction; and the hedge relationship

[54] See preamble discussion at section II.E.

[55] The potential downward adjustment to the carrying value of an equity exposure reflects the fact that 100 percent of the unrealized gains on available-for-sale equity exposures are included in carrying value but only up to 45 percent of any such unrealized gains are included in regulatory capital.

has an E greater than or equal to 0.8. A banking organization would measure E at least quarterly and would use one of three alternative measures of E: The dollar-offset method, the variability-reduction method, or the regression method.

It is possible that only part of a banking organization's exposure to a particular equity instrument is part of a hedge pair. For example, assume a banking organization has an equity exposure A with a $300 adjusted carrying value and chooses to hedge a portion of that exposure with an equity exposure B with an adjusted carrying value of $100. Also assume that the combination of equity exposure B and $100 of the adjusted carrying value of equity exposure A form an effective hedge with an E of 0.8. In this situation the banking organization would treat $100 of equity exposure A and $100 of equity exposure B as a hedge pair, and the remaining $200 of its equity exposure A as a separate, stand-alone equity position.

The effective portion of a hedge pair would be E multiplied by the greater of the adjusted carrying values of the equity exposures forming the hedge pair, and the ineffective portion would be (1–E) multiplied by the greater of the adjusted carrying values of the equity exposures forming the hedge pair. In the above example, the effective portion of the hedge pair would be $0.8 \times \$100 = \$80$ and the ineffective portion of the hedge pair would be $(1 - 0.8) \times \$100 = \$20$.

(3) Measures of Hedge Effectiveness

Under the dollar-offset method of measuring effectiveness, the banking organization would determine the ratio of the cumulative sum of the periodic changes in the value of one equity exposure to the cumulative sum of the periodic changes in the value of the other equity exposure, termed the ratio of value change (RVC). If the changes in the values of the two exposures perfectly offset each other, the RVC would be $-1.0$. If RVC is positive, implying that the values of the two equity exposures move in the same direction, the hedge is not effective and E = 0. If RVC is negative and greater than or equal to $-1.0$ (that is, between zero and $-1.0$), then E would equal the absolute value of RVC. If RVC is negative and less than $-1.0$, then E would equal 2.0 plus RVC.

The variability-reduction method of measuring effectiveness compares changes in the value of the combined position of the two equity exposures in the hedge pair (labeled X) to changes in the value of one exposure as though that one exposure were not hedged (labeled A). This measure of E expresses the time-series variability in X as a proportion of the variability of A. As the variability described by the numerator becomes small relative to the variability described by the denominator, the measure of effectiveness improves, but is bounded from above by a value of one. E would be computed as:

$$E = 1 - \frac{\sum_{t=1}^{T} \left( X_t - X_{t-1} \right)^2}{\sum_{t=1}^{T} \left( A_t - \mathrm{A}_{t-1} \right)^2},$$

Where:

$X_t = A_t - B_t$

$A_t$ = the value at time t of the one exposure in a hedge pair, and

$B_t$ = the value at time t of the other exposure in the hedge pair.

The value of t would range from zero to T, where T is the length of the observation period for the values of A and B, and is comprised of shorter values each labeled t.

The regression method of measuring effectiveness is based on a regression in which the change in value of one exposure in a hedge pair is the dependent variable and the change in value of the other exposure in the hedge pair is the independent variable. E would equal the coefficient of determination of this regression, which is the proportion of the variation in the dependent variable explained by variation in the independent variable. However, if the estimated regression coefficient is positive, then the value of E is zero. The closer the relationship between the values of the two exposures, the higher E will be.

(4) Simple Risk-Weight Approach (SRWA)

Under the SRWA, a banking organization would determine the risk-weighted asset amount for each equity exposure, other than an equity exposure to an investment fund, by multiplying the adjusted carrying value of the equity exposure, or the effective portion and ineffective portion of a hedge pair as described above, by the lowest applicable risk weight in Table 17. A banking organization would determine the risk-weighted asset amount for an equity exposure to an investment fund under section 52 of the proposed rule.

The banking organization's aggregate risk-weighted asset amount for its equity exposures (other than equity exposures to investment funds) would be equal to the sum of the risk-weighted asset amounts for each of the banking organization's individual equity exposures.

(5) Non-Significant Equity Exposures

Under the SRWA, a banking organization may apply a 100 percent risk weight to non-significant equity exposures. The proposed rule defines non-significant equity exposures as equity exposures [56] to the extent that the aggregate adjusted carrying value of the exposures does not exceed 10 percent of the banking organization's tier 1 capital plus tier 2 capital.

When computing the aggregate adjusted carrying value of a banking organization's equity exposures for determining non-significance, the banking organization may exclude (i) equity exposures that receive less than a 300 percent risk weight under the SRWA (other than equity exposures determined to be non-significant); (ii) the equity exposure in a hedge pair with the smaller adjusted carrying value; and (iii) a proportion of each equity exposure to an investment fund equal to the proportion of the assets of the investment fund that are not equity exposures or that qualify as community development equity exposures. If a banking organization does not know the actual holdings of the investment fund, the banking organization may calculate the proportion of the assets of the fund that are not equity exposures based on the terms of the prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. If the sum of the investment limits for all exposure classes within the fund exceeds 100 percent, the banking organization would assume that the investment fund invests to the maximum extent possible in equity exposures.

When determining which of a banking organization's equity exposures qualify for a 100 percent risk weight based on non-significance, a banking organization first would include equity exposures to unconsolidated small business investment companies, or those held through consolidated small business investment companies described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682), then would include publicly traded equity exposures (including those held indirectly through investment funds), and then would include non-publicly traded equity exposures (including those held indirectly through investment funds).

[56] Excluding exposures to an investment firm that would meet the definition of traditional securitization were it not for the primary Federal supervisor's application of paragraph (8) of that definition and has greater than immaterial leverage.

As discussed above in the Securitization section of this NPR, the agencies would have discretion under the proposed rule to exclude from the definition of a traditional securitization those investment firms that exercise substantially unfettered control over the size and composition of their assets, liabilities, and off-balance sheet exposures. Equity exposures to investment firms that would otherwise be a traditional securitization were it not for the specific agency exclusion are leveraged exposures to the underlying financial assets of the investment firm. The agencies believe that equity exposure to such firms with greater than immaterial leverage warrant a 600 percent risk weight under the SRWA, due to their particularly high risk. Moreover, the agencies believe that the 100 percent risk weight assigned to non-significant equity exposures is inappropriate for equity exposures to investment firms with greater than immaterial leverage.

The SRWA is summarized in Table 17:

TABLE 17.—SIMPLE RISK-WEIGHT APPROACH

| Risk weight (in percent) | Equity exposure |
|---|---|
| 0 | An equity exposure to a sovereign entity, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, a MDB, a PSE, and any other entity whose credit exposures receive a zero percent risk weight under section 33 of this proposed rule that may be assigned a zero percent risk weight. |
| 20 | An equity exposure to a Federal Home Loan Bank or Farmer Mac. |
| 100 | • Community development equity exposures.[57]<br>• The effective portion of a hedge pair.<br>• Non-significant equity exposures to the extent less than 10 percent of tier 1 plus tier 2 capital. |
| 300 | A publicly traded equity exposure (other than an equity exposure that receives a 600 percent risk weight and including the ineffective portion of a hedge pair). |
| 400 | An equity exposure that is not publicly traded (other than an equity exposure that receives a 600 percent risk weight). |
| 600 | An equity exposure to an investment firm that (1) would meet the definition of a traditional securitization were it not for the primary Federal supervisor's application of paragraph (8) of that definition and (2) has greater than immaterial leverage. |

(6) Equity Exposures to Investment Funds

Under the agencies' general risk-based capital rules, exposures to investments funds are captured through one of two methods. These methods are similar to the alternative modified look-through approach and the simple modified look-through approach described below. The agencies propose two additional options in this NPR, the full look-through approach and money market fund approach.

The agencies are proposing a separate treatment for equity exposures to an investment fund to prevent banks from arbitraging the proposed rule's risk-based capital requirements for certain high-risk exposures and to ensure that banking organizations do not receive a punitive risk-based capital requirement for equity exposures to investment funds that hold only low-risk assets. Under this proposal, the agencies would define an investment fund as a company (i) all or substantially all of the assets of which are financial assets and (ii) that has no material liabilities. As proposed, a banking organization would determine the risk-weighted asset amount for equity exposures to investment funds using one of four approaches: The full look-through approach, the simple modified look-through approach, the alternative modified look-through approach, or for qualifying investment funds, the money market fund approach, unless the equity exposure to an investment fund is a community development equity exposure. Such community development equity exposures would be subject to a 100 percent risk weight. If an equity exposure to an investment fund is part of a hedge pair, a banking organization could use the ineffective portion of the hedge pair as the adjusted carrying value for the equity exposure to the investment fund. The risk-weighted asset amount of the effective portion of the hedge pair would be equal to its adjusted carrying value. A banking organization could choose to apply a different approach among the four alternatives to different equity exposures to investment funds.

(7) Full Look-Through Approach

A banking organization may use the full look-through approach only if the banking organization is able to compute a risk-weighted asset amount for each of the exposures held by the investment fund. Under the proposed rule, a banking organization would be required to calculate the risk-weighted asset amount for each of the exposures held by the investment fund as if the exposures were held directly by the banking organization. Depending on the exposure type, a banking organization would apply the appropriate proposed rule treatment to an equity exposure to an investment fund. The banking organization's risk-weighted asset amount for the fund would be equal to the total risk-weighted amount for the exposures held by the fund multiplied by the banking organization's proportional interest in the fund.

(8) Simple Modified Look-Through Approach

Under the proposed simple modified look-through approach, a banking organization would set the risk-weighted asset amount for its equity exposure to an investment fund equal to the adjusted carrying value of the equity exposure multiplied by the highest risk weight that applies to any exposure the fund is permitted to hold under its prospectus, partnership agreement, or similar contract that defines the fund's

[57] The proposed rule generally defines these exposures as exposures that would qualify as community development investments under 12 U.S.C. 24 (Eleventh), excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682). For savings associations, community development investments would be defined to mean equity investments that are designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or jobs, and excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

permissible investments. The banking organization could exclude derivative contracts held by the fund that are used for hedging, not speculative purposes, and do not constitute a material portion of the fund's exposures.

(9) Alternative Modified Look-Through Approach

Under this approach, a banking organization may assign the adjusted carrying value of an equity exposure to an investment fund on a pro rata basis to risk-weight categories based on the investment limits in the fund's prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. The risk-weighted amount for the banking organization's equity exposure to the investment fund would be equal to the sum of each portion of the adjusted carrying value assigned to an exposure class multiplied by the applicable risk weight. If the sum of the investment limits for all exposure classes within the fund exceeds 100 percent, the banking organization must assume that the fund invests to the maximum extent permitted under its investment limits in the exposure class with the highest risk weight in this proposed rule, and continues to make investments in the order of the exposure class with the next highest risk weight until the maximum total investment level is reached. If more than one exposure class applies to an exposure, the banking organization would use the highest applicable risk weight. A banking organization could exclude derivative contracts held by the fund that are used for hedging, not speculative, purposes and do not constitute a material portion of the fund's exposures.

(10) Money Market Fund Approach

Under this proposed rule, a banking organization may apply a seven percent risk weight to an equity exposure to a money market fund that is subject to SEC rule 2a–7 and that has an applicable external rating in the highest investment-grade category.

*O. Operational Risk*

(1) Basic Indicator Approach (BIA)

The general risk-based capital rules do not include an explicit capital charge for operational risk. Rather, the general risk-based capital rules were designed to focus on credit risk. However, due to their broad-brush nature, the rules implicitly cover other types of risks such as operational risk. The more risk-sensitive treatment under the standardized approach for credit risk sharpens the capital measure for that element of the risk-based capital charge and lessens the implicit capital buffer for other risks.

The agencies recognize that operational risk is an important risk and that a number of factors are driving increases in operational risk. These factors include greater use of automated technology; proliferation of new and highly complex products; growth of e-banking transactions and related business applications; large-scale acquisitions, mergers and consolidations; and greater use of outsourcing arrangements. These factors, and in light of the agencies' goal to promote improved risk measurement processes support the inclusion of an explicit capital requirement for operational risk for those institutions that adopt the proposed rule.

Consistent with the New Accord, the agencies propose to implement the BIA for determining a banking organization's risk-based capital requirement for operational risk. The operational risk capital requirement would cover the risk of loss resulting from inadequate or failed internal processes, people, and systems or from external events. Operational risk includes legal risk, which is the risk of loss (including litigation costs, settlements, and regulatory fines) resulting from the failure of the banking organization to comply with laws, regulations, prudent ethical standards, and contractual obligations in any aspect of the banking organization's business, but excludes strategic and reputational risks.

Under the BIA, a banking organization's risk-weighted assets for operational risk would equal 15 percent of its average positive annual gross income over the previous three years multiplied by 12.5. The calculation of average positive annual gross income is based on annual gross income as reported by the banking organization in its regulatory financial reports over the three most recent calendar years as discussed below. Gross income is a proxy for the scale of a banking organization's operational risk exposure and can, in some instances (for example, for a banking organization with low margins or profitability) underestimate the banking organization's capital needs for operational risk. Therefore, a banking organization using the BIA should manage its operational risk consistent with the Basel Committee's ''Sound Practices for the Management and Supervision of Operational Risk'' guidance, which includes a set of principles for the effective management of operational risk.[58]

The proposed rule defines average positive annual gross income as the sum of the banking organization's positive annual gross income, as described below, over the three most recent calendar years. This calculation would not include any amounts from any year in which annual gross income is negative or zero; that is, it is the sum of its positive annual gross income divided by the number of years in which its annual gross income was positive. Annual gross income would equal:

(i) For a bank, its net interest income plus its total noninterest income minus its underwriting income from insurance and reinsurance activities as reported on the bank's year-end Consolidated Reports of Condition and Income (Call Report).

(ii) For a bank holding company, its net interest income plus its total noninterest income minus its underwriting income from insurance and reinsurance activities as reported on the bank holding company's Consolidated Financial Statements for Bank Holding Companies (Y9–C Report).

(iii) For a savings association, its net interest income (expense) before provision for losses on interest-bearing assets, plus total noninterest income, minus the portion of its other fees and charges that represents income derived from insurance and reinsurance underwriting activities, minus (plus) its income (loss) from the sale of assets held-for-sale and available-for-sale securities to include only the profit or loss from the disposition of available-for-sale securities pursuant to FASB Statement No. 115, minus (plus) its income (loss) from the sale of securities held-to-maturity, all as reported on the savings association's year-end Thrift Financial Report (TFR).

[58] See the February 2003 BCBS publication entitled ''Sound Practices for the Management and Supervision of Operational Risk.''

Table 18 illustrates the relevant components of average positive annual gross income from regulatory reports.

TABLE 18.—CALCULATION OF GROSS INCOME FOR BIA

| For Bank FFIEC 031/041, BHC Y–9C, and TFR reporting | | | | Call report | Y–9C | TFR |
|---|---|---|---|---|---|---|
| Item No. | Item No. from Schedules RI and HI | Description | | RIAD | BHC K | SO |
| 1 | 3. | Net interest income | | 4074 | 4074 | SO312 |
| 2 | 5.m | Total noninterest income | + | 4079 | 4079 | SO42 |
| 3 | 5.d.(4) | Underwriting income from insurance and reinsurance activities. | – | C386 | C386 | n/a |
| 4 | n/a | Other fees and charges | – | n/a | n/a | [1] SO420 |
| 5 | n/a | Sale of assets held-for-sale and of available-for-sale securities. | – | n/a | n/a | [2] SO430 |
| 6 | n/a | Sale of securities held-to-maturity | – | n/a | n/a | SO467 |
| 7 | n/a | Gross income for BIA | | | | |

[1] Include only the portion of SO420 that represents income derived from insurance and reinsurance underwriting activities.
[2] Include only "profit or loss from the disposition of available-for-sale securities pursuant to FASB Statement No. 115" from SO430.

*Question 19: The agencies solicit comment on this proposed treatment of operational risk, and, in particular, on the appropriateness of the proposed average positive gross income calculation.*

(2) Advanced Measurement Approaches (AMA)

Under the AMA framework of the New Accord, a banking organization that meets the qualifying criteria for AMA would use its internal operational risk quantifications system to calculate its risk-based capital requirement for operational risk. The AMA framework is fully discussed in the advanced approaches final rule. The specific references in the advanced approaches final rule's preamble and common rule text are: (i) Preamble; [59] (ii) section 22(c) and certain other paragraphs in section 22 of the common rule text,[60] such as (a)(2) and (3), (i), (j), and (k), which discuss advanced systems in general and therefore would apply to AMA; (iii) sections 22(h), 61, and 62 of the common rule text; [61] (iv) applicable definitions in section 2 of the common rule text; [62] and (v) applicable disclosure requirements in Table 11.9 of the common rule text. [63]

Under the New Accord, the AMA option may be made available for banking organizations that apply any of the New Accord's approaches to credit risk. The agencies are considering whether to implement the AMA option in a standardized framework final rule consistent with the requirements in the advanced approaches final rule. Accordingly, the agencies would like to know whether any banking organizations that would be eligible to opt in to a standardized framework believe that they can meet the advance systems requirements that would qualify them to use the more complex AMA approach for calculating their risk-based capital requirement for operational risk.

*Question 20: The agencies therefore solicit comment on the appropriateness of including the AMA for calculating the risk-based capital requirement for operational risk in any final rule implementing the standardized framework and the extent to which banking organizations implementing the standardized approach believe they can meet the associated advanced modeling and systems requirements.*

*P. Supervisory Oversight and Internal Capital Adequacy Assessment*

One of the objectives of the New Accord is to provide incentives for banking organizations to develop and apply better techniques for measuring and managing risks and ensuring that capital is adequate to support those risks, not just to meet minimum regulatory capital requirements. Consistent with the agencies' general risk-based capital rules and Pillar 2 of the New Accord, the proposed rule would require a banking organization to hold capital that is commensurate with the level and nature of all risks to which the banking organization is exposed, and to have both a rigorous process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining appropriate capital levels.

Consistent with existing supervisory practice, a banking organization's primary Federal supervisor would evaluate a banking organization's compliance with the minimum capital requirements and also evaluate how well the banking organization is assessing its capital needs relative to its risks and capital goals. Also, consistent with existing supervisory practice, a primary Federal supervisor may require a banking organization under its jurisdiction to increase its capital levels or reduce its risk exposures if capital is deemed inadequate relative to a banking organization's risk profile.

*Q. Market Discipline*

(1) Overview

The general risk-based capital rules do not require disclosures beyond the filing of the risk-based capital section of the agencies' regulatory reports (that is, FR Y9–C, Call Reports, TFR, etc). The agencies, however, have long supported meaningful public disclosure by banking organizations to improve market discipline. The agencies recognize the importance of market discipline in encouraging sound risk management practices and fostering financial stability.

Pillar 3 of the New Accord, market discipline, complements the minimum capital requirements and the supervisory review process by encouraging market discipline through enhanced and meaningful public disclosure. These proposed public disclosure requirements are intended to allow market participants to assess key information about a banking organization's risk profile and its associated level of capital.

[59] See 72 FR 69302–21, 69382–84, and 69293–94 (December 7, 2007).
[60] Id. at 69407–08.
[61] Id. at 69407–08 and 69428–29.
[62] Id. at 69397–405.
[63] Id. at 69436.

With enhanced transparency, investors can better evaluate a banking organization's capital structure, risk exposures, and capital adequacy. With sufficient and relevant information, market participants can better evaluate a banking organization's risk management performance, earnings potential, and financial strength.

Improvements in public disclosures come not only from regulatory standards, but also through efforts by a banking organization's management to improve communications to public shareholders and other market participants. In this regard, improvements to risk management processes and internal reporting systems provide opportunities to improve significantly public disclosures over time. Accordingly, the agencies strongly encourage the management of each banking organization to review regularly its public disclosures and enhance these disclosures, where appropriate, to identify clearly all significant risk exposures, whether on- or off-balance sheet, and their effects on the banking organization's financial condition and performance, cash flow, and earnings potential.

(2) General Requirements

The proposed public disclosure requirements apply to the top-tier legal entity that is a banking organization within a consolidated banking group (that is, the top-tier banking organization). In general, a banking organization that is a subsidiary of a bank holding company (BHC) or another banking organization would not be subject to the disclosure requirements, except that every banking organization would have to disclose total and tier 1 capital ratios and their components, similar to current requirements. If a banking organization is not a subsidiary of a BHC or another banking organization that must make the full set of disclosures, the banking organization would have to make these disclosures.

A banking organization's exposure to risk and the techniques that it uses to identify, measure, monitor, and control those risks are important factors that market participants consider in their assessment of the institution. Accordingly, each banking organization that is subject to the disclosure requirements would have a formal disclosure policy approved by its board of directors that addresses the banking organization's approach for determining the disclosures it should make. The policy should address the associated internal controls and disclosure controls and procedures. The board of directors and senior management would have to ensure that appropriate review of the disclosures takes place and that effective internal controls and disclosure controls and procedures are maintained.

A banking organization should decide which disclosures are relevant for it based on a materiality concept. Information would be regarded as material if its omission or misstatement could change or influence the assessment or decision of a user relying on that information for the purpose of making investment decisions.

A banking organization may be able to fulfill some of the proposed disclosure requirements by relying on similar disclosures made in accordance with accounting standards or SEC mandates. In these situations, a banking organization must explain material differences between the accounting or other disclosures and the disclosures required under this proposed rule.

(3) Frequency/Timeliness

Consistent with longstanding requirements in the United States for robust quarterly disclosures in financial and regulatory reports, and considering the potential for rapid changes in risk profiles, this NPR would require that quantitative disclosures be made quarterly. However, qualitative disclosures that provide a general summary of a banking organization's risk management objectives and policies, reporting system, and definitions may be disclosed annually, provided any significant changes to these are disclosed in the interim. The disclosures must be timely, that is, made by the reporting deadline for financial reports (for example SEC forms 10–Q and 10–K) or 45 days after the calendar quarter-end. When these deadlines differ, the later deadline should be used.

In some cases, management may determine that a significant change has occurred, such that the most recent reported amounts do not reflect the banking organization's capital adequacy and risk profile. In those cases, a banking organization would have to disclose the general nature of these changes and briefly describe how they are likely to affect public disclosures going forward. A banking organization would make these interim disclosures as soon as practicable after the determination that a significant change has occurred.

(4) Location of Disclosures and Audit/Certification Requirements

The disclosures would have to be publicly available (for example, included on a public Web site) for each of the last three years or such shorter time period since the banking organization opted into the standardized framework. Except as discussed below, management would have some discretion to determine the appropriate medium and location of the disclosure. Furthermore, a banking organization would have flexibility in formatting its public disclosures.

The agencies encourage management to provide all of the required disclosures in one place on the entity's public Web site. The public Web site address would be reported in a regulatory report. Alternatively, banking organizations would be permitted to provide the disclosures in more than one place, as some of them may be included in public financial reports (for example, in Management's Discussion and Analysis included in SEC filings) or other regulatory reports. The agencies would encourage such banking organizations to provide a summary table on their public Web site that specifically indicates where all the disclosures may be found (for example, regulatory report schedules, pages numbers in annual reports).

Disclosures of tier 1 and total capital ratios would be tested by external auditors as part of the financial statement audit, if the banking organization is required to obtain financial statement audits. Disclosures that are not included in the footnotes to the audited financial statements are not subject to external audit reports for financial statements or internal control reports from management and the external auditor. Due to the importance of reliable disclosures, the agencies would require one or more senior officers to attest that the disclosures would meet the proposed disclosure requirements. The senior officer may be the chief financial officer, the chief risk officer, an equivalent senior officer, or a combination thereof.

(5) Proprietary and Confidential Information

The agencies believe that the proposed requirements strike an appropriate balance between the need for meaningful disclosure and the protection of proprietary and confidential information.[64] Accordingly, the agencies believe that banking organizations would be able to provide

[64] Proprietary information encompasses information that, if shared with competitors, would render a banking organization's investment in these products/systems less valuable, and, hence, could undermine its competitive position. Information about customers is often confidential, in that it is provided under the terms of a legal agreement or counterparty relationship.

all of these disclosures without revealing proprietary and confidential information. Only in rare circumstances might disclosure of certain items of information required by the proposed rule compel a banking organization to reveal confidential and proprietary information. In these unusual situations, the agencies propose that if a banking organization believes that disclosure of specific commercial or financial information would prejudice seriously the position of the banking organization by making public information that is either proprietary or confidential in nature, the banking organization need not disclose those specific items. Instead, the banking organization must disclose more general information about the subject matter of the requirement, together with the fact that, and the reason why, the specific items of information have not been disclosed. This provision would apply only to those disclosures included in this NPR and does not apply to disclosure requirements imposed by accounting standards or other regulatory agencies.

*Question 21: The agencies seek commenters' views on all of the elements of the proposed public disclosure requirements. In particular, the agencies seek comment on the extent to which the proposed disclosures balance providing market participants with sufficient information to appropriately assess the risk profile and capital strength of individual institutions, fostering comparability across banking organizations, and minimizing burden on the banking organizations that are reporting the information. The agencies further request comment on whether certain banking organizations (for example, those not publicly listed or not required to have audited financial statements) should be exempt or have more limited disclosure requirements and, if so, how to preserve competitive equity with banking organizations required to make a full set of disclosures.*

(6) Summary of Specific Public Disclosure Requirements

The public disclosure requirements described in the tables in the proposed rule provide important information to market participants on the scope of application, capital, risk exposures, risk assessment processes, and, hence, the capital adequacy of the banking organization. The table numbers below refer to the table numbers in the proposed rule. For each separate risk area described in Table 15.4 through 15.10, the banking organization would be required to describe its risk management objectives and policies. The agencies expect that these objectives and policies would include: (i) Strategies and processes; (ii) the structure and organization of the relevant risk management function; (iii) the scope and nature of risk reporting and/or measurement systems; and (iv) policies for hedging and/or mitigating risk and strategies and processes for monitoring the continuing effectiveness of hedges/mitigants.

A banking organization should focus on the substantive content of the tables, not the tables themselves. The proposed disclosures are:

- Table 15.1, Scope of Application, would include a description of the level in the banking organization to which the disclosures apply and an outline of any differences in consolidation for accounting and regulatory capital purposes, as well as a description of any restrictions on the transfer of funds and capital within the banking organization. These disclosures provide the basic context underlying regulatory capital calculations.
- Table 15.2, Capital Structure, would provide information on various components of regulatory capital available to absorb losses and allow for an evaluation of the quality of the capital available to absorb losses within the banking organization.
- Table 15.3, Capital Adequacy, would provide information about how a banking organization assesses the adequacy of its capital and set requirements that the banking organization disclose its risk-weighted asset amounts for various asset categories. The table also requires disclosure of the regulatory capital ratios of the consolidated group and each DI subsidiary. Such disclosures provide insight into the overall adequacy of capital based on the risk profile of the banking organization.
- Tables 15.4 and 15.6, Credit Risk, would provide information for different types and concentrations of a banking organization's exposure to credit risk and the techniques the banking organization uses to measure, monitor, and mitigate that risk.
- Table 15.5, General Disclosures for Counterparty Credit Risk-Related Exposures, would provide information related to counterparty credit risk-related exposures.
- Table 15.7, Securitization, would provide information to market participants on the amount of credit risk transferred and retained by the banking organization through securitization transactions and the types of products securitized by the organization. These disclosures provide users a better understanding of how securitization transactions impact the credit risk of the banking organization.
- Table 15.8, Operational Risk, would provide insight into the banking organization's operational risk exposure.
- Table 15.9, Equities Not Subject to the Market Risk Rule, would provide market participants with an understanding of the types of equity securities held by the banking organization and how they are valued. This disclosure also would provide information on the capital allocated to different equity products and the amount of unrealized gains and losses.
- Table 15.10, Interest Rate Risk in Non-Trading Activities, would provide information about the potential risk of loss that may result from changes in interest rates and how the banking organization measures such risk.

## III. Regulatory Analysis

### *A. Regulatory Flexibility Act Analysis*

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include banking organizations with assets less than or equal to $165 million) and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule. Pursuant to section 605(b) of the RFA, the agencies certify that this proposed rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed. The amendments to the agencies' regulations described above are elective. They will apply only to banking organizations that opt to take advantage of the proposed revisions to the existing domestic risk-based capital framework and that will not be required to use the advanced approaches contained in the advanced approaches final rule. The agencies believe that banking organizations that elect to adopt these proposals will generally be able to do so with data they currently use as part of their credit approval and portfolio management processes. Banking organizations not exercising this option would remain subject to the current capital framework. The proposal does not impose any new mandatory requirements or burdens. Moreover, industry groups representing small banking organizations that commented on the Basel IA NPR noted that small banking organizations typically hold

more capital than is required by the capital rules and would prefer to remain under the general risk-based capital rules. For these reasons, the proposal will not result in a significant economic impact on a substantial number of small entities.

*B. OCC Executive Order 12866 Determination*

Executive Order 12866 requires federal agencies to prepare a regulatory impact analysis for agency actions that are found to be ''significant regulatory actions''. Significant regulatory actions include, among other things, rulemakings that ''have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.'' [65] Regulatory actions that satisfy one or more of these criteria are referred to as ''economically significant regulatory actions.''

Based on the OCC's estimate of the number of national banks likely to adopt this proposal and the proposal's total cost of approximately $74 million, the proposed rule would not have an annual effect on the economy of $100 million or more. In light of certain unique features of the proposal, the OCC has nevertheless prepared this regulatory impact analysis. Specifically, this proposal affords most national banks the option to apply this approach, which results in additional uncertainty in estimating the total costs.

In conducting the regulatory analysis for an economically significant regulatory action, Executive Order 12866 requires each federal agency to provide to the Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA):

- The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need;
- An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with state, local, and tribal governments in the exercise of their governmental functions;
- An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
- An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

Set forth below is a summary of the OCC's regulatory impact analysis, which can be found in its entirety at *http://www.occ.treas.gov/law/basel.htm* under the link of ''Regulatory Impact Analysis for Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Standardized Risk-Based Capital Rules (Basel II: Standardized Option), Office of the Comptroller of the Currency, International and Economic Affairs (2008)''.

## I. The Need for the Regulatory Action

Federal banking law directs federal banking agencies, including the Office of the Comptroller of the Currency (OCC), to require banking organizations to hold adequate capital. The law authorizes federal banking agencies to set minimum capital levels to ensure that banking organizations maintain adequate capital. The law also gives federal banking agencies broad discretion with respect to capital regulation by authorizing them to also use any other methods that they deem appropriate to ensure capital adequacy.

Capital regulation seeks to address market failures that stem from several sources. Asymmetric information about the risk in a banking organization's portfolio creates a market failure by hindering the ability of creditors and outside monitors to discern a banking organization's actual risk and capital adequacy. Moral hazard creates market failure in which the banking organization's creditors fail to restrain the banking organization from taking excessive risks because deposit insurance either fully or partially protects them from losses. Public policy addresses these market failures because individual banks fail to adequately consider the positive externality or public benefit that adequate capital brings to financial markets and the economy as a whole.

Capital regulations cannot be static. Innovation in and transformation of financial markets require periodic reassessments of what may count as capital and what amount of capital is adequate. Continuing changes in financial markets create both a need and an opportunity to refine capital standards in banking. The proposed revisions to U.S. risk-based capital rules, ''Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Standardized Risk-Based Capital Rules'' (standardized option), which we address in this impact analysis, provide a new option for determining risk-based capital for banking organizations not required to operate under ''Risk-Based Capital Standards: Advanced Capital Adequacy Framework'' (advanced approaches). The standardized option and the advanced approaches reflect the implementation in the United States of the Basel Committee on Banking Supervision's ''International Convergence of Capital Measurement and Capital Standards: A Revised Framework'' (New Accord).

## II. Regulatory Background

The proposed capital regulation examined in this analysis would apply to commercial banks and savings associations (collectively, banks). Three banking agencies, the OCC, the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) regulate commercial banks, while the Office of Thrift Supervision (OTS) regulates all federally chartered and many state-chartered savings associations.

[65] Executive Order 12866 (September 30, 1993), 58 FR 51735 (October 4, 1993), as amended by Executive Order 13258, 67 FR 9385 (February 28, 2002) and by Executive Order 13422, 72 FR 2763 (January 23, 2007). For the complete text of the definition of ''significant regulatory action,'' see E.O. 12866 at § 3(f). A ''regulatory action'' is ''any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.'' E.O. 12866 at § 3(e).

Throughout this document, the four are jointly referred to as the federal banking agencies.

The New Accord comprises three mutually reinforcing ''pillars'' as summarized below.

1. Minimum Capital Requirements (Pillar 1)

The first pillar establishes a method for calculating minimum regulatory capital. It sets new requirements for assessing credit risk and operational risk while generally retaining the approach to market risk as developed in the 1996 amendments to the 1988 Accord.

The New Accord offers banks a choice of three methodologies for calculating the capital charge for credit risk. The first approach, called the standardized approach, essentially refines the risk-weighting framework of the 1988 Accord. The other two approaches are variations on an internal ratings-based (IRB) approach that leverages banks' internal credit-rating systems: A ''foundation'' methodology, whereby banks estimate the probability of borrower or obligor default, and an ''advanced'' approach, whereby organizations also supply other inputs needed for the capital calculation. In addition, the new framework uses more risk-sensitive methods for dealing with collateral, guarantees, credit derivatives, securitizations, and receivables.

The New Accord also introduces an explicit capital requirement for operational risk.[66] The New Accord offers banking organizations a choice of three methodologies for calculating their capital charge for operational risk. The first method, called the basic indicator approach, requires banks to hold capital for operational risk equal to 15 percent of annual gross income (averaged over the most recent three years). The second option, called the standardized approach, uses a formula that divides a banking organization's activities into eight business lines, calculates the capital charge for each business line as a fixed percentage of gross income (12 percent, 15 percent, or 18 percent depending on the nature of the business, again averaged over the most recent three years), and then sums across business lines. The third option, called the advanced measurement approaches (AMA), uses an institution's internal operational risk measurement system to determine the capital requirement.

[66] Operational risk is the risk of loss resulting from inadequate or failed processes, people, and systems or from external events. It includes legal risk but excludes strategic risk and reputation risk.

2. Supervisory Review Process (Pillar 2)

The second pillar calls upon banking organizations to have an internal capital assessment process and banking supervisors to evaluate each banking organization's overall risk profile as well as its risk management and internal control processes. This pillar establishes an expectation that banking organizations hold capital beyond the minimums computed under Pillar 1, including additional capital for any risks that are not adequately captured under Pillar 1. It encourages banking organizations to develop better risk management techniques for monitoring and managing their risks. Pillar 2 also charges supervisors with the responsibility to ensure that banking organizations using advanced Pillar 1 techniques, such as the advanced IRB approach to credit risk and the AMA for operational risk, comply with the minimum standards and disclosure requirements of those methods, and take action promptly if capital is not adequate.

3. Market Discipline (Pillar 3)

The third pillar of the New Accord sets minimum disclosure requirements for banking organizations. The disclosures, covering the composition and structure of the banking organization's capital, the nature of its risk exposures, its risk management and internal control processes, and its capital adequacy, are intended to improve transparency and strengthen market discipline. By establishing a common set of disclosure requirements, Pillar 3 seeks to provide a consistent and understandable disclosure framework that market participants can use to assess key pieces of information on the risks and capital adequacy of a banking organization.

4. U.S. Implementation

The proposed standardized option rule seeks to improve the risk sensitivity of existing risk-based capital rules. The standardized option would be voluntary and available to banking organizations not subject to the advanced approaches rule. Any institution that is not an advanced approaches bank would be able to remain under the existing risk-based capital rules or elect to adopt the standardized option. The standardized option would:

1. Include a capital requirement for operational risk.
2. Use external credit ratings to risk weight sovereign, public sector entity, corporate, and securitization exposures.
3. Use the risk weight of the appropriate sovereign to assign risk weights for exposures to banks.
4. Use loan-to-value ratios to risk-weight residential mortgages.
5. Lower the risk weights for some retail exposures and small loans to businesses.
6. Expand the range of credit risk mitigation techniques that are recognized for risk-based capital purposes, including expanding the range of recognized collateral and eligible guarantors.
7. Increase the credit conversion factor for certain commitments with an original maturity of one year or less that are not unconditionally cancelable.
8. Revise the risk weights for securitization exposures and assess a capital charge for early amortizations in securitizations of revolving exposures.
9. Remove the 50 percent limit on the risk weight for certain derivative transactions.
10. Revise the risk-based capital treatment for unsettled and failed trades for securities, foreign exchange, and commodities.
11. Expand the range of methodologies available to banking organizations for measuring counterparty credit risk.

The Agencies would continue to reserve the authority to require banking organizations to hold additional capital where appropriate.

## III. Cost-Benefit Analysis of the Proposed Rule

A cost-benefit analysis considers the costs and benefits of a proposal as they relate to society as a whole. The social benefits of a proposal are benefits that accrue directly to those subject to a proposal plus benefits that might accrue indirectly to the rest of society. Similarly, the overall social costs of a proposal are costs incurred directly by those subject to the rule and costs incurred indirectly by others. In the case of the Standardized Option, direct costs and benefits are those that apply to the banking organizations that are subject to the proposal. Indirect costs and benefits then stem from banks and other financial institutions that are not subject to the proposal, bank customers, and, through the safety and soundness externality, society as a whole.

The broad social and economic benefit that derives from a safe and sound banking system supported by vigorous and comprehensive supervision, including ensuring adequate capital, clearly dwarfs any direct benefits that might accrue to institutions adopting the Standardized Option. Similarly, the social and economic cost of any reduction in the safety and soundness of the banking system would dramatically overshadow

any cost borne by banking organizations subject to the rule. The banking agencies are confident that the enhanced risk sensitivity of the proposed rule could allow banking organizations to more effectively achieve objectives that are consistent with a safe and sound banking system.

Beyond this societal benefit from maintaining a safe and sound banking system, we do not anticipate additional benefits outside of those accruing directly to the banking organizations that elect to adopt the Standardized Option. Because many factors besides regulatory capital requirements affect pricing and lending decisions, we do not expect the adoption or non-adoption of the Standardized Option to affect pricing or lending. Hence, we do not anticipate any costs or benefits affecting the customers or competitors of institutions adopting the Standardized Option. For these reasons, the cost and benefit analysis of the Standardized Option is primarily an analysis of the costs and benefits directly attributable to institutions that might elect to adopt its capital rules.

*A. Organizations Affected by the Proposed Rule* [67]

As of December 31, 2007, twelve banking organizations meet the criteria that would require them to adopt the U.S. implementation of the New Accord's advanced approaches. Removing those twelve mandatory advanced approaches institutions from the 7,415 FDIC-insured banking organizations active in December 2007 leaves 7,403 organizations that would be eligible to adopt the Standardized Option. Seven of the twelve mandatory advanced approaches institutions are national banks. Out of 1,421 banking organizations with national banks, 1,414 national banking organizations would thus be eligible to adopt the Standardized Option.

*B. Benefits of the Proposed Rule*

The proposed rule aims to enhance safety and soundness by improving the risk sensitivity of regulatory capital requirements. The proposed rule:

1. Enhances the risk sensitivity of capital charges.
2. Facilitates more efficient use of required bank capital.
3. Recognizes new developments in financial markets.
4. Mitigates potential distortions in minimum regulatory capital requirements between Advanced Approaches banking organizations and other banking organizations.
5. Better aligns capital and operational risk and encourages banking organizations to mitigate operational risk.
6. Enhances supervisory feedback.
7. Promotes market discipline through enhanced disclosure.
8. Preserves the benefits of international consistency and coordination achieved with the 1988 Basel Accord.
9. Offers long-term flexibility to banking organizations by providing the ability to opt in to the standardized approach.

*C. Costs of the Proposed Rule*

As with any rule, the costs of the proposal include necessary expenditures by banks and thrifts necessary to comply with the new regulation and costs to the federal banking agencies of implementing the new rules. Because of a lack of cost estimates from banking organizations, the OCC found it necessary to use a scope-of-work comparison with the Advanced Approaches in order to arrive at a cost estimate for the Standardized Option. Based on this rough assessment, we estimate that implementation costs for the Standardized Option could range from $200,000 at smaller institutions to $5 million at larger institutions.

1. Costs to Banking Organizations

Explicit costs of implementing the proposed rule at banking organizations fall into two categories: Setup costs and ongoing costs. Setup costs are typically one-time expenses associated with introducing the new programs and procedures necessary to achieve initial compliance with the proposed rule. Setup costs may also involve expenses related to tracking and retrieving data needed to implement the proposed rule. Ongoing costs are also likely to reflect data costs associated with retrieving and preserving data.

The total cost of the standardized option depends entirely on the number and size of institutions that elect to adopt the voluntary rule. Obviously, if the number of institutions adopting the standardized option is zero, then the cost to banks will be zero. Based on comment letters and discussions with bank supervision staff, we sought to identify national banks that would be most likely to adopt the standardized option. Because one of the principal changes in the standardized option affects the risk weighting for residential mortgages, we selected national banks with significant mortgage holdings as the more likely adopters of the new rule. In particular, our list of more likely adopters includes national banks where one-to-four family first-lien mortgages comprise over 30 percent of all assets if the institution has less than $1 billion in assets and where the mortgage to asset ratio is over 20 percent at larger institutions. We also include the few national banks that do not meet the well-capitalized threshold for their risk based capital-to-assets ratio as of December 31, 2007. Using those criteria, we identified 113 national banks, which if they adopted the standardized option would result in a total cost to national banks of approximately $74 million. Over time, the standardized option may become more appealing to a larger number of banks. The total cost of the proposed rule would consequently increase to the extent that more institutions opt into the standardized option over time. At present, it is unclear how many national banks will ultimately elect to adopt the standardized option. The standardized option's provision for an explicit charge for operational risk is another important factor that national banks will undoubtedly consider in assessing whether to adopt the standardized option. Although we are unable to estimate how many of our estimated adopters might be dissuaded from the standardized option because of an operational risk capital charge, we do believe that the explicit charge for operational risk could significantly reduce the number of likely adopters.[68]

2. Government Administrative Costs

Like the banking organizations subject to new requirements, the costs to government agencies of implementing the proposed rule also involve both startup and ongoing costs. Startup costs include expenses related to the development of the regulatory proposals, costs of establishing new programs and procedures, and costs of initial training of bank examiners in the new programs and procedures. Ongoing costs include maintenance expenses for any additional examiners and analysts needed to regularly apply the new supervisory processes. In the case of the standardized option, because modest changes to Call Reports will capture most of the rule changes, these ongoing costs are likely to be minor.

OCC expenditures fall into three broad categories: Training, guidance,

[67] Unless otherwise noted, the population of banks and thrifts used in this analysis consists of all FDIC-insured institutions. Banking organizations are aggregated to the top holding company level.

[68] If the advanced measurement approach (AMA) option for operational risk were to be made available as part of the standardized option, we believe that its considerable startup requirements and accompanying costs would dissuade almost all institutions with less than $10 billion in assets from pursuing the AMA operational risk option.

and supervision. Training includes expenses for workshops and other training courses and seminars for examiners. Guidance expenses reflect expenditures on the development of standardized option guidance. Supervision expenses reflect organization-specific supervisory activities. We estimate that OCC expenses for the standardized option will be approximately $4.3 million through 2008. We also expect expenditures of $1 million per year between 2009 and 2011. Applying a five percent discount rate to future expenditures, past expenses ($4.3 million) plus the present value of future expenditures ($2.7 million) equals total OCC expenditures of $7 million on the standardized option.

3. Total Cost Estimate of Proposed Rule

The OCC's estimate of the total cost of the proposed rule includes expenditures by banking organizations and the OCC from the present through 2011. Based on our estimate that approximately 113 national banks will adopt the standardized option at a cost to each institution of between $200,000 and $5 million depending on the size of the institution, we estimate that national banks will spend approximately $74 million on the standardized option. Combining expenditures provides an estimate of $81 million for the total cost of the proposed rule for the OCC and national banks.

## IV. Analysis of Baseline and Alternatives

In order to place the costs and benefits of the proposed rule in context, Executive Order 12866 requires a comparison between the proposed rule, a baseline of what the world would look like without the proposed rule, and a reasonable alternative to the proposed rule. In this regulatory impact analysis, we analyze one baseline and one alternative to the proposed rule. The baseline considers the possibility that the proposed standardized option rule is not adopted and current capital standards continue to apply.

The baseline scenario appears in this analysis in order to estimate the effects of adopting the proposed rule relative to a hypothetical regulatory regime that might exist without the Standardized Option. Because the baseline scenario considers costs and benefits as if the proposed rule never existed, we set the costs and benefits of the baseline scenario to zero. Obviously, banking organizations face compliance costs and reap the benefits of a well-capitalized banking system even under the baseline. However, because we cannot quantify these costs and benefits, we normalize the baseline costs and benefits to zero and estimate the costs and benefits of the proposed rule and alternative as deviations from this zero baseline.

1. Baseline Scenario: Current capital standards based on the 1988 Basel Accord continue to apply.

*Description of Baseline Scenario*

Under the Baseline Scenario, current capital rules would continue to apply to all banking organizations in the United States that are not subject to the U.S. implementation of the advanced approaches. Under this scenario, the United States would not adopt the proposed standardized option, but the implementation of the advanced approaches final rule would continue.

*Change in Benefits: Baseline Scenario*

Staying with current capital rules instead of adopting the standardized option proposal would eliminate the nine benefits of the proposed rule listed above. Under the baseline, banking organizations not subject to the advanced approaches would not be given the option of voluntarily selecting the standardized option. Institutions that would have adopted the standardized option would not be able to take advantage of the enhanced risk sensitivity of its capital charges and the more efficient use of bank capital that implies.

Without the standardized option, an institution would have to choose between the advanced approaches and the status quo. The baseline without the standardized option would leave a level playing field for all the non-core banks. However, the absence of an opportunity to mitigate potential distortions in minimum required capital would likely diminish this benefit in the eyes of an institution concerned about potential distortions created by the implementation of the advanced approaches.

*Changes in Costs: Baseline Scenario*

Continuing to use current capital rules eliminates the benefits and the costs of adopting the proposed rule. As discussed above, under the proposed rule we estimate that organizations would spend up to $74 million on implementation-related expenditures. Retaining current capital rules would eliminate any costs associated with the proposed rule, even though banking organizations would only incur those costs if they elected to do so.

2. Alternative: Require all U.S. banking organizations not subject to the Advanced Approaches rule to adopt the Standardized Option.

*Description of Alternative*

The only change between the proposed rule and the alternative is that adoption of the proposed rule would be mandatory under the alternative rather than voluntary. Under this alternative, the provisions of the proposed rule would remain intact and apply to all national banks that are not subject to the advanced approaches rule, i.e., mandatory advanced approaches institutions and those institutions that elect to adopt the advanced approaches framework.

*Change in Benefits: Alternative*

Because there are no changes to the elements of the proposed rule under the alternative, the list of benefits remains the same. Among these benefits, only one benefit is lost by making the proposed rule mandatory: The benefit derived from the fact that the proposed rule is voluntary. As for the benefits relating to the enhanced risk sensitivity of capital charges, because adoption of the standardized option is mandatory under the alternative, more banks will be subject to the standardized option provisions and the aggregate level of benefits will be higher. Because we estimate that 113 national banks would adopt the standardized option voluntarily, the difference in the aggregate benefit level could be considerable.

*Changes in Costs: Alternative*

Clearly the most significant drawback to the alternative is the dramatically increased cost of applying a new set of capital rules to almost all U.S. banking organizations. Under the alternative, direct costs would increase for every U.S. banking organization that would have elected to continue to use current capital rules under the proposed rule. The cost estimate for the alternative is the total cost estimate for a 100 percent adoption rate of the standardized option. With 1,414 national banking organizations eligible for the standardized option, we estimate that the cost to national banking organizations of the alternative is approximately $740 million. The actual cost may be somewhat less depending on the number of national banks that elect to adopt the advanced approaches rule, but it is much greater than our cost estimate of $74 million for the proposed rule.

3. Overall Comparison of Proposed Rule with Baseline and Alternative.

The New Accord and its U.S. implementation seek to incorporate risk measurement and risk management advances into capital requirements.

Risk-sensitive capital requirements are integral to ensuring an adequate capital cushion to absorb financial losses at financial institutions. In implementing the standardized option in the United States, the agencies' intent is to enhance risk sensitivity while maintaining a regulatory capital regime that is as rigorous as the current system. Total capital requirements under the standardized option, including capital for operational risk, will better allocate capital in the system. A better allocation will occur regardless of whether the minimum required capital at a particular institution is greater or less than it would be under current capital rules.

The objective of the proposed rule is to enhance the risk sensitivity of capital charges for institutions not subject to the advanced approaches rule. The proposal also seeks to mitigate any potential distortions in minimum regulatory capital requirements that the implementation of the advanced approaches rule might create between large and small banking organizations. Like the Advanced Approaches rule, the anticipated benefits of the standardized option proposal are difficult to quantify in dollar terms. Nevertheless, the OCC believes that the proposed rule provides benefits associated with enhanced risk sensitivity and preserves the safety and soundness of the banking industry and the security of the Federal Deposit Insurance system. To offset the costs of the proposed rule, its voluntary nature offers regulatory flexibility that will allow institutions to adopt the standardized option on a bank-by-bank basis when an institution's anticipated benefits exceed the anticipated costs of adopting this regulation.

The banking agencies are confident that the proposed rule could serve to strengthen institutions electing to adopt the standardized option while the safety and soundness of institutions electing to forgo the standardized option and the advanced approaches rule will not diminish. On the basis of our analysis, we believe that the benefits of the proposed rule are sufficient to offset the costs of implementing the proposed rule. However, with safety and soundness secure under either capital rule, we believe it is best to make the proposed rule voluntary in order to let each national bank decide whether it is in that institution's best interest to adopt the standardized option. This will help to ensure that the costs associated with implementation of the standardized option do not rise precipitously and outweigh the benefits. Because adoption is voluntary, the proposed rule offers an improvement over the baseline scenario and the alternative. The proposed rule offers an important degree of flexibility unavailable with either the baseline or the alternative. The baseline does not give banking organizations a way into the standardized option and the alternative does not offer them a way out. The alternative for mandatory adoption would compel most banking organizations to follow a new set of capital rules and require them to undertake the time and expense of adjusting to these new rules. The proposed rule offers a better balance between costs and benefits than either the baseline or the alternative. Overall, the OCC believes that the benefits of the proposed rule justify its potential costs.

*C. OTS Executive Order 12866 Determination*

OTS concurs with OCC's RIA. Rather than replicate that analysis, OTS drafted an RIA incorporating OCC's analysis by reference and adding appropriate material reflecting unique aspects of the thrift industry. The full text of OTS's RIA is available at the locations designated for viewing the OTS docket, which are indicated in the **ADDRESSES** section above. OTS believes that its analysis meets the requirements of Executive Order 12866. The following discussion supplements OCC's summary of its RIA.

OTS is the primary federal regulator for 826 federal- and state-chartered savings associations with assets of $1.51 trillion as of December 31, 2007. OTS-regulated savings association assets are highly concentrated in residential mortgage-related assets, with approximately 67 percent of total assets in residential mortgage-related assets. By contrast, OCC-regulated institutions tend to concentrate their assets in commercial loans, non-interest earning deposits, and other kinds of non-mortgage loans, with only 35 percent of total assets in residential mortgage-related assets. Accordingly, OTS's analysis focuses on the impact on proposed changes to the capital treatment of residential mortgages.

Benefit-Cost Analysis

Overall, OTS believes that the benefits of the proposed rule justify its costs. OTS notes, however, that measuring costs and benefits of changes in minimum capital requirements pose considerable challenges. Costs can be difficult to attribute to particular expenditures because institutions are likely to incur some of the costs as part of their ongoing efforts to improve risk measurement and management systems. The measurement of benefits is more problematic because the benefits of the NPR are more qualitative than quantitative. Further, measurement problems exist even for those factors that ostensibly may have measurable effects, such as a lower capital requirement. Savings associations, particularly smaller institutions, generally hold capital well above regulatory minimums for a variety of reasons. Thus, the effect of reducing the regulatory capital requirement is uncertain and likely to vary across regulated savings associations. Nonetheless, OTS anticipates that a more risk sensitive allocation of regulatory capital may have a slight marginal effect on pricing and lending of adopting savings associations, but may not have a measurable effect on pricing and lending in the market at a whole.

Under OTS's analysis, direct costs and benefits include costs and benefits to the approximately 180 savings associations that opt in to the proposed rule.[69] Direct costs and benefits also include OTS's costs of implementing the proposed rule.

1. Benefits

OTS concurs with the OCC analysis identifying the benefits associated with the proposed rule. Among the benefits cited by OCC was the enhanced risk sensitivity of minimum regulatory capital requirements. Because savings associations have a greater concentration of their assets in first-lien mortgages, the most significant change for savings associations will involve the risk weighting of residential mortgages. Under the general risk-based capital rules, most prudently underwritten residential mortgages with LTV ratios at origination of less than 90 percent are risk weighed at 50 percent. Most other residential mortgages receive a risk weight of 100 percent. Under the proposed rule, risk-weights for residential mortgages would increase as the LTV ratios increase. Thus, the benefits of opting in to the new rules will be greater for savings associations to the extent that their lending and portfolio practices include lower LTV mortgages. OTS believes that this aspect of the proposed rule is likely to be the

[69] OTS identified potential opt-in savings associations based on asset size, asset composition, and complexity. Specifically, OTS identified savings associations with total assets in excess of $500 million as an appropriate threshold for opting in to the new framework. It further estimated that savings associations would opt in to the new framework if the institution has a concentration of first-lien mortgages equal to 30 percent (for savings associations with total assets between $500 million and $1 billion) and 20 percent (for savings associations with assets in excess of $1 billion).

major factor in a savings association's decision to adopt the proposed rule.

2. Costs

OTS anticipates that the total direct costs of implementing the proposed rule will be $143.8 million. This estimate includes direct costs of $137.6 million for approximately 180 savings associations that would opt in to the proposed rule.[70] OTS further estimated that the direct costs for OTS implementation expenses would be $6.2 million.

3. Uncertainty of Costs and Benefits

OTS concurs with the OCC discussion regarding the uncertainty of costs and benefits. To the extent that undesirable competitive inequities may emerge, the banking agencies have the power to respond to them through many channels, including, but not limited to suitable changes to capital adequacy regulation.

Analysis of Baseline and Alternatives.

The OCC analysis includes a comparison between the NPR, a baseline scenario of what the world would look like without the NPR, and an alternative to the NPR. The selected alternative would require all banking organizations that are not subject to the advanced approaches rule to apply the NPR. OTS concurs in the OCC analysis and finds analogous results for savings associations. Specifically, OTS agrees with the OCC conclusion that the NPR could strengthen savings associations electing to opt in to the NPR and would not diminish the safety and soundness of savings associations that elect to forego the NPR or the advanced approaches.

1. Baseline Scenario

In its analysis of the baseline scenario, which would leave the current risk-based capital rules unchanged, OCC determines that national banks could avoid $74 million of implementation-related expenditures that would otherwise be required by the NPR. As noted above, OTS estimates that 180 savings associations would spend up to $137.6 million to implement the NPR. Retaining the current capital rules without adopting the NPR would permit these savings associations to avoid these new expenditures.

2. Alternative Scenario

In its analysis of the alternative scenario, OCC concludes that the aggregate benefits would considerably increase because 1,414 national banks, rather than 113, would implement the alternative. Under the alternative scenario, OTS estimates that the aggregate costs to savings associations would also increase considerably. Specifically, OTS estimates that these costs would increase from $137.6 million (for 180 savings associations) to $339.8 million (for 820 savings associations).[71]

*D. OCC Executive Order 13132 Determination*

The OCC has determined that this proposed rule does not have any Federalism implications, as required by Executive Order 13132.

*E. Paperwork Reduction Act*

(1) Request for Comment on Proposed Information Collection

In accordance with the requirements of the Paperwork Reduction Act of 1995, the 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. The agencies are requesting comment on a proposed information collection. The agencies are also giving notice that the proposed collection of information has been submitted to OMB for review and approval.

Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used;

(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 automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Commenters may submit comments on aspects of this notice that may affect reporting and disclosure requirements to the addresses listed in the **ADDRESSES** section of this NPR. Paperwork burden comments directed to the OCC should reference ''OMB Control No. 1557–NEW'' instead of the Docket ID.

(2) Proposed Information Collection

*Title of Information Collection:* Risk-Based Capital Guidelines; Standardized Risk-Based Capital Rules

*Frequency of Response:* event-generated and quarterly.

*Affected Public:*

*OCC:* National banks.

*Board:* State member banks and bank holding companies.

*FDIC:* Insured nonmember banks, insured state branches of foreign banks, and certain subsidiaries of these entities.

*OTS:* Savings associations and certain of their subsidiaries.

*Abstract:* The proposed rule sets forth revisions to the agencies' existing risk-based capital rules based on the provisions in the Standardized Approach for credit risk and the Basic Indicator Approach for operational risk contained in the capital adequacy framework titled ''International Convergence of Capital Measurement and Capital Standards: A Revised Framework'' published by the Basel Committee on Banking Supervision in June 2004.

The new information collection requirements in the proposed rule are found in Sections 1, 37, 42, and 71. The collections of information are necessary in order to implement the proposed standardized capital adequacy framework.

Section 1 requires banking organizations to provide written notification prior to using the appendix to calculate their risk-based capital requirements (opt-in letter) or ceasing its use (opt-out letter). It also requires written notification prior to applying the principle of conservatism for a particular exposure. Section 37 requires a banking organization's prior written notification before it can calculate its own collateral haircuts using its own internal estimates. It also requires a banking organization's prior written notification before it can estimate an exposure amount for a single-product netting set of repo-style transactions and eligible margin loans when recognizing the risk-mitigating effects of financial collateral using the simple VaR methodology. The agencies believe that the notifications in Section 37 would in most cases be included in the opt-in letter discussed in Section 1. Section 42 requires certain public disclosures if a banking organization provides support

[70] The estimated cost per institution increased with the size of the total assets. OTS estimated that savings associations would have implementation costs of $500,000 (for savings associations with total assets between $500 million and $1 billion); $1 million (for savings associations with total assets between $1 billion and $10 billion); and $5 million (for savings associations with total assets in excess of $10 billion.

[71] Six of the 826 savings associations could not apply the NPR because they are subject to the advanced approaches rule.

to a securitization in excess of its contractual obligation. Section 71 requires a number of qualitative and quantitative disclosures regarding a banking organization's risk-based capital ratios and their components.

*Estimated Burden:* The burden estimates below exclude any regulatory reporting burden associated with changes to the Consolidated Reports of Income and Condition for banks (FFIEC 031 and FFIEC 031; OMB Nos. 7100–0036, 3064–0052, 1557–0081), the Thrift Financial Report for thrifts (TFR; OMB No. 1550–0023), and the Financial Statements for Bank Holding Companies (FR Y–9; OMB No. 7100–0128). The agencies are still considering whether to revise these information collections or to implement a new information collection for the regulatory reporting requirements. In either case, a separate notice would be published for comment on the regulatory reporting requirements.

The burden associated with this collection of information may be summarized as follows:

OCC

Number of Respondents: 113.

Estimated Burden Per Respondent: Opt-in letter and prior approvals, 3 hours; opt-out letter, 1 hour; and disclosures, 144 hours.

Total Estimated Annual Burden: 16,272 hours.

Board

Number of Respondents: 60.

Estimated Burden Per Respondent: Opt-in letter and prior approvals, 3 hours; opt-out letter, 1 hour; and disclosures, 144 hours.

Total Estimated Annual Burden: 8,880 hours.

FDIC

Number of Respondents: 61.

Estimated Burden Per Respondent: Opt-in letter and prior approvals, 3 hours; opt-out letter, 1 hour; and disclosures, 144 hours.

Total Estimated Annual Burden: 9,032 hours.

OTS

Number of Respondents: 180.

Estimated Burden Per Respondent: Opt-in letter, 0.5 hours; prior approvals, 2.5 hours; opt-out letter, 1 hour; and disclosures, 144 hours.

Total Estimated Annual Burden: 26,120 hours.

The agencies' estimates represent an average across all respondents and reflect variations between institutions based on their size, complexity, and practices. Each agency is responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the same methodology to determine their burden estimates.

*F. OCC Unfunded Mandates Reform Act of 1995 Determination*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) (UMRA) requires cost-benefit and other analyses for a rule that would include any Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year. The current inflation-adjusted expenditure threshold is $119.6 million. The requirements of the UMRA include assessing a rule's effects on future compliance costs; particular regions or state, local, or tribal governments; communities; segments of the private sector; productivity; economic growth; full employment; creation of productive jobs; and the international competitiveness of U.S. goods and services. The proposed rule qualifies as a significant regulatory action under the UMRA because its Federal mandates may result in the expenditure by the private sector of $119.6 or more in any one year. As permitted by section 202(c) of the UMRA, the required analyses have been prepared in conjunction with the Executive Order 12866 analysis document titled *Regulatory Impact Analysis for Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Standardized Risk-Based Capital Rules (Basel II: Standardized Option).* The analysis is available on the Internet at *http://www.occ.treas.gov/law/basel.htm* under the link of ''Regulatory Impact Analysis for Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Standardized Risk-Based Capital Rules (Basel II: Standardized Option), Office of the Comptroller of the Currency, International and Economic Affairs (2008).''

*G. OTS Unfunded Mandates Reform Act of 1995 Determination*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) (UMRA) requires cost-benefit and other analyses for a rule that would include any Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year. The current inflation-adjusted expenditure threshold is $119.6 million. The requirements of the UMRA include assessing a rule's effects on future compliance costs; particular regions or State, local, or tribal governments; communities; segments of the private sector; productivity; economic growth; full employment; creation of productive jobs; and the international competitiveness of U.S. goods and services. The proposed rule qualifies as a significant regulatory action under the UMRA because its Federal mandates may result in the expenditure by the private sector of $119.6 or more in any one year. As permitted by section 202(c) of the UMRA, the required analyses have been prepared in conjunction with the Executive Order 12866 analysis document titled *Regulatory Impact Analysis for Risk-Based Capital Standards: Capital Adequacy Guidelines; Capital Maintenance; Domestic Capital Modifications (Basel II: Standardized Option).* The analysis is available at the locations designated for viewing the OTS docket indicated in the **ADDRESSES** section above.

*H. Solicitation of Comments on Use of Plain Language*

Section 722 of the GLBA required the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Federal banking agencies invite comment on how to make this proposed rule easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could the rule be more clearly stated?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- Would more, but shorter, sections be better? If so, which sections should be changed?
- What else could we do to make the regulation easier to understand?

**Text of Common Appendix (All Agencies)**

The text of the agencies' common appendix appears below:

## Appendix [__] to Part [__]—Capital Adequacy Guidelines for [Banks]:[72] Standardized Framework

Part I General Provisions
Section 1 Purpose, Applicability, Election Procedures, and Reservation of Authority
Section 2 Definitions
Section 3 Minimum Risk-Based Capital Requirements and Overall Capital Adequacy
Section 4 Merger and Acquisition Transitional Arrangements
Part II Qualifying Capital
Section 21 Modifications to Tier 1 and Tier 2 Capital
Part III Risk-Weighted Assets for General Credit Risk
Section 31 Mechanics for Calculating Risk-Weighted Assets for General Credit Risk
Section 32 Inferred Ratings for General Credit Risk
Section 33 General Risk Weights
Section 34 Off-Balance Sheet Exposures
Section 35 OTC Derivative Contracts
Section 36 Guarantees and Credit Derivatives: Substitution Treatment
Section 37 Collateralized Transactions
Section 38 Unsettled Transactions
Part IV Risk-Weighted Assets for Securitization Exposures
Section 41 Operational Requirements for Securitization Exposures
Section 42 Risk-Weighted Assets for Securitization Exposures
Section 43 Ratings-Based Approach (RBA)
Section 44 Securitization Exposures That Do Not Qualify for the RBA
Section 45 Recognition of Credit Risk Mitigants for Securitization Exposures
Section 46 Risk-Weighted Assets for Securitizations With Early Amortization Provisions
Part V Risk-Weighted Assets for Equity Exposures
Section 51 Introduction and Exposure Measurement
Section 52 Simple Risk-Weight Approach (SRWA)
Section 53 Equity Exposures to Investment Funds
Part VI Risk-Weighted Assets for Operational Risk
Section 61 Basic Indicator Approach
Part VII Disclosure
Section 71 Disclosure Requirements

### Part I. General Provisions

*Section 1. Purpose, Applicability, Election Procedures, and Reservation of Authority*

(a) *Purpose.* This appendix establishes:

(1) Methodologies for the calculation of risk-based capital requirements for [BANK]s that elect to use this appendix; and

(2) Operational and public disclosure requirements for such [BANK]s.

(b) *Applicability.* This appendix applies to a [BANK] that:

(1) Elects to use this appendix to calculate its risk-based capital requirements;

(2) Must use this appendix based on a determination by the [agency] under paragraph (c)(3) of this section;

(3) Is a subsidiary of or controls a depository institution that uses 12 CFR part 3, appendix D; 12 CFR part 208, appendix G; 12 CFR part 325, appendix E; or 12 CFR part 567, appendix B to calculate it risk-based capital requirements; or

(4) Is a subsidiary of a bank holding company that uses 12 CFR part 225, appendix H, to calculate its risk-based capital requirements.

(c) *Election procedures.* (1) *Opt-in procedures.* (i) Except for a [BANK] that is required under section 1(b)(1) of [the advanced approaches risk-based capital rules] to use that capital framework (other than a [BANK] that is exempt under section 1(b)(3) of [the advanced approaches risk-based capital rules]), any [BANK] may elect to use this appendix to calculate its risk-based capital requirements.

(ii) Unless otherwise waived by the [agency], a [BANK] must notify the [agency] of its intent to use this appendix in writing at least 60 days before the beginning of the calendar quarter in which it first uses this appendix. This notice must contain a list of any affiliated depository institutions or bank holding companies, if applicable, that seek not to apply this appendix under section 1(c)(2)(iii) of 12 CFR part 3, appendix D; 12 CFR part 208, appendix G; 12 CFR part 225, appendix H; 12 CFR part 325, appendix E; or 12 CFR part 567, appendix B.

(2) *Opt-out procedures.* (i) A [BANK] that uses this appendix to calculate its risk-based capital requirements may instead elect to use the [the general risk-based capital rules] or [the advanced approaches risk-based capital rules].

(ii) Unless otherwise waived by the [agency], a [BANK] must notify the [agency] of its intent to cease the use of this appendix in writing at least 60 days before the beginning of the calendar quarter in which it plans to cease the use of this appendix. Such notice must include an explanation of the [BANK]'s rationale for ceasing the use of this appendix and a statement regarding the appendix or rules the [BANK] plans to use to calculate its risk-based capital requirements.

(iii) A [BANK] that otherwise would be required to apply this appendix under paragraph (b)(3) or (b)(4) of this section may continue to use [the general risk-based capital rules] if the [agency] determines in writing that application of this appendix is not appropriate in light of the [BANK]'s asset size, level of complexity, risk profile, or scope of operations.

(3) *Supervisory application of this appendix and exclusion.* (i) The [agency] may apply this appendix to any [BANK] if the [agency] determines that application of this appendix is appropriate in light of the [BANK]'s asset size, level of complexity, risk profile, or scope of operations.

(ii) The [agency] may exclude a [BANK] that has opted-in under paragraph (c)(1) of this section from using this appendix if the [agency] determines that application of this appendix is not appropriate in light of the [BANK]'s asset size, level of complexity, risk profile, or scope of operations.

(d) *Reservation of authority.* (1) *Additional capital in the aggregate.* The [agency] may require a [BANK] to hold an amount of capital greater than otherwise required under this appendix if the [agency] determines that the [BANK]'s risk-based capital requirement under this appendix is not commensurate with the [BANK]'s credit, market, operational, or other risks.

(2) *Risk-weighted asset amounts.* (i) If the [agency] determines that the risk-weighted asset amount calculated under this appendix by the [BANK] for one or more exposures is not commensurate with the risks associated with those exposures, the [agency] may require the [BANK] to assign a different risk-weighted asset amount to the exposure(s) or to deduct the amount of the exposure from capital.

(ii) If the [agency] determines that the risk-weighted asset amount for operational risk produced by the [BANK] under this appendix is not commensurate with the operational risks of the [BANK], the [agency] may require the [BANK] to assign a different risk-weighted asset amount for operational risk.

(3) *Other supervisory authority.* Nothing in this appendix limits the authority of the [agency] under any other provision of law or regulation to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law.

(e) *Notice and response procedures.* In making a determination under paragraph (c)(2)(iii), (c)(3), or (d) of this section, the [agency] will apply notice and response procedures in the same manner as the notice and response procedures in 12 CFR 3.12 (for national banks), 12 CFR 263.202 (for bank holding companies and state member banks), 12 CFR 325.6(c) (for state nonmember banks), and 12 CFR 567.3(d) (for savings associations).

(f) *Principle of conservatism.* Notwithstanding the requirements of this appendix, a [BANK] may choose not to apply a provision of this appendix to one or more exposures, provided that:

(1) The [BANK] can demonstrate on an ongoing basis to the satisfaction of the [agency] that not applying the provision would, in all circumstances, unambiguously generate a risk-based capital requirement for each such exposure greater than that which would otherwise be required under this appendix;

(2) The [BANK] appropriately manages the risk of each such exposure;

(3) The [BANK] notifies the [agency] in writing prior to applying this principle to each such exposure; and

(4) The exposures to which the [BANK] applies this principle are not, in the aggregate, material to the [BANK].

[72] For simplicity, and unless otherwise noted, this NPR uses the term [BANK] to include banks, savings associations, and bank holding companies. The term [agency] refers to the primary Federal supervisor of the bank applying the rule. The term [the general risk-based capital rules] refers to each agency's existing non-internal ratings based capital rules. The term [the advanced approaches risk-based capital rules] refers to each agency's existing internal ratings based capital rules. The term [the market risk rule] refers to the agencies' existing market risk capital rules.

*Section 2. Definitions*

For the purposes of this appendix, the following definitions apply:

*Affiliate* with respect to a company means any company that controls, is controlled by, or is under common control with, the company.

*Applicable external rating.* (1) With respect to an exposure, applicable external rating means:

(i) If the exposure has a single external rating, the external rating; and

(ii) If the exposure has multiple external ratings, the lowest external rating.

(2) See also *external rating*.

*Applicable inferred rating.* (1) With respect to an exposure, applicable inferred rating means:

(i) If the exposure has a single inferred rating, the inferred rating; and

(ii) If the exposure has multiple inferred ratings, the lowest inferred rating.

(2) See also *external rating, inferred rating*.

*Asset-backed commercial paper (ABCP) program* means a program that primarily issues commercial paper that:

(1) Has an external rating; and

(2) Is backed by underlying exposures held in a bankruptcy-remote securitization special purpose entity (SPE).

*Asset-backed commercial paper (ABCP) program sponsor* means a [BANK] that:

(1) Establishes an ABCP program;

(2) Approves the sellers permitted to participate in an ABCP program;

(3) Approves the exposures to be purchased by an ABCP program; or

(4) Administers the ABCP program by monitoring the underlying exposures, underwriting or otherwise arranging for the placement of debt or other obligations issued by the program, compiling monthly reports, or ensuring compliance with the program documents and with the program's credit and investment policy.

*Carrying value* means, with respect to an asset, the value of the asset on the balance sheet of the [BANK] determined in accordance with generally accepted accounting principles (GAAP).

*Clean-up call* means a contractual provision that permits an originating [BANK] or servicer to call securitization exposures before their stated maturity or call date. (See also *eligible clean-up call*.)

*Commitment* means any legally binding arrangement that obligates a [BANK] to extend credit or to purchase assets.

*Commodity derivative contract* means a commodity-linked swap, purchased commodity-linked option, forward commodity-linked contract, or any other instrument linked to commodities that gives rise to similar counterparty credit risks.

*Company* means a corporation, partnership, limited liability company, business trust, special purpose entity, depository institution, association, or similar organization.

*Control.* A person or company *controls* a company if it:

(1) Owns, controls, or holds with power to vote 25 percent or more of a class of voting securities of the company; or

(2) Consolidates the company for financial reporting purposes.

*Controlled early amortization provision* means an early amortization provision that meets all the following conditions:

(1) The originating [BANK] has appropriate policies and procedures to ensure that it has sufficient capital and liquidity available in the event of an early amortization;

(2) Throughout the duration of the securitization (including the early amortization period), there is the same pro rata sharing of interest, principal, expenses, losses, fees, recoveries, and other cash flows from the underlying exposures based on the originating [BANK]'s and the investors' relative shares of the underlying exposures outstanding measured on a consistent monthly basis;

(3) The amortization period is sufficient for at least 90 percent of the total underlying exposures outstanding at the beginning of the early amortization period to be repaid or recognized as in default; and

(4) The schedule for repayment of investor principal is not more rapid than would be allowed by straight-line amortization over an 18-month period.

*Corporate exposure* means a credit exposure to a natural person or a company (including an industrial development bond, an exposure to a government-sponsored entity (GSE), or an exposure to a securities broker or dealer) that is not:

(1) An exposure to a sovereign entity, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, a multilateral development bank (MDB), a depository institution, a foreign bank, a credit union, or a public sector entity (PSE);

(2) A regulatory retail exposure;

(3) A residential mortgage exposure;

(4) A pre-sold construction loan;

(5) A statutory multifamily mortgage;

(6) A securitization exposure; or

(7) An equity exposure.

*Credit derivative* means a financial contract executed under standard industry credit derivative documentation that allows one party (the protection purchaser) to transfer the credit risk of one or more exposures (reference exposure) to another party (the protection provider). (See also *eligible credit derivative*.)

*Credit-enhancing interest-only strip (CEIO)* means an on-balance sheet asset that, in form or in substance:

(1) Represents a contractual right to receive some or all of the interest and no more than a minimal amount of principal due on the underlying exposures of a securitization; and

(2) Exposes the holder to credit risk directly or indirectly associated with the underlying exposures that exceeds a pro rata share of the holder's claim on the underlying exposures, whether through subordination provisions or other credit-enhancement techniques.

*Credit-enhancing representations and warranties* means representations and warranties that are made or assumed in connection with a transfer of underlying exposures (including loan servicing assets) and that obligate a [BANK] to protect another party from losses arising from the credit risk of the underlying exposures. Credit-enhancing representations and warranties include provisions to protect a party from losses resulting from the default or nonperformance of the obligors of the underlying exposures or from an insufficiency in the value of the collateral backing the underlying exposures. Credit-enhancing representations and warranties do not include:

(1) Early default clauses and similar warranties that permit the return of, or premium refund clauses that cover, loans secured by a first lien on one-to-four family residential property for a period not to exceed 120 days from the date of transfer, provided that the date of transfer is within one year of origination of the residential mortgage exposure;

(2) Premium refund clauses that cover underlying exposures guaranteed, in whole or in part, by the U.S. Government, a U.S. Government Agency, or a GSE, provided that the clauses are for a period not to exceed 120 days from the date of transfer; or

(3) Warranties that permit the return of underlying exposures in instances of misrepresentation, fraud, or incomplete documentation.

*Credit risk mitigant* means collateral, a credit derivative, or a guarantee.

*Depository institution* means a depository institution as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

*Derivative contract* means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivative contracts, and any other instrument that poses similar counterparty credit risks. Derivative contracts also include unsettled securities, commodities, and foreign exchange transactions with a contractual settlement or delivery lag that is longer than the lesser of the market standard for the particular instrument or five business days.

*Early amortization provision* means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision:

(1) Is triggered solely by events not directly related to the performance of the underlying exposures or the originating [BANK] (such as material changes in tax laws or regulations); or

(2) Leaves investors fully exposed to future draws by obligors on the underlying exposures even after the provision is triggered. (See also *controlled early amortization provision*.)

*Effective notional amount* means, for an eligible guarantee or eligible credit derivative, the lesser of the contractual notional amount of the credit risk mitigant or the exposure amount of the hedged exposure, multiplied by the percentage coverage of the credit risk mitigant. For example, the effective notional amount of an eligible

guarantee that covers, on a pro rata basis, 40 percent of any losses on a $100 bond would be $40.

*Eligible asset-backed commercial paper (ABCP) liquidity facility* means a liquidity facility supporting ABCP, in form or in substance, that is subject to an asset quality test at the time of draw that precludes funding against assets that are 90 days or more past due or in default. If the assets or exposures that an eligible ABCP liquidity facility is required to fund against are externally rated at the inception of the facility, the facility can be used to fund only those assets or exposures with an applicable external rating of at least investment grade at the time of funding. Notwithstanding the two preceding sentences, a liquidity facility is an eligible ABCP liquidity facility if the assets or exposures funded under the liquidity facility that do not meet the eligibility requirements are guaranteed by a sovereign entity with an issuer rating in one of the three highest investment grade rating categories.

*Eligible clean-up call* means a clean-up call that:

(1) Is exercisable solely at the discretion of the originating [BANK] or servicer;

(2) Is not structured to avoid allocating losses to securitization exposures held by investors or otherwise structured to provide credit enhancement to the securitization; and

(3)(i) For a traditional securitization, is only exercisable when 10 percent or less of the principal amount of the underlying exposures or securitization exposures (determined as of the inception of the securitization) is outstanding; or

(ii) For a synthetic securitization, is only exercisable when 10 percent or less of the principal amount of the reference portfolio of underlying exposures (determined as of the inception of the securitization) is outstanding.

*Eligible credit derivative* means a credit derivative in the form of a credit default swap, nth-to-default swap, total return swap, or any other form of credit derivative approved by the [agency], provided that:

(1) The contract meets the requirements of an eligible guarantee and has been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap or nth-to-default swap, the contract includes the following credit events:

(i) Failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) Bankruptcy, insolvency, or inability of the obligor on the reference exposure to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(4) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(5) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provide that any required consent to transfer may not be unreasonably withheld;

(7) If the credit derivative is a credit default swap or nth-to-default swap, the contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event; and

(8) If the credit derivative is a total return swap and the [BANK] records net payments received on the swap as net income, the [BANK] records offsetting deterioration in the value of the hedged exposure (through reductions in fair value).

*Eligible guarantee* means a guarantee from an eligible guarantor that:

(1) Is written;

(2) Is either unconditional, or a contingent obligation of the United States Government or its agencies, the validity of which to the beneficiary is dependent upon some affirmative action on the part of the beneficiary of the guarantee or a third party (for example, servicing requirements);

(3) Covers all or a pro rata portion of all contractual payments of the obligor on the reference exposure;

(4) Gives the beneficiary a direct claim against the protection provider;

(5) Is not unilaterally cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(6) Is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced;

(7) Requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligor on the reference exposure in a timely manner without the beneficiary first having to take legal actions to pursue the obligor for payment;

(8) Does not increase the beneficiary's cost of credit protection on the guarantee in response to deterioration in the credit quality of the reference exposure; and

(9) Is not provided by an affiliate of the [BANK], unless the affiliate is an insured depository institution, foreign bank, securities broker or dealer, or insurance company that:

(i) Does not control the [BANK]; and

(ii) Is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities brokers or dealers, or insurance companies (as the case may be).

*Eligible guarantor* means:

(1) A sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation (Farmer Mac), an MDB, a depository institution, a foreign bank, a credit union, a bank holding company (as defined in section 2 of the Bank Holding Company Act (12 U.S.C. 1841)), or a savings and loan holding company (as defined in 12 U.S.C. 1467a) provided all or substantially all of the holding company's activities are permissible for a financial holding company under 12 U.S.C. 1843(k); or

(2) Any other entity (other than a SPE) if at the time the entity issued the guarantee or credit derivative or any time thereafter, the entity has issued and outstanding an unsecured debt security without credit enhancement that has an applicable external rating based on a long-term rating.

*Eligible margin loan* means an extension of credit where:

(1) The extension of credit is collateralized exclusively by liquid and readily marketable debt or equity securities, gold, or conforming residential mortgage exposures;

(2) The collateral is marked-to-market daily, and the transaction is subject to daily margin maintenance requirements;

(3) The extension of credit is conducted under an agreement that provides the [BANK] the right to accelerate and terminate the extension of credit and to liquidate or set off collateral promptly upon an event of default (including upon an event of bankruptcy, insolvency, or similar proceeding) of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions;[73] and

(4) The [BANK] has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that the agreement meets the requirements of paragraph (3) of this definition and is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

*Eligible servicer cash advance facility* means a servicer cash advance facility in which:

(1) The servicer is entitled to full reimbursement of advances, except that a servicer may be obligated to make non-reimbursable advances for a particular underlying exposure if any such advance is contractually limited to an insignificant amount of the outstanding principal balance of that exposure;

(2) The servicer's right to reimbursement is senior in right of payment to all other claims on the cash flows from the underlying exposures of the securitization; and

(3) The servicer has no legal obligation to, and does not, make advances to the

[73] This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute ''securities contracts'' under section 555 of the Bankruptcy Code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or netting contracts between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or the Federal Reserve Board's Regulation EE (12 CFR part 231).

securitization if the servicer concludes the advances are unlikely to be repaid.

*Equity derivative contract* means an equity-linked swap, purchased equity-linked option, forward equity-linked contract, or any other instrument linked to equities that gives rise to similar counterparty credit risks.

*Equity exposure* means:

(1) A security or instrument (whether voting or non-voting) that represents a direct or indirect ownership interest in, and is a residual claim on, the assets and income of a company, unless:

(i) The issuing company is consolidated with the [BANK] under GAAP;

(ii) The [BANK] is required to deduct the ownership interest from tier 1 or tier 2 capital under this appendix;

(iii) The ownership interest incorporates a payment or other similar obligation on the part of the issuing company (such as an obligation to make periodic payments); or

(iv) The ownership interest is a securitization exposure;

(2) A security or instrument that is mandatorily convertible into a security or instrument described in paragraph (1) of this definition;

(3) An option or warrant that is exercisable for a security or instrument described in paragraph (1) of this definition; or

(4) Any other security or instrument (other than a securitization exposure) to the extent the return on the security or instrument is based on the performance of a security or instrument described in paragraph (1) of this definition.

*Exchange rate derivative contract* means a cross-currency interest rate swap, forward foreign-exchange contract, currency option purchased, or any other instrument linked to exchange rates that gives rise to similar counterparty credit risks.

*Exposure amount* means:

(1) For the on-balance sheet component of an exposure (other than an OTC derivative contract; a repo-style transaction or an eligible margin loan for which the [BANK] determines the exposure amount under paragraph (c) or (d) of section 37 of this appendix; or a securitization exposure), exposure amount means:

(i) If the exposure is a security classified as available-for-sale, the [BANK]'s carrying value of the exposure, less any unrealized gains on the exposure, plus any unrealized losses on the exposure.

(ii) If the exposure is not a security classified as available-for-sale, the [BANK]'s carrying value of the exposure.

(2) For the off-balance sheet component of an exposure (other than an OTC derivative contract; a repo-style transaction or an eligible margin loan for which the [BANK] calculates the exposure amount under paragraph (c) or (d) of section 37 of this appendix; or a securitization exposure), exposure amount means the notional amount of the off-balance sheet component multiplied by the appropriate credit conversion factor (CCF) in section 34 of this appendix.

(3) If the exposure is an OTC derivative contract, the exposure amount determined under section 35 or 37 of this appendix.

(4) If the exposure is an eligible margin loan or repo-style transaction for which the [BANK] calculates the exposure amount as provided in paragraph (c) or (d) of section 37 of this appendix, the exposure amount determined under section 37.

(5) If the exposure is a securitization exposure, the exposure amount determined under section 42 of this appendix.

*External rating* means a credit rating that is assigned by a nationally recognized statistical rating organization (NRSRO) to an exposure, provided:

(1) The credit rating fully reflects the entire amount of credit risk with regard to all payments owed to the holder of the exposure. If a holder is owed principal and interest on an exposure, the credit rating must fully reflect the credit risk associated with timely repayment of principal and interest. If a holder is owed only principal on an exposure, the credit rating must fully reflect only the credit risk associated with timely repayment of principal; and

(2) The credit rating is published in an accessible form and is or will be included in the transition matrices made publicly available by the NRSRO that summarize the historical performance of positions rated by the NRSRO. (See also *applicable external rating, applicable inferred rating, inferred rating, issuer rating.*)

*Financial collateral* means collateral:

(1) In the form of:

(i) Cash on deposit with the [BANK] (including cash held for the [BANK] by a third-party custodian or trustee);

(ii) Gold bullion;

(iii) Long-term debt securities that have an applicable external rating of one category below investment grade or higher;

(iv) Short-term debt instruments that have an applicable external rating of at least investment grade;

(v) Equity securities that are publicly traded;

(vi) Convertible bonds that are publicly traded;

(vii) Money market mutual fund shares and other mutual fund shares if a price for the shares is publicly quoted daily; or

(viii) Conforming residential mortgage exposures; and

(2) In which the [BANK] has a perfected, first priority security interest or, outside of the United States, the legal equivalent thereof (with the exception of cash on deposit and notwithstanding the prior security interest of any custodial agent).

*Financial standby letter of credit* means a letter of credit or similar arrangement that represents an irrevocable obligation of a [BANK] to a third-party beneficiary:

(1) To repay money borrowed by, or advanced to, or for the account of, a second party (the account party); or

(2) To make payment on behalf of the account party, in the event that the account party fails to fulfill its financial obligation to the beneficiary.

*First-lien residential mortgage exposure* means a residential mortgage exposure secured by a first lien or a residential mortgage exposure secured by first and junior lien(s) where no other party holds an intervening lien. (See also *residential mortgage exposure.*)

*Foreign bank* means a foreign bank as defined in § 211.2 of the Federal Reserve Board's Regulation K (12 CFR 211.2) other than a depository institution. (See also *depository institution.*)

*GAAP* means generally accepted accounting principles as used in the United States.

*Gain-on-sale* means an increase in the equity capital (as reported on Schedule RC of the Consolidated Statement of Condition and Income (Call Report), Schedule HC of the FR Y–9C Report, or Schedule SC of the Thrift Financial Report) of a [BANK] that results from a securitization (other than an increase in equity capital that results from the [BANK]'s receipt of cash in connection with the securitization). (See also *securitization.*)

*Guarantee* means a financial guarantee, letter of credit, insurance, or other similar financial instrument (other than a credit derivative) that allows one party (beneficiary) to transfer the credit risk of one or more specific exposures (reference exposure) to another party (protection provider). (See also *eligible guarantee.*)

*Inferred rating.* (1) *Securitization exposures.* A securitization exposure has an *inferred rating* equal to the external rating of the securitization exposure referenced in paragraph (1)(ii) of this definition if:

(i) The securitization exposure does not have an external rating; and

(ii) Another securitization exposure issued by the same obligor and secured by the same underlying exposures:

(A) Has an external rating;

(B) Is subordinated in all respects to the exposure with no external rating;

(C) Does not benefit from any credit enhancement that is not available to the exposure with no external rating;

(D) Has an effective remaining maturity that is equal to or longer than that of the exposure with no external rating; and

(E) Is the most immediately subordinated exposure to the exposure with no external rating that meets the requirements of paragraph (1)(ii)(A) through (1)(ii)(D) of this definition.

(2) *Other exposures.* With respect to an exposure to a sovereign entity, an exposure to a PSE, or a corporate exposure, *inferred rating* means an inferred rating based on an issuer rating and an inferred rating based on a specific issue as determined under section 32 of this appendix. (See also *applicable external rating, applicable inferred rating, external rating, issuer rating.*)

*Interest rate derivative contract* means a single-currency interest rate swap, basis swap, forward rate agreement, purchased interest rate option, when-issued securities, or any other instrument linked to interest rates that gives rise to similar counterparty credit risks.

*Investing [BANK]* means, with respect to a securitization, a [BANK] that assumes the credit risk of a securitization exposure (other than an originating [BANK] of the securitization). In a typical synthetic securitization, the investing [BANK] sells credit protection on a pool of underlying exposures to the originating [BANK].

*Investment fund* means a company:

(1) All or substantially all of the assets of which are financial assets; and

(2) That has no material liabilities.

*Issuer rating* means a credit rating that is assigned by an NRSRO to an entity, provided:

(1) The credit rating reflects the entity's capacity and willingness to satisfy all of its financial obligations; and

(2) The credit rating is published in an accessible form and is or will be included in the transition matrices made publicly available by the NRSRO that summarize the historical performance of the NRSRO's ratings. (See also *applicable external rating, applicable inferred rating.*)

*Junior-lien residential mortgage exposure* means a residential mortgage exposure that is not a first-lien residential mortgage exposure. (See also *first-lien residential mortgage exposure, residential mortgage exposure.*)

*Main index* means the Standard & Poor's 500 Index, the FTSE All-World Index, and any other index for which the [BANK] can demonstrate to the satisfaction of the [agency] that the equities represented in the index have comparable liquidity, depth of market, and size of bid-ask spreads as equities in the Standard & Poor's 500 Index and FTSE All-World Index.

*Multi-lateral development bank (MDB)* means the International Bank for Reconstruction and Development, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, and any other multilateral lending institution or regional development bank in which the U.S. government is a shareholder or contributing member or which the [agency] determines poses comparable credit risk.

*Nationally recognized statistical rating organization (NRSRO)* means an entity registered with the Securities and Exchange Commission (SEC) as a nationally recognized statistical rating organization under section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7).

*Netting set* means a group of transactions with a single counterparty that is subject to a qualifying master netting agreement.

*Nth-to-default credit derivative* means a credit derivative that provides credit protection only for the nth-defaulting reference exposure in a group of reference exposures.

*Operational risk* means the risk of loss resulting from inadequate or failed internal processes, people, and systems or from external events (including legal risk but excluding strategic and reputational risk).

*Original maturity* with respect to an off-balance sheet commitment means the length of time between the date a commitment is issued and:

(1) For a commitment that is not subject to extension or renewal, the stated expiration date of the commitment; or

(2) For a commitment that is subject to extension or renewal, the earliest date on which the [BANK] can, at its option, unconditionally cancel the commitment.

*Originating [BANK]*, with respect to a securitization, means a [BANK] that:

(1) Directly or indirectly originated or securitized the underlying exposures included in the securitization; or

(2) Serves as an ABCP program sponsor to the securitization.

*Over-the-counter (OTC) derivative contract* means a derivative contract that is not traded on an exchange that requires the daily receipt and payment of cash-variation margin.

*Performance standby letter of credit (or performance bond)* means an irrevocable obligation of a [BANK] to pay a third-party beneficiary when a customer (account party) fails to perform on any contractual nonfinancial or commercial obligation. To the extent permitted by law or regulation, performance standby letters of credit include arrangements backing, among other things, subcontractors' and suppliers' performance, labor and materials contracts, and construction bids.

*Pre-sold construction loan* means any one-to-four family residential pre-sold construction loan for a residence meeting the requirements under section 618(a)(1) or (2) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 (RTCRRI Act) and under 12 CFR part 3, appendix A, section 3(a)(3)(iv) (for national banks); 12 CFR part 208, appendix A, section III.C.3. (for state member banks); 12 CFR part 225, appendix A, section III.C.3. (for bank holding companies); 12 CFR part 325, appendix A, section II.C. (for state nonmember banks), and that is not 90 days or more past due or on nonaccrual; or 12 CFR 567.1 (definition of ''qualifying residential construction loan'') (for savings associations), and that is not on nonaccrual.

*Protection amount (P)* means, with respect to an exposure hedged by an eligible guarantee or eligible credit derivative, the effective notional amount of the guarantee or credit derivative as reduced to reflect any currency mismatch, maturity mismatch, or lack of restructuring coverage (as provided in section 36 of this appendix).

*Publicly traded* means traded on:

(1) Any exchange registered with the SEC as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f); or

(2) Any non-U.S.-based securities exchange that:

(i) Is registered with, or approved by, a national securities regulatory authority; and

(ii) Provides a liquid, two-way market for the instrument in question, meaning that there are enough independent bona fide offers to buy and sell so that a sales price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined promptly and a trade can be settled at such a price within five business days.

*Public sector entity (PSE)* means a state, local authority, or other governmental subdivision below the sovereign entity level.

*Qualifying master netting agreement* means any written, legally enforceable bilateral netting agreement, provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default, including bankruptcy, insolvency, or similar proceeding, of the counterparty;

(2) The agreement provides the [BANK] the right to accelerate, terminate, and close out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of default, including upon an event of bankruptcy, insolvency, or similar proceeding, of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions;

(3) The [BANK] has conducted sufficient legal review to conclude with a well-founded basis (and has maintained sufficient written documentation of that legal review) that:

(i) The agreement meets the requirements of paragraph (2) of this definition; and

(ii) In the event of a legal challenge (including one resulting from default or from bankruptcy, insolvency, or similar proceeding) the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions;

(4) The [BANK] establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of this definition; and

(5) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it would make otherwise under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement).

*Regulatory retail exposure* means an exposure that meets the following requirements:

(1) The [BANK]'s aggregate exposure to a single obligor does not exceed $1 million;

(2) The exposure is part of a well diversified portfolio; and

(3) The exposure is not:

(i) An exposure to a sovereign entity, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, an MDB, a depository institution, a foreign bank, a credit union, or a PSE;

(ii) An acquisition, development, and construction loan;

(iii) A residential mortgage exposure;

(iv) A pre-sold construction loan;

(v) A statutory multifamily mortgage;

(vi) A securitization exposure;

(vii) An equity exposure; or

(viii) A debt security.

*Repo-style transaction* means a repurchase or reverse repurchase transaction, or a securities borrowing or securities lending transaction, including a transaction in which the [BANK] acts as agent for a customer and indemnifies the customer against loss, provided that:

(1) The transaction is based solely on liquid and readily marketable securities, cash, gold, or conforming residential mortgage exposures;

(2) The transaction is marked-to-market daily and subject to daily margin maintenance requirements;

(3)(i) The transaction is a ''securities contract'' or ''repurchase agreement'' under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or the Federal Reserve Board's Regulation EE (12 CFR part 231); or

(ii) If the transaction does not meet the criteria in paragraph (3)(i) of this definition, then either:

(A) The transaction is executed under an agreement that provides the [BANK] the right to accelerate, terminate, and close out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of default (including upon an event of bankruptcy, insolvency, or similar proceeding) of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions; or

(B) The transaction is:

(I) Either overnight or unconditionally cancelable at any time by the [BANK]; and

(II) Executed under an agreement that provides the [BANK] the right to accelerate, terminate, and close out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of counterparty default; and

(4) The [BANK] has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that the agreement meets the requirements of paragraph (3) of this definition and is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

*Residential mortgage exposure* means an exposure (other than a pre-sold construction loan) that is primarily secured by one-to-four family residential property. (See also *first-lien residential mortgage exposure, junior-lien residential mortgage exposure*.)

*Securities and Exchange Commission (SEC)* means the U.S. Securities and Exchange Commission.

*Securitization* means a traditional securitization or a synthetic securitization.

*Securitization exposure* means an on-balance sheet or off-balance sheet credit exposure that arises from a traditional or synthetic securitization (including credit-enhancing representations and warranties). (See also synthetic securitization, traditional securitization.)

*Securitization special purpose entity (securitization SPE)* means a corporation, trust, or other entity organized for the specific purpose of holding underlying exposures of a securitization, the activities of which are limited to those appropriate to accomplish this purpose, and the structure of which is intended to isolate the underlying exposures held by the entity from the credit risk of the seller of the underlying exposures to the entity.

*Servicer cash advance facility* means a facility under which the servicer of the underlying exposures of a securitization may advance cash to ensure an uninterrupted flow of payments to investors in the securitization, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the underlying exposures. (See also *eligible servicer cash advance facility*.)

*Sovereign entity* means a central government (including the U.S. Government) or an agency, department, ministry, or central bank of a central government.

*Sovereign of incorporation* means the country where an entity is incorporated, chartered, or similarly established.

*Statutory multifamily mortgage* means any multifamily residential mortgage that:

(1) Meets the requirements under section 618(b)(1) of the RTCRRI Act, and under 12 CFR part 3, appendix A, section 3(a)(3)(v) (for national banks); 12 CFR part 208, appendix A, section III.C.3. (for state member banks); 12 CFR part 225, appendix A, section III.C.3. (for bank holding companies); 12 CFR part 325, appendix A, section II.C. (for state nonmember banks); or 12 CFR 567.1 (definition of ''qualifying multifamily mortgage loan'') and 12 CFR 567.6(a)(1)(iii) (for savings associations); and

(2) Is not on nonaccrual.

*Subsidiary* means, with respect to a company, a company controlled by that company.

*Synthetic securitization* means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties through the use of one or more credit derivatives or guarantees (other than a guarantee that transfers only the credit risk of an individual retail exposure);

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures; and

(4) All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities).

*Tier 1 capital* has the same meaning as in [the general risk-based capital rules], except as modified in part II of this appendix.

*Tier 2 capital* has the same meaning as in [the general risk-based capital rules], except as modified in part II of this appendix.

*Total qualifying capital* means the sum of tier 1 capital and tier 2 capital, after all deductions required in this appendix.

*Total risk-weighted assets* means the sum of a [BANK]'s:

(1) Total risk-weighted assets for general credit risk as calculated under section 31 of this appendix;

(2) Total risk-weighted assets for unsettled transactions as calculated under paragraph (f) of section 38 of this appendix;

(3) Total risk-weighted assets for securitization exposures as calculated under paragraph (b) of section 42 of this appendix;

(4) Total risk-weighted assets for equity exposures as calculated under paragraph (a) of section 52 of this appendix; and

(5) Risk-weighted assets for operational risk as calculated under section 61 of this appendix.

*Traditional securitization* means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties other than through the use of credit derivatives or guarantees.

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority.

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures.

(4) All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities).

(5) The underlying exposures are not owned by an operating company.

(6) The underlying exposures are not owned by a small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

(7)(i) For banks and bank holding companies, the underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under 12 U.S.C. 24 (Eleventh); or

(ii) For savings associations, the underlying exposures are not owned by a firm an investment in which is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or employment.

(8) The [agency] may determine that a transaction in which the underlying exposures are owned by an investment firm that exercises substantially unfettered control over the size and composition of its assets, liabilities, and off-balance sheet exposures is not a traditional securitization based on the transaction's leverage, risk profile, or economic substance.

(9) The [agency] may deem a transaction that meets the definition of a traditional securitization, notwithstanding paragraph (5), (6), or (7) of this definition, to be a traditional securitization based on the transaction's leverage, risk profile, or economic substance.

*Unconditionally cancelable* means with respect to a commitment that a [BANK] may, at any time, with or without cause, refuse to extend credit under the facility (to the extent permitted under applicable law).

*Underlying exposures* means one or more exposures that have been securitized in a securitization transaction.

*Value-at-Risk (VaR)* means the estimate of the maximum amount that the value of one or more exposures could decline due to market price or rate movements during a fixed holding period within a stated confidence interval.

*Section 3. Minimum Risk-Based Capital Requirements and Overall Capital Adequacy*

(a) Except as modified by paragraph (c) of this section, each [BANK] must meet a minimum ratio of:

(1) Total qualifying capital to total risk-weighted assets of 8.0 percent; and

(2) Tier 1 capital to total risk-weighted assets of 4.0 percent.

(b) Each [BANK] must hold capital commensurate with the level and nature of all risks to which the [BANK] is exposed.

(c) When a [BANK] subject to [the market risk rule] calculates its risk-based capital requirements under this appendix, the [BANK] must also refer to [the market risk rule] for supplemental rules to calculate risk-based capital requirements adjusted for market risk.

(d) A [BANK] must have a rigorous process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining an appropriate level of capital.

*Section 4. Merger and Acquisition Transitional Arrangements*

(a) *Mergers and acquisitions of companies that use the general risk-based capital rules.* If a [BANK] that uses this appendix merges with or acquires a company that uses the general risk-based capital rules (12 CFR part 3, appendix A; 12 CFR part 208, appendix A; 12 CFR part 225, appendix A; 12 CFR part 325, appendix A; or 12 CFR part 567, subpart B), the [BANK] may use the general risk-based capital rules to calculate the risk-weighted asset amounts for, and the deductions from capital associated with, the merged or acquired company's exposures for up to 12 months after the last day of the calendar quarter during which the merger or acquisition consummates. The risk-weighted assets of the merged or acquired company calculated under the general risk-based capital rules are included in the [BANK]'s total risk-weighted assets. Deductions associated with the exposures of the merged or acquired company are deducted from the [BANK]'s tier 1 capital and tier 2 capital. If a [BANK] relies on this paragraph, the [BANK] separately must disclose publicly the amounts of risk-weighted assets and total qualifying capital calculated under this appendix for the acquiring [BANK] and under the general risk-based capital rules for the acquired company.

(b) *Mergers and acquisitions of companies that use the standardized risk-based capital rules.* If a [BANK] that uses this appendix merges with or acquires a company that uses different aspects of the standardized risk-based capital rules (12 CFR part 3, appendix D; 12 CFR part 208, appendix G; 12 CFR part 225, appendix H; 12 CFR part 325, appendix E; or 12 CFR part 567, appendix B), the [BANK] may continue to use the merged or acquired company's systems to determine the risk-weighted asset amounts for, and deductions from capital associated with, the merged or acquired company's exposures for up to 12 months after the last day of the calendar quarter during which the merger or acquisition consummates. The risk-weighted assets of the merged or acquired company are included in the [BANK]'s total risk-weighted assets. Deductions associated with the exposures of the merged or acquired company are deducted from the [BANK]'s tier 1 capital and tier 2 capital. If a [BANK] relies on this paragraph, the [BANK] separately must disclose publicly the amounts of risk-weighted assets and total qualifying capital for the acquiring [BANK] and for the merged or acquired company under the standardized risk-based capital rules.

(c) *Mergers and acquisitions of companies that use the advanced approaches risk-based capital rules.* If a [BANK] that uses this appendix merges with or acquires a company that uses the advanced approaches risk-based capital rules (12 CFR part 3, appendix C; 12 CFR part 208, appendix F; 12 CFR part 225, appendix G; 12 CFR part 325, appendix D; or 12 CFR part 567, appendix C), the [BANK] may use the advanced approaches risk-based capital rules to determine the risk-weighted asset amounts for, and deductions from capital associated with, the merged or acquired company's exposures for up to 12 months after the last day of the calendar quarter during which the merger or acquisition consummates. During the period when the advanced approaches risk-based capital rules apply to the merged or acquired company, any ALLL associated with the merged or acquired company's exposures must be excluded from the [BANK]'s tier 2 capital. Any excess eligible credit reserves associated with the merged or acquired company's exposures may be included in the acquiring [BANK]'s tier 2 capital up to 0.6 percent of the acquired company's risk-weighted assets. (Excess eligible credit reserves must be determined according to paragraph (a)(2) of section 13 of the advanced approaches risk-based capital rules.) If a [BANK] relies on this paragraph, the [BANK] separately must disclose publicly the amounts of risk-weighted assets and qualifying capital calculated under this appendix for the acquiring [BANK] and under the advanced approaches risk-based capital rules for the acquired company.

**Part II. Qualifying Capital**

*Section 21. Modifications to Tier 1 and Tier 2 Capital*

(a) *Modifications to tier 1 and tier 2 capital.* A [BANK] that uses this appendix must make the same deductions from its tier 1 capital and tier 2 capital required in [the general risk-based capital rules], except that:

(1) A [BANK] is not required to make the deductions from capital for CEIOs in 12 CFR part 3, appendix A, section 2(c)(1)(iv) (for national banks); 12 CFR part 208, appendix A, section II.B.1.e. (for state member banks); 12 CFR part 225, appendix A, section II.B.1.e. (for bank holding companies); 12 CFR part 325, appendix A, section II.B.5. (for state nonmember banks); and 12 CFR 567.5(a)(2)(iii) and 567.12(e) (for savings associations);

(2)(i) A bank or bank holding company is not required to make the deductions from capital for nonfinancial equity investments in 12 CFR part 3, appendix A, section 2(c)(1)(v) (for national banks); 12 CFR part 208, appendix A, section II.B.5. (for state member banks); 12 CFR part 225, appendix A, section II.B.5. (for bank holding companies); and 12 CFR part 325, appendix A, section II.B. (for state nonmember banks);

(ii) A savings association is not required to deduct investments in equity securities from capital under 12 CFR 567.5(c)(2)(ii). However, it must continue to deduct equity investments in real estate under that section. See 12 CFR 567.1, which defines equity investments, including equity securities and equity investments in real estate; and

(3) A [BANK] must make the additional deductions from capital required by paragraphs (b) and (c) of this section.

(b) *Deductions from tier 1 capital.* In accordance with paragraph (a) of section 41 and paragraph (a)(1) of section 42, a [BANK] must deduct any after-tax gain-on-sale resulting from a securitization from tier 1 capital.

(c) *Deductions from tier 1 and tier 2 capital.* A [BANK] must deduct the exposures specified in paragraphs (c)(1) through (c)(3) in this section 50 percent from tier 1 capital and 50 percent from tier 2 capital. If the amount deductible from tier 2 capital exceeds the [BANK]'s actual tier 2 capital, however, the [BANK] must deduct the excess amount from tier 1 capital.

(1) *Credit-enhancing interest-only strips (CEIOs).* In accordance with paragraphs (a)(1) and (c) of section 42, any CEIO that does not constitute after-tax gain-on-sale.

(2) *Certain securitization exposures.* In accordance with paragraphs (a)(3) and (c) of section 42 and sections 43 and 44, certain securitization exposures that are required to be deducted from capital.

(3) *Certain unsettled transactions.* In accordance with paragraph (e)(3) of section 38, the [BANK]'s exposure on certain unsettled transactions.

**Part III. Risk-Weighted Assets for General Credit Risk**

*Section 31. Mechanics for Calculating Risk-Weighted Assets for General Credit Risk*

A [BANK] must risk weight its assets and exposures as follows:

(a) A [BANK] must determine the exposure amount of each on-balance sheet asset, each OTC derivative contract, and each off-balance sheet commitment, trade and transaction-related contingency, guarantee, repurchase agreement, securities lending and borrowing transaction, financial standby letter of credit, forward agreement, or other similar transaction that is not:

(1) An unsettled transaction subject to section 38;

(2) A securitization exposure; or

(3) An equity exposure (other than an equity derivative contract).

(b) A [BANK] must multiply each exposure amount identified under paragraph (a) of this section by the risk weight appropriate to the exposure based on the obligor or exposure type, eligible guarantor, or financial collateral to determine the risk-weighted asset amount for each exposure.

(c) Total risk-weighted assets for general credit risk equals the sum of the risk-weighted asset amounts calculated under paragraph (b) of this section.

*Section 32. Inferred Ratings for General Credit Risk*

(a) *General.* This section describes two kinds of inferred ratings, an inferred rating based on an issuer rating and an inferred rating based on a specific issue. This section applies to an exposure to a sovereign entity, an exposure to a PSE, and a corporate exposure, except as otherwise provided in this appendix.

(b) *Inferred rating based on an issuer rating.* If a senior exposure to an obligor (that is, an exposure that ranks pari passu with an obligor's general creditors in the event of bankruptcy, insolvency, or other similar proceeding) has no external rating and the obligor has one or more issuer ratings, the senior exposure has inferred rating(s) equal to the issuer rating(s) of the obligor that reflects the currency in which the exposure is denominated.

(c) *Inferred rating based on a specific issue.* (1) An exposure with no external rating (the unrated exposure) has inferred rating(s) based on a specific issue equal to the external rating in paragraph (c)(1)(ii), if another exposure issued by the same obligor and secured by the same collateral (if any):

(i) Ranks pari passu with the unrated exposure (or at the [BANK]'s option, is subordinated in all respects to the unrated exposure);

(ii) Has an external rating based on a long-term rating;

(iii) Does not benefit from any credit enhancement that is not available to the unrated exposure;

(iv) Has an effective remaining maturity that is equal to or longer than that of the unrated exposure; and

(v) Is denominated in the same currency as the unrated exposure. This requirement does not apply where the unrated exposure is denominated in a foreign currency that arises from a [BANK]'s participation in a loan extended or guaranteed by an MDB against convertibility and transfer risk. If the [BANK]'s participation is only partially guaranteed against convertibility and transfer risk by an MDB, the [BANK] may only use the external rating denominated in the foreign currency for the portion of the participation that benefits from the MDB's guarantee.

(2) An unrated exposure has inferred rating(s) equal to the external rating(s) based on any long-term rating of low-quality exposure(s) that are issued by the same obligor and that are senior in all respects to the unrated exposure. For the purposes of this paragraph, a low-quality exposure is an exposure that would receive a risk weight of 150 percent (for an exposure to a sovereign entity or a corporate exposure) or 100 percent or greater (for an exposure to a PSE) under section 33.

*Section 33. General Risk Weights*

(a) *Exposures to sovereign entities.* (1) A [BANK] must assign a risk weight to an exposure to a sovereign entity using the risk weight that corresponds to its applicable external or applicable inferred rating in Table 1.

(2) Notwithstanding paragraph (a)(1) of this section, a [BANK] may assign a risk weight that is lower than the applicable risk weight in Table 1 to an exposure to a sovereign entity if:

(i) The exposure is denominated in the sovereign entity's currency;

(ii) The [BANK] has at least an equivalent amount of liabilities in that currency; and

(iii) The sovereign entity allows banks under its jurisdiction to assign the lower risk weight to the same exposures to the sovereign entity.

TABLE 1.—EXPOSURES TO SOVEREIGN ENTITIES

| Applicable external or applicable inferred rating of an exposure to a sovereign entity | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | AAA | 0 |
| Second-highest investment grade rating | AA | 0 |
| Third-highest investment grade rating | A | 20 |
| Lowest investment grade rating | BBB | 50 |
| One category below investment grade | BB | 100 |
| Two categories below investment grade | B | 100 |
| Three categories or more below investment grade | CCC | 150 |
| No applicable rating | N/A | 100 |

(b) *Certain supranational entities and multilateral development banks.* A [BANK] may assign a zero percent risk weight to an exposure to the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, or an MDB.

(c) *Exposures to depository institutions, foreign banks, and credit unions.* (1) Except as provided in paragraph (c)(2) of this section, a [BANK] must assign a risk weight to an exposure to a depository institution, a foreign bank, or a credit union using the risk weight that corresponds to the lowest issuer rating of the entity's sovereign of incorporation in Table 2.

(2) A [BANK] must assign a risk weight of at least 100 percent to an exposure to a depository institution or a foreign bank that is includable in the depository institution's or foreign bank's regulatory capital and that is not subject to deduction as a reciprocal holding pursuant to 12 CFR part 3, appendix A, section 2(c)(6)(ii) (national banks); 12 CFR part 208, appendix A, section II.B.3 (state member banks); 12 CFR part 225, appendix A, section II.B.3 (bank holding companies); 12 CFR part 325, appendix A, section I.B.(4) (state nonmember banks); and 12 CFR part 567.5(c)(2)(i) (savings associations).

TABLE 2.—EXPOSURES TO DEPOSITORY INSTITUTIONS, FOREIGN BANKS, AND CREDIT UNIONS

| Lowest issuer rating of the sovereign of incorporation | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | AAA | 20 |
| Second-highest investment grade rating | AA | 20 |
| Third-highest investment grade rating | A | 50 |
| Lowest investment grade rating | BBB | 100 |
| One category below investment grade | BB | 100 |
| Two categories below investment grade | B | 100 |
| Three categories or more below investment grade | CCC | 150 |
| No issuer rating | N/A | 100 |

(d) *Exposures to public sector entities.* (1) Subject to the limitation in paragraph (d)(2) of this section, a [BANK]:

(i) Must risk weight an exposure to a PSE with an applicable external or applicable inferred rating based on a long-term rating using the risk weight that corresponds to the applicable external or applicable inferred

rating based on a long-term rating in Table 3.

(ii) Must assign a 50 percent risk weight to an exposure to a PSE with no applicable external rating based on a long-term rating and no applicable inferred rating based on a long-term rating.

(iii) May assign a lower risk weight than would otherwise apply under Table 3 to an exposure to a foreign PSE if:

(A) The PSE's sovereign of incorporation allows banks under its jurisdiction to assign the lower risk weight; and

(B) The risk weight is not lower than the risk weight that corresponds to the lowest issuer rating of the PSE's sovereign of incorporation in Table 1.

(2) A [BANK] may not assign an exposure to a PSE with no external rating a risk weight that is lower than the risk weight that corresponds to the lowest issuer rating of the PSE's sovereign of incorporation in Table 1.

TABLE 3.—EXPOSURES TO PUBLIC SECTOR ENTITIES: LONG-TERM CREDIT RATING

| Applicable external or applicable inferred rating of an exposure to a PSE | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | AAA | 20 |
| Second-highest investment grade rating | AA | 20 |
| Third-highest investment grade rating | A | 50 |
| Lowest investment grade rating | BBB | 50 |
| One category below investment grade | BB | 100 |
| Two categories below investment grade | B | 100 |
| Three categories or more below investment grade | CCC | 150 |
| No applicable rating | N/A | 50 |

(e) *Corporate exposures.* A [BANK] must use one of the following approaches to assign risk weights to corporate exposures:

(1) *100 percent risk weight approach.* A [BANK] that chooses this approach must assign a 100 percent risk weight to all corporate exposures.

(2) *Ratings approach.* (i) Subject to the limitations in paragraph (e)(2)(ii) of this section, a [BANK] that chooses this approach:

(A) Must assign a risk weight to a corporate exposure with an applicable external or applicable inferred rating based on a long-term rating using the risk weight that corresponds to the applicable external or applicable inferred rating based on a long-term rating in Table 4.

(B) Must assign a risk weight to a corporate exposure with an applicable external rating based on a short-term rating using the risk weight that corresponds to the applicable external rating based on a short-term rating in Table 5.

(C) Must assign a 100 percent risk weight to all corporate exposures with no external rating and no inferred rating.

(ii) *Limitations.* (A) A [BANK] may not assign a corporate exposure with no external rating a risk weight that is lower than the risk weight that corresponds to the lowest issuer rating of the obligor's sovereign of incorporation in Table 1.

(B) If an obligor has any exposure with an external rating based on a short-term rating that corresponds to a risk weight of 150 percent under Table 5, a [BANK] must assign a 150 percent risk weight to a corporate exposure to that obligor with no external rating and that ranks pari passu with or is subordinated to the externally rated exposure.

TABLE 4.—CORPORATE EXPOSURES: LONG-TERM CREDIT RATING

| Applicable external or applicable inferred rating of the corporate exposure | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | AAA | 20 |
| Second-highest investment grade rating | AA | 20 |
| Third-highest investment grade rating | A | 50 |
| Lowest investment grade rating | BBB | 100 |
| One category below investment grade | BB | 100 |
| Two categories below investment grade | B | 150 |
| Three categories or more below investment grade | CCC | 150 |
| No applicable rating | N/A | 100 |

TABLE 5.—CORPORATE EXPOSURES: SHORT-TERM CREDIT RATING

| Applicable external rating of the corporate exposure | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | A–1/P–1 | 20 |
| Second-highest investment grade rating | A–2/P–2 | 50 |
| Third-highest investment grade rating | A–3/P–3 | 100 |
| Below investment grade | B, C and non-prime | 150 |
| No applicable external rating | N/A | 100 |

(f) *Regulatory retail exposures.* A [BANK] must assign a 75 percent risk weight to a regulatory retail exposure.

(g) *Residential mortgage exposures.* (1) *First-lien residential mortgage exposures.* (i) A [BANK] must assign the applicable risk weight in Table 6, using the loan-to-value ratio (LTV ratio) as described in paragraph (g)(3) of this section, to a first-lien residential mortgage exposure that is secured by property that is owner-occupied or rented, is prudently underwritten, is not 90 days or more past due, and is not on nonaccrual. A first-lien residential mortgage exposure that has been restructured may receive a risk weight lower than 100 percent only if the [BANK] updates the LTV ratio at the time of restructuring as provided under paragraph (g)(3) of this section.

(ii) If a first-lien residential mortgage exposure does not satisfy these requirements, the [BANK] must assign a 100 percent risk weight to the exposure if the LTV ratio is 90 percent or less, and must assign a 150 percent risk weight if the LTV ratio is greater than 90 percent.

TABLE 6.—RISK WEIGHTS FOR FIRST-LIEN RESIDENTIAL MORTGAGE EXPOSURES

| Loan-to-value ratio (in percent) | Risk weight (in percent) |
|---|---|
| Less than or equal to 60 | 20 |
| Greater than 60 and less than or equal to 80 | 35 |
| Greater than 80 and less than or equal to 85 | 50 |
| Greater than 85 and less than or equal to 90 | 75 |
| Greater than 90 and less than or equal to 95 | 100 |
| Greater than 95 | 150 |

(2) *Junior-lien residential mortgage exposures.* (i) A [BANK] must assign the applicable risk weight in Table 7, using the LTV ratio described in paragraph (g)(3) of this section, to a junior-lien residential mortgage exposure that is not 90 days or more past due or on nonaccrual.

(ii) If a junior-lien residential mortgage exposure is 90 days or more past due or on nonaccrual, a [BANK] must assign a 150 percent risk weight to the exposure.

TABLE 7.—RISK WEIGHTS FOR JUNIOR-LIEN RESIDENTIAL MORTGAGE EXPOSURES

| Loan-to-value ratio (in percent) | Risk weight (in percent) |
|---|---|
| Less than or equal to 60 | 75 |
| Greater than 60 and less than or equal to 90 | 100 |
| Greater than 90 | 150 |

(3) *LTV ratio calculation.* To determine the appropriate risk weight for a residential mortgage exposure under this paragraph (g), a [BANK] must calculate the LTV ratio (that is, the loan amount of the exposure divided by the value of the property) as described in this paragraph. A [BANK] must calculate a separate LTV ratio for the funded and unfunded portions of a residential mortgage exposure and must assign a risk weight to the exposure amount of each portion according to its respective LTV ratio.

(i) *Loan amount for calculating the LTV ratio of the funded portion of a residential mortgage exposure.*

(A) *First-lien residential mortgage exposure.* The loan amount of the funded portion of a first-lien residential mortgage exposure is the principal amount of the exposure.

(B) *Junior-lien residential mortgage exposure.* The loan amount of the funded portion of a junior-lien residential mortgage exposure is the principal amount of the exposure plus the principal amounts of all senior exposures secured by the same residential property on the date of origination of the junior-lien residential mortgage exposure plus the unfunded portion of the maximum contractual amount of any senior exposure(s) secured by the same residential property.

(ii) *Loan amount for calculating the LTV ratio of the unfunded portion of a residential mortgage exposure.* The loan amount of the unfunded portion of a residential mortgage exposure is:

(A) The amount calculated under paragraph (g)(3)(i) of this section; plus

(B) The unfunded portion of the maximum contractual amount of the exposure.

(iii) *PMI.* A [BANK] may reduce the loan amount in the LTV ratio up to the amount covered by loan-level private mortgage insurance (PMI). The loan-level PMI must protect the [BANK] in the event of borrower default up to a predetermined amount of the residential mortgage exposure, and may not have a pool-level cap that would effectively reduce coverage below the predetermined amount of the exposure. Loan-level PMI must be provided by a regulated mortgage insurance company that is not an affiliate of the [BANK], and that:

(A) Has issued long-term senior debt (without credit enhancement) that has an external rating that is in at least the third-highest investment grade rating category; or

(B) Has a claims-paying rating that is in at least the third-highest investment grade rating category.

(iv) *Value.* (A) The value of the property is the lesser of the actual acquisition cost (for a purchase transaction) or the estimate of the property's value at the origination of the loan or, at the [BANK]'s option, at the time of restructuring.

(B) A [BANK] must base all estimates of a property's value on an appraisal or evaluation of the property that satisfies subpart C of 12 CFR part 34 (national banks); subpart E of 12 CFR part 208 (state member banks); 12 CFR part 323 (state nonmember banks); and 12 CFR part 564 (savings associations).

(h) *Pre-sold residential construction loans.* A [BANK] must assign a 50 percent risk weight to a pre-sold construction loan unless the purchase contract is cancelled. A [BANK] must assign a 100 percent risk weight to such loan if the purchase contract is cancelled.

(i) *Statutory multifamily mortgages.* A [BANK] must assign a 50 percent risk weight to a statutory multifamily mortgage.

(j) *Past due exposures.* Except for a residential mortgage exposure, if an exposure is 90 days or more past due or on nonaccrual:

(1) A [BANK] must assign a 150 percent risk weight to the portion of the exposure that does not have a guarantee or that is unsecured.

(2) A [BANK] may assign a risk weight to the collateralized portion of the exposure based on the risk weight of the collateral under this section if the collateral meets the requirements of paragraph (b)(1) of section 37 of this appendix.

(3) A [BANK] may assign a risk weight to the guaranteed portion of the exposure based on the risk weight that would apply under section 36 of this appendix if the guarantee or credit derivative meets the requirements of that section.

(k) *Other assets.* (1) A [BANK] may assign a zero percent risk weight to cash owned and held in all offices of the [BANK] or in transit; to gold bullion held in the [BANK]'s own vaults or held in another depository institution's vaults on an allocated basis, to the extent the gold bullion assets are offset by gold bullion liabilities; and to derivative contracts that are publicly traded on an exchange that requires the daily receipt and payment of cash-variation margin.

(2) A [BANK] may assign a 20 percent risk weight to cash items in the process of collection.

(3) A [BANK] must apply a 100 percent risk weight to all assets not specifically assigned a different risk weight under this appendix (other than exposures that are deducted from tier 1 or tier 2 capital).

*Section 34. Off-Balance Sheet Exposures*

(a) *General.* (1) A [BANK] must calculate the exposure amount of an off-balance sheet exposure using the credit conversion factors (CCFs) in paragraph (b) of this section.

(2) Where a [BANK] commits to provide a commitment, the [BANK] may apply the lower of the two applicable CCFs.

(3) Where a [BANK] provides a commitment structured as a syndication or participation, the [BANK] is only required to calculate the exposure amount for its pro rata share of the commitment.

(b) *Credit conversion factors.* (1) *Zero percent CCF.* A [BANK] must apply a zero percent CCF to the unused portion of commitments that are unconditionally cancelable.

(2) *20 percent CCF.* A [BANK] must apply a 20 percent CCF to the following off-balance-sheet exposures:

(i) Commitments with an original maturity of one year or less that are not unconditionally cancelable.

(ii) Self-liquidating, trade-related contingent items that arise from the movement of goods, with an original maturity of one year or less.

(3) *50 percent CCF.* A [BANK] must apply a 50 percent CCF to the following off-balance-sheet exposures:

(i) Commitments with an original maturity of more than one year that are not unconditionally cancelable by the [BANK].

(ii) Transaction-related contingent items, including performance bonds, bid bonds, warranties, and performance standby letters of credit.

(4) *100 percent CCF.* A [BANK] must apply a 100 percent CCF to the following off-balance-sheet items and other similar transactions:

(i) Guarantees;

(ii) Repurchase agreements (the off-balance sheet component of which equals the sum of the current market values of all positions the [BANK] has sold subject to repurchase);

(iii) Off-balance sheet securities lending transactions (the off-balance sheet component of which equals the sum of the current market values of all positions the [BANK] has lent under the transaction);

(iv) Off-balance sheet securities borrowing transactions (the off-balance sheet component of which equals the sum of the current market values of all non-cash positions the [BANK] has posted as collateral under the transaction);

(v) Financial standby letters of credit; and

(vi) Forward agreements. Forward agreements are legally binding contractual

obligations to purchase assets with certain drawdown at a specified future date. Such obligations do not include commitments to make residential mortgage loans or forward foreign exchange contracts.

*Section 35. OTC Derivative Contracts*

A [BANK] must calculate the exposure amount of an OTC derivative contract under this section.

(a) A [BANK] must determine the exposure amount for an OTC derivative contract that is not subject to a qualifying master netting agreement using the single OTC derivative contract calculation in paragraph (c) of this section.

(b) A [BANK] must determine the exposure amount for multiple OTC derivative contracts that are subject to a qualifying master netting agreement using the multiple OTC derivative contracts calculation in paragraph (d) of this section.

(c) *Single OTC derivative contract.* Except as modified by paragraph (e) of this section, the exposure amount for a single OTC derivative contract that is not subject to a qualifying master netting agreement is equal to the sum of the [BANK]'s current credit exposure and potential future credit exposure (PFE) on the derivative contract.

(1) *Current credit exposure.* The current credit exposure for a single OTC derivative contract is the greater of the mark-to-market value of the derivative contract or zero.

(2) *PFE.* The PFE for a single OTC derivative contract, including an OTC derivative contract with a negative mark-to-market value, is calculated by multiplying the notional principal amount of the derivative contract by the appropriate conversion factor in Table 8. For purposes of calculating either the PFE under this paragraph or the gross PFE under paragraph (d) of this section for exchange rate contracts and other similar contracts in which the notional principal amount is equivalent to the cash flows, notional principal amount is the net receipts to each party falling due on each value date in each currency. For any OTC derivative contract that does not fall within one of the specified categories in Table 8, the PFE must be calculated using the appropriate ''other'' conversion factor. A [BANK] must use an OTC derivative contract's effective notional principal amount (that is, its apparent or stated notional principal amount multiplied by any multiplier in the OTC derivative contract) rather than its apparent or stated notional principal amount in calculating PFE. PFE of the protection provider of a credit derivative is capped at the net present value of the amount of unpaid premiums.

TABLE 8.—CONVERSION FACTOR MATRIX FOR OTC DERIVATIVE CONTRACTS [1]

| Remaining maturity [2] | Interest rate | Foreign exchange rate and gold | Credit (investment-grade reference obligor) [3] | Credit (non-investment-grade reference obligor) | Equity | Precious metals (except gold) | Other |
|---|---|---|---|---|---|---|---|
| One year or less | 0.00 | 0.01 | 0.05 | 0.10 | 0.06 | 0.07 | 0.10 |
| Greater than one year and less than or equal to five years | 0.005 | 0.05 | 0.05 | 0.10 | 0.08 | 0.07 | 0.12 |
| Greater than five years | 0.015 | 0.075 | 0.05 | 0.10 | 0.10 | 0.08 | 0.15 |

[1] For an OTC derivative contract with multiple exchanges of principal, the conversion factor is multiplied by the number of remaining payments in the derivative contract.

[2] For an OTC derivative contract that is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the market value of the contract is zero, the remaining maturity equals the time until the next reset date. For an interest rate derivative contract with a remaining maturity of greater than one year that meets these criteria, the minimum conversion factor is 0.005.

[3] A [BANK] must use the column labeled ''Credit (investment-grade reference obligor)'' for a credit derivative whose reference obligor has an outstanding unsecured debt security that has an applicable external rating based on a long-term rating of at least investment grade without credit enhancement. A [BANK] must use the column labeled ''Credit (non-investment grade reference obligor)'' for all other credit derivatives.

(d) *Multiple OTC derivative contracts subject to a qualifying master netting agreement.* Except as modified by paragraph (e) of this section, the exposure amount for multiple OTC derivative contracts subject to a qualifying master netting agreement is equal to the sum of the net current credit exposure and the adjusted sum of the PFE for all OTC derivative contracts subject to the qualifying master netting agreement.

(1) *Net current credit exposure.* The net current credit exposure is the greater of the net sum of all positive and negative mark-to-market values of the individual OTC derivative contracts subject to the qualifying master netting agreement or zero.

(2) *Adjusted sum of the PFE.* The adjusted sum of the PFE, Anet, is calculated as

$$\text{Anet} = (0.4 \times \text{Agross}) + (0.6 \times \text{NGR} \times \text{Agross}),$$

Where:

(i) Agross = the gross PFE (that is, the sum of the PFE amounts (as determined under paragraph (c)(2) of this section) for each individual OTC derivative contract subject to the qualifying master netting agreement); and

(ii) NGR = the net to gross ratio (that is, the ratio of the net current credit exposure to the gross current credit exposure). In calculating the NGR, the gross current credit exposure equals the sum of the positive current credit exposures (as determined under paragraph (c)(1) of this section) of all individual OTC derivative contracts subject to the qualifying master netting agreement.

(e) *Collateralized OTC derivative contracts.* A [BANK] may recognize the credit risk mitigation benefits of financial collateral that secures an OTC derivative contract or multiple OTC derivatives subject to a qualifying master netting agreement (netting set) by using the simple approach in paragraph (b) of section 37 of this appendix. Alternatively, a [BANK] may recognize the credit risk mitigation benefits of financial collateral that secures such a contract or netting set if the financial collateral is marked-to-market on a daily basis and subject to a daily margin maintenance requirement by applying a risk weight to the exposure as if it is uncollateralized and adjusting the exposure amount calculated under paragraph (c) or (d) of this section using the collateral haircut approach in paragraph (c) of section 37 of this appendix. The [BANK] must substitute the exposure amount calculated under paragraph (c) or (d) of this section for $\Sigma E$ in the equation in paragraph (c)(3) of section 37 and must use a 10-business-day minimum holding period ($T_M = 10$).

(f) *Counterparty credit risk for credit derivatives.* (1) A [BANK] that purchases a credit derivative that is recognized under section 36 of this appendix as a credit risk mitigant for an exposure that is not a covered position under [the market risk rule] is not required to compute a separate counterparty credit risk capital requirement under section 31 of this appendix provided that the [BANK] does so consistently for all such credit derivatives and either includes all or excludes all such credit derivatives that are subject to a qualifying master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes.

(2) A [BANK] that is the protection provider in a credit derivative must treat the credit derivative as an exposure to the reference obligor and is not required to compute a counterparty credit risk capital requirement for the credit derivative under section 31 of this appendix provided that it does so consistently for all such credit derivatives and either includes all or excludes all such credit derivatives that are

subject to a qualifying master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes (unless the [BANK] is treating the credit derivative as a covered position under [the market risk rule], in which case the [BANK] must compute a supplemental counterparty credit risk capital requirement under this section).

(g) *Counterparty credit risk for equity derivatives.* (1) A [BANK] must treat an equity derivative contract as an equity exposure and compute a risk-weighted asset amount for the equity derivative contract under part V of this appendix (unless the [BANK] is treating the contract as a covered position under [the market risk rule]).

(2) In addition, the [BANK] must also calculate a risk-based capital requirement for the counterparty credit risk of an equity derivative contract under this part if the [BANK] is treating the contract as a covered position under [the market risk rule].

(3) If the [BANK] risk weights the contract under the Simple Risk-Weight Approach (SRWA) in section 52 of this appendix, a [BANK] may choose not to hold risk-based capital against the counterparty credit risk of the equity derivative contract, as long as it does so for all such contracts. Where the equity derivative contracts are subject to a qualified master netting agreement, a [BANK] using the SRWA must either include all or exclude all of the contracts from any measure used to determine counterparty credit risk exposure.

*Section 36. Guarantees and Credit Derivatives: Substitution Treatment*

(a) *Scope.* (1) *General.* A [BANK] may recognize the credit risk mitigation benefits of an eligible guarantee or eligible credit derivative by substituting the risk weight associated with a protection provider for the risk weight assigned to an exposure, as provided under this section.

(2) This section applies to exposures for which:

(i) Credit risk is fully covered by an eligible guarantee or eligible credit derivative; or

(ii) Credit risk is covered on a pro rata basis (that is, on a basis in which the [BANK] and the protection provider share losses proportionately) by an eligible guarantee or eligible credit derivative.

(3) Exposures on which there is a tranching of credit risk (reflecting at least two different levels of seniority) generally are securitization exposures subject to the securitization framework in part IV of this appendix.

(4) If multiple eligible guarantees or eligible credit derivatives cover a single exposure described in paragraph (a)(2) of this section, a [BANK] may treat the hedged exposure as multiple separate exposures each covered by a single eligible guarantee or eligible credit derivative and may calculate a separate risk-weighted asset amount for each separate exposure as described in paragraph (c) of this section.

(5) If a single eligible guarantee or eligible credit derivative covers multiple hedged exposures described in paragraph (a)(2) of this section, a [BANK] must treat each hedged exposure as covered by a separate eligible guarantee or eligible credit derivative and must calculate a separate risk-weighted asset amount for each exposure as described in paragraph (c) of this section.

(6) If a [BANK] calculates the risk-weighted asset amount under section 31 for an exposure whose applicable external or applicable inferred rating reflects the benefits of a credit risk mitigant provided to the exposure, the [BANK] may not use the credit risk mitigation rules in this section to further reduce the risk-weighted asset amount for the exposure to reflect that credit risk mitigant.

(b) *Rules of recognition.* (1) A [BANK] may only recognize the credit risk mitigation benefits of eligible guarantees and eligible credit derivatives.

(2) A [BANK] may only recognize the credit risk mitigation benefits of an eligible credit derivative to hedge an exposure that is different from the credit derivative's reference exposure used for determining the derivative's cash settlement value, deliverable obligation, or occurrence of a credit event if:

(i) The reference exposure ranks pari passu with or is subordinated to the hedged exposure; and

(ii) The reference exposure and the hedged exposure are to the same legal entity, and legally enforceable cross-default or cross-acceleration clauses are in place to assure payments under the credit derivative are triggered when the obligor fails to pay under the terms of the hedged exposure.

(c) *Substitution approach.* (1) *Full coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the exposure amount of the hedged exposure, a [BANK] may recognize the guarantee or credit derivative in determining the risk-weighted asset amount for the hedged exposure by substituting the risk weight applicable to the guarantee or credit derivative under section 33 for the risk weight assigned to the exposure. If the [BANK] determines that full substitution under this paragraph leads to an inappropriate degree of risk mitigation, the [BANK] may substitute a higher risk weight than that applicable to the guarantee or credit derivative.

(2) *Partial coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the exposure amount of the hedged exposure, the [BANK] must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(i) The [BANK] may calculate the risk-weighted asset amount for the protected exposure under section 31 of this appendix, where the applicable risk weight is the risk weight applicable to the guarantee or credit derivative. If the [BANK] determines that full substitution under this paragraph leads to an inappropriate degree of risk mitigation, the [BANK] may use a higher risk weight than that applicable to the guarantee or credit derivative.

(ii) The [BANK] must calculate the risk-weighted asset amount for the unprotected exposure under section 31 of this appendix, where the applicable risk weight is that of the hedged exposure.

(iii) The treatment in this paragraph (c)(2) is applicable when the credit risk of an exposure is covered on a partial pro rata basis and may be applicable when an adjustment is made to the effective notional amount of the guarantee or credit derivative under paragraph (d), (e), or (f) of this section.

(d) *Maturity mismatch adjustment.* (1) A [BANK] that recognizes an eligible guarantee or eligible credit derivative in determining the risk-weighted asset amount for a hedged exposure must adjust the effective notional amount of the credit risk mitigant to reflect any maturity mismatch between the hedged exposure and the credit risk mitigant.

(2) A maturity mismatch occurs when the residual maturity of a credit risk mitigant is less than that of the hedged exposure(s).

(3) The residual maturity of a hedged exposure is the longest possible remaining time before the obligor is scheduled to fulfil its obligation on the exposure. If a credit risk mitigant has embedded options that may reduce its term, the [BANK] (protection purchaser) must use the shortest possible residual maturity for the credit risk mitigant. If a call is at the discretion of the protection provider, the residual maturity of the credit risk mitigant is at the first call date. If the call is at the discretion of the [BANK] (protection purchaser), but the terms of the arrangement at origination of the credit risk mitigant contain a positive incentive for the [BANK] to call the transaction before contractual maturity, the remaining time to the first call date is the residual maturity of the credit risk mitigant. For example, where there is a step-up in cost in conjunction with a call feature or where the effective cost of protection increases over time even if credit quality remains the same or improves, the residual maturity of the credit risk mitigant will be the remaining time to the first call.

(4) A credit risk mitigant with a maturity mismatch may be recognized only if its original maturity is greater than or equal to one year and its residual maturity is greater than three months.

(5) When a maturity mismatch exists, the [BANK] must apply the following adjustment to reduce the effective notional amount of the credit risk mitigant:

$$P_m = E \times (t - 0.25)/(T - 0.25),$$

where:

(i) $P_m$ = effective notional amount of the credit risk mitigant, adjusted for maturity mismatch;

(ii) E = effective notional amount of the credit risk mitigant;

(iii) t = the lesser of T or the residual maturity of the credit risk mitigant, expressed in years; and

(iv) T = the lesser of five or the residual maturity of the hedged exposure, expressed in years.

(e) *Adjustment for credit derivatives without restructuring as a credit event.* If a [BANK] recognizes an eligible credit

derivative that does not include as a credit event a restructuring of the hedged exposure involving forgiveness or postponement of principal, interest, or fees that results in a credit loss event (that is, a charge-off, specific provision, or other similar debit to the profit and loss account), the [BANK] must apply the following adjustment to reduce the effective notional amount of the credit derivative:

$P_r = P_m \times 0.60$,

where:

(1) $P_r$ = effective notional amount of the credit risk mitigant, adjusted for lack of restructuring event (and maturity mismatch, if applicable); and

(2) $P_m$ = effective notional amount of the credit risk mitigant (adjusted for maturity mismatch, if applicable).

(f) *Currency mismatch adjustment.* (1) If a [BANK] recognizes an eligible guarantee or eligible credit derivative that is denominated in a currency different from that in which the hedged exposure is denominated, the [BANK] must apply the following formula to the effective notional amount of the guarantee or credit derivative:

$P_c = P_r \times (1 - H_{FX})$,

where:

(i) $P_c$ = effective notional amount of the credit risk mitigant, adjusted for currency mismatch (and maturity mismatch and lack of restructuring event, if applicable);

(ii) $P_r$ = effective notional amount of the credit risk mitigant (adjusted for maturity mismatch and lack of restructuring event, if applicable); and

(iii) $H_{FX}$ = haircut appropriate for the currency mismatch between the credit risk mitigant and the hedged exposure.

(2) A [BANK] must set $H_{FX}$ equal to eight percent unless it qualifies for the use of and uses its own internal estimates of foreign exchange volatility based on a 10-business-day holding period and daily marking-to-market and remargining. A [BANK] qualifies for the use of its own internal estimates of foreign exchange volatility if it qualifies for:

(i) The own-estimates haircuts in paragraph (c)(5) of section 37; or

(ii) The simple VaR methodology in paragraph (d) of section 37.

(3) A [BANK] must adjust $H_{FX}$ calculated in paragraph (f)(2) of this section upward if the [BANK] revalues the guarantee or credit derivative less frequently than once every 10 business days using the following square root of time formula:

$$H_M = H_N \sqrt{\frac{T_M}{T_N}},$$

where:

(i) $T_M$ equals the greater of 10 or the number of days between revaluation;

(ii) $T_N$ equals the holding period used by the [BANK] to derive $H_N$; and

(iii) $H_N$ equals the haircut based on the holding period $T_N$.

*Section 37. Collateralized Transactions*

(a) *General.* (1) This section provides three approaches that a [BANK] may use to recognize the risk-mitigating effects of financial collateral:

(i) *The simple approach.* A [BANK] may use the simple approach for any exposure.

(ii) *The collateral haircut approach.* A [BANK] may use the collateral haircut approach for repo-style transactions, eligible margin loans, collateralized OTC derivative contracts, and single-product netting sets of such transactions.

(iii) *The simple VaR methodology.* A [BANK] may use the simple VaR methodology for single-product netting sets of repo-style transactions and eligible margin loans.

(2) A [BANK] may use any approach described in this section that is valid for a particular type of exposure or transaction; however, it must use the same approach for similar exposures or transactions.

(3) If a [BANK] calculates its risk-weighted asset amount under section 31 for an exposure whose applicable external or applicable inferred rating reflects the benefits of financial collateral to the exposure, the [BANK] may not use the credit risk mitigation rules in this section to further reduce the risk-weighted asset amount for the exposure to reflect that financial collateral.

(b) *The simple approach.* (1) *General requirements.* (i) A [BANK] may recognize the credit risk mitigation benefits of financial collateral that secures any exposure or any collateral that secures a repo-style transaction that is included in the [BANK]'s VaR-based measure under [the market risk rule].

(ii) To qualify for the simple approach the collateral must meet the following requirements:

(A) The collateral must be subject to a collateral agreement for at least the life of the exposure;

(B) The collateral must be revalued at least every six months; and

(C) The collateral (other than gold) and the exposure must be denominated in the same currency.

(2) *Risk weight substitution.* (i) A [BANK] may risk weight the portion of an exposure that is secured by the market value of collateral (that meets the requirements of paragraph (b)(1) of this section) based on the risk weight assigned to the collateral under this appendix. For repurchase agreements, reverse repurchase agreements, and securities lending and borrowing transactions, the collateral is the instruments, gold, and cash the [BANK] has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction. Except as provided in paragraph (b)(3) of this section, the risk weight assigned to the collateralized portion of the exposure may not be less than 20 percent.

(ii) A [BANK] must risk weight the unsecured portion of the exposure based on the risk weight assigned to the exposure under this appendix.

(3) *Exceptions to the 20 percent risk-weight floor and other requirements.* Notwithstanding paragraph (b)(2)(i) of this section:

(i) A [BANK] may assign a zero percent risk weight to an exposure to an OTC derivative contract that is marked-to-market on a daily basis and subject to a daily margin maintenance requirement, to the extent the contract is collateralized by cash on deposit.

(ii) A [BANK] may assign a 10 percent risk weight to an exposure to an OTC derivative contract that is marked-to-market on a daily basis and subject to a daily margin maintenance requirement, to the extent that the contract is collateralized by a sovereign security or a PSE security that qualifies for a zero percent risk weight under section 33 of this appendix.

(iii) A [BANK] may assign a zero percent risk weight to the collateralized portion of an exposure where:

(A) The financial collateral is cash on deposit; or

(B) The financial collateral is a sovereign security or a PSE security, the security qualifies for a zero percent risk weight under section 33, and the [BANK] has discounted the market value of the collateral by 20 percent.

(iv) If a [BANK] recognizes collateral in the form of a conforming residential mortgage, the [BANK] must risk weight the portion of the exposure that is secured by the conforming residential mortgage at 50 percent.

(c) *Collateral haircut approach.* (1) *General.* A [BANK] may recognize the credit risk mitigation benefits of financial collateral that secures an eligible margin loan, repo-style transaction, collateralized OTC derivative contract, or single-product netting set of such transactions, and of any collateral that secures a repo-style transaction that is included in the [BANK]'s VaR-based measure under [the market risk rule] by using the collateral haircut approach in this paragraph (c).

(2) *Approaches for the calculation of collateral haircuts.* There are two ways to calculate collateral haircuts: the standard supervisory haircuts approach and the own internal estimates for haircuts approach. For exposures other than repo-style transactions included in the [BANK]'s VaR-based measure under the [the market risk rule], a [BANK] must use the standard supervisory haircut approach with a minimum 10-business-day holding period if it chooses to recognize in the exposure amount the benefits of collateral in the form of a conforming residential mortgage.

(3) *Exposure amount equation.* Under either collateral haircut approach, a [BANK] must determine the exposure amount for an eligible margin loan, repo-style transaction, collateralized OTC derivative contract, or a single-product netting set of such transactions by setting the exposure amount equal to max $\{0, [(\Sigma E - \Sigma C) + \Sigma(Es \times Hs) + \Sigma(Efx \times Hfx)]\}$, where:

(i)(A) For eligible margin loans and repo-style transactions, $\Sigma E$ equals the value of the exposure (the sum of the current market values of all instruments, gold, and cash the [BANK] has lent, sold subject to repurchase, or posted as collateral to the counterparty under the transaction (or netting set)); and

(B) For collateralized OTC derivative contracts and netting sets thereof, $\Sigma E$ equals the exposure amount of the OTC derivative contract (or netting set) calculated under paragraph (c) or (d) of section 35 of this appendix;

(ii) ΣC equals the value of the collateral (the sum of the current market values of all instruments, gold and cash the [BANK] has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction (or netting set));

(iii) Es equals the absolute value of the net position in a given instrument or in gold (where the net position in a given instrument or in gold equals the sum of the current market values of the instrument or gold the [BANK] has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current market values of that same instrument or gold the [BANK] has borrowed, purchased subject to resale, or taken as collateral from the counterparty);

(iv) Hs equals the market price volatility haircut appropriate to the instrument or gold referenced in Es;

(v) Efx equals the absolute value of the net position of instruments and cash in a currency that is different from the settlement currency (where the net position in a given currency equals the sum of the current market values of any instruments or cash in the currency the [BANK] has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current market values of any instruments or cash in the currency the [BANK] has borrowed, purchased subject to resale, or taken as collateral from the counterparty); and

(vi) Hfx equals the haircut appropriate to the mismatch between the currency referenced in Efx and the settlement currency.

(4) *Standard supervisory haircuts.* Under the standard supervisory haircuts approach:

(i) A [BANK] must use the haircuts for market price volatility (Hs) in Table 9, as adjusted in certain circumstances as provided under in paragraph (c)(4)(iii) and (iv) of this section:

TABLE 9.—STANDARD SUPERVISORY MARKET PRICE VOLATILITY HAIRCUTS [1]

| Applicable external rating grade category for debt securities | Residual maturity for debt securities | Sovereign entities [2] | Other issuers |
|---|---|---|---|
| Two highest investment-grade rating categories for long-term ratings/highest investment-grade rating category for short-term ratings. | ≤ 1 year | 0.005 | 0.01 |
| | > 1 year, ≤ 5 years | 0.02 | 0.04 |
| | > 5 years | 0.04 | 0.08 |
| Two lowest investment-grade rating categories for both short- and long-term ratings. | ≤ 1 year | 0.01 | 0.02 |
| | > 1 year, ≤ 5 years | 0.03 | 0.06 |
| | > 5 years | 0.06 | 0.12 |
| One rating category below investment grade | All | 0.15 | 0.25 |
| Main index equities (including convertible bonds) and gold | | 0.15 | |
| Other publicly traded equities (including convertible bonds), conforming residential mortgages, and non-financial collateral. | | 0.25 | |
| Mutual funds | | Highest haircut applicable to any security in which the fund can invest. | |
| Cash on deposit with the [BANK] (including a certificate of deposit issued by the [BANK]) | | 0 | |

[1] The market price volatility haircuts in Table 9 are based on a 10-business-day holding period.
[2] This column includes the haircuts for MDBs and foreign PSEs that receive a zero percent risk weight under section 33 of this appendix.

(ii) For currency mismatches, a [BANK] must use a haircut for foreign exchange rate volatility (Hfx) of 8.0 percent, as adjusted in certain circumstances as provided under paragraph (c)(4)(iii) and (iv) of this section.

(iii) For repo-style transactions, a [BANK] may multiply the standard supervisory haircuts provided in paragraphs (c)(4)(i) and (ii) of this section by the square root of ½ (which equals 0.707107).

(iv) A [BANK] must adjust the standard supervisory haircuts provided in paragraphs (c)(4)(i) and (ii) of this section upward on the basis of a holding period longer than 10 business days (for eligible margin loans and OTC derivative contracts) or five business days (for repo-style transactions) where and as appropriate to take into account the illiquidity of an instrument.

(5) *Own internal estimates for haircuts.* With the prior written approval of the [agency], a [BANK] may calculate haircuts (Hs and Hfx) using its own internal estimates of the volatilities of market prices and foreign exchange rates.

(i) To receive [agency] approval to use its own internal estimates, a [BANK] must satisfy the following minimum quantitative standards:

(A) A [BANK] must use a 99th percentile one-tailed confidence interval.

(B) The minimum holding period for a repo-style transaction is five business days and for an eligible margin loan or OTC derivative contract is 10 business days. When a [BANK] calculates an own-estimates haircut on a $T_N$-day holding period, which is different from the minimum holding period for the transaction type, the applicable haircut ($H_M$) is calculated using the following square root of time formula:

$$H_M = H_N \sqrt{\frac{T_M}{T_N}},$$

where:

(*1*) $T_M$ equals 5 for repo-style transactions and 10 for eligible margin loans and OTC derivative contracts;

(*2*) $T_N$ equals the holding period used by the [BANK] to derive $H_N$; and

(*3*) $H_N$ equals the haircut based on the holding period $T_N$.

(C) A [BANK] must adjust holding periods upward where and as appropriate to take into account the illiquidity of an instrument.

(D) The historical observation period must be at least one year.

(E) A [BANK] must update its data sets and recompute haircuts no less frequently than quarterly and must also reassess data sets and haircuts whenever market prices change materially.

(ii) With respect to debt securities that have an applicable external rating of investment grade, a [BANK] may calculate haircuts for categories of securities. For a category of securities, the [BANK] must calculate the haircut on the basis of internal volatility estimates for securities in that category that are representative of the securities in that category that the [BANK] has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. In determining relevant categories, the [BANK] must at a minimum take into account:

(A) The type of issuer of the security;

(B) The applicable external rating of the security;

(C) The maturity of the security; and

(D) The interest rate sensitivity of the security.

(iii) With respect to debt securities that have an applicable external rating of below investment grade and equity securities, a [BANK] must calculate a separate haircut for each individual security.

(iv) Where an exposure or collateral (whether in the form of cash or securities) is denominated in a currency that differs from the settlement currency, the [BANK] must

calculate a separate currency mismatch haircut for its net position in each mismatched currency based on estimated volatilities of foreign exchange rates between the mismatched currency and the settlement currency.

(v) A [BANK]'s own estimates of market price and foreign exchange rate volatilities may not take into account the correlations among securities and foreign exchange rates on either the exposure or collateral side of a transaction (or netting set) or the correlations among securities and foreign exchange rates between the exposure and collateral sides of the transaction (or netting set).

(d) *Simple VaR methodology*. (1) With the prior written approval of the [agency], a [BANK] may estimate the exposure amount for a single-product netting set of repo-style-transactions or eligible margin loans using a VaR model that meets the requirements in paragraph (d)(3) of this section. However, a [BANK] may not use the VaR model described below to recognize in the exposure amount the benefits of collateral in the form of a conforming residential mortgage (other than for repo-style transactions included in the [BANK]'s VaR-based measure under [the market risk rule]).

(2) The [BANK] must set the exposure amount equal to max

$$\{0, [(\Sigma E - \Sigma C) + PFE]\},$$

where:

(i) $\Sigma E$ equals the value of the exposure (the sum of the current market values of all instruments, gold, and cash the [BANK] has lent, sold subject to repurchase, or posted as collateral to the counterparty under the netting set);

(ii) $\Sigma C$ equals the value of the collateral (the sum of the current market values of all instruments, gold, and cash the [BANK] has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the netting set); and

(iii) PFE equals the [BANK]'s empirically based best estimate of the 99th percentile, one-tailed confidence interval for an increase in the value of $(\Sigma E - \Sigma C)$ over a five-business-day holding period for repo-style transactions or over a 10-business-day holding period for eligible margin loans using a minimum one-year historical observation period of price data representing the instruments that the [BANK] has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral.

(3) The [BANK] must validate its VaR model, including by establishing and maintaining a rigorous and regular backtesting regime. For the purposes of this section, backtesting means a comparison of a [BANK]'s internal estimates with actual outcomes during a sample period not used in model development.

*Section 38. Unsettled Transactions*

(a) *Definitions*. For purposes of this section:

(1) *Delivery-versus-payment (DvP) transaction* means a securities or commodities transaction in which the buyer is obligated to make payment only if the seller has made delivery of the securities or commodities and the seller is obligated to deliver the securities or commodities only if the buyer has made payment.

(2) *Payment-versus-payment (PvP) transaction* means a foreign exchange transaction in which each counterparty is obligated to make a final transfer of one or more currencies only if the other counterparty has made a final transfer of one or more currencies.

(3) *Qualifying central counterparty* means a counterparty (for example, a clearing house) that:

(i) Facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating contracts;

(ii) Requires all participants in its arrangements to be fully collateralized on a daily basis; and

(iii) The [BANK] demonstrates to the satisfaction of the [agency] is in sound financial condition and is subject to effective oversight by a national supervisory authority.

(4) *Normal settlement period*. A transaction has a *normal settlement period* if the contractual settlement period for the transaction is equal to or less than the market standard for the instrument underlying the transaction and equal to or less than five business days.

(5) *Positive current exposure*. The positive current exposure of a [BANK] for a transaction is the difference between the transaction value at the agreed settlement price and the current market price of the transaction, if the difference results in a credit exposure of the [BANK] to the counterparty.

(b) *Scope*. This section applies to all transactions involving securities, foreign exchange instruments, and commodities that have a risk of delayed settlement or delivery. This section does not apply to:

(1) Transactions accepted by a qualifying central counterparty that are subject to daily marking-to-market and daily receipt and payment of variation margin;

(2) Repo-style transactions, including unsettled repo-style transactions;

(3) One-way cash payments on OTC derivative contracts; or

(4) Transactions with a contractual settlement period that is longer than the normal settlement period (which are treated as OTC derivative contracts as provided in section 35).

(c) *System-wide failures*. In the case of a system-wide failure of a settlement or clearing system, the [agency] may waive risk-based capital requirements for unsettled and failed transactions until the situation is rectified.

(d) *Delivery-versus-payment (DvP) and payment-versus-payment (PvP) transactions*. A [BANK] must hold risk-based capital against any DvP or PvP transaction with a normal settlement period if the [BANK]'s counterparty has not made delivery or payment within five business days after the settlement date. The [BANK] must determine its risk-weighted asset amount for such a transaction by multiplying the positive current exposure of the transaction for the [BANK] by the appropriate risk weight in Table 10.

TABLE 10.—RISK WEIGHTS FOR UNSETTLED DVP AND PVP TRANSACTIONS

| Number of business days after contractual settlement date | Risk weight to be applied to positive current exposure (in percent) |
|---|---|
| From 5 to 15 | 100.0 |
| From 16 to 30 | 625.0 |
| From 31 to 45 | 937.5 |
| 46 or more | 1,250.0 |

(e) *Non-DvP/non-PvP (non-delivery-versus-payment/non-payment-versus-payment) transactions*. (1) A [BANK] must hold risk-based capital against any non-DvP/non-PvP transaction with a normal settlement period if the [BANK] has delivered cash, securities, commodities, or currencies to its counterparty but has not received its corresponding deliverables by the end of the same business day. The [BANK] must continue to hold risk-based capital against the transaction until the [BANK] has received its corresponding deliverables.

(2) From the business day after the [BANK] has made its delivery until five business days after the counterparty delivery is due, the [BANK] must calculate the risk-weighted asset amount for the transaction by treating the current market value of the deliverables owed to the [BANK] as an exposure to the counterparty and using the applicable counterparty risk weight in section 33 of this appendix.

(3) If the [BANK] has not received its deliverables by the fifth business day after counterparty delivery was due, the [BANK] must deduct the current market value of the deliverables owed to the [BANK] 50 percent from tier 1 capital and 50 percent from tier 2 capital.

(f) *Total risk-weighted assets for unsettled transactions*. Total risk-weighted assets for unsettled transactions is the sum of the risk-weighted asset amounts of all DvP, PvP, and non-DvP/non-PvP transactions.

**Part IV. Risk-Weighted Assets for Securitization Exposures**

*Section 41. Operational Requirements for Securitization Exposures*

(a) *Operational criteria for traditional securitizations*. A [BANK] that transfers exposures it has originated or purchased to a securitization SPE or other third party in connection with a traditional securitization may exclude the exposures from the calculation of its risk-weighted assets only if each condition in this paragraph (a) is satisfied. A [BANK] that meets these conditions must hold risk-based capital against any securitization exposures it retains in connection with the securitization. A [BANK] that fails to meet these conditions must instead hold risk-based capital against the transferred exposures as if they had not been securitized and must deduct from tier 1 capital any after-tax gain-on-sale resulting from the transaction. The conditions are:

(1) The transfer is considered a sale under GAAP;

(2) The [BANK] has transferred to one or more third parties credit risk associated with the underlying exposures; and

(3) Any clean-up calls relating to the securitization are eligible clean-up calls.

(b) *Operational criteria for synthetic securitizations.* For synthetic securitizations, a [BANK] may recognize for risk-based capital purposes the use of a credit risk mitigant to hedge underlying exposures only if each condition in this paragraph (b) is satisfied. A [BANK] that fails to meet these conditions must instead hold risk-based capital against the underlying exposures as if they had not been synthetically securitized. The conditions are:

(1) The credit risk mitigant is financial collateral, an eligible credit derivative, or an eligible guarantee;

(2) The [BANK] transfers credit risk associated with the underlying exposures to one or more third parties, and the terms and conditions in the credit risk mitigants employed do not include provisions that:

(i) Allow for the termination of the credit protection due to deterioration in the credit quality of the underlying exposures;

(ii) Require the [BANK] to alter or replace the underlying exposures to improve the credit quality of the pool of underlying exposures;

(iii) Increase the [BANK]'s cost of credit protection in response to deterioration in the credit quality of the underlying exposures;

(iv) Increase the yield payable to parties other than the [BANK] in response to a deterioration in the credit quality of the underlying exposures; or

(v) Provide for increases in a retained first loss position or credit enhancement provided by the [BANK] after the inception of the securitization;

(3) The [BANK] obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk mitigant in all relevant jurisdictions; and

(4) Any clean-up calls relating to the securitization are eligible clean-up calls.

*Section 42. Risk-Weighted Assets for Securitization Exposures*

(a) *Hierarchy of approaches.* Except as provided elsewhere in this section or in section 41:

(1) A [BANK] must deduct from tier 1 capital any after-tax gain-on-sale resulting from a securitization and must deduct from total capital in accordance with paragraph (c) of this section the portion of any CEIO that does not constitute after-tax gain-on-sale.

(2) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and qualifies for the Ratings-Based Approach (RBA) in section 43 of this appendix, a [BANK] must apply the RBA to the exposure.

(3) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and does not qualify for the RBA, a [BANK] must apply the treatments in section 44.

(4) If a securitization exposure is an OTC derivative contract (other than a credit derivative) that has a first priority claim on the cash flows from the underlying exposures (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments), with approval of the [agency], a [BANK] may choose to set the risk-weighted asset amount of the exposure equal to the amount of the exposure as determined in paragraph (d) of this section rather than apply the hierarchy of approaches described in paragraphs (a)(1) through (3) of this section.

(b) *Total risk-weighted assets for securitization exposures.* A [BANK]'s total risk-weighted assets for securitization exposures equals the sum of the risk-weighted asset amount for securitization exposures that the [BANK] risk weights under section 43, 44, or 45 of this appendix plus any risk-weighted asset amount calculated under section 46 of this appendix, as modified by paragraphs (e) through (k) of this section.

(c) *Deductions.* (1) If a [BANK] must deduct a securitization exposure from total capital, the [BANK] must take the deduction 50 percent from tier 1 capital and 50 percent from tier 2 capital. If the amount deductible from tier 2 capital exceeds the [BANK]'s tier 2 capital, the [BANK] must deduct the excess from tier 1 capital.

(2) A [BANK] may calculate any deduction from tier 1 capital and tier 2 capital for a securitization exposure net of any deferred tax liabilities associated with the securitization exposure.

(d) *Exposure amount of a securitization exposure.* (1) *On-balance sheet securitization exposures.* The exposure amount of an on-balance sheet securitization exposure that is not a repo-style transaction, eligible margin loan, or OTC derivative contract (other than a credit derivative) is:

(i) The [BANK]'s carrying value minus any unrealized gains and plus any unrealized losses on the exposure, if the exposure is a security classified as available-for-sale; or

(ii) The [BANK]'s carrying value, if the exposure is not a security classified as available-for-sale.

(2) *Off-balance sheet securitization exposures.* (i) The exposure amount of an off-balance sheet securitization exposure that is not a repo-style transaction or an OTC derivative contract (other than a credit derivative) is the notional amount of the exposure. For an off-balance sheet securitization exposure to an ABCP program, such as a liquidity facility, the notional amount may be reduced to the maximum potential amount that the [BANK] could be required to fund given the ABCP program's current underlying assets (calculated without regard to the current credit quality of those assets).

(ii) A [BANK] must determine the exposure amount of an eligible ABCP liquidity facility by multiplying the notional amount of the exposure by the appropriate CCF:

(A) 20 percent, for an eligible ABCP liquidity facility with an original maturity of one year or less that does not qualify for the RBA.

(B) 50 percent, for an eligible ABCP liquidity facility with an original maturity of over one year that does not qualify for the RBA.

(C) 100 percent, for an eligible ABCP liquidity facility that qualifies for the RBA.

(3) *Repo-style transactions, eligible margin loans, and OTC derivative contracts.* The exposure amount of a securitization exposure that is a repo-style transaction, eligible margin loan, or OTC derivative contract (other than a credit derivative) is the exposure amount of the transaction as calculated under section 35 or 37 of this appendix.

(e) *Overlapping exposures.* If a [BANK] has multiple securitization exposures that provide duplicative coverage to the underlying exposures of a securitization (such as when a [BANK] provides a program-wide credit enhancement and multiple pool-specific liquidity facilities to an ABCP program), the [BANK] is not required to hold duplicative risk-based capital against the overlapping position. Instead, the [BANK] may apply to the overlapping position the applicable risk-based capital treatment that results in the highest risk-based capital requirement.

(f) *Implicit support.* If a [BANK] provides support to a securitization in excess of the [BANK]'s contractual obligation to provide credit support to the securitization (implicit support):

(1) The [BANK] must hold regulatory capital against all of the underlying exposures associated with the securitization as if the exposures had not been securitized and must deduct from tier 1 capital any after-tax gain-on-sale resulting from the securitization; and

(2) The [BANK] must disclose publicly:

(i) That it has provided implicit support to the securitization; and

(ii) The regulatory capital impact to the [BANK] of providing such implicit support.

(g) *Undrawn portion of an eligible servicer cash advance facility.* Regardless of any other provision of this part, a [BANK] is not required to hold risk-based capital against the undrawn portion of an eligible servicer cash advance facility.

(h) *Interest-only mortgage-backed securities.* Regardless of any other provisions of this part, the risk weight for a non-credit-enhancing interest-only mortgage-backed security may not be less than 100 percent.

(i) *Small-business loans and leases on personal property transferred with recourse.* (1) Regardless of any other provisions of this appendix, a [BANK] that has transferred small-business loans and leases on personal property (small-business obligations) with recourse must include in risk-weighted assets only the contractual amount of retained recourse if all the following conditions are met:

(i) The transaction is a sale under GAAP.

(ii) The [BANK] establishes and maintains, pursuant to GAAP, a non-capital reserve sufficient to meet the [BANK]'s reasonably estimated liability under the recourse arrangement.

(iii) The loans and leases are to businesses that meet the criteria for a small-business concern established by the Small Business Administration under section 3(a) of the Small Business Act (15 U.S.C. 632).

(iv) The [BANK] is well capitalized, as defined in the [agency]'s prompt corrective action regulation—12 CFR part 6 (for national banks); 12 CFR part 208, subpart D (for state

member banks or bank holding companies); 12 CFR part 325, subpart B (for state nonmember banks); and 12 CFR part 565 (for savings associations). For purposes of determining whether a [BANK] is well capitalized for purposes of this paragraph, the [BANK]'s capital ratios must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in this paragraph (i)(1).

(2) The total outstanding amount of recourse retained by a [BANK] on transfers of small-business obligations receiving the capital treatment specified in paragraph (i)(1) of this section cannot exceed 15 percent of the [BANK]'s total qualifying capital.

(3) If a [BANK] ceases to be well capitalized or exceeds the 15 percent capital limitation, the capital treatment specified in paragraph (i)(1) of this section will continue to apply to any transfers of small-business obligations with recourse that occurred during the time that the [BANK] was well capitalized and did not exceed the capital limit.

(4) The risk-based capital ratios of the [BANK] must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (i)(1) of this section as provided in 12 CFR part 3, appendix A (for national banks); 12 CFR part 208, appendix A (for state member banks); 12 CFR part 225, appendix A (for bank holding companies); 12 CFR part 325, appendix A (for state nonmember banks); and 12 CFR 567.6(b)(5)(v) (for savings associations).

(j) *Consolidated ABCP programs.* (1) A [BANK] that qualifies as a primary beneficiary and must consolidate an ABCP program as a variable interest entity under GAAP may exclude the consolidated ABCP program assets from risk-weighted assets if the [BANK] is the sponsor of the ABCP program. If a [BANK] excludes such consolidated ABCP program assets from risk-weighted assets, the [BANK] must hold risk-based capital against any securitization exposures of the [BANK] to the ABCP program in accordance with this part.

(2) If a [BANK] either is not permitted, or elects not, to exclude consolidated ABCP program assets from its risk-weighted assets, the [BANK] must hold risk-based capital against the consolidated ABCP program assets in accordance with this appendix but is not required to hold risk-based capital against any securitization exposures of the [BANK] to the ABCP program.

(k) *Nth-to-default credit derivatives.* (1) *First-to-default credit derivatives.* (i) *Protection purchaser.* A [BANK] that obtains credit protection on a group of underlying exposures through a first-to-default credit derivative must determine its risk-based capital requirement for the underlying exposures as if the [BANK] synthetically securitized the underlying exposure with the lowest risk-based capital requirement and had obtained no credit risk mitigant on the other underlying exposures.

(ii) *Protection provider.* A [BANK] that provides credit protection on a group of underlying exposures through a first-to-default credit derivative must determine its risk-weighted asset amount for the derivative by applying the RBA or, if the derivative does not qualify for the RBA, by setting its risk-weighted asset amount for the derivative equal to the product of:

(A) The protection amount of the derivative; and

(B) The sum of the risk weights of the individual underlying exposures, up to a maximum of 1,250 percent.

(2) *Second-or-subsequent-to-default credit derivatives.* (i) *Protection purchaser.* (A) A [BANK] that obtains credit protection on a group of underlying exposures through an nth-to-default credit derivative (other than a first-to-default credit derivative) may recognize the credit risk mitigation benefits of the derivative only if:

(*1*) The [BANK] also has obtained credit protection on the same underlying exposures in the form of first-through-(n-1)-to-default credit derivatives; or

(*2*) If n-1 of the underlying exposures have already defaulted.

(B) If a [BANK] satisfies the requirements of paragraph (k)(2)(i)(A) of this section, the [BANK] must determine its risk-based capital requirement for the underlying exposures as if the [BANK] had only synthetically securitized the underlying exposure with the nth lowest risk-based capital requirement and had obtained no credit risk mitigant on the other underlying exposures.

(ii) *Protection provider.* A [BANK] that provides credit protection on a group of underlying exposures through an nth-to-default credit derivative (other than a first-to-default credit derivative) must determine its risk-weighted asset amount for the derivative by applying the RBA in section 43 of this appendix (if the derivative qualifies for the RBA) or, if the derivative does not qualify for the RBA, by setting its risk-weighted asset amount for the derivative equal to the product of:

(A) The protection amount of the derivative; and

(B) The sum of the risk weights of the individual underlying exposures (excluding the n-1 underlying exposures with the lowest risk-based capital requirement), up to a maximum of 1,250 percent.

*Section 43. Ratings-Based Approach (RBA)*

(a) *Eligibility requirements for use of the RBA.* (1) *Originating [BANK].* An originating [BANK] must use the RBA to calculate its risk-based capital requirement for a securitization exposure if the exposure has two or more external or inferred ratings (and may not use the RBA if the exposure has fewer than two external or inferred ratings).

(2) *Investing [BANK].* An investing [BANK] must use the RBA to calculate the risk-based capital requirement for a securitization exposure if the exposure has one or more external or inferred ratings (and may not use the RBA if the exposure has no external rating or inferred rating).

(b) *Ratings-based approach.* (1) A [BANK] must determine its risk-based capital requirement for a securitization exposure not required to be deducted under Table 11 or 12 by multiplying the exposure amount (as determined in paragraph (d) of section 42) by the risk weight that corresponds to the applicable external or applicable inferred rating provided in Table 11 or 12. If the applicable table requires deduction, the exposure amount must be deducted from total capital in accordance with paragraph (c) of section 42 of this appendix.

(2) A [BANK] must apply the risk weights in Table 11 when the securitization exposure's applicable external or applicable inferred rating represents a long-term credit rating, and must apply the risk weights in Table 12 when the securitization exposure's applicable external or applicable inferred rating represents a short-term credit rating.

TABLE 11.—LONG-TERM CREDIT RATING RISK WEIGHTS UNDER THE RBA

| Applicable external or applicable inferred rating of a securitization exposure | Example | Risk weight (in percent) |
|---|---|---|
| Highest investment grade rating | AAA | 20. |
| Second-highest investment grade rating | AA | 20. |
| Third-highest investment grade rating | A | 50. |
| Lowest investment grade rating | BBB | 100. |
| One category below investment grade | BB | 350. |
| Two categories below investment grade | B | Deduction. |
| Three categories or more below investment grade | CCC | Deduction. |

TABLE 12.—SHORT-TERM CREDIT RATING RISK WEIGHTS UNDER THE RBA

| Applicable external or applicable inferred rating of a securitization exposure | Example | Risk Weight (in percent) |
|---|---|---|
| Highest investment grade rating | A–1/P–1 | 20. |
| Second-highest investment grade rating | A–2/P–2 | 50. |
| Third-highest investment grade rating | A–3/P–3 | 100. |
| All other ratings | N/A | Deduction. |

*Section 44. Securitization Exposures That Do Not Qualify for the RBA*

A [BANK] must deduct from total capital all securitization exposures that do not qualify for the RBA in section 43 of this appendix with the following exceptions, provided that the [BANK] knows the composition of the underlying exposures at all times:

(a) *An eligible ABCP liquidity facility.* A [BANK] may determine the risk-weighted asset amount of an eligible ABCP liquidity facility by multiplying the exposure amount by the highest risk weight applicable to any of the individual underlying exposures covered by the facility.

(b) *A first priority securitization exposure.* A [BANK] may determine the risk-weighted asset amount of a first priority securitization exposure by multiplying the exposure amount by the weighted-average risk weight of the underlying exposures. For purposes of this section, a first priority securitization exposure is a securitization exposure that has a first priority claim on the cash flows from the underlying exposures and that is not an eligible ABCP liquidity facility. When determining whether a securitization exposure has a first priority claim on the cash flows from the underlying exposures, a [BANK] is not required to consider amounts due under interest rate or currency derivative contracts, fees due, or other similar payments.

(c) *A securitization exposure in a second loss position or better in an ABCP program.* (1) A [BANK] may determine the risk-weighted asset amount of a securitization exposure that is in a second loss position or better in an ABCP program that meets the requirements of paragraph (c)(2) of this section by multiplying the exposure amount by the higher of the following risk weights:

(i) 100 percent; or

(ii) The highest risk weight applicable to any of the individual underlying exposures of the ABCP program.

(2) *Requirements.* (i) The exposure is not a first priority securitization exposure or an eligible ABCP liquidity facility;

(ii) The exposure must be economically in a second loss position or better, and the first loss position must provide significant credit protection to the second loss position;

(iii) The credit risk of the exposure must be the equivalent of investment grade or better; and

(iv) The [BANK] holding the exposure must not retain or provide the first loss position.

*Section 45. Recognition of Credit Risk Mitigants for Securitization Exposures*

(a) *General.* (1) An originating [BANK] that has obtained a credit risk mitigant to hedge its securitization exposure to a synthetic or traditional securitization that satisfies the operational criteria in section 41 of this appendix may recognize the credit risk mitigant under section 36 or 37 of this appendix, but only as provided in this section.

(2) An investing [BANK] that has obtained a credit risk mitigant to hedge a securitization exposure may recognize the credit risk mitigant under section 36 or 37 of this appendix, but only as provided in this section.

(3) A [BANK] that has used section 43 or section 44 to calculate its risk-based capital requirement for a securitization exposure based on external or inferred ratings that reflect the benefits of a credit risk mitigant provided to the associated securitization or that supports some or all of the underlying exposures may not use the credit risk mitigation rules in this section to further reduce its risk-based capital requirement for the exposure to reflect that credit risk mitigant.

(b) *Eligible guarantors for securitization exposures.* A [BANK] may only recognize an eligible guarantee or eligible credit derivative from an eligible guarantor that:

(1) Is described in paragraph (1) of the definition of eligible guarantor; or

(2) Has issued and outstanding an unsecured debt security without credit enhancement that has an applicable external rating based on a long-term rating in one of the three highest investment grade rating categories.

(c) *Mismatches.* A [BANK] must make applicable adjustments to the protection amount of an eligible guarantee or credit derivative as required in paragraphs (d), (e), and (f) of section 36 of this appendix for any hedged securitization exposure. In the context of a synthetic securitization, when an eligible guarantee or eligible credit derivative covers multiple hedged exposures that have different residual maturities, the [BANK] must use the longest residual maturity of any of the hedged exposures as the residual maturity of all the hedged exposures.

*Section 46. Risk-Weighted Assets for Securitizations with Early Amortization Provisions*

(a) *General.* (1) An originating [BANK] must hold risk-based capital against the sum of the originating [BANK]'s interest and the investors' interest in a securitization that:

(i) Includes one or more underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit; and

(ii) Contains an early amortization provision.

(2) The total capital requirement for a [BANK]'s exposures to a single securitization with an early amortization provision is subject to a maximum capital requirement equal to the greater of:

(i) The capital requirement for retained securitization exposures, or

(ii) The capital requirement for the underlying exposures that would apply if the [BANK] directly held the underlying exposures.

(3) For securitizations described in paragraph (a)(1) of this section, an originating [BANK] must calculate the risk-based capital requirement for the originating [BANK]'s interest under sections 42 through 45 of this appendix, and the risk-weighted asset amount for the investors' interest under paragraph (c) of this section.

(b) *Definitions.* For purposes of this section:

(1) *Investors' interest* means, with respect to a securitization, the exposure amount of the underlying exposures multiplied by the ratio of:

(i) The total amount of securitization exposures issued by the securitization SPE; divided by

(ii) The outstanding principal amount of the underlying exposures.

(2) *Excess spread* for a period means:

(i) Gross finance charge collections and other income received by a securitization SPE (including market interchange fees) over a period minus interest paid to the holders of the securitization exposures, servicing fees, charge-offs, and other senior trust or similar expenses of the SPE over the period; divided by

(ii) The principal balance of the underlying exposures at the end of the period.

(c) *Risk-weighted asset amount for investors' interest.* The originating [BANK]'s risk-weighted asset amount for the investors' interest in the securitization is equal to the product of the following four quantities:

(1) The investors' interest;

(2) The appropriate conversion factor in paragraph (d) of this section;

(3) The weighted-average risk weight that would apply under this appendix to the underlying exposures if the underlying exposures had not been securitized; and

(4) The proportion of the underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit.

(d) *Conversion factors.* (1)(i) Except as provided in paragraph (d)(2) of this section, to calculate the appropriate conversion factor, a [BANK] must use Table 13 for a securitization that contains a controlled early amortization provision and must use Table 14 for a securitization that contains a non-controlled early amortization provision. In

circumstances where a securitization contains a mix of retail and nonretail exposures or a mix of committed and uncommitted exposures, a [BANK] may take a pro rata approach to determining the conversion factor for the securitization's early amortization provision. If a pro rata approach is not feasible, a [BANK] must treat the mixed securitization as a securitization of nonretail exposures if a single underlying exposure is a nonretail exposure and must treat the mixed securitization as a securitization of committed exposures if a single underlying exposure is a committed exposure.

(ii) To find the appropriate conversion factor in the tables, a [BANK] must divide the three-month average annualized excess spread of the securitization by the excess spread trapping point in the securitization structure. In securitizations that do not require excess spread to be trapped, or that specify trapping points based primarily on performance measures other than the three-month average annualized excess spread, the excess spread trapping point is 4.5 percent.

TABLE 13.—CONTROLLED EARLY AMORTIZATION PROVISIONS

| 3-month average annualized excess spread | Uncommitted CF (in percent) | Committed CF (in percent) |
|---|---|---|
| Retail Credit Lines: | | |
| Greater than or equal to 133.33% of trapping point | 0 | 90 |
| Less than 133.33% to 100% of trapping point | 1 | ..... |
| Less than 100% to 75% of trapping point | 2 | ..... |
| Less than 75% to 50% of trapping point | 10 | ..... |
| Less than 50% to 25% of trapping point | 20 | ..... |
| Less than 25% of trapping point | 40 | ..... |
| Non-retail credit lines | 90 | 90 |

TABLE 14.—NON-CONTROLLED EARLY AMORTIZATION PROVISIONS

| 3-month average annualized excess spread | Uncommitted CF (in percent) | Committed CF (in percent) |
|---|---|---|
| Retail Credit Lines: | | |
| Greater than or equal to 133.33% of trapping point | 0 | 100 |
| Less than 133.33% to 100% of trapping point | 5 | ..... |
| Less than 100% to 75% of trapping point | 15 | ..... |
| Less than 75% to 50% of trapping point | 50 | ..... |
| Less than 50% of trapping point | 100 | ..... |
| Non-retail credit lines | 100 | 100 |

(2) For a securitization for which all or substantially all of the underlying exposures are secured by liens on one-to-four family residential property, a [BANK] may calculate the appropriate conversion factor discussed in paragraph (c)(2) of this section using paragraph (d)(1) of this section or may use a conversion factor of 10 percent. If the [BANK] chooses to use a conversion factor of 10 percent, it must use that conversion factor for all securitizations for which all or substantially all of the underlying exposures are secured by liens on one-to-four family residential property.

**Part V. Risk-Weighted Assets for Equity Exposures**

*Section 51. Introduction and Exposure Measurement*

(a) *General.* To calculate its risk-weighted asset amounts for equity exposures that are not equity exposures to investment funds, a [BANK] must use the Simple Risk-Weight Approach (SRWA) in section 52. A [BANK] must use the look-through approaches in section 53 to calculate its risk-weighted asset amounts for equity exposures to investment funds.

(b) *Adjusted carrying value.* For purposes of this part, the adjusted carrying value of an equity exposure is:

(1) For the on-balance sheet component of an equity exposure, the [BANK]'s carrying value of the exposure reduced by any unrealized gains on the exposure that are reflected in such carrying value but excluded from the [BANK]'s tier 1 and tier 2 capital; and

(2) For the off-balance sheet component of an equity exposure that is not an equity commitment, the effective notional principal amount of the exposure, the size of which is equivalent to a hypothetical on-balance sheet position in the underlying equity instrument that would evidence the same change in fair value (measured in dollars) for a given small change in the price of the underlying equity instrument, minus the adjusted carrying value of the on-balance sheet component of the exposure as calculated in paragraph (b)(1) of this section.

(3) For a commitment to acquire an equity exposure (an equity commitment), the effective notional principal amount of the exposure multiplied by the following conversion factors (CFs):

(i) Conditional equity commitments with an original maturity of one year or less receive a CF of 20 percent.

(ii) Conditional equity commitments with an original maturity of over one year receive a CF of 50 percent.

(iii) Unconditional equity commitments receive a CF of 100 percent.

*Section 52. Simple Risk-Weight Approach (SRWA)*

(a) *General.* Under the SRWA, a [BANK]'s total risk-weighted assets for equity exposures equals the sum of the risk-weighted asset amounts for each of the [BANK]'s individual equity exposures (other than equity exposures to an investment fund) as determined in this section and the risk-weighted asset amounts for each of the [BANK]'s individual equity exposures to an investment fund as determined in section 53.

(b) *SRWA computation for individual equity exposures.* A [BANK] must determine the risk-weighted asset amount for an individual equity exposure (other than an equity exposure to an investment fund) by multiplying the adjusted carrying value of the equity exposure or the effective portion and ineffective portion of a hedge pair (as defined in paragraph (c) of this section) by the lowest applicable risk weight in this paragraph (b).

(1) *Zero percent risk weight equity exposures.* An equity exposure to a sovereign entity, the Bank for International Settlements, the European Central Bank, the European Commission, the International Monetary Fund, an MDB, a PSE, and any other entity whose credit exposures receive a zero percent risk weight under section 33 may be assigned a zero percent risk weight.

(2) *20 percent risk weight equity exposures.* An equity exposure to a Federal Home Loan Bank or Federal Agricultural Mortgage Corporation (Farmer Mac) is assigned a 20 percent risk weight.

(3) *100 percent risk weight equity exposures.* The following equity exposures are assigned a 100 percent risk weight:

(i) *Community development equity exposures.* (A) For banks and bank holding companies, an equity exposure that qualifies as a community development investment under 12 U.S.C. 24 (Eleventh), excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

(B) For savings associations, an equity exposure that is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or employment, and excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

(ii) *Effective portion of hedge pairs.* The effective portion of a hedge pair.

(iii) *Non-significant equity exposures.* Equity exposures, excluding exposures to an investment firm that would meet the definition of a traditional securitization were it not for the [agency]'s application of paragraph (8) of that definition and has greater than immaterial leverage, to the extent that the aggregate adjusted carrying value of the exposures does not exceed 10 percent of the [BANK]'s tier 1 capital plus tier 2 capital.

(A) To compute the aggregate adjusted carrying value of a [BANK]'s equity exposures for purposes of this paragraph (b)(3)(iii), the [BANK] may exclude equity exposures described in paragraphs (b)(1), (b)(2), (b)(3)(i), and (b)(3)(ii) of this section, the equity exposure in a hedge pair with the smaller adjusted carrying value, and a proportion of each equity exposure to an investment fund equal to the proportion of the assets of the investment fund that are not equity exposures or that meet the criterion of paragraph (b)(3)(i) of this section. If a [BANK] does not know the actual holdings of the investment fund, the [BANK] may calculate the proportion of the assets of the fund that are not equity exposures based on the terms of the prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. If the sum of the investment limits for all exposure classes within the fund exceeds 100 percent, the [BANK] must assume for purposes of this paragraph (b)(3)(iii) that the investment fund invests to the maximum extent possible in equity exposures.

(B) When determining which of a [BANK]'s equity exposures qualify for a 100 percent risk weight under this paragraph, a [BANK] first must include equity exposures to unconsolidated small business investment companies or held through consolidated small business investment companies described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682), then must include publicly traded equity exposures (including those held indirectly through investment funds), and then must include non-publicly traded equity exposures (including those held indirectly through investment funds).

(4) *300 percent risk weight equity exposures.* A publicly traded equity exposure (other than an equity exposure described in paragraph (b)(6) of this section and including the ineffective portion of a hedge pair) is assigned a 300 percent risk weight.

(5) *400 percent risk weight equity exposures.* An equity exposure (other than an equity exposure described in paragraph (b)(6) of this section) that is not publicly traded is assigned a 400 percent risk weight.

(6) *600 percent risk weight equity exposures.* An equity exposure to an investment firm that:

(i) Would meet the definition of a traditional securitization were it not for the [agency]'s application of paragraph (8) of that definition, and

(ii) Has greater than immaterial leverage is assigned a 600 percent risk weight.

(c) *Hedge transactions.* (1) *Hedge pair.* A hedge pair is two equity exposures that form an effective hedge so long as each equity exposure is publicly traded or has a return that is primarily based on a publicly traded equity exposure.

(2) *Effective hedge.* Two equity exposures form an effective hedge if the exposures either have the same remaining maturity or each has a remaining maturity of at least three months; the hedge relationship is formally documented in a prospective manner (that is, before the [BANK] acquires at least one of the equity exposures); the documentation specifies the measure of effectiveness (E) the [BANK] will use for the hedge relationship throughout the life of the transaction; and the hedge relationship has an E greater than or equal to 0.8. A [BANK] must measure E at least quarterly and must use one of three alternative measures of E:

(i) Under the dollar-offset method of measuring effectiveness, the [BANK] must determine the ratio of value change (RVC). The RVC is the ratio of the cumulative sum of the periodic changes in value of one equity exposure to the cumulative sum of the periodic changes in the value of the other equity exposure. If RVC is positive, the hedge is not effective and E equals 0. If RVC is negative and greater than or equal to $-1$ (that is, between zero and $-1$), then E equals the absolute value of RVC. If RVC is negative and less than $-1$, then E equals 2 plus RVC.

(ii) Under the variability-reduction method of measuring effectiveness:

$$E = 1 - \frac{\sum_{t=1}^{T} \left( X_t - X_{t-1} \right)^2}{\sum_{t=1}^{T} \left( A_t - \mathrm{A}_{t-1} \right)^2},$$

where:

(A) $X_t = A_t - B_t$;

(B) $A_t$ = the value at time t of one exposure in a hedge pair; and

(C) $B_t$ = the value at time t of the other exposure in a hedge pair.

(iii) Under the regression method of measuring effectiveness, E equals the coefficient of determination of a regression in which the change in value of one exposure in a hedge pair is the dependent variable and the change in value of the other exposure in a hedge pair is the independent variable. However, if the estimated regression coefficient is positive, then the value of E is zero.

(3) The effective portion of a hedge pair is E multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

(4) The ineffective portion of a hedge pair is $(1-E)$ multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

*Section 53. Equity Exposures to Investment Funds*

(a) *Available approaches.* (1) Unless the exposure meets the requirements for a community development equity exposure in paragraph (b)(3)(i) of section 52, a [BANK] must determine the risk-weighted asset amount of an equity exposure to an investment fund under the Full Look-Through Approach in paragraph (b) of this section, the Simple Modified Look-Through Approach in paragraph (c) of this section, the Alternative Modified Look-Through Approach in paragraph (d) of this section, or, if the investment fund qualifies for the Money Market Fund Approach, the Money Market Fund Approach in paragraph (e) of this section.

(2) The risk-weighted asset amount of an equity exposure to an investment fund that meets the requirements for a community development equity exposure in paragraph (b)(3)(i) of section 52 is its adjusted carrying value.

(3) If an equity exposure to an investment fund is part of a hedge pair and the [BANK] does not use the Full Look-Through Approach, the [BANK] may use the ineffective portion of the hedge pair as determined under paragraph (c) of section 52 as the adjusted carrying value for the equity exposure to the investment fund. The risk-weighted asset amount of the effective portion of the hedge pair is equal to its adjusted carrying value.

(b) *Full Look-Through Approach.* A [BANK] that is able to calculate a risk-weighted asset amount for its proportional ownership share of each exposure held by the investment fund (as calculated under this appendix as if the proportional ownership share of each exposure were held directly by the [BANK]) may set the risk-weighted asset amount of the [BANK]'s exposure to the fund equal to the product of:

(1) The aggregate risk-weighted asset amounts of the exposures held by the fund as if they were held directly by the [BANK]; and

(2) The [BANK]'s proportional ownership share of the fund.

(c) *Simple Modified Look-Through Approach.* Under this approach, the risk-weighted asset amount for a [BANK]'s equity exposure to an investment fund equals the adjusted carrying value of the equity exposure multiplied by the highest risk weight that applies to any exposure the fund is permitted to hold under its prospectus, partnership agreement, or similar contract that defines the fund's permissible

investments (excluding derivative contracts that are used for hedging rather than speculative purposes and that do not constitute a material portion of the fund's exposures).

(d) *Alternative Modified Look-Through Approach.* Under this approach, a [BANK] may assign the adjusted carrying value of an equity exposure to an investment fund on a pro rata basis to different risk weight categories under this appendix based on the investment limits in the fund's prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. The risk-weighted asset amount for the [BANK]'s equity exposure to the investment fund equals the sum of each portion of the adjusted carrying value assigned to an exposure class multiplied by the applicable risk weight under this appendix. If the sum of the investment limits for exposure classes within the fund exceeds 100 percent, the [BANK] must assume that the fund invests to the maximum extent permitted under its investment limits in the exposure class with the highest applicable risk weight under this appendix and continues to make investments in order of the exposure class with the next highest applicable risk weight under this appendix until the maximum total investment level is reached. If more than one exposure class applies to an exposure, the [BANK] must use the highest applicable risk weight. A [BANK] may exclude derivative contracts held by the fund that are used for hedging rather than for speculative purposes and do not constitute a material portion of the fund's exposures.

(e) *Money Market Fund Approach.* The risk-weighted asset amount for a [BANK]'s equity exposure to an investment fund that is a money market fund subject to 17 CFR 270.2a–7 and that has an applicable external rating in the highest investment-grade rating category equals the adjusted carrying value of the equity exposure multiplied by seven percent.

**Part VI. Risk-Weighted Assets for Operational Risk**

*Section 61. Basic Indicator Approach*

(a) *Risk-weighted assets for operational risk.* Risk-weighted assets for operational risk equals 15 percent of a [BANK]'s average positive annual gross income multiplied by 12.5.

(b) *Average positive annual gross income.* A [BANK]'s average positive annual gross income equals the sum of the [BANK]'s positive annual gross income, as described below, over the three most recent calendar years divided by the number of those years in which its annual gross income is positive. A [BANK] must exclude from this calculation amounts from any year in which the annual gross income is negative or zero.

(c) *Annual gross income equals*:

(1) For a [BANK], its net interest income plus its total noninterest income minus its underwriting income from insurance and reinsurance activities as reported on the [BANK]'s Call Report.

(2) For a bank holding company, its net interest income plus its total noninterest income minus its underwriting income from insurance and reinsurance activities as reported on the bank holding company's Y9–C Report.

(3) For a savings association, its net interest income (expense) before provision for losses on interest-bearing assets, plus total noninterest income, minus the portion of its other fees and charges that represents income derived from insurance and reinsurance underwriting activities, minus (plus) its income (loss) from the sale of assets held for sale and available-for-sale securities to include only the profit or loss from the disposition of available-for-sale securities pursuant to FASB Statement No. 115, minus (plus) its income (loss) from the sale of securities held-to-maturity, all as reported on the savings association's year-end Thrift Financial Report.

**Part VII. Disclosure**

*Section 71. Disclosure Requirements*

(a) Each [BANK] must publicly disclose each quarter its total and tier 1 risk-based capital ratios and their components (that is, tier 1 capital, tier 2 capital, total qualifying capital, and total risk-weighted assets).[74]

(b) A [BANK] must comply with paragraph (c) of this section unless it is a consolidated subsidiary of a bank holding company or depository institution that is subject to these disclosure requirements.

(c) (1) Each [BANK] that is not a subsidiary of a non-U.S. banking organization that is subject to comparable public disclosure requirements in its home jurisdiction must provide timely public disclosures each calendar quarter of the information in tables 15.1–15.10 below. If a significant change occurs, such that the most recent reported amounts are no longer reflective of the [BANK]'s capital adequacy and risk profile, then a brief discussion of this change and its likely impact must be provided as soon as practicable thereafter. Qualitative disclosures that typically do not change each quarter (for example, a general summary of the [BANK]'s risk management objectives and policies, reporting system, and definitions) may be disclosed annually, provided any significant changes to these are disclosed in the interim. Management is encouraged to provide all of the disclosures required by this appendix in one place on the [BANK]'s public Web site.[75] The [BANK] must make these disclosures publicly available for each of the last three years (that is, twelve quarters) or such shorter period [beginning on the effective date of a [BANK]'s election to use this appendix].

(2) Each [BANK] is required to have a formal disclosure policy approved by the board of directors that addresses its approach for determining the disclosures it makes. The policy must address the associated internal controls and disclosure controls and procedures. The board of directors and senior management are responsible for establishing and maintaining an effective internal control structure over financial reporting, including the disclosures required by this appendix, and must ensure that appropriate review of the disclosures takes place. One or more senior officers of the [BANK] must attest that the disclosures meet the requirements of this appendix.

(3) If a [BANK] believes that disclosure of specific commercial or financial information would prejudice seriously its position by making public information that is either proprietary or confidential in nature, the [BANK] need not disclose those specific items, but must disclose more general information about the subject matter of the requirement, together with the fact that, and the reason why, the specific items of information have not been disclosed.

TABLE 15.1.—SCOPE OF APPLICATION

| | |
|---|---|
| Qualitative Disclosures ..... | (a) The name of the top corporate entity in the group to which the appendix applies.<br>(b) An outline of differences in the basis of consolidation for accounting and regulatory purposes, with a brief description of the entities [1] within the group:<br>(1) that are fully consolidated;<br>(2) that are deconsolidated and deducted;<br>(3) for which the regulatory capital requirement is deducted; and<br>(4) that are neither consolidated nor deducted (for example, where the investment is risk weighted).<br>(c) Any restrictions, or other major impediments, on transfer of funds or regulatory capital within the group. |
| Quantitative Disclosures ..... | (d) The aggregate amount of surplus capital of insurance subsidiaries included in the regulatory capital of the consolidated group. |

[74] Other public disclosure requirements continue to apply—for example, Federal securities law and regulatory reporting requirements.

[75] Alternatively, a [BANK] may provide the disclosures in more than one place, as some of them may be included in public financial reports (for example, in Management's Discussion and Analysis included in SEC filings) or other regulatory reports. The [BANK] must publicly provide a summary table that specifically indicates where all the disclosures may be found (for example, regulatory report schedules, page numbers in annual reports).

TABLE 15.1.—SCOPE OF APPLICATION—Continued

| | |
|---|---|
| | (e) The aggregate amount by which actual regulatory capital is less than the minimum regulatory capital requirement in all subsidiaries with regulatory capital requirements and the name(s) of the subsidiaries with such deficiencies. |

[1] Entities include securities, insurance and other financial subsidiaries, commercial subsidiaries (where permitted), significant minority equity investments in insurance, financial and commercial entities.

TABLE 15.2.—CAPITAL STRUCTURE

| | |
|---|---|
| Qualitative Disclosures ..... | (a) Summary information on the terms and conditions of the main features of all capital instruments, especially in the case of innovative, complex or hybrid capital instruments. |
| Quantitative Disclosures ..... | (b) The amount of tier 1 capital, with separate disclosure of:<br>(1) common stock/surplus;<br>(2) retained earnings;<br>(3) minority interests in the equity of subsidiaries;<br>(4) restricted core capital elements as defined in [the general risk-based capital rules];<br>(5) amounts deducted from tier 1 capital, including goodwill and certain intangibles.<br>(c) The total amount of tier 2 capital, with a separate disclosure of amounts deducted from tier 2 capital.<br>(d) Other deductions from capital.<br>(e) Total eligible capital. |

TABLE 15.3.—CAPITAL ADEQUACY

| | |
|---|---|
| Qualitative Disclosures ..... | (a) A summary discussion of the [BANK]'s approach to assessing the adequacy of its capital to support current and future activities. |
| Quantitative Disclosures ..... | (b) Risk-weighted assets for:<br>(1) Exposures to sovereign entities;<br>(2) Exposures to certain supranational entities and MDBs;<br>(3) Exposures to depository institutions, foreign banks, and credit unions;<br>(4) Exposures to PSEs;<br>(5) Corporate exposures;<br>(6) Regulatory retail exposures;<br>(7) Residential mortgage exposures;<br>(8) Statutory multifamily mortgages and pre-sold construction loans;<br>(9) Past due loans;<br>(10) Other assets;<br>(11) Securitization exposures; and<br>(12) Equity exposures.<br>(c) Risk-weighted assets for market risk as calculated under [the market risk rule]: [1]<br>(1) Standardized specific risk charge; and<br>(2) Internal models approach for specific risk.<br>(d) Risk-weighted assets for operational risk.<br>(e) Total and tier 1 risk-based capital ratios:<br>(1) For the top consolidated group; and<br>(2) For each [BANK] subsidiary.<br>(f) Total risk-weighted assets. |

[1] Risk-weighted assets determined under [the market risk rule] are to be disclosed only for the approaches used.

**General qualitative disclosure requirement**

For each separate risk area described in tables 15.4 through 15.10, the [BANK] must describe its risk management objectives and policies.

TABLE 15.4.[1]—CREDIT RISK: GENERAL DISCLOSURES

| | |
|---|---|
| Qualitative Disclosures ..... | (a) The general qualitative disclosure requirement with respect to credit risk (excluding counterparty credit risk disclosed in accordance with Table 16.5), including:<br>(1) Definitions of past due and impaired (for accounting purposes);<br>(2) Description of approaches followed for allowances, including statistical methods used where applicable;<br>(3) Discussion of the [BANK]'s credit risk management policy. |
| Quantitative Disclosures ..... | (b) Total gross credit risk exposures and average credit risk exposures, after accounting offsets in accordance with GAAP,[2] and without taking into account the effects of credit risk mitigation techniques (for example, collateral and netting), over the period broken down by major types of credit exposure. For example, [BANK]s could apply a breakdown similar to that used for accounting purposes. Such a breakdown might, for instance, be loans, off-balance sheet commitments, and other non-derivative off-balance sheet exposures; debt securities; and OTC derivatives<br>(c) Geographic[3] distribution of exposures, broken down in significant areas by major types of credit exposure.<br>(d) Industry or counterparty type distribution of exposures, broken down by major types of credit exposure.<br>(e) Remaining contractual maturity breakdown (for example, one year or less) of the whole portfolio, broken down by major types of credit exposure.<br>(f)(1) By major industry or counterparty type: |

TABLE 15.4.[1]—CREDIT RISK: GENERAL DISCLOSURES—Continued

| | |
|---|---|
| | (2) Amount of impaired loans;<br>(3) Amount of past due loans;[4]<br>(4) Allowances; and<br>(5) Charge-offs during the period.<br>(g) Amount of impaired loans and, if available, the amount of past due loans broken down by significant geographic areas including, if practical, the amounts of allowances related to each geographical area.[5]<br>(h) Reconciliation of changes in the allowance for loan and lease losses.[6] |

[1] Table 15.4 does not include equity exposures.
[2] For example, FASB Interpretations 39 and 41.
[3] Geographical areas may comprise individual countries, groups of countries, or regions within countries. A [BANK] might choose to define the geographical areas based on the way the [BANK]'s portfolio is geographically managed. The criteria used to allocate the loans to geographical areas must be specified.
[4] A [BANK] is encouraged also to provide an analysis of the aging of past-due loans.
[5] The portion of general allowance that is not allocated to a geographical area should be disclosed separately.
[6] The reconciliation should include the following: a description of the allowance; the opening balance of the allowance; charge-offs taken against the allowance during the period; amounts provided (or reversed) for estimated probable loan losses during the period; any other adjustments (for example, exchange rate differences, business combinations, acquisitions and disposals of subsidiaries), including transfers between allowances; and the closing balance of the allowance. Charge-offs and recoveries that have been recorded directly to the income statement should be disclosed separately.

TABLE 15.5.—GENERAL DISCLOSURE FOR COUNTERPARTY CREDIT RISK-RELATED EXPOSURES

| | |
|---|---|
| Qualitative Disclosures ..... | (a) The general qualitative disclosure requirement with respect to OTC derivatives, eligible margin loans, and repo-style transactions, including:<br>(1) Discussion of methodology used to assign economic capital and credit limits for counterparty credit exposures;<br>(2) Discussion of policies for securing collateral, valuing and managing collateral, and establishing credit reserves;<br>(3) Discussion of the primary types of collateral taken;<br>(4) Discussion of policies with respect to wrong-way risk exposures; and<br>(5) Discussion of the impact of the amount of collateral the [BANK] would have to provide given a credit rating downgrade. |
| Quantitative Disclosures ..... | (b) Gross positive fair value of contracts, netting benefits, netted current credit exposure, collateral held (including type, for example, cash, government securities), and net unsecured credit exposure.[1] Also report the notional value of credit derivative hedges purchased for counterparty credit risk protection and the distribution of current credit exposure by types of credit exposure.[2]<br>(c) Notional amount of purchased and sold credit derivatives, segregated between use for the [BANK]'s own credit portfolio, as well as in its intermediation activities, including the distribution of the credit derivative products used, broken down further by protection bought and sold within each product group. |

[1] Net unsecured credit exposure is the credit exposure after considering both the benefits from legally enforceable netting agreements and collateral arrangements without taking into account haircuts for price volatility, liquidity, etc.
[2] This may include interest rate derivative contracts, foreign exchange derivative contracts, equity derivative contracts, credit derivatives, commodity or other derivative contracts, repo-style transactions, and eligible margin loans.

TABLE 15.6.—CREDIT RISK MITIGATION[1, 2, 3]

| | |
|---|---|
| Qualitative Disclosures ..... | (a) The general qualitative disclosure requirement with respect to credit risk mitigation including:<br>(1) policies and processes for, and an indication of the extent to which the [BANK] uses, on- and off-balance sheet netting;<br>(2) policies and processes for collateral valuation and management;<br>(3) a description of the main types of collateral taken by the [BANK];<br>(4) the main types of guarantors/credit derivative counterparties and their creditworthiness; and<br>(5) information about (market or credit) risk concentrations within the mitigation taken. |
| Quantitative Disclosures ..... | (b) For each separately disclosed portfolio, the total exposure (after, where applicable, on-or off-balance sheet netting) that is covered by guarantees/credit derivatives and the risk-weighted asset amount associated with that exposure. |

[1] At a minimum, a [BANK] must give the disclosures in Table 15.6 in relation to credit risk mitigation that has been recognized for the purposes of reducing capital requirements under this appendix. Where relevant, [BANK]s are encouraged to give further information about mitigants that have not been recognized for that purpose.
[2] Credit derivatives that are treated, for the purposes of this appendix, as synthetic securitization exposures should be excluded from the credit risk mitigation disclosures and included within those relating to securitization.
[3] Counterparty credit risk-related exposures disclosed pursuant to Table 15.5 should be excluded from the credit risk mitigation disclosures in Table 15.6.

TABLE 15.7.—SECURITIZATION

| | |
|---|---|
| Qualitative Disclosures ..... | (a) The general qualitative disclosure requirement with respect to securitization (including synthetic securitizations), including a discussion of:<br>(1) the [BANK]'s objectives relating to securitization activity, including the extent to which these activities transfer credit risk of the underlying exposures away from the [BANK] to other entities;<br>(2) the roles played by the [BANK] in the securitization process[1] and an indication of the extent of the [BANK]'s involvement in each of them.<br>(b) Summary of the [BANK]'s accounting policies for securitization activities, including: |

TABLE 15.7.—SECURITIZATION—Continued

| | |
|---|---|
| | (1) whether the transactions are treated as sales or financings;<br>(2) recognition of gain-on-sale;<br>(3) key assumptions for valuing retained interests, including any significant changes since the last reporting period and the impact of such changes; and<br>(4) treatment of synthetic securitizations.<br>(c) Names of NRSROs used for securitizations and the types of securitization exposure for which each organization is used. |
| Quantitative Disclosures ..... | (d) The total outstanding exposures securitized by the [BANK] in securitizations that meet the operation criteria in Section 41 (broken down into traditional/synthetic), by underlying exposure type.[2 3 4]<br>(e) For exposures securitized by the [BANK] in securitizations that meet the operational criteria in Section 41:<br>(1) amount of securitized assets that are impaired/past due; and<br>(2) losses recognized by the [BANK] during the current period[5] broken down by exposure type.<br>(f) Aggregate amount of securitization exposures broken down by underlying exposure type.<br>(g) Aggregate amount of securitization exposures and the associated capital charges for these exposures by risk-weight category. Exposures that have been deducted from capital should be disclosed separately by type of underlying asset.<br>(h) For securitizations subject to the early amortization treatment, the following items by underlying asset type for securitized facilities:<br>(1) the aggregate drawn exposures attributed to the seller's and investors' interests; and<br>(2) the aggregate capital charges incurred by the [BANK] against the investor's shares of drawn balances and undrawn lines.<br>(i) Summary of current year's securitization activity, including the amount of exposures securitized (by exposure type), and recognized gain-or loss-on-sale by asset type. |

[1] For example: originator, investor, servicer, provider of credit enhancement, sponsor of asset-backed commercial paper facility, liquidity provider, swap provider.
[2] Underlying exposure types may include, for example, mortgage loans secured by liens on one-to-four family residential property, home equity lines, credit card receivables, and auto loans.
[3] Securitization transactions in which the originating [BANK] does not retain any securitization exposure should be shown separately but need only be reported for the year of inception.
[4] Where relevant, a [BANK] is encouraged to differentiate between exposures resulting from activities in which they act only as sponsors, and exposures that result from all other [BANK] securitization activities.
[5] For example, charge-offs/allowances (if the assets remain on the [BANK]'s balance sheet) or write-downs of I/O strips and other residual interests.

TABLE 15.8.—OPERATIONAL RISK

| | |
|---|---|
| Qualitative disclosures ..... | (a) The general qualitative disclosure requirement for operational risk.<br>(b) A description of the use of insurance for the purpose of mitigating operational risk. |

TABLE 15.9.—EQUITIES NOT SUBJECT TO MARKET RISK RULE

| | |
|---|---|
| Qualitative Disclosures ..... | (a) The general qualitative disclosure requirement with respect to equity risk, including:<br>(1) differentiation between holdings on which capital gains are expected and those taken under other objectives including for relationship and strategic reasons; and<br>(2) discussion of important policies covering the valuation of and accounting for equity holdings in the banking book. This includes the accounting techniques and valuation methodologies used, including key assumptions and practices affecting valuation as well as significant changes in these practices. |
| Quantitative Disclosures ..... | (b) Value disclosed in the balance sheet of investments, as well as the fair value of those investments; for quoted securities, a comparison to publicly-quoted share values where the share price is materially different from fair value.<br>(c) The types and nature of investments, including the amount that is:<br>(1) Publicly traded; and<br>(2) Non-publicly traded.<br>(d) The cumulative realized gains (losses) arising from sales and liquidations in the reporting period.<br>(e)(1) Total unrealized gains (losses)[1]<br>(2) Total latent revaluation gains (losses)[2]<br>(3) Any amounts of the above included in tier 1 and/or tier 2 capital.<br>(f) Capital requirements broken down by appropriate equity groupings, consistent with the [BANK]'s methodology, as well as the aggregate amounts and the type of equity investments subject to any supervisory transition regarding regulatory capital requirements. |

[1] Unrealized gains (losses) recognized in the balance sheet but not through earnings.
[2] Unrealized gains (losses) not recognized either in the balance sheet or through earnings.

TABLE 15.10.—INTEREST RATE RISK FOR NON-TRADING ACTIVITIES

| | |
|---|---|
| Qualitative disclosures ..... | (a) The general qualitative disclosure requirement, including the nature of interest rate risk for non-trading activities and key assumptions, including assumptions regarding loan prepayments and behavior of non-maturity deposits, and frequency of measurement of interest rate risk for non-trading activities. |
| Quantitative disclosures ..... | (b) The increase (decline) in earnings or economic value (or relevant measure used by management) for upward and downward rate shocks according to management's method for measuring interest rate risk for non-trading activities, broken down by currency (as appropriate). |

END OF COMMON RULE.
[END OF COMMON TEXT]

**List of Subjects**

*12 CFR Part 3*

Administrative practices and procedure, Capital, National banks, Reporting and recordkeeping requirements, Risk.

*12 CFR Part 208*

Confidential business information, Crime, Currency, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Securities.

*12 CFR Part 225*

Administrative practice and procedure, Banks, banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

*12 CFR Part 325*

Administrative practice and procedure, Banks, banking, Capital Adequacy, Reporting and recordkeeping requirements, Savings associations, State nonmember banks.

*12 CFR Part 567*

Capital, Reporting and recordkeeping requirements, Savings associations.

**Proposed Adoption of Common Appendix**

The proposed adoption of the common rules by the agencies, as modified by agency-specific text, is set forth below:

**Department of the Treasury**

**Office of the Comptroller of the Currency**

**12 CFR Chapter I**

**Authority and Issuance**

For the reasons stated in the common preamble, the Office of the Comptroller of the Currency amends Part 3 of chapter I of Title 12, Code of Federal Regulations as follows:

## PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

1. The authority citation for part 3 continues to read as follows:

**Authority:** 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, and 3909.

2. New Appendix D to part 3 is added as set forth at the end of the common preamble.

3. Appendix D to part 3 is amended as set forth below:

a. Remove ''[agency]'' and add ''OCC'' in its place wherever it appears.

b. Remove ''[BANK]'' and add ''bank'' in its place wherever it appears, and remove ''[Banks]'' and add ''Banks'' in its place wherever it appears.

c. Remove ''[Appendix__to Part__]'' and add ''Appendix D to Part 3'' in its place wherever it appears.

d. Remove ''[the general risk-based capital rules]'' and add ''12 CFR part 3, appendix A'' in its place wherever it appears.

e. Remove ''[the market risk rule]'' and add ''12 CFR part 3, appendix B'' in its place wherever it appears.

f. Remove ''[the advanced approaches risk-based capital rules]'' and add ''12 CFR part 3, appendix C'' in its place wherever it appears.

g. In section 1, revise paragraph (e) to read as follows:

**Section 1. Purpose, Applicability, Election Procedures, and Reservation of Authority**

* * * * *

(e) *Notice and response procedures.* In making a determination under paragraphs (c)(3) or (d) of this section, the OCC will apply notice and response procedures in the same manner as the notice and response procedures in 12 CFR 3.12.

* * * * *

h. In section 2, revise the definitions of gain-on-sale, pre-sold construction loan, statutory multifamily mortgage, and paragraph (7) of the definition of traditional securitization to read as follows:

**Section 2. Definitions**

* * * * *

*Gain-on-sale* means an increase in the equity capital (as reported on Schedule RC of the Consolidated Statement of Condition and Income (Call Report)) of a bank that results from a securitization (other than an increase in equity capital that results from the bank's receipt of cash in connection with the securitization). (See also *securitization*.)

* * * * *

*Pre-sold construction loan* means any one-to-four family residential pre-sold construction loan for a residence meeting the requirements under section 618(a)(1) or (2) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 (RTCRRI Act) and under 12 CFR part 3, appendix A, section 3(a)(3)(iv).

* * * * *

*Statutory multifamily mortgage* means any multifamily residential mortgage meeting the requirements under section 618(b)(1) of the RTCRRI Act, and under 12 CFR part 3, appendix A, section 3(a)(3)(v).

* * * * *

*Traditional securitization* * * *

(7) The underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under 12 U.S.C. 24(Eleventh);

* * * * *

i. In section 21, revise paragraph (a)(1) and (a)(2) to read as follows:

**Section 21. Modifications to Tier 1 and Tier 2 Capital**

(a) * * *

(1) A bank is not required to make the deductions from capital for CEIOs in 12 CFR part 3, appendix A, section 2(c)(1)(iv).

(2) A bank is not required to make the deductions from capital for nonfinancial equity investments in 12 CFR part 3, appendix A, section 2(c)(1)(v).

* * * * *

j. In section 33, revise paragraphs (c)(2) and (g)(3)(iv)(B) to read as follows:

**Section 33. General Risk Weights**

* * * * *

(c)* * *

(2) A bank must assign a risk weight of at least 100 percent to an exposure to a depository institution or a foreign bank that is includable in the depository institution's or foreign bank's regulatory capital and that is not subject to deduction as a reciprocal holding pursuant to 12 CFR part 3, appendix A, section 2(c)(6)(ii).

* * * * *

(g) * * *

(3) * * *

(iv) * * *

(B) A bank must base all estimates of a property's value on an appraisal or evaluation of the property that satisfies subpart C of 12 CFR part 34.

* * * * *

k. Revise paragraph (i)(1)(iv) and paragraph (i)(4) of section 42 to read as follows:

**Section 42. Risk-Weighted Assets for Securitization Exposures**

* * * * *

(i) * * *

(1) * * *

(iv) The bank is well capitalized, as defined in the OCC's prompt corrective action regulation at 12 CFR part 6. For purposes of determining whether a bank is well capitalized for purposes of this paragraph, the bank's capital ratios must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (i)(1) of this section.

* * * * *

(4) The risk-based capital ratios of the bank must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (i)(1) of this section as provided in 12 CFR part 3, appendix A.

* * * * *

l. In section 52, revise paragraph (b)(3)(i) to read as follows:

**Section 52. Simple Risk-Weight Approach (SRWA)**

* * * * *

(b) * * *

(3) * * *

(i) *Community development exposures.* An equity exposure that qualifies as a community development investment under 12 U.S.C. 24(Eleventh), excluding equity exposures to an unconsolidated small

business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

* * * * *

m. In section 61, revise paragraph (c) to read as follows:

**Section 61. Basic Indicator Approach**

* * * * *

(c) *Annual gross income.* A bank's annual gross income equals its net interest income plus its total noninterest income minus its underwriting income from insurance and reinsurance activities as reported on the bank's Call Report.

* * * * *

n. In section 71, revise paragraph (b) to read as follows:

**Section 71. Disclosure Requirements**

* * * * *

(b) A bank must comply with paragraph (c) of section 71 of appendix H to the Federal Reserve Board's Regulation Y (12 CFR part 225, appendix H), including Tables 15.1—15.10, unless it is a consolidated subsidiary of a bank holding company or depository institution that is subject to these requirements.

* * * * *

o. In section 71, remove paragraph (c) and Tables 15.1–15.10.

## Board of Governors of the Federal Reserve System

## 12 CFR Chapter II

## Authority and Issuance

For the reasons stated in the common preamble, the Board of Governors of the Federal Reserve System amends parts 208 and 225 of chapter II of title 12 of the Code of Federal Regulations as follows:

## PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

1. The authority citation for part 208 continues to read as follows:

**Authority:** 12 U.S.C. 24, 36, 92a, 93a, 248(a), 248(c), 321–338a, 371d, 461, 481–486, 601, 611, 1814, 1816, 1818, 1820(d)(9), 1823(j), 1828(o), 1831, 1831o, 1831p–1, 1831r–1, 1835a, 1882, 2901–2907, 3105, 3310, 3331–3351, and 3906–3909; 15 U.S.C. 78b, 78l(b), 78l(g), 78l(i), 78o–4(c)(5), 78q, 78q–1, and 78w, 6801, and 6805; 31 U.S.C. 5318; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

2. New Appendix G to part 208 is added as set forth at the end of the common preamble.

3. Appendix G to part 208 is amended as set forth below:

a. Remove ''[agency]'' and add ''Federal Reserve'' in its place wherever it appears.

b. Remove ''[BANK]'' and add ''bank'' in its place wherever it appears, and remove ''[Banks]'' and add ''Banks'' in its place wherever it appears.

c. Remove ''[Appendix __ to Part __]'' and add ''Appendix G to Part 208'' in its place wherever it appears.

d. Remove ''[the general risk-based capital rules]'' and add ''12 CFR part 208, appendix A'' in its place wherever it appears.

e. Remove ''[the market risk rule]'' and add ''12 CFR part 208, appendix E'' in its place wherever it appears.

f. Remove ''[the advanced approaches risk-based capital rules]'' and add ''12 CFR part 208, appendix F'' in its place wherever it appears.

g. In section 1, revise paragraph (e) to read as follows:

**Section 1. Purpose, Applicability, Election Procedures, and Reservation of Authority**

* * * * *

(e) *Notice and response procedures.* In making a determination under paragraphs (c)(3) or (d) of this section, the Federal Reserve will apply notice and response procedures in the same manner as the notice and response procedures in 12 CFR 263.202.

* * * * *

h. In section 2, revise the definitions of gain-on-sale, pre-sold construction loan, statutory multifamily mortgage, and paragraph (7) of the definition of traditional securitization to read as follows:

**Section 2. Definitions**

* * * * *

*Gain-on-sale* means an increase in the equity capital (as reported on Schedule RC of the Consolidated Statement of Condition and Income (Call Report)) of a bank that results from a securitization (other than an increase in equity capital that results from the bank's receipt of cash in connection with the securitization). (See also *securitization.*)

* * * * *

*Pre-sold construction loan* means any one-to-four family residential pre-sold construction loan for a residence meeting the requirements under section 618(a)(1) or (2) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 (RTCRRI Act) and under 12 CFR part 208, appendix A, section III.C.3.

* * * * *

*Statutory multifamily mortgage* means any multifamily residential mortgage meeting the requirements under section 618(b)(1) of the RTCRRI Act and under 12 CFR part 208, appendix A, section III.C.3.

* * * * *

*Traditional securitization* * * *

(7) The underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under 12 U.S.C. 24 (Eleventh);

* * * * *

i. In section 21, revise paragraphs (a)(1) and (2) to read as follows:

**Section 21. Modifications to Tier 1 and Tier 2 Capital**

(a) * * *

(1) A bank is not required to make the deductions from capital for CEIOs in 12 CFR part 208, appendix A, section II.B.1.e.

(2) A bank is not required to make the deductions from capital for nonfinancial equity investments in 12 CFR part 208, appendix A, section II.B.5.

* * * * *

j. In section 33, revise paragraphs (c)(2) and (g)(3)(iv)(B) to read as follows:

**Section 33. General Risk Weights**

* * * * *

(c) * * *

(2) A bank must assign a risk weight of at least 100 percent to an exposure to a depository institution or a foreign bank that is includable in the depository institution's or foreign bank's regulatory capital and that is not subject to deduction as a reciprocal holding pursuant to 12 CFR part 208, appendix A, section II.B.3.

* * * * *

(g) * * *

(3) * * *

(iv) * * *

(B) A bank must base all estimates of a property's value on an appraisal or evaluation of the property that satisfies subpart E of 12 CFR part 208.

* * * * *

k. Revise paragraph (i)(1)(iv) and paragraph (i)(4) of section 42 to read as follows:

**Section 42. Risk-Weighted Assets for Securitization Exposures**

* * * * *

(i) * * *

(1) * * *

(iv) The bank is well capitalized, as defined in the Federal Reserve's prompt corrective action regulation at 12 CFR part 208, Subpart D. For purposes of determining whether a bank is well capitalized for purposes of this paragraph, the bank's capital ratios must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (i)(1) of this section.

* * * * *

(4) The risk-based capital ratios of the bank must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (i)(1) of this section as provided in 12 CFR part 208, appendix A.

* * * * *

l. In section 52, revise paragraph (b)(3)(i) to read as follows:

**Section 52. Simple Risk-Weight Approach (SRWA)**

* * * * *

(b) * * *

(3) * * *

(i) *Community development exposures.* An equity exposure that qualifies as a community development investment under 12 U.S.C. 24 (Eleventh), excluding equity exposures to an unconsolidated small

business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

* * * * *

m. In section 61, revise paragraph (c) to read as follows:

**Section 61. Basic Indicator Approach**

* * * * *

(c) *Annual gross income.* A bank's annual gross income equals its net interest income plus its total noninterest income minus its underwriting income from insurance and reinsurance activities as reported on the bank's Call Report.

* * * * *

n. In section 71, revise paragraph (b) to read as follows:

**Section 71. Disclosure Requirements**

* * * * *

(b) A bank must comply with paragraph (c) of section 71 of appendix H to the Federal Reserve Board's Regulation Y (12 CFR part 225, appendix H), including Tables 15.1–15.10, unless it is a consolidated subsidiary of a bank holding company or depository institution that is subject to these requirements.

* * * * *

o. In section 71, remove paragraph (c) and remove Tables 15.1–15.10.

## PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for part 225 continues to read as follows:

**Authority:** 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3907, and 3909; 15 U.S.C. 6801 and 6805.

2. New Appendix H to part 225 is added as set forth at the end of the common preamble.

3. Appendix H to part 225 is amended as set forth below:

a. Remove ''[agency]'' and add ''Federal Reserve'' in its place wherever it appears.

b. Remove ''[BANK]'' and add in its place ''bank holding company'' wherever it appears, and remove ''[Banks]'' and add ''Bank Holding Companies'' in its place wherever it appears.

c. Remove ''[Appendix __ to Part __]'' and add ''Appendix H to Part 225'' in its place wherever it appears.

d. Remove ''[the general risk-based capital rules]'' and add ''12 CFR part 225, appendix A'' in its place wherever it appears.

e. Remove ''[the market risk rule]'' and add ''12 CFR part 225, appendix E'' in its place wherever it appears.

f. Remove ''[the advanced approaches risk-based capital rules]'' and add ''12 CFR part 225, appendix G'' in its place wherever it appears.

g. In section 1, revise paragraphs (b) and (e) to read as follows:

**Section 1. Purpose, Applicability, Election Procedures, and Reservation of Authority**

* * * * *

(b) *Applicability.* This appendix applies to a bank holding company that elects to use this appendix to calculate its risk-based capital requirements and that is not a consolidated subsidiary of another bank holding company that uses this appendix to calculate its risk-based capital requirements.

* * * * *

(e) *Notice and response procedures.* In making a determination under paragraphs (c)(3) or (d) of this section, the Federal Reserve will apply notice and response procedures in the same manner as the notice and response procedures in 12 CFR 263.202.

* * * * *

h. In section 2, revise the definitions of gain-on-sale, pre-sold construction loan, statutory multifamily mortgage, and paragraph (7) of the definition of traditional securitization to read as follows:

**Section 2. Definitions**

* * * * *

*Gain-on-sale* means an increase in the equity capital (as reported on Schedule HC of the FR Y–9C Report) of a bank holding company that results from a securitization (other than an increase in equity capital that results from the bank holding company's receipt of cash in connection with the securitization). (See also *securitization.*)

* * * * *

*Pre-sold construction loan* means any one-to-four family residential pre-sold construction loan for a residence meeting the requirements under section 618(a)(1) or (2) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 (RTCRRI Act) and under 12 CFR part 225, appendix A, section III.C.3.

* * * * *

*Statutory multifamily mortgage* means any multifamily residential mortgage meeting the requirements under section 618(b)(1) of the RTCRRI Act and under 12 CFR part 225, appendix A, section III.C.3.

* * * * *

*Traditional securitization* * * *

(7) The underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under 12 U.S.C. 24(Eleventh);

* * * * *

i. In section 21, revise paragraphs (a)(1) and (2) and add a new paragraph (c)(4) to read as follows:

**Section 21. Modifications to Tier 1 and Tier 2 Capital**

(a) * * *

(1) A bank holding company is not required to make the deductions from capital for CEIOs in 12 CFR part 225, appendix A, section II.B.1.e.

(2) A bank holding company is not required to make the deductions from capital for nonfinancial equity investments in 12 CFR part 225, appendix A, section II.B.5.

* * * * *

(c) * * *

(4) A bank holding company must also deduct an amount equal to the minimum regulatory capital requirement established by the regulator of any insurance underwriting subsidiary of the holding company. For U.S.-based insurance underwriting subsidiaries, this amount generally would be 200 percent of the subsidiary's Authorized Control Level as established by the appropriate state regulator of the insurance company.

j. In section 33, revise paragraph (c)(2) to read as follows:

**Section 33. General Risk Weights**

* * * * *

(c) * * *

(2) A bank holding company must assign a risk weight of at least 100 percent to an exposure to a depository institution or a foreign bank that is includable in the depository institution's or foreign bank's regulatory capital and that is not subject to deduction as a reciprocal holding pursuant to 12 CFR part 225, appendix A, section II.B.3.

* * * * *

k. In paragraph (k)(1) of section 33, remove ''A [BANK] may assign a zero percent risk weight to cash owned and held in all offices of the [BANK] or in transit; to gold bullion held in the [BANK]'s own vaults, or held in another depository institution's vaults on an allocated basis, to the extent the gold bullion assets are offset by gold bullion liabilities;'' and add in its place ''A bank holding company may assign a zero percent risk weight to cash owned and held in all offices of subsidiary depository institutions or in transit; to gold bullion held in either a subsidiary depository institution's own vaults, or held in another depository institution's vaults on an allocated basis, to the extent the gold bullion assets are offset by gold bullion liabilities;''

* * * * *

l. Revise paragraph (i)(1)(iv) and revise paragraph (i)(4) of section 42 to read as follows:

**Section 42. Risk-Weighted Assets for Securitization Exposures**

* * * * *

(i) * * *

(1) * * *

(iv) The bank holding company is well capitalized, as defined in the Federal Reserve's prompt corrective action regulation at 12 CFR part 208, Subpart D. For purposes of determining whether a bank holding company is well capitalized for purposes of this paragraph, the bank holding company's capital ratios must be calculated without regard to the capital treatment for transfers of

small-business obligations with recourse specified in paragraph (i)(1) of this section.

* * * * *

(4) The risk-based capital ratios of the bank holding company must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (i)(1) of this section as provided in 12 CFR part 225, appendix A.

* * * * *

m. In section 52, revise paragraph (b)(3)(i) to read as follows:

**Section 52. Simple Risk-Weight Approach (SRWA)**

* * * * *

(b) * * *

(3) * * *

(i) *Community development exposures.* An equity exposure that qualifies as a community development investment under 12 U.S.C. 24(Eleventh), excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

* * * * *

n. In section 61, revise paragraph (c) to read as follows:

**Section 61. Basic Indicator Approach**

* * * * *

(c) *Annual gross income.* A bank holding company's annual gross income equals its net interest income plus its total noninterest income minus its underwriting income from insurance and reinsurance activities as reported on the bank holding company's Y–9C Report.

* * * * *

## Federal Deposit Insurance Corporation

## 12 CFR Chapter III

## Authority and Issuance

For the reasons stated in the common preamble, the Federal Deposit Insurance Corporation amends part 325 of chapter III of Title 12, Code of Federal Regulations as follows:

## PART 325—CAPITAL MAINTENANCE

1. The authority citation for part 325 continues to read as follows:

**Authority:** 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1835, 3907, 3909, 4808; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n, note); Pub. L. 102–242, 105 Stat. 2236, 2355, 2386 (12 U.S.C. 1828 note).

2. New Appendix E to part 325 is added as set forth at the end of the common preamble.

3. Appendix E to part 325 is amended as set forth below:

a. Remove ''[agency]'' and add ''FDIC'' in its place wherever it appears.

b. Remove ''[BANK]'' and add ''bank'' in its place wherever it appears, and remove ''[Banks]'' and add ''Banks'' in its place wherever it appears.

c. Remove ''[Appendix __ to Part __]'' and add ''Appendix E to Part 325'' in its place wherever it appears.

d. Remove ''[the general risk-based capital rules]'' and add ''12 CFR part 325, appendix A'' in its place wherever it appears.

e. Remove ''[the market risk rule]'' and add ''12 CFR part 325, appendix C'' in its place wherever it appears.

f. Remove ''[the advanced approaches risk-based capital rules]'' and add ''12 CFR part 325, appendix D'' in its place wherever it appears.

g. In section 1, revise paragraph (e) to read as follows:

**Section 1. Purpose, Applicability, Election Procedures, and Reservation of Authority**

* * * * *

(e) *Notice and response procedures.* In making a determination under paragraphs (c)(3) or (d) of this section, the FDIC will apply notice and response procedures in the same manner as the notice and response procedures in 12 CFR 325.6(c).

* * * * *

h. In section 2, revise the definitions of gain-on-sale, pre-sold construction loan, statutory multifamily mortgage, and paragraph (7) of the definition of traditional securitization to read as follows:

**Section 2. Definitions**

* * * * *

*Gain-on-sale* means an increase in the equity capital (as reported on Schedule RC of the Consolidated Statement of Condition and Income (Call Report)) of a bank that results from a securitization (other than an increase in equity capital that results from the bank's receipt of cash in connection with the securitization). (See also *securitization.*)

* * * * *

*Pre-sold construction loan* means any one-to-four family residential pre-sold construction loan for a residence meeting the requirements under section 618(a)(1) or (2) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 (RTCRRI Act) and under 12 CFR part 325, appendix A, section II.C, and that is not 90 days or more past due or on nonaccrual.

* * * * *

*Statutory multifamily mortgage* means any multifamily residential mortgage meeting the requirements under section 618(b)(1) of the RTCRRI Act and under 12 CFR part 325, appendix A, section II.C.

* * * * *

*Traditional securitization* * * *

(7) The underlying exposures are not owned by a firm an investment in which qualifies as a community development investment under 12 U.S.C. 24(Eleventh);

* * * * *

i. In section 21, revise paragraph (a)(1) and (a)(2) to read as follows:

**Section 21. Modifications to Tier 1 and Tier 2 Capital**

(a) * * *

(1) A bank is not required to make the deductions from capital for CEIOs in 12 CFR part 325, appendix A, section II.B.5.

(2) A bank is not required to make the deductions from capital for nonfinancial equity investments in 12 CFR part 325, appendix A, section II.B.

* * * * *

j. In section 33, revise paragraphs (c)(2) and (g)(3)(iv)(B) to read as follows:

**Section 33. General Risk Weights**

* * * * *

(c) * * *

(2) A bank must assign a risk weight of at least 100 percent to an exposure to a depository institution or a foreign bank that is includable in the depository institution's or foreign bank's regulatory capital and that is not subject to deduction as a reciprocal holding pursuant to 12 CFR part 325, appendix A, section I.B.(4).

* * * * *

(g) * * *

(3) * * *

(iv) * * *

(B) A bank must base all estimates of a property's value on an appraisal or evaluation of the property that satisfies 12 CFR part 323.

* * * * *

k. Revise paragraph (i)(1)(iv) and paragraph (i)(4) of section 42 to read as follows:

**Section 42. Risk-Weighted Assets for Securitization Exposures**

* * * * *

(i) * * *

(1) * * *

(iv) The bank is well capitalized, as defined in the FDIC's prompt corrective action regulation at 12 CFR part 325, subpart B. For purposes of determining whether a bank is well capitalized for purposes of this paragraph, the bank's capital ratios must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (i)(1) of this section.

* * * * *

(4) The risk-based capital ratios of the bank must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (i)(1) of this section as provided in 12 CFR part 325, appendix A.

* * * * *

l. In section 52, revise paragraph (b)(3)(i) to read as follows:

**Section 52. Simple Risk-Weight Approach (SRWA)**

* * * * *

(b) * * *

(3) * * *

(i) *Community development exposures.* An equity exposure that qualifies as a community development investment under 12 U.S.C. 24(Eleventh), excluding equity exposures to an unconsolidated small

business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

* * * * *

m. In section 61, revise paragraph (c) to read as follows:

**Section 61. Basic Indicator Approach**

* * * * *

(c) *Annual gross income.* A bank's annual gross income equals its net interest income plus its total noninterest income minus its underwriting income from insurance and reinsurance activities as reported on the bank's Call Report.

* * * * *

n. In section 71, revise paragraph (b) to read as follows:

**Section 71. Disclosure Requirements**

* * * * *

(b) A bank must comply with paragraph (c) of section 71 of appendix H to the Federal Reserve Board's Regulation Y (12 CFR part 225, appendix H), including Tables 15.1–15.10, unless it is a consolidated subsidiary of a bank holding company or depository institution that is subject to these requirements.

* * * * *

o. In section 71, remove paragraph (c) and Tables 15.1–15.10.

## Department of the Treasury

## Office of Thrift Supervision

## 12 CFR Chapter V

## Authority and Issuance

For the reasons stated in the common preamble, the Office of Thrift Supervision amends Part 567 of chapter V of Title 12, Code of Federal Regulations as follows:

## PART 567—CAPITAL

1. The authority citation for part 567 continues to read as follows:

**Authority:** 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828(note).

2. In § 567.0, revise paragraph (a), redesignate paragraph (b) as paragraph (c), add new paragraph (b), and amend redesignated paragraph (c) by adding a new heading and by revising paragraph (c)(2)(ii) to read as follows:

### § 567.0 Scope.

(a) *General.* This part prescribes the minimum regulatory capital requirements for savings associations. Subpart B of this part applies to all savings associations, except as described in paragraphs (b) and (c) of this section.

(b) *Savings associations using the standardized approach rule.* (1) A savings association that uses Appendix B of this part must utilize the methodologies in that appendix to calculate their risk based capital requirement and make the required disclosures described in that appendix.

(2) Subpart B of this part does not apply to the computation of risk-based capital requirements by a savings association that uses Appendix B of this part. However, these savings associations:

(i) Must compute the components of capital under § 567.5 subject to the modifications in section 21 of Appendix B of this part.

(ii) Must meet the leverage ratio requirement described at §§ 567.2(a)(2) and 567.8. Notwithstanding paragraph (b)(2)(i) of this section, the savings association must compute core (tier 1) capital under section 567.5.

(iii) Must meet the tangible capital requirement described at §§ 567.2(a)(3) and 567.9.

(iv) Are subject to §§ 567.3 (individual minimum capital requirement), 567.4 (capital directives); and 567.10 (consequences of failure to meet capital requirements).

(v) Are subject to the reservations of authority at § 567.11, which supplement the reservations of authority at section 1 of Appendix B of this part.

(c) *Savings associations using the advanced approaches rule.*

* * * * *

(2) * * *

(ii) Must meet the leverage ratio requirement described at §§ 567.2(a)(2) and 567.8. Notwithstanding paragraph (c)(2)(i) of this section, the savings association must compute core (tier 1) capital under section 567.5.

* * * * *

2. Appendix B is added to part 567 as set forth at the end of the common preamble.

3. Amend Appendix B of part 567 as follows:

a. Revise the heading of Appendix B to read as follows:

### Appendix B to Part 567—Risk-Based Capital Requirements—Standardized Framework

b. Remove [agency] and add ''OTS'' in its place wherever it appears.

c. Remove ''[BANK]'' and add ''savings association'' in its place wherever it appears, and remove ''[Banks]'' and add ''Savings Associations'' in its place wherever it appears.

d. Remove ''[Appendix __ to Part __]'' and add ''Appendix B to Part 567'' in its place wherever it appears.

e. Remove ''[the general risk-based capital rules]'' and add ''subpart B of part 567'' in its place wherever it appears.

f. Remove ''[the market risk rule]'' and add ''any applicable market risk rule'' in its place wherever it appears.

g. Remove ''[the advanced approaches risk-based capital rules] and add ''Appendix C to Part 567'' in its place wherever it appears.

h. In section 1, revise paragraph (e) to read as follows:

**Section 1. Purpose, Applicability, Election Procedures, and Reservation of Authority**

* * * * *

(e) *Notice and response procedures.* In making a determination under paragraphs (c)(3) or (d) of this section, the [agency] will apply notice and response procedures in the same manner as the notice and response procedures in 12 CFR 567.3(d).

* * * * *

i. In section 2, revise the definitions of gain-on-sale, pre-sold construction loan, statutory multifamily loan, and paragraph (7) of the definition of traditional securitization to read as follows:

**Section 2. Definitions**

* * * * *

*Gain-on-sale* means an increase in the equity capital (as reported on Schedule SC of the Thrift Financial Report) of a savings association that results from a securitization (other than an increase in equity capital that results from the savings association's receipt of cash in connection with the securitization). (See also *securitization.*)

* * * * *

*Pre-sold construction loan* means any one-to-four family residential pre-sold construction loan for a residence meeting the requirements under section 618(a)(1) or (2) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 (RTCRRI Act) and 12 CFR 567.1 (definition of ''qualifying residential construction loan''), and that is not on nonaccrual.

* * * * *

*Statutory multifamily mortgage* means any multifamily residential mortgage that:

(1) Meets the requirements under section 618(b)(1) of the RTCRRI Act and under 12 CFR 567.1 (definition of ''qualifying multifamily mortgage loan'') and 12 CFR 567.6(a)(1)(iii); and

(2) Is not on nonaccrual.

* * * * *

*Traditional securitization* * * *

(7) The underlying exposures are not owned by a firm an investment in which is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or jobs.

* * * * *

j. Revise paragraphs (a)(1) and (2) of section 21 to read as follows:

**Section 21. Modifications to Tier 1 and Tier 2 Capital**

* * * * *

(a) * * *

(1) A savings association is not required to make the deductions from capital for CEIOs in 12 CFR 567.5(a)(2)(iii) and 567.12(e);

(2) A savings association is not required to deduct equity securities from capital under 12 CFR 567.5(c)(2)(ii). However, it must continue to deduct equity investments in real estate under that section. *See* 12 CFR 567.1, which defines equity investments, including equity securities and equity investments in real estate.

* * * * *

k. Revise paragraphs (c)(2) and (g)(3)(iv)(B) of section 33 to read as follows:

**Section 33. General Risk Weights**

* * * * *

(c) * * *

(2) A savings association must assign a risk weight of at least 100 percent to an exposure to a depository institution or a foreign bank that is includable in the depository institution's or foreign bank's regulatory capital and that is not subject to deduction as a reciprocal holding pursuant to 12 CFR part 567.5(c)(2)(i).

* * * * *

(g) * * *

(3) * * *

(iv) * * *

(B) A savings association must base all estimates of a property's value on an appraisal or evaluation of the property that satisfies 12 CFR part 564.

* * * * *

l. Revise the first sentence of paragraph (i)(1)(iv) and paragraph (i)(4) of section 42 to read as follows:

**Section 42. Risk-Weighted Assets for Securitization Exposures**

* * * * *

(i) * * *

(1) * * *

(iv) The savings association is well capitalized, as defined in the OTS 's prompt corrective action regulation at 12 CFR part 565. * * *

* * * * *

(4) The risk-based capital ratios of the savings association must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (i)(1) of this section as provided in 12 CFR 567.6(b)(5)(v).

* * * * *

m. Revise paragraph (b)(3)(i) of section 52 to read as follows:

**Section 52. Simple Risk-Weight Approach (SRWA)**

* * * * *

(b) * * *

(3) * * *

(i) *Community development equity exposures.* An equity exposure that is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or jobs, excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

* * * * *

n. Revise paragraph (c) in section 61 to read as follows:

**Section 61. Basic Indicator Approach**

* * * * *

(c) *Annual gross income.* Annual gross income equals a savings association's net interest income (expense) before provision for losses on interest-bearing assets, plus total noninterest income, minus the portion of its other fees and charges that represents income derived from insurance and reinsurance underwriting activities, minus (plus) its net income (loss) from the sale of assets held for sale and available-for-sale securities to include only the profit or loss from the disposition of available-for-sale securities pursuant to FASB Statement No. 115, minus (plus) its net income (loss) from the sale of securities held-to-maturity, all as reported on the savings association's year-end Thrift Financial Report.

* * * * *

o. In section 71, revise paragraph (b) to read as follows:

**Section 71. Disclosure Requirements**

* * * * *

(b) A savings association must comply with paragraph (c) of this section, unless it is a consolidated subsidiary of a bank holding company or depository institution that is subject to these requirements.

* * * * *

Dated: July 2, 2008.

**John C. Dugan,**

*Comptroller of the Currency.*

By order of the Board of Governors of the Federal Reserve System, July 10, 2008.

**Jennifer J. Johnson,**

*Secretary of the Board.*

Dated at Washington, DC, this 25th day of June 2008.

By order of the Board of Directors. Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

Dated: July 2, 2008.

By the Office of Thrift Supervision.

**John M. Reich,**

*Director.*

[FR Doc. E8–16262 Filed 7–28–08; 8:45 am]

**BILLING CODE 4810–33–P, 6210–01–P, 6714–01–P, 6720–01–P**

Federal Register

Tuesday,
July 29, 2008

# Part III

# Department of the Interior

## Fish and Wildlife Service

## 50 CFR Part 17

## Endangered and Threatened Wildlife and Plants; Annual Notice of Findings on Resubmitted Petitions for Foreign Species; Annual Description of Progress on Listing Actions; Proposed Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[96000–1671–0000–B6]**

## Endangered and Threatened Wildlife and Plants; Annual Notice of Findings on Resubmitted Petitions for Foreign Species; Annual Description of Progress on Listing Actions

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of review.

**SUMMARY:** In this notice of review, we announce our annual petition findings for foreign species, as required under section 4(b)(3)(C)(i) of the Endangered Species Act of 1973, as amended. When, in response to a petition, we find that listing a species is warranted but precluded, we must complete a new status review each year until we publish a proposed rule or make a determination that listing is not warranted. These subsequent status reviews and the accompanying 12-month findings are referred to as ''resubmitted'' petition findings.

Information contained in this notice describes our status review of 50 foreign taxa that were the subjects of previous warranted-but-precluded findings, most recently summarized in our 2007 Notice of Review (72 FR 20184). Based on our current review, we find that 20 species (see Table 1) continue to warrant listing, but that their listing remains precluded by higher-priority listing actions. For 30 species previously found to be warranted but precluded, the petitioned action is now warranted. We will promptly publish listing proposals for those 30 species (see Table 1).

With this annual notice of review (ANOR), we are requesting additional status information for the 20 taxa that remain warranted but precluded by higher priority listing actions. We will consider this information in preparing listing documents and future resubmitted petition findings for these 20 taxa. This information will also help us to monitor the status of the taxa and in conserving them.

**DATES:** We will accept comments on these resubmitted petition findings at any time.

**ADDRESSES:** Submit any comments, information, and questions by mail to the Chief, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 110, Arlington, Virginia 22203; by fax to 703–358–2276; or by e-mail to *ScientificAuthority@fws.gov*. Comments and supporting information will be available for public inspection, by appointment, Monday through Friday from 8 a.m. to 4 p.m. at the above address.

**FOR FURTHER INFORMATION CONTACT:** Mary M. Cogliano, PhD, at the above address or by telephone 703–358–1708; fax, 703–358–2276; or e-mail, *ScientificAuthority@fws.gov*.

**SUPPLEMENTARY INFORMATION:**

### Background

The Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), provides two mechanisms for considering species for listing. First, we can identify and propose for listing those species that are endangered or threatened based on the factors contained in section 4(a)(1). We implement this through the candidate program. Candidate taxa are those taxa for which we have sufficient information on file relating to biological vulnerability and threats to support a proposal to list the taxa as endangered or threatened, but for which preparation and publication of a proposed rule is precluded by higher-priority listing actions. None of the species covered by this notice were assessed through the candidate program; they were the result of public petitions to add species to the Lists of Endangered and Threatened Wildlife and Plants (Lists), which is the other mechanism for considering species for listing.

Under section 4(b)(3)(A) of the Act, when we receive a listing petition, we must determine within 90 days, to the maximum extent practicable, whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted (90-day finding). If we make a positive 90-day finding, we are required to promptly commence a review of the status of the species, whereby, in accordance with section 4(b)(3)(B) of the Act we must make one of three findings within 12 months of the receipt of the petition (12-month finding). The first possible 12-month finding is that listing is not warranted, in which case we need not take any further action on the petition. The second possibility is that we may find that listing is warranted, in which case we must promptly publish a proposed rule to list the species. Once we publish a proposed rule for a species, sections 4(b)(5) and 4(b)(6) govern further procedures, regardless of whether or not we issued the proposal in response to the petition. The third possibility is that we may find that listing is warranted but precluded. A warranted-but-precluded finding on a petition to list means that listing is warranted, but that the immediate proposal and timely promulgation of a final regulation is precluded by higher priority listing actions. In making a warranted-but precluded finding under the Act, the Service must demonstrate that expeditious progress is being made to add and remove species from the lists of endangered and threatened wildlife and plants.

Pursuant to section 4(b)(3)(C)(i) of the Act, when, in response to a petition, we find that listing a species is warranted but precluded, we must make a new 12-month finding annually until we publish a proposed rule or make a determination that listing is not warranted. These subsequent 12-month findings are referred to as ''resubmitted'' petition findings. This notice contains our resubmitted petition findings for all foreign species previously described in the 2007 Notice of Review (72 FR 20184) and that are currently the subject of outstanding petitions.

### Previous Notices

The species discussed in this notice were the result of three separate petitions submitted to the U.S. Fish and Wildlife Service (Service) to list a number of foreign bird and butterfly species as threatened or endangered under the Act. We received petitions to list foreign bird species on November 24, 1980, and May 6, 1991 (46 FR 26464 and 56 FR 65207, respectively). On January 10, 1994, we received a petition to list 7 butterfly species as threatened or endangered (59 FR 24117).

We took several actions on these petitions. To notify the public on these actions, we published petition findings, listing rules, status reviews, and petition finding reviews that included foreign species in the **Federal Register** on May 12, 1981 (46 FR 26464); January 20, 1984 (49 FR 2485); May 10, 1985 (50 FR 19761); January 9, 1986 (51 FR 996); July 7, 1988 (53 FR 25511); December 29, 1988 (53 FR 52746); April 25, 1990 (55 FR 17475); September 28, 1990 (55 FR 39858); November 21, 1991 (56 FR 58664); December 16, 1991 (56 FR 65207); March 28, 1994 (59 FR 14496); May 10, 1994 (59 FR 24117); January 12, 1995 (60 FR 2899); and May 21, 2004 (69 FR 29354). Our most recent review of petition findings was published on April 23, 2007 (72 FR 20184).

Since our last review of petition findings, we have taken two listing actions related to this notice (see Preclusion and Expeditious Progress section for additional listing actions that were not related to this notice). On

December 17, 2007, we published a proposed rule to list 6 species of foreign Procellariids under the Act (72 FR 71298). We also published a final rule on January 16, 2008, to list 6 foreign bird species as endangered under the Act (73 FR 3146).

**Findings on Resubmitted Petitions**

This notice describes our resubmitted petition findings for 50 foreign species for which we had previously found proposed listing to be warranted but precluded. We have considered all of the new information that we have obtained since the previous findings, and we have updated the listing priority number (LPN) of each taxon for which proposed listing continues to be warranted but precluded, in accordance with our Listing Priority Guidance published September 21, 1983 (48 FR 43098). Such a priority ranking guidance system is required under section 4(h)(3) of the Act. Using this guidance, we assign each taxon an LPN of 1 to 12, whereby we first categorize based on the magnitude of the threat(s) (high versus moderate-to-low), then by the immediacy of the threat(s) (imminent versus nonimminent), and finally by taxonomic status; the lower the listing priority number, the higher the listing priority (i.e., a species with an LPN of 1 would have the highest listing priority).

As a result of our review of 50 foreign species, we find that warranted-but-precluded findings remain appropriate for 20 species. We emphasize that we are not proposing these species for listing by this notice, but we do anticipate developing and publishing proposed listing rules for these species in the future, with an objective of making expeditious progress in addressing all 20 of these foreign species within a reasonable timeframe.

Also as a result of this review, we find that proposing 30 taxa for listing under the Act is warranted. We will promptly publish proposals to list these 30 taxa, listed below in taxonomic order: Junín flightless grebe (*Podiceps taczanowskii*), greater adjutant stork (*Leptoptilos dubius*), Andean flamingo (*Phoenicoparrus andinus*), Brazilian merganser (*Mergus octosetaceus*), Caucau Guan (*Crax alberti*), blue-billed curassow (*Penelope perspicax*), Cantabrian capercaillie (*Tetrao urogallus cantabricus*), gorgeted wood-quail (*Odontophorus strophium*), Junín rail (*Laterallus tuerosi*), Jerdon's Courser (*Rhinoptilus bitorquatus*), slender billed curlew (*Numenius tenuirostris*), Marquesan imperial pigeon (*Ducula galeata*), salmon-crested cockatoo (*Cacatua moluccensis*), southeastern rufous-vented ground-cuckoo (*Neomorphus geoffroyi dulcis*), Margaretta's hermit (*Phaethornis malaris margarettae*), black-breasted puffleg (*Eriocnemis nigrivestis*), Chilean woodstar (*Eulidia yarrellii*), Esmeraldas woodstar (*Chaetocerus berlepschi*), royal cinclodes (*Cinclodes aricomae*), white-browed tit-spinetail (*Leptasthenura xenothorax*), black-hooded antwren (*Formicivora erythronotos*), fringe-backed fire-eye (*Pyriglena atra*), brown-banded antpitta (*Grallaria milleri*), Kaempfer's tody-tyrant (*Hemitriccus kaempferi*), ash-breasted tit-tyrant (*Anairetes alpinus*), Peruvian plantcutter (*Phytotoma raimondii*), St. Lucia forest thrush (*Cichlherminia herminieri sanctaeluciae*), Eiao Polynesian warbler (*Acrocephalus cafier aquilonis*), medium tree-finch (*Camarhynchus pauper*), and cherry-throated tanager (*Nemosia rourei*).

Our warranted finding is based on a species' LPN, as well as a recent court order. We have found all taxa with LPNs of 2 or 3, as reported in the 2007 Notice of Review (72 FR 20184), to be warranted for proposed listing under the Act, because these species face threats that are both imminent and high in magnitude. In addition to the LPN directing our findings, on January 23, 2008, the United States District Court ordered the Service to propose listing rules for five foreign bird species, actions which had been previously determined to be warranted but precluded: the Chilean woodstar (*Eulidia yarrellii*), Andean flamingo (*Phoenicoparrus andinus*), medium tree-finch (*Camarhynchus pauper*), black-breasted puffleg (*Eriocnemis nigrivestis*), and the St. Lucia forest thrush (*Cichlherminia herminieri sanctaeluciae*). Of these five species, only one, the medium tree-finch (*Camarhynchus pauper*), did not have an LPN number of 2 or 3. To comply with the court-order, however, we are declaring the medium tree-finch to be warranted for proposed listing at this time, in addition to the 29 species that were reported with LPNs of 2 or 3 in our 2007 Notice of Review, for which we have already begun to prepare proposed listing rules.

Based on our review of 50 species, we did not find any taxa to be no longer warranted for listing. Table 1 provides a summary of all updated determinations of the 50 taxa in our review. Any changes in LPN are explained in the species summaries in the text of this notice. Taxa in Table 1 of this notice are assigned to two status categories, noted in the ''Category'' column at the left side of the table. We identify the taxa for which we find that listing is warranted but precluded by a ''C'' in the category column, referring to these taxa as ''candidates'' under the Act. The other category is for those species for which we find that proposed listing is warranted, and we designate these taxa with a ''P,'' indicating that proposed rules to list these taxa under the Act will be published promptly. The column labeled ''Priority'' indicates the LPN for all taxa for which proposed listing is warranted but precluded. Following the scientific name of each taxon (third column) is the family designation (fourth column) and the common name, if one exists (fifth column). The sixth column provides the known historic range for the taxon. The avian species in Table 1 are listed taxonomically.

**Findings on Species for Which Listing Is Warranted**

Below are our 12-month resubmitted petition findings on the 30 taxa found by this notice to be warranted for proposed listing under the Act.

*Birds*

Junín Flightless Grebe (*Podiceps taczanowskii*)

The Junín flightless grebe is endemic to Lake Junon, a large lake that covers 35,385 acres (ac) (14,320 hectares (ha)) in the central Andes of Peru at 13,386 feet (ft) (4,080 meters (m)) above sea level (Fjeldså 1981; Fjeldså 2004; Fjeldså and Krabbe 1990; INRENA 1996). Historically, the species was likely distributed throughout the lake, but it is now absent from the northwest portion of the lake due to contamination from mining wastes (Fjeldså 1981).

The lake is bordered by extensive reed marshes and reaches a depth of 32.8 ft (10 m) at the center. The reed marshes are continuous in some areas of the lake shore, but they form a mosaic with stretches of open water in other areas. Considerable stretches of the lake are shallow, supporting dense growth of stonewort (*Chara* spp.) (del Hoyo et al. 1992). The Junín flightless grebe prefers open lake habitat and remains in the center of the lake when it is not breeding. During the breeding season, however, it nests in stands of tall *Scirpus californicus tatora* or bays and channels along the outer edge of the reed marshes surrounding the lake (O'Donnel and Fjedså 1997). The Junín flightless grebe feeds predominantly on fish (*Orestias spp.*), which constitute approximately 90 percent of its diet (del Hoyo et al. 1992).

The Junín flightless grebe has experienced dramatic population

declines since the early 1960s when there were at least 1,000 individuals (F. Gill and R.W. Storer, as cited in Fjeldså 2004). Prior to the 1960s, the Junín flightless grebe had been described as ''extremely abundant on the lake'' (Morrison 1939). However, by 1979, the population was estimated to be 250 to 300 birds, indicating a rapid and extensive decline (Harris 1981, as cited in O'Donnell and Fjeldså 1997). From 1979 through 2004, population estimates fluctuated between 50 to 375 birds (J. Fjeldså 2005, as cited in Butchart et al. 2006; O'Donnel and Fjeldså 1997). In 2004, the population estimate was 100 to 300 birds (BirdLife International 2007); however, in dry years (*e.g.*, 1983–1987, 1991, 1994–1997), the population was reduced to 100 birds or fewer (Elton 2000; Fjeldså 2004). Short-term population increases ranging from 200 to 300 birds have occurred in years with high rainfall levels related to the El Niño Southern-Oscillation (ENSO) (1997–1998 and 2001–2002) (T. Valqui and PROFONANPE 2002, as cited in Fjeldså 2004). In 2007, the population once more declined due to a high-mortality weather event (Hirschfeld 2007).

The Junín flightless grebe is considered ''Critically Endangered'' by the IUCN (International Union for Conservation of Nature) Red List because of the species' rapid decline, highly restricted range, and increasing exposure to contaminants produced by the mining industry (Birdlife International 2006). Variations in lake water levels of up to 23 ft (7 m) at a time are linked to electrical power generation by a local hydroelectric power station. These water-level fluctuations have reduced prey populations, resulting in increased food competition with white-tufted grebes (*Rollandia rolland*). Frequent manipulation and drawdowns of the lake's water level also prevent foraging, nest building, and breeding in drought years (BirdLife International 2007). In addition, contamination from mining wastes (Fjeldså 1981; Martin and McNee 1999) has reduced the amount of available habitat in the northern section of the lake by diminishing or eliminating stands of submerged aquatic vegetation (Fjeldså 2004; ParksWatch 2006). Greater concentration of contaminants in the lake as a result of droughts (T. Valqui and J. Barrio in litt. 1992, as cited in Collar et al. 1992) has coincided with mortality of Junín flightless grebes (T. Valqui and J. Barrio in litt. 1992, as cited in Collar et al. 1992), and is believed either to have directly caused the mortalities or to have resulted in mortality of the grebes by reducing their prey (Fjeldså 2004). Threats to this species and its habitat continue, and we find that proposing this species for listing under the Act is warranted.

Greater Adjutant Stork (*Leptoptilos dubius*)

The current range of the greater adjutant stork consists of two breeding populations, one in India and the other in Cambodia. Recent sighting records of this species from the neighboring countries of Nepal, Bangladesh, Vietnam, and Thailand are presumed to be wandering birds from one of the two populations in India or Cambodia (Birdlife International 2007).

The greater adjutant stork frequents marshes, lakes, paddy fields, and open forest, and may also be found in dry areas, such as grasslands and fields. In India, much of the native habitat has been lost. The greater adjutant stork often occurs close to urban areas, feeding in and around wetlands in the breeding season, and disperses to feed on carcasses and to scavenge at trash dumps, burial grounds, and slaughter houses at other times of the year. The natural diet of the greater adjutant stork consists primarily of fish, frogs, reptiles, small mammals and birds, crustaceans, and carrion (BirdLife International 2007; Singha and Rahman 2006).

This species breeds in colonies during the dry season (winter) in stands of tall trees near water sources. In India, the breeding sites are commonly associated with bamboo forests which provide protection from wind (Singha et al. 2002). The greater adjutant stork constructs platform nests made of sticks in the upper lateral limbs of large trees (Singha et al. 2002). In Cambodia, the greater adjutant stork breeds in freshwater flooded forest and disperses to seasonally inundated forest, tall wet grasslands, mangroves, and intertidal flats to forage. At the Kulen Promtep Wildlife Sanctuary, it is known to nest only in evergreen forests (Clements et al. 2007b). At two breeding sites near the city of Guwahati in the State of Assam, the most recent survey data show that the number of breeding birds has declined from 247 birds in 2005 to 118 birds in 2007 (Hindu 2007).

During the nineteenth century, there were vast colonies of millions of greater adjutant storks in Burma, and del Hoyo et al. (1992) noted that in Calcutta there was ''almost one [stork] on every roof.'' However, during the twentieth century the species experienced a rapid decline, and currently the population estimate is 800 to 1,000 birds in two very small and highly disjunct breeding populations (BirdLife International 2007). The greater adjutant stork is classified as ''Endangered'' by the IUCN Red List (BirdLife International 2007).

Identified risks to this species include habitat destruction, particularly lowland deforestation and the felling of nest trees (Hindu 2007; Singha et al. 2002; Singha et al. 2006; WCS 2007); habitat modification from flooding and hydrological changes brought about by Mekong River dam development (Clements et al. 2007b; WCS 2007); direct exploitation, such as hunting and egg collection from nesting colonies (Clements et al. 2007a); and drainage, agricultural conversion, pollution, and over-exploitation of wetlands (BirdLife International 2007; Clements et al. 2007; Singha et al. 2003). The Assam population is also negatively impacted by the loss of a readily available food source, due to the reduced number of open rubbish dumps for the disposal of carcasses and foodstuffs (BirdLife International 2007). Threats to this species and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Andean Flamingo (*Phoenicoparrus andinus*)

The Andean flamingo is the rarest of six flamingo species worldwide and one of three endemic to the high Andes of South America (Arengo in litt. 2007; Caziani et al. 2007; del Hoyo et al. 1992; Johnson et al. 1958; Johnson 1967; Line 2004). The Andean flamingo is found in lakes in the Andean altiplano (high plains) from southern Peru and southwestern Bolivia to northern Chile and northwest Argentina. A small section of the population winters in the lowlands of central Argentina, mainly at Mar Chiquita Lake (Blake 1977; Bucher 1992; Boyle et al. 2004; Caziani et al. 2006; Caziani et al. 2007; Fjeldså and Krabbe 1990; Hurlbert and Keith 1979; Kahl 1975). There have been several documented occurrences of Andean flamingos in Brazil, but it is unclear whether the species is accidental or a more frequent visitor (Bornschein and Reinert 1996; Sick 1993).

Andean flamingo habitat consists of plankton-rich, high-elevation, shallow lakes and salt flats (Fjeldså and Krabbe 1990). The range of the species becomes more restricted in the winter as low temperatures and aridity seasonally inhibit the suitability of some wetlands (Caziani et al. 2007; Mascitti and Bonaventura 2002). The Andean flamingo feeds in large flocks on diatoms of the genus *Surirella* from the benthic interface in water less than 3 ft (1 m) deep (Hurlbert and Chang 1983; Mascitti and Castañera 2006; Mascitti and Kravetz 2002).

Population assessments for this species vary greatly. In 1967, Charles Cordier estimated the number of Andean flamingos to be 250,000 to 300,000 birds (Johnson 1967). Kahl (1975) reviewed previous estimates and noted that Cordier's 1965 and 1968 population estimates varied by an order of magnitude (from 50,000 to 500,000) during that same time period. By 1986, R. Schlatter estimated the population to be fewer than 50,000 individuals, with a declining population trend (Johnson 2000). However, the accuracy of these early estimates has never been confirmed, making it difficult to establish trends.

Using a comprehensive sampling design and conducting simultaneous surveys at over 200 wetlands in Peru, Bolivia, Chile, and Argentina, Caziani et al. (2007) counted 33,918 Andean flamingos in January 1997; 27,913 in January 1998; 14,722 in June 1998; and 24,442 in July 2000. In the summer of 2005, Caziani et al. (2006) reported 31,617 Andean flamingos distributed throughout 25 wetlands, with 50 percent of the population located in five wetlands in Chile and Bolivia.

Long-lived species with slow rates of reproduction, such as the Andean flamingo, may appear to have robust populations, but can rapidly decline if reproduction does not keep pace with mortality. Andean flamingo recruitment was very low from the late 1980s to the mid-1990s, averaging only 800 chicks per year from 1988 through 1997. Recruitment appears to have improved in recent years, with a total of 13,201 Andean flamingo chicks hatched from 1997 through 2001 (Caziani et al. 2007), and an average of 3,000 chicks per year has fledged since 2000 (Amado et al. 2007 as cited in Arengo in litt. 2007). However, in some years breeding success is extremely limited; in 1997, only 200 chicks were observed to have hatched (Caziani et al. 2007). The reasons for such variation appear to be related to annual climatic conditions (Caziani et al. 2007). When climatic conditions are favorable, breeding takes place, whereas, when climatic conditions are unfavorable breeding is abandoned, very limited, or takes place at alternative breeding grounds, which tend to be less productive (Bucher et al. 2000).

The IUCN categorizes the Andean flamingo as ''Vulnerable'' because it has undergone a rapid population decline, it is exposed to ongoing exploitation and declines in habitat quality, and finally, although previous exploitation has decreased, the longevity and slow breeding of flamingos suggest that the legacy of past threats may persist through future generations (BirdLife International 2007).

Experts consider the greatest threats to the Andean flamingo to be habitat degradation caused by mining, agricultural, and residential/urban development, and tourism (Arengo in litt. 2007). Mining takes place in or near many of the wetlands occupied by the Andean flamingo, including successful breeding sites (Corporación Nacional Forestal 1996a; Soto 1996; Ugarte-Nunez and Mosaurieta-Echegaray 2000). Loss of habitat due to excavations in the lakebed and extraction of water are attributed to mining, which also causes extensive degradation of water quality. Chemical pollution produced by the mining and metallurgical industries and recent petroleum spills are also responsible for the degradation of water resources (OAS/UNEP and ALT 1999, as cited in Rocha 2002). Pollution from mining wastes has been reported as a risk factor to flamingos in Argentina (Laredo 1990 as cited in Administración de Parques Nacionales 1994), although it was not reported whether the risk was due to direct mortality of flamingos or due to a reduction in their food supply. In Chile, where Andean flamingo breeding colonies are concentrated and where mineral and hydrocarbon exploration and exploitation have increased in the last two decades, both the number of successful breeding colonies and the total production of chicks of Andean Flamingos have declined since the 1980s (Parada 1992, Rodríguez and Contreras 1998, as cited in Caziani et al. 2007).

Water consumption for agriculture and domestic use can cause serious declines in water levels at important breeding sites (Messerli et al. 1997), and increased tourism is likely to further stress already tenuous water budgets as hotels and restaurants are established (RIDES 2005). Other potential risks to the species include overutilization of individuals (Valqui et al. 2000) and eggs (Caziani et al. 2007) as a food resource and collection of feathers (Valqui et al. 2000). Threats to the Andean flamingo and its habitat continue, and we find that proposing this species for listing under the Act is warranted.

Brazilian Merganser (*Mergus octosetaceus*)

The Brazilian merganser is a diving duck that occurred historically in riverine habitats throughout southern Brazil, northeastern Argentina, and eastern Paraguay (Hughes et al. 2006). The species is considered extinct in Mato Grosso do Sul, Rio de Janeiro, Sao Paolo, and Santa Catarina (BirdLife International 2007). There is only one recent record of the species from Misiones, Argentina (Benstead 1994; Hearn 1994, as cited in Collar et al. 1994), and it was last recorded in Paraguay in 1984 (BirdLife International 2007).

Currently the species is found in extremely low numbers at six highly disjunct localities, of which five are in southeastern Brazil, and one is in northeastern Argentina and, possibly, extreme eastern Paraguay (BirdLife International 2007; Hughes et al. 2006). The species inhabits shallow clear-water streams and rapid rivers, preferably surrounded by dense tropical forests, and it is believed to be a highly sedentary, monogamous species, presumably maintaining its territory all year (del Hoyo et al. 1992; Bruno et al. 2006; Ducks Unlimited 2007; Hughes et al. 2006). The Brazilian merganser is a good swimmer and diver, and feeds primarily on fish, and occasionally aquatic insects and snails (Collar et al. 1992).

Recent records from Brazil and a newly discovered northern range extension indicate that the status of this species is better than previously considered, as several highly disjunct populations were located in 2002 (BirdLife International 2007; Hughes et al. 2006). However, the IUCN categorizes the species as ''Critically Endangered'' (BirdLife International 2007). Additionally, the population is estimated at between 50 to 249 individuals, and the trend is decreasing (BirdLife International 2007).

Identified risks to the species include habitat loss and degradation, fragmentation, and hydrological changes with perturbation and pollution of rivers, which are predominately the result of deforestation, agriculture, and diamond mining in the Serra da Canastra area (Bianchi et al. 2005; Bartmann 1994 and 1996, as cited in BirdLife International 2007; Bruno et al. 2006; Collar et al. 1994; Ducks Unlimited 2007; Hughes et al. 2006; Lamas and Santos 2004). Each breeding pair of Brazilian mergansers requires relatively long segments of river—up to ca. 7.5 miles (mi) (12 kilometers (km))—and the species is sensitive to human disturbance, including activities associated with expanded human presence such as tourism and scientific research programs (Braz et al. 2003; Bruno et al. 2006). Dam construction has destroyed suitable habitat, especially in Brazil and Paraguay (BirdLife International 2007). The species is highly adapted to shallow, rapid-flowing riverine conditions and, therefore, cannot tolerate the lacustrine (i.e., lake-like) conditions of reservoirs

that result from dam-building activities within their occupied range (Hughes et al. 2006).

The Brazilian merganser is legally protected in Brazil, and four of Brazil's protected areas represent the major sites where the species occurs (del Hoyo et al. 1992; Hughes et al. 2006). These sites are critical for protecting some of the key remaining subpopulations of the Brazilian merganser (del Hoyo et al. 1992; Braz et al. 2003; Bianchi et al. 2005; Bruno et al. 2006; BirdLife International 2007). The Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (IBAMA) in Brazil has established eight committees to develop and monitor conservation strategies for the country's ''endangered'' species, including the Brazilian merganser (Marinia and Garcia 2004). These committees developed an Action Plan for Conservation of the Brazilian Merganser, which has recently been published by the government of Brazil (Hughes et al. 2006). Despite these protections, threats to the Brazilian merganser continue. Therefore, we find that proposing this species for listing under the Act is warranted.

Cauca Guan (*Penelope perspicax*)

The Cauca guan is a medium-sized cracid with a bright red dewlap. It is dull brownish-gray, with mainly chestnut rear parts. It has whitish-scaled feather edges from head to mantle and breast (BirdLife International 2008). The Cauca guan is endemic to the slopes of the west and central Andes (Risaralda, Quindio, Valle del Cauca, and Cauca) in Colombia (Collar et al. 1992). The historic range is estimated to have been approximately 9,614 mi$^2$ (24,900 km$^2$) (Renjifo 2002). In the early part of the twentieth century, the Cauca guan inhabited the dry forests of the Cauca, Dagua, and Patía Valleys (Renjifo 2002). Today, most of the dry forests have been eliminated or highly fragmented, such that continuous forest exists only above 6,562 ft (2,000 m) (Renjifo 2002). At the beginning of the twentieth century through the 1950s, the species was considered common (Renjifo 2002; BirdLife International 2007). Between the 1970s and 1980s, there was extensive deforestation in the Cauca Valley, and the species went unobserved during this time, leading researchers to suspect that the Cauca guan was either extinct or on the verge of extinction (Brooks and Strahl 2000; del Hoyo et al. 1994; Hilty 1985; Hilty and Brown 1986). The species was rediscovered in 1987 (Renjifo 2002). In the late 1990s, Ucumarí Regional Park was considered the stronghold of the species (BirdLife International 2007). However, the species has not been observed again in that location since 1995 (Wege and Long 1995).

Cauca guan populations are characterized as small, containing only tens of individuals or, in rare instances, hundreds (Renjifo 2002). BirdLife International (2007) reported that the largest subpopulation contained an estimated 50 to 249 individuals; however, they did not specify to which population this refers, and these figures are not found in any other literature regarding population surveys of the Cauca guan. Kattan et al. (2006) conducted the only two population surveys in 2000 and 2001 (Muñoz et al. 2006). They estimated population densities at two locations—Otún-Quimbaya Flora and Fauna Sanctuary (Risaralda) and Reserva Forestal de Yotoco (Valle de Cauca)—to be between 144 and 264 individuals and 35 to 61 individuals, respectively (Kattan et al. 2006). Kattan et al. (2006) examined 10 additional localities, based on locality data reported by Renjifo (2002). Visual confirmations were made at only 2 of the 10 localities, and auditory confirmations were made at 5 of the 10 localities (Kattan et al. 2006). In 2006, Kattan (in litt., as cited in Muñoz et al. 2006) estimated the global population to be between 196 and 342 individuals. The IUCN categorizes the species as ''Endangered'' due to its small, contracted range, composed of widely fragmented patches of habitat (BirdLife International 2007) and considers the overall population to be in decline (BirdLife International 2007; Kattan 2004; Renjifo 2002). The Cauca guan is listed as ''Endangered'' under Colombian law, which prohibits commercial and sport hunting of the species (ECOLEX 2007). The level of enforcement is uncertain, however, despite this protection. Poaching continues to be a problem for the Cauca guan and may play a role in the possible local extirpation of the species from at least two protected areas (Collar et al. 1992; del Hoyo et al. 1994; Strahl et al. 1995).

Extensive habitat destruction and fragmentation since the 1950s have resulted in an estimated 95 percent range reduction of this species (Chapman 1917; Collar et al. 1992; Kattan et al. 2006; Renjifo 2002; Rios et al. 2006). As a result, although it prefers mature, tropical, humid forests, the Cauca guan exists primarily in fragmented and isolated secondary forest remnants, forest edges, and in plantations of the nonnative Chinese ash trees (Fraxinus chinensis) that are located within 0.62 mi (1 km) of primary forest (Renjifo 2002; Kattan et al. 2006; Rios et al. 2006). Its current range is estimated to be less than 290 mi$^2$ (750 km$^2$), of which only 216 mi$^2$ (560 km$^2$) is considered suitable habitat (BirdLife International 2007; Kattan et al. 2006; Rios et al. 2006). It is estimated that more than 30 percent of this loss of habitat has occurred within the species' last 3 generations (30 years) (Renjifo 2002), and recent studies indicate that the rate of habitat destruction is accelerating (Butler 2006; FAO 2003).

Cauca guans, the largest birds in their area of distribution, are considered among those species most rapidly depleted by hunting (Redford 1992; Renjifo 2002). It serves as a major source of subsistence protein for indigenous people (Brooks and Strahl 2000), although hunting by local residents is illegal (del Hoyo et al. 1994; Muñoz et al. 2006; Renjifo 2002; Rios et al. 2006). Threats to the Cauca guan and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Blue-Billed Curassow (*Crax alberti*)

The blue-billed curassow is a large, mainly black, terrestrial cracid. The species historically occurred in northern Colombia, from the base of the Sierra Nevada de Santa Marta, west to the Sinú valley, through the Río Magdalena (BirdLife International 2007; Cuervo and Salaman 1999; del Hoyo et al. 1994). The species' historic range encompassed an approximate area of 41,197 mi$^2$ (106,700 km$^2$) (Cuervo 2002). There were no confirmed observations of blue-billed curassows between 1978 and 1997 (Brooks and Gonzalez-Garcia 2001), and surveys conducted in 1998 failed to locate any males (BirdLife International 2007), prompting researchers to believe the species to be extinct in the wild (del Hoyo et al. 1994). However, a series of observations reported in 1993 were later confirmed (Cuervo 2002).

The current range of the blue-billed curassow is estimated to be 807 mi$^2$ (2,090 km$^2$) (BirdLife International 2007) of fragmented, disjunct, and isolated tropical, moist, and humid lowlands and premontane forested foothills in the Rio Magdalena and lower Cauca Valleys of the Sierra Nevada de Santa Marta Mountains, where it feeds on fruit, shoots, invertebrates, and possibly carrion. The species is more commonly found below 1,968 ft (600 m) (del Hoyo et al. 1994), but can be found at elevations up to 3,937 ft (1,200 m) (Collar et al. 1992; Cuervo and Salaman 1999; del Hoyo et al. 1994; Donegan and Huertas 2005; Salaman et al. 2001).

In 1993, sightings were reported in the northern Departments of Córdoba (at La Terretera, near Alto Sinú) and Bolívar (in the Serranía de San Jacinto) (Williams in litt., as cited in BirdLife International 2007). Additional observations were made in the northernmost Department of La Guajira in 2003 (in the Valle de San Salvador Valley) (Strewe and Navarro 2003). More recently, individuals have been observed in the tropical forests of the more central Departments of Antioquía, and Santander and Boyacá Departments, and in the southeastern Department of Cauca (BirdLife International 2007; Cuervo 2002; Donegan and Huertas 2005; Ochoa-Quintero et al. 2005; Urueña et al. 2006). Experts consider the most important refugia for this species to be: (1) Serranía de San Lucas (Antioquía); (2) Paramillo National Park (Antioquía and Córdoba Departments); (3) Bajo Cauca-Nechí Regional Reserve (Antioquía and Córdoba Departments); and (4) Serranía de las Quinchas Bird Reserve (Santander and Boyacá Departments) (BirdLife International 2007; Cuervo 2002).

The blue-billed curassow is categorized as ''Critically Endangered'' by the IUCN Red List (BirdLife International 2007) and is considered a ''Critically Endangered'' species under Colombian law, pursuant to paragraph 23 of Article 5 of the Law 99 of 1993, as outlined in Resolution No. 584 of 2002 (ECOLEX 2007b). The blue-billed curassow is identified as an immediate conservation priority by the Cracid Specialist Group (Brooks and Strahl 2000). There is little information on population numbers for the various reported localities. In 2003, the population at Serranía de las Quinchas (Boyacá Department) was estimated to be between 250 and 1,000 birds. The only other information on the subpopulation level is a report from Strewe and Navarro (2003), based on field studies conducted between 2000 and 2001, that hunting had nearly extirpated the blue-billed curassow from a site in San Salvador. In 1994, the IUCN estimated the blue-billed curassow population at between 1,000 and 2,499 individuals (BirdLife International 2007). In 2001, Brooks and Gonzalez-Garcia (2001) estimated the total population to be much less than 2,000 individuals. In 2002, it was estimated that the species had lost 88 percent of its habitat and half of its population within the species' previous 3 generations (30 years) (Cuervo 2002).

Rapid deforestation and habitat loss throughout the lowland forests across northern Colombia over the past 100 years has extirpated the blue-billed curassow from a large portion of its previous range and continues to impact remaining populations (Brooks and Gonzalez-Garcia 2001; Collar et al. 1992; Cuervo and Salaman 1999). Additionally, oil extraction, gold mining, government defoliation of illegal drug crops, and increased human encroachment put the blue-billed curassow at risk (BirdLife International 2007). Blue-billed curassows are hunted by indigenous people and local residents for sustenance, sport, trade, and entertainment (Brooks 2006; Brooks and Gonzalez-Garcia 2001; Brooks and Strahl 2000; Cuervo and Salaman 1999), involving the species at all life stages, with eggs and chicks collected in some areas for sale at local markets or for domestic use (Brooks 2006; Cuervo 2002). Threats to the blue-billed curassow and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Cantabrian Capercaillie (*Tetrao urogallus cantabricus*)

The Cantabrian capercaillie is a subspecies of the western capercaillie (*T. ugogallus*). Currently it is restricted to the Cantabrian Mountains in northwest Spain. This grouse's range is separated by the Pyrenees Mountains from its nearest neighboring capercaillie subspecies (*T. u. aquitanus*) by a distance of more than 186 mi (300 km) (Quevedo et al. 2006).

The Cantabrian capercaillie occurs in mature beech forests (*Fagus sylvatica*) and mixed beech and oak forests (*Quercus robur, Q. petraea,* and *Q. pyrenaica*) at elevations ranging from 2,625 to 5,900 ft (800 to 1,800 m). The Cantabrian capercaillie also inhabits other microhabitat types such as broom (*Genista spp.*), meadow, and heath (*Erica* spp.) selectively throughout the year (Quevedo et al. 2006). Bilberry (*Vaccinium myrtillus*) is an important component of its diet, and it also feeds on beech buds, catkins of birch (*Betrula alba*), and holly leaves (*Ilex aquifolium*) (Rodriguez and Obeso 2000, as cited in Pollo et al. 2005).

In 2004, at the species level, the western capercaillie (*Tetrao urogallus*) was assessed by the IUCN as a species of ''Least Concern'' (BirdLife International 2004a). However, the IUCN Species Survival Commission's Grouse Specialist Group has noted that the subspecies qualifies to be listed as ''Endangered'' according to the IUCN Red List criteria (Storch 2000). In the year 1998–1999, it was estimated there were 1,900 to 2,000 pairs and that the subspecies was in decline (BirdLife International 2004b). This subspecies is currently classified as ''Vulnerable'' in Spain, which affords it protection from hunting. Although hunting the capercaillie is prohibited in Spain, poaching still occurs. It is unknown what the incidence of poaching is or what impact it has on the subspecies (Storch 2000, 2007).

Habitat degradation, loss, and fragmentation influence the population dynamics of the Cantabrian capercaillie throughout its range (Storch 2000, 2007). This subspecies' historic range has declined by more than 50 percent (Quevedo et al. 2006). The current range is severely fragmented, with 22 percent in low forest habitat, and most of the remaining suitable habitat is in small patches of less than 25 ac (10 ha) (Garcia et al. 2005). Research conducted on other subspecies of capercaillie indicates that the size of forest patches is correlated to the number of males that gather in leks (courtship grounds) to display and that below a certain forest patch size, leks are abandoned (Quevedo et al. 2006).

Patches of good quality habitat are scarce and discontinuous, particularly in the central portions of the species' range (Quevedo et al. 2006), and leks in the smaller forest patches have been abandoned during the last few decades. The leks that remain are now located farther from forest edges than those that were occupied in the 1980s (Quevedo et al. 2006). Recent studies indicate that habitat fragmentation may have a greater effect on this subspecies than previously recognized (Quevedo et al 2005; Vandermeer and Carvajal 2001), and if further habitat fragmentation occurs, the Cantabrian capercaillie population could end up in a few isolated subpopulations too small to ensure the subspecies' long-term survival (Grimm and Storch 2000).

Forest silviculture practices affect both the quantity, as well as the quality, of suitable habitat for the Cantabrian capercaillie. Forest structure plays an important role in determining habitat suitability and occupancy for the subspecies. Quevedo et al. (2006) found that open forest structure with well-distributed bilberry shrubs, an important component of the species' diet (Rodriguez and Obeso 2000, as reported in Pollo et al. 2005), was the preferred habitat type of Cantabrian capercaillie.

Management of forest resources for timber production causes significant changes in forest structure, such as species composition, tree density and height, forest patch size, and understory vegetation (Pollo et al. 2005). Such silviculture practices continue to negatively affect the quality, quantity, and distribution of suitable habitat

available for this subspecies, particularly by reducing the availability of bilberry food resources and potentially reducing the availability of suitably sized breeding grounds.

Recurring fires have also been implicated as a factor in the decline of the subspecies (Lloyd 2007). Threats to the Cantabrian capercaillie and its habitat are ongoing, and we find that proposing this subspecies for listing under the Act is warranted.

Gorgeted Wood-Quail (*Odontophorus strophium*)

The gorgeted wood-quail is endemic to the west slope of the East Andes, in the Magdalena Valley (Donegan and Huertas 2005). It is currently known only in the central Colombian Department of Santander, with less than 10 sightings (del Hoyo et al. 1994; Fjelds and Krabbe 1990; Hilty and Brown 1986).

The gorgeted wood-quail prefers montane temperate and humid subtropical forests dominated by roble (*Tabebuia rosea*), and secondary growth forests in proximity to mature forests (Sarria and Álvarez 2002), especially those dominated by oak (*Quercus humboldtii*). The species is most often found at elevations between 5,741 and 6,726 ft (1,750 and 2,050 m) (BirdLife International 2007; Donegan et al. 2003; Donegan and Huertas 2005; Sarria and Álvarez 2002; Turner 2006; Wege and Long 1995). The gorgeted wood-quail is primarily terrestrial (Fuller et al. 2000), living on the forest floor and feeding on fruit, seeds, and arthropods (Collar et al. 1992; del Hoyo et al. 1994; Fuller et al. 2000). It is probably dependent on primary-growth forest for at least part of its life cycle, although it has also been found in degraded habitats and secondary-growth forest (BirdLife International 2007).

The species is classified as ''Critically Endangered'' by the IUCN Red List due to its small and highly fragmented range, with recent population records from only two areas. Logging and hunting are believed to be causing some declines in range and population size (BirdLife International 2004). The population is estimated at between 250 and 999 individuals (BirdLife International 2007).

Since the seventeenth century, the west slope of the East Andes has been extensively logged and converted to agriculture (Stiles et al. 1999). Forest habitat loss below 8,200 ft (2,500 m) has been almost complete (Stattersfield et al. 1998), with habitat reduced in many areas to highly fragmented relict patches on steep slopes and along streams (Stiles et al. 1999). In the early part of the twentieth century, the gorgeted wood-quail was known only in the oak forests in the Department of Cundinamarca. However, extensive deforestation and habitat conversion for agricultural use nearly denuded all the oak forests in Cundinamarca below 8,202 ft (2,500 m) (BirdLife International 2007; Hilty and Brown 1986). Subsequent surveys have not located the species in this area since 1954 (Collar et al. 1992; Fuller et al. 2000; Sarria and Álvarez 2002), and researchers consider the gorgeted wood-quail to be locally extirpated from Cundinamarca (BirdLife International 2007; Fuller et al. 2000; Sarria and Álvarez 2002; Wege and Long 1995). The species has recently been confirmed to exist in three locations, and its current range is between 4 $mi^2$ (10 $km^2$) (Sarria and Álvarez 2002) and 10.42 $mi^2$ (27 $km^2$) (BirdLife International 2007). These localities are in two disjunct areas within the Department of Santander. Serranoa de los Yarguoes is in northern Santander and the other two localities are adjacent to each other in southern Santander (Donegan and Huertas 2005). The species has lost 92 percent of its former habitat (Sarria and Álvarez 2002), and habitat loss through logging and land conversion to agricultural purposes continues throughout its range (BirdLife International 2007; Collar et al. 1992; Collar et al. 1994; Donegan et al. 2003; Hilty and Brown 1986; Sarria and Álvarez 2002; Stattersfield et al. 1998). Threats to the gorgeted wood-quail and its habitat continue, and we find that proposing this species for listing under the Act is warranted.

Junín Rail (*Laterallus tuerosi*)

The Junín rail is endemic to Lake Junín. The lake is large, covering 35,385 ac (14,320 ha) in the central Andes of Peru at 13,386 ft (4,080 m) above sea level (BirdLife International 2000; Fjeldså 1983). The Junín rail is known from only two sites on the southwest lakeshore, near Ondores and Pari, but it may occur in other portions of the 37,066 ac (15,000 ha) of marshlands surrounding Lake Junín (Fjeldså 1983).

The species' habitat preferences are not fully understood, but it is known to inhabit marshy vegetation located around the margins of Lake Junín. The Junín rail has been observed in the interior of large stands of *Juncus* spp. on the southeast shoreline of the lake and in mosaics of open marshes, in association with *Juncus* spp., mosses, and low herbs (Fjeldså 1983).

Rigorous population estimates for the Junín rail have not been made. In 1983, however, the species was believed to be common based on anecdotal reports of two local fishermen (Fjeldså 1983). Based on these accounts, BirdLife International (2000, 2007) estimated that the population might range between 1,000 and 2,500 individuals. BirdLife International, however, acknowledged that the data quality is poor and that the actual population size might be much smaller (BirdLife International 2000).

The Junín rail is categorized as ''Endangered'' by the IUCN because its range is limited to the shores of a single lake where habitat quality is declining, and the population is very small and believed to be declining (BirdLife International 2007). The Junín rail is considered an ''Endangered'' species by the Peruvian government under Supreme Decree No. 034–2004–AG, which prohibits hunting, taking, transport, or trade of this species, except as permitted by regulation.

One of the key factors contributing to the species' decline is adverse habitat modification. Dam operations cause seasonal lake-level fluctuations of up to 6 ft (2 m) (Martin and McNee 1999). Because few reed-beds are now permanently inundated, tall reeds (*Scirpus tatora*) have virtually disappeared from the lake's shoreline (O'Donnel and Fjeldså 1997). Long-term drawdowns of water levels lead to desiccation of the *Juncus* spp. marshes, and it has been suggested that the Junín rail may be particularly susceptible to such effects because they tend to occupy dry or shallow-water lakeshore sites (Eddleman et al. 1988).

Marsh desiccation also provides easy access to the shore for large livestock herds (primarily sheep, but also cattle, and to a lesser extent llamas and alpacas) to move into the wetlands surrounding the lake, resulting in overgrazing and soil compaction (INRENA 2000, as cited in ParksWatch 2006). Given the large number of livestock that are currently located around the lake (approximately 60,000 to 70,000), habitat destruction and trampling of nests and fledglings negatively impact this species (BirdLife International 2000; BirdLife International 2007; Collar et al. 1992).

Another threat to the Junín rail's habitat is the contamination of Lake Junín from mining wastes. There are a number of mining operations (lead, copper, and zinc) to the north of Lake Junín, and wastewater from these mines runs untreated into the lake via the Rio San Juan (Fjeldså 1981; Martin and McNee 1999). The Rio San Juan (the primary input of water into the Lake) exhibits elevated levels of several trace metals in comparison to local background values (Martin and McNee 1999). In addition, concentrations of

fertilizer by-products such as ammonium and nitrate have been found to be elevated (Martin and McNee 1999), and agricultural insecticides, which wash into the lake from the surrounding fields and through drainage systems from villages around the lake, have been detected (ParksWatch 2006). The contaminant load increases substantially during the wet season when agricultural run-off is greater (Martin and McNee 1999).

Cattail (*Typha spp.*) harvesting and burning also destroy the Junín rail's habitat (ParksWatch 2006), resulting in long-term impacts to the species' habitat (Eddleman et al. 1988). Cattails are harvested for handicrafts and livestock forage and are periodically burned to encourage shoot renewal (ParksWatch 2006). Threats to the Junín rail and its habitat continue, and we find that proposing this species under the Act is warranted.

Jerdon's Courser (*Rhinoptilus bitorquatus*)

The Jerdon's courser is endemic to the Eastern Ghats of the states of Andhra Pradesh and extreme southern Madhya Pradesh in India. The species was thought to be extinct for approximately 86 years until 1986, when it was rediscovered in Lankamalai. It has since been located at six additional sites in the vicinity of the Velikonda and Palakonda hills, in the southern State of Andhra Pradesh (Birdlife International 2006). It prefers sparse, thorny areas dominated by *Acacia* spp., *Zizyphus* spp., and *Carissa* spp. (BirdLife International 2006). The Jerdon's courser may also inhabit scrub forest consisting of *Cassia* spp., *Hardwickia* spp., *Dalbergia* spp., *Butea* spp., and *Anogeissus* spp., interspersed with patches of bare ground, in gently undulating rocky foothills (BirdLife International 2006).

This species' population is estimated at 50 to 249 birds (Birdlife International 2006). Very few individuals have been recorded thus far, mainly due to the species' nocturnal and secretive habits (BirdLife International 2006). Negative impacts to the species include exploitation of the scrub-forest, livestock grazing, disturbance by humans and livestock (BirdLife International 2006), and construction of canals (Jeganathen et al. 2005). Jeganathan et al. (2004) found that Jerdon's courser occurrence is strongly correlated with the density of bushes and trees, which is, in turn, negatively affected by mismanaged livestock grazing, woodcutting, and land clearing for agricultural production. The State of Andhra Pradesh has experienced intensive agricultural growth in recent years (Senapathi et al. 2006). From 1991 through 2000, a net loss of 14.6 percent of scrub habitat in the Cuddapah District and parts of the Nellore District in Andhra Pradesh took place, while the amount of land occupied by agricultural fields more than doubled during the same time period (Senapathi et al. 2006). The main cause for the loss of scrub habitat was conversion to agriculture, while gains in scrub habitat came largely at the expense of native deciduous forest due to mechanical clearing and fire (Jeganathan et al. 2004b). Researchers believe that suitable habitat conditions for the Jerdon's courser could be created through the use of a combination of well-managed animal grazing and woodcutting to maintain optimal height, density, and species composition of shrubs for the species. However, over-utilization of scrub habitat could also result in local courser extirpations (Jeganathan et al. 2004a; Senapathi et al. 2006). If not well-managed, increased levels of woodcutting and livestock grazing, as well as mechanical clearing of scrub habitat to create pasture, orchards, and agricultural fields, are all land uses likely to create habitat that is low in quality, highly-fragmented, and unsuitable for use by the Jerdon's courser. From 1991 through 2000, the patch size of scrub habitat declined significantly (Senapathi et al. 2006). Continuing encroachment of human settlement into areas currently occupied by the courser is likely to result in increased livestock grazing pressure and additional land conversion for agricultural purposes.

The Jerdon's courser is categorized as ''Critically Endangered'' on the IUCN Red List because of its small, declining population and habitat that is being reduced by livestock overgrazing and disturbance (BirdLife International 2004). The species is also listed under Schedule I of the Indian Wildlife Protection Act of 1972. Hunting of Schedule I-listed species is strictly prohibited. The Indian Wildlife Protection Act provides for the designation and management of Sanctuaries and National Parks for the purposes of protecting, propagating, or developing wildlife or its environment. Two areas have been established to protect the habitat of the Jerdon's courser. Suitable habitat, however, outside of these Protected Areas continues to be lost through its conversion for development and agriculture. Threats to Jerdon's courser and its habitat continue, and we find that proposing this species for listing under the Act is warranted.

Slender-Billed Curlew (*Numenius tenuirostris*)

The slender-billed curlew migrates along a west-southwest route from Siberia through central and eastern Europe (predominantly Russia, Kazakhstan, Ukraine, Bulgaria, Hungrary, Romania, and Yugoslavia) to southern Europe (Greece, Italy, and Turkey) and North Africa (Algeria, Morocco, and Tunisia). The species has only been confirmed breeding near Tara, Siberia, Russia, between 1909 and 1925, and the only known nests were found on the northern limit of the forest-steppe habitat (Birdlife International 2006). During seasonal migrations and the winter months, the slender-billed curlew utilizes a wide variety of habitats, including coastal marshes, steppe grassland, fish ponds, saltpans, brackish lagoons, tidal mudflats, semi-desert, brackish wetlands, and sandy farmlands in close proximity to lagoons (Hirschfeld 2007).

From the second half of the nineteenth century until 1920, the slender-billed curlew was considered an abundant bird (Chandrinos 2000). Flocks of more than 100 slender-billed curlews were recorded in Morocco as late as 1970. However, population declines have been observed since 1980 (BirdLife International 2006). BirdLife International (2008) reports that in 1994 the population estimate was 50–270 individuals, but the lack of recent confirmed sightings, despite extensive survey efforts, indicates that the population may now include less than 50 birds. Surveys were conducted between 1987 and 2000 in various sections of the species' historic range and covered hundreds of miles (and the corresponding number of kilometers) of habitat. Not a single slender-billed curlew, however, was located during these efforts (CMS 2004; Gretton et al. 2002).

The slender-billed curlew is classified as ''Critically Endangered'' by the IUCN, because the species has an extremely small population size, and the number of birds recorded annually continues to fall, likely representing a continuing population decline (BirdLife International 2004). The species is listed under Appendix I of CITES; commercial trade of this species is strictly prohibited (UNEP–WCMC 2008).

The slender-billed curlew is also listed under Appendices I and II of the Convention on Migratory Species (CMS) (BirdLife International 2004). In an effort to safeguard the slender-billed curlew, a Memorandum of

Understanding (MOU) was developed under CMS auspices and became effective on September 10, 1994. The MOU area covers 30 Range States in Southern and Eastern Europe, Northern Africa and the Middle East. As of December 31, 2000, the MOU had been signed by 18 Range States and three co-operating organizations. An International Action Plan for the Conservation of the slender-billed Curlew has been prepared by BirdLife International (Council of Europe, 1996), and approved by the European Commission and endorsed by the Fifth Meeting of the CMS. Conservation priorities include effective legal protection for the slender-billed curlew and its look-alikes, locating its breeding grounds as well as key wintering and passage sites, applying appropriate protection and management of its habitat, and increasing the awareness of politicians in the affected countries. The CMS website includes an update on the progress being made under the slender-billed curlew MOU. It states that conservation activities have already been undertaken or are underway in Albania, Bulgaria, Greece, Italy, Morocco, Russian Federation, Ukraine and Iran. However, no details of these activities are provided.

The slender-billed curlew is listed on Annex I of the European Union Wild Bird Directive (BirdLife International 2004), which provides a framework for the conservation and management of wild birds in Europe. Although this Directive sets objectives for activities intended to protect wild birds, the legal implementation and achievement of these objectives are at the discretion of each Member State (DEFRA 2008). This species is also listed on Appendix II of the Bern Convention (COE 1979), ''a binding international legal instrument in the field of nature conservation, which covers the whole of the natural heritage of the European continent and extends to some States of Africa'' (COE n.d.). This agreement, however, would not afford protections to the species' breeding habitats in the forest-steppe of Russia.

Historically, hunting levels have been high along the species' entire migratory flyway, especially Russia, and are believed to be the primary factor for the species' previous decline (BirdLife International 2006). Threats to the species on its current breeding grounds are largely unknown due to the lack of information on its nesting localities. However, modification of the forest-steppe habitat within the species' breeding range suggests that the species may be at risk due to loss of its breeding habitat. The forest-steppe has been partially cultivated, and much of the steppe has been developed for intensive agricultural purposes (Gretton 1996).

Progress is underway in some range nations to conserve habitat, prevent hunter misidentification of the species, and increase awareness about the species' precarious status; however, range nations have had differing levels of success in the implementation of needed protections. Threats to the slender-billed curlew and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Marquesan Imperial-Pigeon (*Ducula galeata*)

The Marquesan imperial-pigeon, a very large, broad-winged pigeon, is endemic to Nuku Hiva, the largest of the Marquesas Islands in French Polynesia (BirdLife International 2007). Nuku Hiva is a volcanic island 130 $mi^2$ (337 $km^2$) in area; most of the island was originally forested except for the drier north-western plain, where shrub savanna is now predominant. Following conservation recommendations, small numbers of Marquesan imperial-pigeons were translocated beginning in 2000, to the Vaiviki Valley of a second island, Ua Huka, which has been classified as a protected area since 1997. This island contains suitable habitat for this species and is free of mammalian predators (BirdLife International 2007; Blanvillian et al. 2007). The remaining Marquesan imperial-pigeon populations are small, with an estimated 80 to 150 birds on Nuku Hiva (Villard et al. 2003) and 32 birds on Ua Huka (Blanvillian et al. 2007).

The Marquesan imperial-pigeon prefers remote wooded valleys from 820 to 4,265 ft (250 to 1,300 m) in elevation in the west and north of Nuku Hiva. It also inhabits secondary forest and edge habitat near banana and orange plantations (BirdLife International 2007; Blanvillian and Thorsen 2003). The species appears to have strong site-fidelity for its feeding and night roosting sites (Villard et al. 2003).

The Marquesan imperial-pigeon has been categorized as ''Critically Endangered'' by the IUCN since 1994, because it has a very small population size with a decreasing trend and only inhabits one tiny island (aside from the population that is being established at Ua Huka through release efforts). The species appears to owe its survival to the existence of habitat in several areas which are difficult for hunters and introduced species to access (BirdLife International 2007).

The pigeon is protected under the French Environmental Code, which means that the destruction or poaching of eggs or nests or the mutilation, destruction, capture, poaching, intentional disturbance, taxidermy, transport, peddling, use, possession, offer for sale, or purchase of individuals is prohibited by law. Currently, there is no evidence that collection for trade of this species is occurring.

Loss of habitat is believed to have had a large impact on the reduced distribution of the Marquesan imperial-pigeon. Continued grazing by feral goats prevents regeneration of trees, furthering the impacts to previously modified habitat (Thorsen et al. 2002) The introduced black rat (*Rattus rattus*) contributes to habitat degradation on Nuku Hiva by consuming flowers and fruit, thereby inhibiting habitat regeneration (Powlesland et al. 1997).

Transmittal of diseases from domestic pigeons or poultry, or from other introduced avian species imported to Nuku Hiva, has been suggested as a potential risk to this species (Blanvillian et al. 2007). The introduced black rat, although not believed to be a significant predator on adult pigeons (Villard et al. 2003), preys on eggs and young pigeons, potentially putting the species at risk. Rats are also believed to compete for food resources that would otherwise be available to the pigeons (Powlesland et al. 1997). Feral cats have also been introduced on the islands and are suspected to be a predator of adult and juvenile pigeons when they are feeding on low shrubs such as guava (*Psidium guajava*) (Rare Bird Yearbook 2008; Thorsen et al. 2002).

Hunting is believed to be one of the primary contributors to this species' decline and to local extirpations on neighboring islands (Villard et al. 2003). Despite the ban on hunting in French Polynesia since 1967, and the fully protected status of the Marquesan imperial-pigeon species, illegal hunting of the species still occurs. There are no estimates of the current extent of illegal hunting; but long-lived species such as the Marquesan imperial-pigeon with low fecundity rates are generally more affected by the loss of breeding adults than species with shorter life-spans and higher fecundity rates (Clout et al. 1995). Threats to this species and its habitat are ongoing, and we find that proposing the Marquesan imperial-pigeon for listing under the Act is warranted.

Salmon-Crested Cockatoo (*Cacatua moluccensis*)

This cockatoo is endemic to the islands of Ambon, Haruku, Seram, and Saparua in South Maluku, Indonesia. It was formerly a common species of the

lowlands within its range (del Hoyo et al. 1997). Although the species was regarded as locally common in 1970, the following decade saw a dramatic decline (Juniper and Parr 1998). Currently, the species is believed to survive in one area on Ambon; however, almost the entire population is restricted to Seram, where, during the 1990s, it suffered declines of 20 to 40 percent in one region. The species is still locally common in Manusela National Park and probably in east Seram. There are no recent records of the species on Haruku and Saparua (BirdLife International 2000).

The salmon-crested cockatoo is largely a resident in lowland rainforest below 3,280 ft (1,000 m) in elevation. The highest densities of cockatoos were encountered in unlogged forest below 590 ft (180 m), illustrating the importance of primary lowland forest (BirdLife International 2007). In a study of the density and distribution of the salmon-crested cockatoo, Kinnaird et al. (2003) confirmed that the highest densities of cockatoos occurred in primary forest sites with good forest structure and found that the lowest density was a logged site with low stature forest. Marsden (1998) found that density estimates of salmon-crested cockatoos in unlogged forest below 984 ft (300 m) were more than double those in logged forests. Habitat rich in strangler fig trees (*Ficus* spp.) and *Octomeles sumatranus*, the tree species the cockatoos prefer for nesting, was also likely to produce the highest densities of cockatoos (Kinnaird et al. 2003). The diet of salmon-crested cockatoos consists of seeds, nuts, young coconuts (*Cocos nucifera*) (the birds chew through the outer layers of green coconuts to get at the soft pulp), berries, and insects and their larvae (Forshaw 1989; Juniper and Parr 1998).

The species is listed as ''Vulnerable'' on the IUCN Red List because it has suffered a rapid population decline as a result of trapping for the pet bird trade and because of deforestation in its small range (BirdLife International 2004). Current populations are estimated at 62,400 individuals, with a decreasing population trend; the decline for the past 10 years or 3 generations is estimated at 30 to 49 percent (BirdLife International 2007b).

By the 1980s, salmon-crested cockatoo populations were declining rapidly due to uncontrolled trapping for the pet bird trade (BirdLife International 2007a). Concerns about unrestricted trade of parrots, including the salmon-crested cockatoo, led to a CITES Appendix-II listing of all Psittaciformes spp. in 1981 (CITES 2008). After the CITES listing, some 74,509 individual salmon-crested cockatoos were exported from Indonesia from 1981 to 1990 (BirdLife International 2000). The level of imports from Indonesia from 1983 to 1987, as reported to CITES, averaged 8,500 to 9,500 birds per year (CITES 1989b); trade reported in 1985 and 1987 exceeded the quota set by Indonesia by over 1,300 and 3,661 birds, respectively (CITES 1989a). In October 1989, the salmon-crested cockatoo was transferred to CITES Appendix I, which precludes commercial international trade. However, trappers reportedly remained active, and wild-caught birds were being openly sold in the domestic market (Metz and Nursahid 2004). Interviews in villages suggest that perhaps as many as 4,000 birds are still being captured each year (BirdLife International 2001).

Currently, logging impedes salmon-crested cockatoo conservation. Nearly 50 percent of Seram is held within logging concessions, with more than 75 percent held within lowland habitat, prime salmon-crested cockatoo habitat. Only 14 percent of the forests are in protected areas, and logging concessions overlap more than 30 percent of these protected areas, with conflicts over the boundaries of parks and logging concessions. Small-scale illegal logging also occurs within these protected areas. Unsustainable logging practices, which destroy the forest canopy, dramatically reduce habitat available for cockatoos, especially if large nest trees are harvested (Kinnaird et al. 2003).

In addition, the salmon-crested cockatoo's habitat is being degraded and threatened by agriculture, human settlement, and hydroelectric power projects (BirdLife International 2007a). The species has been considered a pest to coconut palms, and consequently has been persecuted, at least historically (BirdLife International 2000).

In 2000, a program was launched to promote ecotourism which was linked to a local project to raise awareness about the plight of the salmon-crested cockatoo. Current conservation measures suggest continuing and expanding the awareness program and using the salmon-crested cockatoo as the island's flagship species to reduce trapping pressure and encourage local support for the survival of the species (BirdLife International 2007a). At the present time, however, the threats to the salmon-crested cockatoo and its habitat continue, and we find that proposing this species for listing under the Act is warranted.

Southeastern Rufous-Vented Ground Cuckoo (*Neomorphus geoffroyi dulcis*)

The southeastern rufous-vented ground-cuckoo is one of seven subspecies of the rufous-vented ground-cuckoo (*Neomorphus geoffroyi*). The species as a whole ranges from Nicaragua to central South America, occurring at several disjunct localities (del Hoyo et al. 1997; Howard and Moore 1980; Payne 2005; Sibley and Monroe 1990). There is currently little concern for the conservation status of the whole species, but the *N. g. dulcis* subspecies, the southeastern rufous-vented ground cuckoo, has experienced serious declines (BirdLife International 2007). Historically, the southeastern rufous-vented ground-cuckoo subspecies had a widespread distribution in southeastern Brazil from Espirito Santo to Rio de Janeiro (del Hoyo et al. 1997), where it has likely always been locally rare (IUCN 1981). This subspecies may now, however, be extinct throughout its entire range; the last confirmed sighting was in 1977 in the Sooretama Biological Reserve north of the Doce River in Esprito Santo (Payne 2005; Scott and Brooke 1985). A recent photographic record (ca. 2004) of a single bird indicates that the subspecies may still occur at Doce River State Park in Minas Gerais (Scoss et al. 2006), but there are no population figures beyond this information.

The southeastern rufous-vented ground cuckoo inhabits tropical lowland evergreen forests, where it feeds on large insects, scorpions, centipedes, spiders, small frogs, lizards, and occasionally seeds and fruit (del Hoyo et al. 1997). It is a solitary subspecies that is dependent upon large blocks of undisturbed tropical lowland forest within the Atlantic Forest biome (del Hoyo et al. 1997; IUCN 1981; Payne 2005; Sick 1993). These birds can run and can flutter to an elevated perch to lookout and to roost, but they are not capable of sustained flight (Payne 2005). Therefore, major rivers and other extensive areas of non-habitat are thought to impede their movements.

Since 1981, the southeastern rufous-vented ground-cuckoo, has been categorized as ''Endangered'' on the IUCN Red List (IUCN 1981). It is formally recognized as ''Endangered'' in Brazil, and is directly protected by legislation promulgated by the Brazilian government (ECOLEX 2007; IUCN 1981). These protections prohibit the following activities with regard to this species: export and international trade, collection, research, and captive propagation. They also provide measures which help to protect

remaining suitable habitat, such as prohibition of exploitation of the remaining primary forests within the Atlantic forest biome and management of various practices in primary and secondary forests, such as logging, charcoal production, reforestation, recreation, and water resources (ECOLEX 2007). The existing regulatory mechanisms that apply to the southeastern rufous-vented ground-cuckoo would appear to be largely adequate if fully enforced; however, there is currently a lack of enforcement of them (BirdLife International 2003a; Conservation International 2007c; Costa 2007; Neotropical News 1997b; Peixoto and Silva 2007; Scott and Brooke 1985; The Nature Conservancy 2007; Venturini et al. 2005). As a result, significant threats to the subspecies' remaining habitats are ongoing.

Based on a number of recent estimates, 92 to 95 percent of the area historically covered by tropical forests within the Atlantic Forest biome has been converted or severely degraded as a result of various human activities (Höfling 2007; The Nature Conservancy 2007). In addition to the overall loss and degradation of native habitat within this biome, the remaining tracts of habitat are severely fragmented. Most of the tropical forest habitats believed to have been used historically by the southeastern rufous-vented ground-cuckoo have been converted or severely degraded by human activities (del Hoyo et al. 1997; IUCN 1981; Payne 2005; Scott and Brooke 1985; Sick 1993). Terrestrial insectivorous birds, such as the southeastern rufous-vented ground-cuckoo, are especially vulnerable to habitat modifications which increase the variability of insect food supplies (Goerck 1997), and the subspecies cannot occupy these extensively altered habitats. The subspecies is dependent upon large blocks of undisturbed forest habitat for its life-cycle requirements, and habitat destruction within the ground-cuckoo's range results in a patchy landscape, reducing the availability of the type of forest habitat necessary for the subspecies. Threats to the southeastern rufous-vented ground cuckoo and its habitat continue, and we find that proposing this subspecies for listing under the Act is warranted.

Margaretta's Hermit (*Phaethornis malaris margarettae*, previously known as *Phaethornis margarettae*)

Margaretta's hermit was first described as a new species in 1972 by A. Ruschi (Sibley and Monroe 1990). Current taxonomic studies place Margaretta's hermit as a subspecies of the great-billed hermit (*Phaethornis malaris*) (Sick 1993).

Margaretta's hermit is found in coastal east Brazil and inhabits the understory of inundated lowland forest, secondary growth, bamboo thickets, and shrubbery. This subspecies is currently limited to forest remnants; consequently, further habitat destruction could be detrimental to this subspecies (del Hoyo et al. 1999). The Margaretta's hermit is listed in Appendix II of CITES (CITES 2006).

The last confirmed occurrence of the Margaretta's hermit is from a relatively old (ca. 1978) sighting of the subspecies on a privately-owned remnant forest called Klabin Farm, which at the time was approximately 15.4 $mi^2$ (40 $km^2$) in Espiritu Santo, and the subspecies likely occurred at the Sooretama Biological Reserve in Espiritu Santo until around 1977 (IUCN 1981).

Most of the tropical forest habitats believed to have been used historically by the Margaretta's hermit have been converted or are severely degraded due to human activities related to land clearing and urban and agricultural development in coastal east Brazil, and the subspecies cannot occupy these extensively altered areas (del Hoyo et al. 1999; Höfling 2007; IUCN 1981; Sick 1993; The Nature Conservancy 2007). While the Margaretta's hermit is not strictly tied to primary forest habitats and can make use of secondary-growth forests, this does not lessen the risk to the subspecies from the effects of deforestation and habitat degradation. This is because Atlantic Forest birds that are tolerant of secondary-growth forests, yet that are also rare or have restricted ranges (i.e., less than 21,000 square km (8,100 square mi)), are threatened by these impacts equally as primary forest-obligate species (Harris and Pimm 2004). The last site known to be occupied by the Margaretta's hermit totaled only about 40 square km (15 square mi) (IUCN 1981). The susceptibility of rare, limited-range species that are tolerant of secondary-growth forests occurs for a variety of reasons. For example, many hummingbird species are susceptible to excessive sun and readily abandon their nests at altered forested sites with too much exposure (Sick 1993), as can occur with various human activities that result in partial clearing (*e.g.*, selective logging). In addition, management of plantations often involves intensive control of the site's understory cover (Rolim and Chiarello 2004; Saatchi et al. 2001). Even if the forest canopy structure remains largely intact, such management practices eventually result in loss of native understory plant species and severely alter understory structure and dynamics, which can be especially detrimental to pollinator species such as the Margaretta's hermit. Furthermore, even when forested lands are formally protected, the remaining fragments of habitat where the subspecies may still occur will likely continue to undergo degradation due to their altered dynamics and isolation (Tabanez and Viana 2000). Finally, secondary impacts that are associated with the above activities include severe fragmentation of the remaining tracts of forested habitat potentially used by the subspecies, and the potential introduction of disease vectors or exotic predators within the subspecies' historic range. As a result of the above influences, there is often a time lag between the initial conversion or degradation of suitable habitats and the extinction of endemic bird populations (Brooks et al. 1999a; Brooks et al. 1999b). Therefore, even without further habitat loss or degradation, the Margaretta's hermit remains at risk from past impacts to its suitable forested habitats.

Loss of this species' habitat is likely to continue due to the high pressure for coastal development. Threats to the Margaretta's hermit and its habitat are ongoing, and we find that proposing this subspecies for listing under the Act is warranted.

Black-Breasted Puffleg (*Eriocnemis nigrivestis*)

The black-breasted puffleg, endemic to Ecuador, is a member of the hummingbird family (Trochilidae). It is confined to the northern ridge crests of Volcán Pichincha near Quito, Ecuador (Fjeldså and Krabbe 1990; Ridgely and Greenfield 1986a; Ridgely and Greenfield 1986b). Volcán Pichincha reaches peaks at 15,699 ft (4,785 m) (Phillips 1998). The species has not been confirmed in the only other known sighting locality, the Volcán Atacazo, since 1902 (Collar et al. 1992; BirdLife International 2007).

This species prefers temperate elfin forests (comprised primarily of *Polyepsis* spp. trees) between 9,350 and 11,483 ft (2,850 and 3,500 m) (Fjeldså and Krabbe 1990; Ridgely and Greenfield 1986a; Ridgely and Greenfield 1986b). It is an altitudinal migrant, spending the breeding season (November to February) in the humid elfin forest and the rest of the year at lower elevations, as determined by flowering of certain plants (Bleiweiss and Olalla 1983; Collar et al. 1992; del Hoyo et al. 1999).

Habitat loss, specifically the felling of *Polylepis* spp. wood for conversion to

charcoal, was the primary cause of historical black-breasted puffleg declines (Phillips 1998). Following more than 13 years without any observation of the species, the black-breasted puffleg was rediscovered on Volcán Pichincha in 1993 (Phillips 1998). The number of specimens in museum collections taken in the nineteenth century up until 1950 is over 100, suggesting the species was once more common (Collar et al. 1992).

The black-breasted puffleg is classified as ''Critically Endangered'' on the IUCN Red List because it has an extremely small range, and the population is restricted to one location (BirdLife International 2007). Its single population is estimated at 50 to 250 adult individuals, with a declining trend (BirdLife International 2007; del Hoyo et al. 1999). The population is believed to have declined by 50 to 79 percent in the past 10 years, or 3 generations, with more than 20 percent of this loss having occurred within the past 5 years. This rate of decline is predicted to continue (BirdLife International 2007). The species is also classified as ''Critically Endangered'' under Ecuadorian law (ECOLEX 2007).

Within the current range of the black-breasted puffleg (33 $mi^2$ (88 $km^2$)), approximately 93 percent of its habitat has been lost (BirdLife International 2007; Hirchfeld 2007). The ridge-crests within the range of the black-breasted puffleg are relatively level, and local settlers have cleared the majority of forested habitat within the species' range and converted it to potato cultivation and grazing (Bleiweiss and Olalla 1983; del Hoyo 1999). Some ridges are almost completely devoid of natural vegetation, and even if black-breasted pufflegs still occur in these areas, their numbers are most likely quite low (BirdLife International 2007).

In 2001, the area around the Volcáns Pichincha and Atacazo was established as the Yanacocha Reserve, and charcoal production within the reserve, which was considered the primary cause for the species' historical decline, was restricted (Bird Conservation 2005; Phillips 1998). The Yanacocha Reserve totals approximately 3,100 ac (1,250 ha) and contains approximately 2,372 ac (960 ha) of *Polylepis* forest (Hirchfeld 2007; World Land Trust 2007).

In 2001, the Ecuadorian government agreed to construct a pipeline to transport heavy oil from the Amazon basin to Esmaraldas on the Pacific Coast (Mindo Working Group 2001). The environmental impact study revealed that the proposed route went through black-breasted puffleg habitat (Mindo Working Group 2001). Satellite mapping showed that much of the area in puffleg habitat was already destroyed, with little remaining habitat above 9,186 ft (2,800 m). The black-breasted puffleg had previously been found at 10,171 ft (3,100 m) in an upper extension from the likely unsuitable forested zone lower down. The pipeline was proposed to pass through pasture slightly above this patch, risking further habitat destruction with the building of a road (Mindo Working Group 2001). The pipeline was recently constructed, transecting every major ecosystem on the Volcán Pichinche, including black-breasted puffleg habitat. The pipeline also deforested pristine habitat, making these areas more accessible and opening them up to further human infiltration (BirdLife International 2007). Threats to the black-breasted puffleg and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Chilean Woodstar (*Eulidia yarrellii*)

The Chilean woodstar is endemic to several river valleys from Tacna, Peru, to northern Antofagasta, Chile, close to the Pacific Coast. This area lies at the northern edge of the Atacama Desert, one of the driest places on Earth (Collar et al. 1992). Breeding populations are only known to occur in the Vitor and Azapa Valleys in extreme northern Chile (BirdLife International 2000; Estades et al. 2007). In the past, there were a few observations of the species in Tacna, Peru, close to the border of Chile, but the observations were infrequent, and there have been no confirmed observations in the last 2 decades (Collar et al. 1992; Fjeldså and Krabbe 1990).

The Chilean woodstar was described as a species of extremely limited range and very small total population size over 40 years ago (Johnson 1967). In September 2003, while using fixed-radius point counts to sample an area larger than the species' presumed range, Estades et al. (2007) found that the Chilean woodstar was restricted to the Azapa and Vitor Valleys of northern Chile, and that it was the rarest hummingbird in the Azapa Valley (Estades et al. 2007). Despite repeated searches, the species was not located in the Lluta Valley, where a breeding colony had been previously reported (Fjeldså and Krabbe 1990). The population was estimated to be about 1,539 individuals. In April 2004, the population was estimated at 758 individuals. The authors warned against interpreting their results as a population crash from 2003 to 2004, because the surveys in 2004 were conducted in April when food resources and woodstar populations are generally more widely dispersed than they are in September (Estades et al. 2007).

The Chilean woodstar inhabits riparian thickets, secondary growth, desert river valleys, arid scrub, agricultural lands, and gardens (Stattersfield et al. 1998). It relies on nectar-producing flowers for food, but also relies on insects for a source of protein (del Hoyo et al. 1999; Estades et al. 2007). The Chilean woodstar drinks nectar from the flowers of a variety of native and ornamental plants, as well as crops—including alfalfa, garlic, onion, and tomatoes (Estades et al. 2007).

The IUCN Red List categorizes the Chilean woodstar as ''Endangered'' because it inhabits a very small range, with all viable populations apparently confined to remnant patches in two desert river valleys. These valleys are heavily cultivated, and the extent, area, and quality of suitable habitat are likely declining (BirdLife International 2007). The Chilean woodstar is listed as an ''Endangered and Rare'' species in Chile and was also designated as a ''National Monument'' under Diario Oficial No. 38.501, which prohibits all hunting and capture of the species. These regulations do not, however, address the current and ongoing destruction and degradation of this species' habitat. The Chilean woodstar is listed in Appendix II of CITES (UNEP–WCMC 2008).

The historic range of the Chilean woodstar has been severely altered by extensive planting of olive and citrus groves in the valleys of northern Chile and southern Peru. The indigenous food plants of the species may have been seriously reduced when habitat for the species was converted to agriculture, but the woodstar apparently adapted to survive on introduced garden flowers (del Hoyo et al. 1999; Estades et al. 2007). However, loss of some native plant species may be a limiting factor for the survival of the species. Estades et al. (2007) reported that one of the reasons the Chilean woodstar disappeared from the Lluta Valley is likely due to the destruction of almost all of the chañares (*Geoffrea dicorticans*), which is considered one of the most important food resources for the species, but is unpopular with farmers who consider it undesirable and an attractant to mice. In addition, the use of insecticides to control the Mediterranean fruit fly (*Ceratitis capitata*) in the 1960s and early 1970s correlates with declines in Chilean woodstar abundance (Estades et al. 2007). The use of such pesticides has been reduced since the 1970s; however, Estades et al. (2007) reported that other insecticides that may harm the woodstar

are still being used for some applications.

Chilean woodstars appear to rely primarily on introduced olive trees for nesting. Although olive trees are not exposed to as many pesticides as other fruit trees in the region, the use of high-pressure water spraying to control mold threatens nests, eggs, and chicks (Estades et al. 2007).

Future land-cover projections from the Millennium Ecosystem Assessment indicate that by 2050, 18 to 24 percent of the Chilean woodstar's range is likely to be unsuitable for the species (Jetz et al. 2007).

Estades et al. (2007) hypothesized that rapid population increases of the Peruvian sheartail hummingbird (*Thaumastura cora*), which shares the range of the Chilean woodstar, is a strong competitor for food or space (Estades et al. 2007). The sheartail is more aggressive than the Chilean woodstar; therefore, it is believed to displace the woodstar within its range. In Azapa, Peruvian sheartails occupy the lower parts of the valley where there is an ample supply of flowers in residential areas year-round. Chilean woodstars, on the other hand, are generally located in mid-valley agricultural areas, where there is a much higher risk of pesticide exposure. Threats to the Chilean woodstar and its habitat continue, and we find that proposing this species for listing under the Act is warranted.

Esmeraldas Woodstar (*Chaetocercus berlepschi*, previously known as *Acestrura berlepschi*)

The Esmeraldas woodstar was first taxonomically described by Simon in 1889, who placed the species in the Trochilidae family, under the name *Chaetocercus berlepschi* (BirdLife International 2007). The species is also known by the synonym *Acestrura berlepschi*. CITES, BirdLife International (BirdLife International 2007), and the Integrated Taxonomic Information System (ITIS 2008) recognize the species as *Chaetocercus berlepschi*. We accept the species as *Chaetocercus berlepschi*, and change our reference to this species from our 2007 Notice of Review.

The Esmeraldas woodstar is restricted to a small area on the Pacific slope of the Andes of western Ecuador (Esmeraldas, Manabi, and Guayas), where only very rare and localized populations are found (BirdLife International 2007).

It ranges along the slopes of the coastal cordillera up to 1,640 ft (500 m) (del Hoyo et al. 1999; Ridgely and Greenfield 1986b; Williams and Tobias 1991). The current extent of the species' range is approximately 446 mi$^2$ (1,155 km$^2$) in 3 disjunct and isolated areas (BirdLife International 2007; Dodson and Gentry 1991).

The Esmeraldas woodstar generally prefers lowland, moist forest habitat (del Hoyo et al. 1999). It has also been recorded in the canopy of semi-humid secondary growth at 164 to 492 ft (50 to 150 m) in December through March, when it is believed to breed (Becker et al. 2000). The species has not been recorded in this habitat type at other times of year, and there is no evidence concerning its long-term ability to survive in this type of forest habitat (BirdLife International 2007).

The Esmeraldas woodstar is considered a rare, range-restricted species with highly localized populations in three general areas (BirdLife International 2007; del Hoyo et al. 1999). There have been no population surveys of this species. BirdLife International estimated that the population includes between 186 and 373 individuals, based on density estimates using similar species of hummingbirds (BirdLife International 2007).

This species is classified as ''Endangered'' by the IUCN Red List on the basis of occupying a small and severely fragmented range with ongoing and very rapid declines in range and, presumably, population (BirdLife International 2007). The species is listed in Appendix II of CITES (UNEP–WCMC 2008b). It is identified as an ''Endangered'' species under Ecuadorian law (ECOLEX 2007f). As such, hunting for sport or commercial purposes is prohibited (ECOLEX 2007g; ECOLEX 2007h). However, we do not consider hunting to be a risk to the Esmeraldas woodstar, so this law does not reduce any threats to the species.

The Esmeraldas woodstar inhabits one of the most threatened forest habitats within the Neotropics (del Hoyo et al. 1999). All forest types within the species' range have diminished rapidly due to logging and clearing for agriculture (Dodson and Gentry 1991). The woodstar inhabits a very small and severely fragmented range, which is decreasing rapidly in size. Ongoing declines in the bird's population are linked to persistent habitat destruction which destroys nesting, breeding, and feeding habitat (BirdLife International 2007). Persistent grazing by goats and cattle damages the understory and prevents regeneration of the forest that the woodstar utilizes (Dodson and Gentry 1991). Dodson and Gentry (1991) indicated that rapid habitat loss is continuing, at least in unprotected areas, and extant forests will soon be eliminated. In Manabi Province, the Esmeraldas woodstar may occur in Machalilla National Park (Collar et al. 1992), but it does not receive adequate protection because its habitat is threatened by illegal settlement, deforestation, livestock-grazing, and habitat clearance by people with land rights (BirdLife International 2007). Threats to the Esmeraldas woodstar and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Royal Cinclodes (*Cinclodes aricomae*)

The royal cinclodes occurs in the Andes of southeastern Peru (Cuzco, Apurimac, and Puno) and adjacent Bolivia (La Paz) (BirdLife International 2007). The species appears to be restricted to mature, humid *Polylepis* spp. woodlands that can sustain mossy ground-cover (Collar et al. 1992). Its diet consists primarily of invertebrates, small vertebrates (small frogs), and occasionally seeds (del Hoyo et al. 2003). It seeks food by probing through moss and debris on the forest floor (Collar et al. 1992; Fjeldså 2002b; del Hoyo et al. 2003), and likely requires territories as large as 5 to 7 ac (2 to 3 ha) due to its feeding strategy (Engblom et al. 2002).

The total royal cinclodes population was estimated to range between 100 and 150 individuals in 1990 (Fjeldså and Krabbe 1990). BirdLife International (2007) estimates the population size to be between 50 and 249 individuals. Detailed surveys of suitable habitat in Peru revealed only 189 individuals that were restricted to 1,554 ac (629 ha) (Chutas 2007). In Bolivia, the population is estimated at 30 individuals that are located on 1,236 ac (500 ha) of fragmented habitat (Purcell and Brelsford 2004). However, the royal cinclodes does not always respond to the tape-playback method that was used to census the population; therefore, the population estimate may not be indicative of the actual population size (Gomez in litt. 2007).

The IUCN Red List categorizes the royal cinclodes as ''Critically Endangered'' due to its extremely small population, which consists of tiny subpopulations that are severely fragmented and dependent upon a rapidly declining habitat (BirdLife International 2007). The royal cinclodes is completely dependent upon high-elevation humid *Polylepis* forests for its survival, and the ongoing loss of this habitat poses the greatest risk to this species. Based on comprehensive surveys and analyses of maps and satellite images, Fjeldså and Kessler

(1996, as cited in Fjeldså 2002a) estimated that *Polylepis* forests now cover less than 247,105 ac (100,000 ha) in Peru and 1,235,527 ac (500,000 ha) in Bolivia, and the majority of the forest is very dispersed with extensive bushy growth. Less than 1 percent of the *Polylepis* forest remains in the humid highlands, where *Polylepis* forests are able to grow tall and dense (Fjeldså 2002a). The royal cinclodes is particularly sensitive to reduced forest density, because decreased canopy cover permits desiccation of the mosses growing within humid *Polylepis* forests, which reduces foraging microhabitats for the species (Engblom et al. 2002).

Fire and livestock grazing are the important factors affecting the distribution of *Polylepis* forests. The vegetation is restricted to stream ravines, loose rocks, rock ledges, and sandy ridges—all places where fires cannot spread and livestock does not normally roam (Fjeldså 2002a; Fjeldså 2002b). Burning land between patches of *Polylepis* forests to stimulate the growth of grasses (chaqueo) for grazing prevents regeneration of native forests and is considered the key factor limiting the distribution of *Polylepis* forests (Fjeldså 2002b). Trampling and grazing by sheep and cattle further limit forest regeneration (Fjeldså 2002a) and can contribute to the degradation of remaining forest patches. Sheep and cattle have solid, sharp hooves that churn up the earth, damaging vegetation and triggering erosion (Purcell et al. 2004). The loss of nutrient-rich soils can also cause degradation and ultimate destruction of *Polylepis* forests (Fjeldså 2002b; Purcell et al. 2004).

As human populations increase in the high-Andes of Bolivia, many farmers burn patches of *Polylepis* forests to make agricultural fields for crops. The scarcity of arable land has even caused some farmers to burn *Polylepis* on steep hillsides that would not normally be considered suitable for cultivation (Hensen 2002). These farming practices continue to result in the rapid loss of *Polylepis* forests and amplified soil erosion. Firewood harvest is another significant threat to remaining patches of *Polylepis* forests. Road building and mining projects for the expanding human population around Bolivia's largest city, La Paz, have increased accessibility to remaining *Polylepis* forest fragments, further threatening the continued existence of the forests upon which the royal cinclodes depends (Purcell et al. 2004; Purcell and Brelsford 2004). Threats to the royal cinclodes and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

White-Browed Tit-Spinetail (*Leptasthenura xenothorax*)

The white-browed tit-spinetail is restricted to high-elevation—12,139 to 14,928 ft (3,700 to 4,550 m) above sea level—semi-humid *Polylepis* and *Polylepis-Gynoxys* woodlands (Collar et al. 1992). This species forages in pairs or small family groups, often in mixed species flocks, gleaning insects from bark crevices and moss and lichens on twigs, branches, and trunks (BirdLife International 2007; Engblom et al. 2002; Parker and O'Neill 1980).

Historically, the white-browed tit-spinetail may have occupied the once large and contiguous expanses of *Polylepis* forests of the high-Andes of Peru and Bolivia (Fjeldså 2002a), but it is now limited to remnant *Polylepis* forests in the Andes mountains of southeast Peru around Cuzco (Birdlife International 2007; Fjeldså and Krabbe 1990; InfoNatura 2007).

Fjeldså and Krabbe (1990) described the white-browed tit-spinetail as common in suitable habitat and numbering ''probably some hundreds,'' yet quite vulnerable to loss of its already restricted habitat. Other estimates of the species' total population size range from 250 to 1,000 (Fjeldså 2002b) to 500 to 1,500 (BirdLife International 2007; Engblom et al. 2002). Recently, only 305 individuals were reported, based on detailed surveys of suitable *Polylepis* forest habitat (Chutas 2007).

The IUCN categorizes the white-browed tit-spinetail as ''Endangered'' due to its very small and severely fragmented range and population, which continue to decline with habitat loss and lack of habitat regeneration (BirdLife International 2007). The white-browed tit-spinetail is listed as an ''Endangered'' species by the Peruvian government under Supreme Decree No. 034–2004–AG, which prohibits hunting, taking, transport, or trade of this species, except as permitted by regulation. However, the species' habitat is not protected by this law.

The principal factor affecting the distribution of *Polylepis* forests, the species' habitat, is the intensity of burning and grazing, which restricts vegetation growth to locations where fires cannot spread and cattle and sheep do not normally roam, such as ravines, boulders, rock ledges, and sandy ridges (Fjeldså 2002a and b). Many farmers, however, destroy *Polylepis* spp. by planting crops on steep hillsides unsuitable for cultivation (Hensen 2002). Harvesting of firewood from *Polylepis* forests is also a significant threat to the white-browed tit-spinetail's habitat (Aucca and Ramsay 2005; Engblom in litt. 2000). Trampling and grazing by sheep and cattle limit forest regeneration and can contribute to degradation of remaining forest patches (Fjeldså 2002a; Purcell et al. 2004). Remaining forest fragments are becoming more accessible to the expanding population around Bolivia's largest city through road building and mining projects, further threatening the survival of *Polylepis* forests upon which the white-browed tit-spinetail depends (Purcell et al. 2004).

Ongoing loss of the *Polylepis* habitat is considered the primary threat to this species' continued existence. Based on comprehensive surveys and analyses of maps and satellite images, Fjeldså and Kessler (1996, as cited in Fjeldså 2002a) estimated that *Polylepis* forests now cover less than 247,105 ac (100,000 ha) in Peru. In Bolivia, 1,235,527 ac (500,000 ha) of *Polylepis* forest remain, but most of it is very dispersed and bushy. However, less than 1 percent persists in the humid highland habitat for the white-browed tit-spinetail, where *Polylepis* forests can grow to be tall and dense (Fjeldså 2002a). According to Chutas (2007), the species is now confined to about 1,532 ac (620 ha) of habitat. From 1956 to 2005, the rate of forest patch habitat decline to the north of Cuzco, Peru, was only about 1 percent; however, the remaining habitat patches in this area are very small (mean patch size of 6.2 ac (2.5 ha)). During this same time-period, 10 percent of existing forest patches showed a decline in density, indicating that degradation might be a more serious threat than outright destruction in this area (Jameson and Ramsay 2007). Threats to the white-browed tit-spinetail and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Black-Hooded Antwren (*Formicivora erythronotos*, previously known as *Myrmotherula erythronotos*)

The black-hooded antwren inhabits early successional secondary growth habitats and the understory of remnant old-growth secondary forests in coastal southeastern Brazil (BirdLife International 2007; Harris and Pimm 2004). This antwren species was previously known only from 20 skins that were collected during the nineteenth century (E. Mendonça and L.P. Gonzaga in litt. 2000, as cited in BirdLife International 2007; Buzzetti 1998), and was believed to be extinct until it was rediscovered in 1987 (Harris and Pimm 2004). There have been recent reports that the species has been seen with increased frequency at a coastal reserve near Rio de Janeiro, the

Reserva Ecológica de Jacarepiá (Worldtwitch 2007).

The IUCN Red List classifies the species as ''Endangered,'' because it has a very small and highly fragmented range. The black-hooded antwren appears to be declining rapidly in response to continuing habitat loss. Currently, it is known to inhabit 7 sites, and the population is estimated at 1,000 to 2,499 birds with a decreasing population trend (BirdLife International 2007). The IUCN Red List notes, however, that data quality is poor for these estimates and that there is a serious need for new population demographic information on the species' current population size (BirdLife International 2007). This species is also formally recognized as ''Endangered'' under Brazilian law (Order No. 1.522) (ECOLEX 2007).

The black-hooded antwren resides in one of the most densely populated regions of Brazil, where deforestation has been occurring for more than 400 years (BirdLife International 2003). The species' habitat is currently threatened by ongoing urbanization, industrialization, and agricultural expansion. The antwren's habitat has been reduced to less than 10 percent of its original extent (Brown and Brown 1992, as cited in BirdLife International 2003; Höfling 2007; The Nature Conservancy 2007). Remaining tracts of suitable habitat near Rio de Janeiro and Sao Paulo are threatened by ongoing development of coastal areas, primarily for tourism enterprises (e.g., hotel complexes, beachside housing) and associated infrastructure, as well as widespread clearing for expansion of livestock pastures and plantations (Birdlife International 2007). Threats to the black-hooded antwen and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Fringe-Backed Fire-Eye (*Pyriglena atra*)

The fringe-backed fire-eye is known from the narrow coastal belt of Atlantic forest in the vicinity of Salvador, coastal Bahia (west of the town of Santo Amaro), forest patches along the Linha Verde highway, and north to southern Sergipe (in the vicinity of Crasto and Santa Luzia de Itanhia), Brazil (Pacheco and Whitney 1995, J. Minns in litt. 1998, B.M. Whitney in litt. 1999, and J. Mazar Barnett in litt. 2000; all as cited in BirdLife International 2007; Collar et al. 1992; del Hoyo et al. 2003). Recent fieldwork indicates that the species' distribution is not as disjunct as previously considered because it has been found in remnant forest and secondary-growth patches along the northern coast of Bahia at Conde and Jandaíra (Souza 2002, as cited in BirdLife International 2007). Although populations may have been vastly reduced over time, the species' preference for early successional secondary-growth habitat means its range is likely to have been underestimated (BirdLife International 2007). The fringe-backed fire-eye also favors the tangled, dense undergrowth of lowland forests as well as other semi-open habitats where horizontal perches are located close to the ground (BirdLife International 2007).

Currently, the population is estimated at 1,000 to 2,499 individuals (BirdLife International 2007), an increase from the population estimate in 2000, which indicated that between 250 and 999 individuals remained in the wild (BirdLife International 2000). The increase in the population estimate results from extension of the species' known range (del Hoyo et al. 2003), as well as indications that the distribution was not as disjunct as previously thought (Souza 2002, as cited in BirdLife International 2007). From 2000 to 2004, the fringe-backed fire-eye was categorized as ''Critically Endangered'' by the IUCN Red List, because of its extremely small range and declining habitat and because it was known from a few, highly-fragmented localities (IUCN 2002). While the fringe-backed fire-eye is now classified as ''Endangered'' by the IUCN Red List because the species' range is more extensive than previously known (BirdLife International 2007), it does still have a very small, fragmented range, within which the extent and quality of its habitat are continuing to decline and where it is only known from a few localities (BirdLife International 2007). The entire range of the fringe-backed fire-eye encompasses only about 1,924 $mi^2$ (4,990 $km^2$), with only 20 percent of this area considered occupied (BirdLife International 2007). Furthermore, the fringe-backed fire-eye has not been located at several sites from where it was previously known in Bahia (del Hoyo et al. 2003). The fringe-backed fire-eye is formally recognized as ''Endangered'' in Brazil and is directly protected by legislation (Collar et al. 1992; BirdLife International 2007; ECOLEX 2007), which prohibits or regulates international trade, hunting, collection, research, captive propagation, and general harm to the species. However, the greatest threat to the species continues to be habitat loss (BirdLife International 2007). Threats to the fringe-backed fire-eye and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Brown-Banded Antpitta (*Grallaria milleri*)

The brown-banded antpitta is endemic to the Volcan Ruíz-Tolima massif of the central Andes (Caldas, Risaralda, Quindío, and Tolima), Colombia (BirdLife International 2007). The species inhabits humid understory and forest floors of mid-montane and cloud forests between 5,905 and 8,530 ft (1,800 and 2,600 m) in areas with a high density of herbs and shrubs (del Hoyo et al. 2003; Kattan and Beltrán 1999). The species' current range is estimated to be 116 $mi^2$ (300 $km^2$) (BirdLife International 2007g). The species is known today in three areas in the upper Río Magdalena Valley: (1) The humid forests in the Central Andes of Colombia's Ucumarí Regional Park (Risaralda Department); the site is approximately 17 $mi^2$ (44 $km^2$) in the Otún River watershed (Kattan and Beltrán 1999); (2) the south-east slope of Volcán Tolima in the Río Toche Valley on private land (Tolima Department); this location is 0.02 $mi^2$ (0.05 $km^2$) in size at elevations ranging from 9,022 to 9,514 ft (2,750 to 2,900 m) (Beltrán and Kattan 2002); and (3) the Río Blanco river basin (Caldas Department); the site is a strip of land less than 124 linear mi (200 linear km) on the Central Cordilla, between 7,546 and 10,171 ft (2,300 and 3,100 m) in elevation (Kattan and Beltrán 2002).

Between the years 1911 and 1942, only 10 specimens were collected at elevations of 9,004 to 10,299 ft (2,745 to 3,140 m) in Caldas and Quindío (Kattan and Beltrán 1997). The species was not seen for more than 50 years, until it was rediscovered in May 1994, in Ucumarí Regional Park, Risaralda (Kattan and Beltrán 1997). Surveys conducted between 1994 and 1997 estimated that 106 individuals were present in a 0.24 $mi^2$ (0.63 $km^2$) area (Kattan and Beltrán 1997, 1999). Further observations of the species were made during 1998–2000 on the southeast slope of Volcán Tolima in the Río Toche Valley, where it is considered uncommon and local (López-Lanús et al. 2000, López-Lanús in litt. 2000, and P.G.W. Salaman in litt. 1999, 2000, as cited in BirdLife International 2007; Renjifo et al. 2002). A census of the population in the Río Blanco river basin was undertaken in June 2000. Researchers estimated the presence of at least 30 individuals, based on vocalizations they elicited in response to recordings of the species' alarm call (Beltrán and Kattan 2002).

The population of brown-banded antpitta is estimated by the IUCN to be

between 250 and 999 birds (BirdLife International 2007). It is estimated that the species has lost up to 9 percent of its population in the last 10 years, or 3 generations, and that this rate of decline will continue over the next 10 years (BirdLife International 2007).

The IUCN has classified the brown-banded antpitta as ''Endangered'' since 1994, because it is known from very few locations, occupies a very small range, and habitat loss and degradation are continuing (BirdLife International 2007). It is identified as an ''Endangered'' species under Colombian law pursuant to paragraph 23 of Article 5 of the Law 99 of 1993 as outlined in Resolution No. 584 of 2002 (ECOLEX 2007).

Deforestation has greatly affected the current population size and distributional range of the brown-banded antpitta. Nearly all the other forested habitat below 10,827 ft (3,300 m) in the Central Andes, where the brown-banded antpitta occurred historically, has been deforested and cleared for agricultural land use (BirdLife International 2007). The remaining forests providing suitable habitat for the brown-banded antpitta have become fragmented and isolated and are either surrounded by, or being converted to, pasture and agricultural crops (e.g. , coffee plantations, potatoes, beans) (Beltrán and Kattan 2002; BirdLife International 2007; Collar et al. 1992; Kattan and Beltrán 1997; Kattan and Beltrán 2002). By 1998, approximately 85 percent of forested habitat at altitudes between 6,234 ft (1,900 m) and 10,499 ft (3,200 m), where the species is most likely to be found, had been converted to other land uses (BirdLife International 2007; Cuervo 2002; Stattersfield et al. 1998), and forest conversion has continued. Cuervo (2002) estimated that the available suitable habitat for this species totals no more than 310 $mi^2$ (500 $km^2$), although the species is estimated to only occupy an area 116 $mi^2$ (300 $km^2$) in size (BirdLife International 2007). Threats to the brown-banded antpitta and its habitat continue, and we find that proposing this species for listing under the Act is warranted.

Kaempfer's Tody-Tyrant (*Hemitriccus kaempferi*, previously known as *Idioptilon kaempferi*)

The Kaempfer's tody-tyrant is very rare and has a very small, extremely fragmented range in Brazil which is estimated to be about 7.3 $mi^2$ (19 $km^2$) (BirdLife International 2007). The species is only known from three localities in Santa Catarina, Brazil (with recent records from just two): one record at Salto do Piraí near Villa Nova in 1929, one specimen that was collected at Brusque in 1950, and another in Reserva Particular do Patrimônio Natural de Volta Velha, near Itapoá in 1998 (Barnett et al. 2000; L.N. Naka in litt. 1999; as cited in BirdLife International 2007). It inhabits humid lowland Atlantic forest. At one of these localities, Salto do Piraí, the species has typically been found in habitats which include forest edge, well-shaded secondary growth, and sections of low, epiphyte-laden open woodland near watercourses (Barnett et al. 2000). It feeds predominantly in the midstory of medium-sized trees, and mated pairs appear to remain within small, well-defined areas (Barnett et al. 2000).

In 2004, the IUCN changed the Kaempfer's tody-tyrant's decade-long classification on the Red List from ''Endangered'' to ''Critically Endangered,'' because the species has an extremely small and fragmented range, with recent records from only two locations, and ongoing deforestation is occurring in the vicinity of these sites (Birdlife International 2007). The population estimate is 1,000 to 2,499 individuals and declining (BirdLife International 2007). The Atlantic forest has been extensively deforested, and the lowland forest continues to be cleared in the vicinity of the two remaining sites (BirdLife International 2007; Höfling 2007; The Nature Conservancy 2007). The Kaempfer's tody-tyrant is protected by Brazilian law. These protections prohibit the following activities with regard to this species: export and international trade, collection and research, captive propagation, and also provide measures which help to protect remaining suitable habitat, such as prohibition of exploitation of the remaining primary forests within the Atlantic forest biome and management of various practices in primary and secondary forests, such as logging, charcoal production, reforestation, recreation, and water resources (ECOLEX 2007). The species is restricted to one 15 $km^2$ (6 $mi^2$) protected area and in adjacent forest (Barnett et al. 2000; BirdLife International 2007). This habitat area is insufficient for the long-term survival of the Kaempfer's tody-tyrant, particularly since, for various reasons (e.g., lack of funding, personnel, or local management commitment), Brazil's current capacity to achieve its stated natural resource objectives in protected areas is limited (ADEJA 2007; Bruner et al. 2001; Costa 2007; IUCN 1999; Neotropical News 1996; Neotropical News 1999). Therefore, even with the expansion or further designation of protected areas, it is likely that not all of the identified resource concerns for the Kaempfer's tody-tyrant (e.g., residential and agricultural encroachment, resource extraction, unregulated tourism, grazing) would be sufficiently addressed at these sites.

Threats to the Kaempfer's tody-tyrant and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Ash-Breasted Tit-Tyrant (*Anairetes alpinus*)

The ash-breasted tit-tyrant is a small New World flycatcher (family *Tyrannidae*) (del Hoyo et al. 2004), confined to humid *Polylepis* forests in the Andes Mountains of Peru and Bolivia (BirdLife International 2007; Collar et al. 1992; Fjeldså and Krabbe 1990; InfoNatura 2007). *A. alpinus* consists of two subspecies, the nominate subspecies, *A. alpinus alpinus*, which occurs on the west Andean slope in northern Peru (Ancash, La Libertad), and *A. alpinus bolivianus*, which occurs in southeast Peru (Cuzco, Apurimac) and northwest Bolivia (La Paz) (BirdLife International 2007; del Hoyo et al. 2004).

Historically, the ash-breasted tit-tyrant may have been well-distributed in the previously large, contiguous expanses of *Polylepis* forest of the high-Andes of Peru and Bolivia (Fjeldså 2002a); however, it is now restricted to remnant patches of these forests in Peru (Cuzco, Apurimac, and Corredor Conchucos) and Bolivia (La Paz) (Birdlife International 2007; Collar et al. 1992; Fjeldså and Krabbe 1990; InfoNatura 2007).

The ash-breasted tit-tyrant is restricted to high-elevations—12,139 to 15,092 ft above sea level (3,700 to 4,600 m) (del Hoyo et al. 2004). Individuals forage alone, in pairs, groups of three, and occasionally in mixed-species flocks, making short trips to hover-glean or perch-glean near the tops and outer edges of *Polylepis* spp. shrubs and trees (del Hoyo et al. 2004; Engblom et al. 2002). We are unaware of any information that is available on the breeding behavior of the species. Juveniles have been observed in March and July around Cuzco, Peru (del Hoyo et al. 2004).

The ash-breasted tit-tyrant has been described as generally quite rare and local, with one to two pairs per occupied woodland (Fjeldså and Krabbe 1990). BirdLife International (2007) and Fjeldså (2002b) placed the population somewhere between 250 to 1,000 individuals. Gomez (2005, in litt. 2007) conducted intensive searches using song

playback within 80 percent of the suitable habitat in Bolivia and found 180 individuals distributed within 14 forest patches. Chutas (2007) reported only 461 individuals, based on detailed surveys of suitable habitat, which contained the highest concentration of *Polylepis* forest in southeastern Peru.

The IUCN categorizes the ash-breasted tit-tyrant as ''Endangered'' because of its very small population, which is confined to a severely fragmented habitat undergoing a continuing decline in extent, area, and quality (BirdLife International 2007). The ash-breasted tit-tyrant is considered an ''Endangered'' species by the Peruvian government under Supreme Decree No. 034–2004–AG which prohibits hunting, taking, transport, or trade of this species, except as permitted by regulation. However, the species' habitat is not protected by this law. We are not aware of any regulations in Bolivia that are effective at protecting the habitat of the ash-breasted tit-tyrant.

The principal factor affecting the distribution of *Polylepis* forests, the species' habitat, is the intensity of burning and grazing, which restrict vegetation growth to locations where fires cannot spread, and cattle and sheep do not normally roam, such as ravines, boulders, rock ledges, and sandy ridges (Fjeldså 2002a and b). Many farmers, however, destroy *Polylepis* forests to plant crops, even on steep hillsides unsuitable for cultivation (Hensen 2002). Harvesting of firewood from *Polylepis* forests is also a significant threat to the ash-breasted tit-tyrant's habitat (Aucca and Ramsay 2005; Engblom in litt. 2000). Trampling and grazing by sheep and cattle limit forest regeneration and can contribute to degradation of remaining forest patches (Fjeldså 2002a). Remaining forest fragments are becoming more accessible to the expanding population around Bolivia's largest city through road building and mining projects, further threatening the survival of *Polylepis* forests upon which the ash-breasted tit-tyrant depends (Purcell et al. 2004; Purcell and Brelsford 2004).

The ash-breasted tit-tyrant is completely dependent upon high-elevation humid *Polylepis* forest for survival, and the ongoing loss of this habitat is believed to be the primary threat to this species. Less than 1 percent of this forest habitat remains in the humid highlands, where *Polylepis* forests can grow to be tall and dense (Fjeldså 2002a), providing habitat for the ash-breasted tit-tyrant. Only about 1,554 ac (629 ha) of habitat remain for the ash-breasted tit-tyrant in Cuzco and Apurimac, Peru (Chutas 2007), and 1,245 ac (504 ha) of *Polylepis* forest remains in La Paz, Bolivia (Purcell and Brelsford 2004). Habitat estimates for Corredor Conchucos (Peru), the area occupied by the northern ash-breasted tit-tyrant subspecies (*A. alpinus alpinus*), are not available, but Chutas (2007) reported only 30 individuals from this area. In Bolivia, approximately 507 ac (205 ha) of habitat have been destroyed by clear-cutting since the early 1990s; if the current rate of deforestation continues, projections indicate that all of the *Polylepis* forest in Bolivia will be destroyed within the next 3 decades (Purcell and Brelsford 2004). The rate of habitat decline is lower north of Cuzco, Peru (Cordillera de Vilcanota), with the loss of only 1 percent of forest patches from 1956 to 2005; however, the remaining habitat patches in this area were already quite small (mean patch size is 6.2 ac (2.5 ha)), and 10 percent of forest patches showed a decline in forest density over this time period, indicating that habitat degradation might be more problematic to the species than total destruction of forests in this area (Jameson and Ramsay 2007). Threats to the ash-breasted tit-tyrant and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Peruvian Plantcutter (*Phytotoma raimondii*)

The Peruvian plantcutter is endemic to the coastal desert of northwestern Peru, from sea level to 1,640 ft (500 m) (del Hoyo et al. 2004). The species is restricted to Peru's Talara region, which contains 60 to 80 percent of the population and highly fragmented forest patches around the Chiclayo area of Lambayeque (del Hoyo et al. 2004). BirdLife International (2007) estimates the total population to range between 500 and 1,000 individuals.

Peruvian plantcutters inhabit sparse desert scrub and coastal dunes scattered with large shrubs (del Hoyo et al. 2004). They also occupy riparian thickets and woodlands dominated by *Prosopis* spp. and *Acacia* spp. (del Hoyo et al. 2004). This species appears to prefer a high diversity of plant species, including specific shrubs and trees with low-hanging branches (Elton 2004; Williams 2005). Plantcutters are the only passerines with a predominantly leaf-eating diet (Bucher et al. 2003).

The Peruvian plantcutter is categorized as ''Endangered'' by the IUCN Red List due to ongoing habitat destruction and continuing degradation of its small and severely fragmented range (BirdLife International 2000; BirdLife International 2007). The Peruvian plantcutter is listed as ''Endangered'' by the Peruvian government under Supreme Decree No. 034–2004–AG which prohibits hunting, taking, transport, or trade of endangered species, except as permitted by regulation. However, the species' habitat is not protected by this law.

The major threat to the Peruvian plantcutter is believed to be loss of habitat due to agriculture, burning, grazing, timber cutting, and human use. Extirpation of the species from many sites occurred as conversion of heavily wooded coastal river valleys to irrigated agriculture took place (Lanyon 1975; Collar et al. 1992). Extensive stands of small- to medium-size trees, such as mesquite (*Prosopis spp.*), acacia (*Acacia* spp.), willow (*Salix* spp.), and *Capparis* spp., previously occupied the river valleys, but wooded areas are now confined to land where the lack of irrigation discourages cultivation (del Hoyo et al. 2004; Williams 2005). The remaining forest fragments are threatened by burning, grazing, timber cutting, firewood and charcoal production, and ongoing conversion for cultivation, primarily sugarcane. These factors are believed to have contributed to the destruction of previously occupied plantcutter habitat, which reduced or eliminated forage and nesting sites necessary for the species to thrive (BirdLife International 2000; del Hoyo et al. 2004).

Talara, owned by PetroPeru, the State-owned petroleum company, retains the largest contiguous area of intact habitat currently occupied by the Peruvian plantcutter. PetroPeru strictly bans trespassing; therefore, the population in this area has not been exposed to the same risk factors that it is subject to in the other forested areas. Estimates of the amount of habitat suitable for the plantcutter at Talara vary widely, from 123,553 ac (50,000 ha) (del Hoyo et al. 2004) to 4,942 ac (2,000 ha) (Williams 2005). Talara supports approximately 400 to 600 individuals or 60 to 80 percent of the global population of Peruvian plantcutters (del Hoyo et al. 2004; Williams 2005). Although PetroPeru historically held the land rights to the whole province of Talara, the land is now reverting to the Peruvian government, which is selling it to buyers who are likely to develop the beachfront property (Elton 2004). Attempts to create a protected reserve for the plantcutter on approximately 12,000 ac (4,860 ha) around Talara are reportedly not progressing as originally proposed (Elton 2004; Williams 2005). Future land-cover projections from the Millennium Ecosystem Assessment indicate that by 2050, 11 to 16 percent of the Peruvian plantcutter's range is

likely to be unsuitable for the species (Jetz et al. 2007). Threats to the Peruvian plantcutter and its habitat continue, and we find that proposing this species for listing under the Act is warranted.

St. Lucia Forest Thrush (*Cichlhermina lherminieri sanctaeluciae*)

The St. Lucia forest thrush is endemic to the island of St. Lucia in the West Indies (Raffaele et al. 1998). This subspecies occupies mid- and high-altitude primary and secondary moist forest habitat in the coastal areas of the island. The St. Lucia forest thrush feeds on insects and berries that are found from ground level all the way up into the forest canopy (Raffaele 1998). The island of St. Lucia encompasses 151,905 ac (61,500 ha). Of this area, 31,048 ac (12,570 ha) are natural forest, 56 percent of which is located in Forest Reserves and the remaining 43 percent of forest is situated on private lands (Delegation of the European Commission 2004). Commercial harvest of timber is allowed on private land, but it is strictly prohibited within the Forest Reserves (Forestry Department Proceedings 2000).

Although the St. Lucia forest thrush's population was considered numerous in the late-1800s (Keith 1997), the subspecies' current population status is unknown. Recent sightings are rare, with only six confirmed sightings during the last few years (Dornelly 2007). The entire species of forest thrush (*Cichlhermina lherminieri*) is classified as ''Vulnerable'' by the IUCN Red List due to human-induced deforestation and introduced predators (IUCN 2006). The St. Lucia forest thrush is a fully protected species under St. Lucia's Wildlife Protection Act (WPA) of 1980 (Schedule 1), which has prohibited hunting of the subspecies since 1980. In addition, the WPA prohibits taking, damaging or destroying nests, eggs, or offspring of a fully protected species.

Identified risks to this species include habitat loss, competition with the bare-eyed robin (*Turdus nudigenis*), brood parasitism by the invasive shiny cowbird (*Molothrus bonarientsis*), hunting by humans for food, and predation by mongoose and other introduced predators (Raffaele et al. 1998). The demand for agricultural land on St. Lucia has resulted in deforestation; approximately 33.7 percent of the island is under agricultural production (GOSL 2000). Another contributing factor to habitat loss is soil erosion. Approximately 80 percent of the island is composed of steep terrain, and poor agricultural practices have resulted in excessive soil erosion and loss of soil productivity, two factors which contribute to destruction of forest habitat in some areas and degradation of forest habitat in other locations (Bond 1990). Traditionally, forest resources have been used for many household products in daily use on St. Lucia. Currently, heating and cooking in the homes of island residents utilize forest resources; charcoal and firewood use combined account for 83 percent of St. Lucia's fuel supply (Forestry Department Proceedings, 2000).

Tropical storms and hurricanes frequently occur in the Caribbean Sea, and can have severe, widespread impacts on the terrestrial ecosystems of small islands. High winds are a primary threat to forest habitats due to the damage caused to the trees. They are often blown over or sustain severe damage to trunks and limbs, which can result in critical habitat loss to the St. Lucia forest thrush. During the last three decades, there has been an increase in the number of hurricanes and severe tropical storms experienced by St Lucia. After hurricane Allen in 1980, at least 55 percent of all dominant tree species had broken branches and many trees lost large portions of their crowns (Whitman 1980, as reported in GOSL 1993). Threats to the St. Lucia forest thrush are ongoing, and we find that proposing this species for listing under the Act is warranted.

Eiao Polynesian Warbler (*Acrocephalus percernis aquilonis*, previously known as *Acrocephalus mendanae aquilonis* and *Acrocephalus caffer aquilonis*)

The reed warblers of Polynesia have been divided into two species, the Tahiti reed-warbler (*Acrocephalus caffer*) and the Marquesas-reed warbler (*Acrocephalus mendanae*) (Birdlife International 2007a and b). However, new genetic research using mitochondrial DNA markers to develop a phylogeny of the eastern Polynesian taxa of reed-warblers of the Marquesas Archipelago has led to further proposed taxonomic changes for the reed-warblers on these islands. This proposed change separates the reed-warblers on the four northernmost islands in the Marquesas Archipelago into a separate species (*Acrocephalus percernis*) from those on the southern islands (*Acrocephalus mendanae*). The proposed taxonomic change maintains the subspecies delineations between the islands; the reed-warblers on Eiao Island remain a subspecies, now renamed *Acrocephalus percernis aquilonis* (Cibois et al. 2007).

The Eiao Polynesian warbler is endemic to a single island (Eiao) in the Marquesas Archipelago of French Polynesia in the Pacific Ocean. The Marquesas Archipelago is one of the most remote island chains in the world, lying between 404 and 600 mi (650 and 965 km) south of the equator and approximately 994 mi (1,600 km) northeast of Tahiti. Eiao Island is one of the northernmost islands in the Archipelago, encompassing 17 $mi^2$ (43.8 $km^2$) in area, and ranging in altitude from sea level to 1,890 ft (576 m) (Wikipedia 2007). The Eiao Polynesian warbler's preferred habitat is dry forest (Raust 2007).

Population densities of the Eiao Polynesian warbler are thought to be high within remaining suitable habitat, based on a recent study which found individual singing birds approximately every 130 to 165 ft (40 to 50 m). Total numbers are estimated to be greater than 2,000 birds (Dr. P. Raust, pers. comm. to Amedee Brickey, USFWS 2007). This estimate is much higher than the 100 to 200 individuals estimated in 1987 by Thibault (as previously cited in USFWS 2007). It is not clear if the subspecies' population actually increased from 1987 to 2007, or if the different population estimates can be attributed to the use of different survey methodologies. We have no reliable information on the population trend of this subspecies. The Eiao Polynesian warbler is a protected subspecies in French Polynesia. The conservation status of this newly designated subspecies has not been categorized on the IUCN Red List.

Although currently uninhabited by humans, Eiao Island's natural vegetation has been heavily impacted by introduced domestic livestock (sheep and swine); part of the island has even been denuded of all vegetation. As a result, only 10 to 20 percent of the island contains the Eiao Polynesian warbler's preferred dry forest habitat (Raust 2007). Suitable subspecies' habitat is limited to steep slopes that are inaccessible to domestic livestock. While Eiao Island was declared a Nature Reserve by French Polynesia in 1992, we are not aware of any plans to protect the habitat of the Eiao Polynesian warbler.

Introduced mammals and birds have been implicated in loss of endemic birds in the Marquesas and may impact the Eiao Polynesian warbler. Two species of nonnative rats, the Polynesian rat (*Rattus excluans*) and the black rat, were introduced to Eiao Island during the late nineteenth century (Thibault and Myers 2000, as reported in Thibault et al. 2002) and are thought to have contributed to the decline of the Eiao Polynesian warbler. However, recent research indicates that reed-warblers in the Marquesas Archipelago nest sufficiently

high in trees to avoid significant predation from rats (Thibault et al. 2002). The most destructive introduced avian predator in the Marquesas, the common myna (*Acridotheres tristis*), has not been found on Eiao Island. If the myna expands its range and colonizes Eiao Island, there is a chance it could impact the Eiao Polynesian warbler (Thibault et al. 2002).

Another potential risk to the Eiao Polynesian warbler is destruction of habitat by tsunamis and cyclones. French Polynesia, and in particular the Marquesas Archipelago, are frequently affected by tsunamis; the waves observed in the Marquesas are generally 2 to 10 times higher than waves recorded in Tahiti (Hebert et al. 2001). The Eiao Polynesian warbler is also exposed to high winds during tropical cyclones, which often displace individuals. Indirect effects occur during the aftermath of a storm when subspecies are impacted by the loss of food supplies, foraging substrates, and roost sites, increasing their vulnerability to predators and disease. Large-scale climate models predict increased intensity of tropical cyclones impacting island chains in the Pacific, including the Marquesas Archipelago (Meehl et al. 2007). Threats to this subspecies and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

Medium Tree-Finch (*Camarhynchus pauper*)

The medium tree-finch is endemic to Floreana in the Galapagos Islands, Ecuador (BirdLife International 2007). Its habitat is montane evergreen and tropical deciduous forest (Stotz et al. 1996), primarily above 328 ft (100 m). Population numbers of this species are poorly known, with indirect estimations at 1,000 to 2,499 birds (BirdLife International 2007). However, Stotz et al. (1996) consider the relative abundance of the species to be ''common.'' Population trends are unknown.

This poorly known species is considered ''Vulnerable'' by the IUCN because it has a very small range and is restricted to a single island where introduced species are a potential threat (BirdLife International 2004) due to herbivore degradation and loss of habitat and possibly predator-caused mortality (BirdLife International 2007; Jackson 1985). In addition, agricultural activities (Cruz and Cruz 1996) and free-ranging domestic livestock continue to destroy and degrade the habitat of the medium tree-finch (BirdLife International 2007). The recent discovery of an introduced parasitic fly (*Philornis downsi*) on Floreana Island (Kleindorfer et al. MS, as cited in Grant et al. 2005) has raised concerns about the impact this parasite might be having on the medium tree-finch (Fessl et al. 2006). In an experimental study conducted on nearby Santa Cruz Island, Fessl et al. (2006) found that high mortality of nestlings was directly attributable to parasitism by *P. downsi*, as evidenced by a near threefold increase in fledgling success in a parasite-reduced group versus a parasite-infested control group. Further, because species with small broods have been found to suffer higher parasite loads and therefore higher nestling mortality (Fessl and Tebbich 2002), infestation of *P. downsi* on species with naturally low clutch sizes, such as the medium tree-finch, is of particular concern (Fessl et al. 2006).

In 1959, Ecuador designated 97 percent of the Galapagos land area as a National Park, leaving 3 percent of the remaining land area distributed between Santa Cruz, San Cristóbal, Isabela, and Floreana Islands. National Park protection, however, does not mean the area is to be maintained in a pristine condition. The park land area is divided into various zones signifying the level of human use (Parque Nacional Galapagos Ecuador n.d.). Although Floreana Island includes a large ''conservation and restoration'' zone, it does include a significant sized ''farming'' zone (Parque Nacional Galapagos Ecuador n.d.), where agricultural and grazing activities may continue to impact the habitat.

The Galapagos Islands were declared a World Heritage Site in 1979, as they were recognized to be ''cultural and natural heritage of outstanding universal value.'' The aim of establishment as a WHS is conservation of the site for future generations (UNESCO World Heritage Centre 2008). However, due to threats to this site posed by invasive species, increasing tourism, and immigration, in June, 2007, the World Heritage Committee placed the Galapagos on the ''List of World Heritage in Danger,'' with the intent of increasing support for their conservation (UNESCO World Heritage Centre News 2007). In March 2008, the UNESCO World Heritage Centre/United Nations Foundation project for invasive species management provided funding of 2.19 million U.S. dollars (USD) to the Ecuadorian National Environmental Fund's ''Galapagos Invasive Species'' account to support invasive species control and eradication on the islands. In addition, the Ecuador government previously had contributed 1 million USD to this fund (UNESCO World Heritage Centre News 2008), demonstrating the government of Ecuador's commitment to reducing the threat of invasive species to the islands. At the present time, however, threats to the medium tree-finch and its habitat caused by introduced species continue, and we find that proposing this species for listing under the Act is warranted.

Cherry-Throated Tanager (*Nemosia rourei*)

The cherry-throated tanager inhabits primary forest habitats in Espírito Santo and, possibly, Minas Gerais and Rio de Janeiro, Brazil (Bauer et al. 2000; BirdLife International 2007; Venturini et al. 2005). Because the cherry-throated tanager was only known from a single specimen collected in the 1800s and a reliable sighting of eight individuals from 1941, the species was presumed to be extinct (Collar et al. 1992; Ridgely and Tudor 1989; Scott and Brooke 1985). However, the species was rediscovered in 1998 (Bauer et al. 2000; Venturini et al. 2005). Since then, the cherry-throated tanager has been documented at three sites of remnant primary forest in south-central Espírito Santo (Bauer et al. 2000; Scott 1997; Venturini et al. 2005). Two of the currently occupied sites are in private ownership and the third, which is believed to be used only sporadically by the species, is within the Augusto Ruschi Biological Reserve (Venturini et al. 2005).

The cherry-throated tanager is endemic to the Atlantic Forest biome and inhabits the upper canopies of trees within humid, montane, primary forests (Bauer et al. 2000; BirdLife International 2007; Venturini et al. 2005). It is a primary forest-obligate species that typically forages for insects within the interior crowns of tall, epiphyte-laden trees and occasionally lower down—ca. 6.6 ft (2 m)—at the forest edge (Bauer et al. 2000; BirdLife International 2007; Venturini et al. 2005). Cherry-throated tanagers can be found in mixed-species flocks and appear to require relatively large territories—ca. 1.544 $mi^2$ (3.99 $km^2$) (Venturini et al. 2005). Within its current distribution, the species makes sporadic use of coffee (*Coffea* spp.), pine (*Pinus* spp.), and eucalyptus (*Eucalyptus* spp.) plantations, presumably as travel corridors between remaining patches of primary forest (Venturini et al. 2005). Little is known about the breeding behavior of the cherry-throated tanager (Venturini et al. 2002).

The IUCN categorizes the species as ''Critically Endangered'' because its extant population is estimated to be between 50 and 249 individuals. The population is extremely small and

highly fragmented, and presumed to be declining (BirdLife International 2007). There is even speculation that the IUCN population estimate is too high, considering that the maximum number of individuals recorded in the only 2 confirmed populations is 19 (Venturini et al. 2005).

Based on a number of recent estimates, 92 to 95 percent of the area historically covered by tropical forests within the Atlantic Forest biome has been converted or severely degraded as a result of various human activities (The Nature Conservancy 2007; Höfling 2007). In addition to the overall loss and degradation of native habitat within this biome, the remaining tracts of habitat are severely fragmented. Most of the tropical forest habitats believed to have been used historically by the cherry-throated tanager have been converted or severely degraded by human activities (Bauer et al. 2000; BirdLife International 2007; Ridgely and Tudor 1989). Even when they are formally protected, the remaining fragments of primary forest habitat where the species may still occur will likely undergo further degradation due to their altered dynamics and isolation between forest fragments (Tabanez and Viana 2000).

The cherry-throated tanager is formally recognized as ''Endangered'' in Brazil and is directly protected by legislation promulgated by the Brazilian government (BirdLife International 2007; ECOLEX 2007). These protections prohibit the following activities with regard to this species: Export and international trade, collection and research, captive propagation, and also provide measures which help to protect remaining suitable habitat, such as prohibition of exploitation of the remaining primary forests within the Atlantic forest biome and management of various practices in primary and secondary forests, such as logging, charcoal production, reforestation, recreation, and water resources (ECOLEX 2007). The owners of Fazenda Pindobas IV and Caetes, two sighting areas, have cooperated in protecting cherry-throated tanager habitat in these areas, and efforts are underway to solidify protection of these privately owned areas (BirdLife International 2007; Venturini et al. 2005). Elsewhere, for various reasons (e.g., lack of funding, personnel, or local management commitment), Brazil's current capacity to achieve its stated natural resource objectives in protected areas is limited (ADEJA 2007; Bruner et al. 2001; Costa 2007; IUCN 1999; Neotropical News 1996; Neotropical News 1999). Therefore, even with the further designation of protected areas, it is likely that not all of the identified resource concerns for the cherry-throated tanager (e.g., residential and agricultural encroachment, resource extraction, unregulated tourism, grazing) would be sufficiently addressed.

Threats to the cherry-throated tanager and its habitat are ongoing, and we find that proposing this species for listing under the Act is warranted.

**Findings on Species for Which Listing Is Warranted but Precluded**

We have found that, for the 20 taxa discussed below, publication of proposed listing rules will continue to be precluded over the next year due to the need to complete pending, higher-priority listing actions. We will continue to monitor the status of these species as new information becomes available (see Monitoring, below). Our review of new information will determine if a change in status is warranted, including the need to emergency list any species or change the LPN of any of the species.

*Birds*

Southern Helmeted Curassow (*Pauxi unicornis*)

The southern helmeted curassow is known from central Bolivia and central and eastern Peru (Collar et al. 1992). In Bolivia, the subspecies (*P. unicornis unicornis*) is known from the adjacent Amboró and Carrasco National Parks (Herzog and Kessler 1998). The southern helmeted curassow is one of the least frequently encountered bird species in South America because of the inaccessibility of its preferred habitat and its apparent intolerance of human disturbance (Herzog and Kessler 1998). It has been reported from only two Peruvian and three Bolivian localities, which are fairly close together (Collar et al. 1992; Cox et al., as cited in Herzog and Kessler 1998). In Bolivia, it remained unknown to science until 1937 (Cordier 1971). In Amboró National Park, the curassows are sighted regularly on the upper Rio Saguayo (Wege and Long 1995). Field surveys on the Peru-Bolivia border, including one in 2004, have failed to locate any birds (BirdLife International 2007a; Herzog et al. 1999; Herzog and Kessler 1998; Mee et al. 2000), and limited local reports suggest that the bird is rare (Herzog et al. 1999; Herzog and Kessler 1998). In 2005, a team from Armonia Association (BirdLife in Bolivia) saw one and heard three southern helmeted curassows (*P. unicornis koepckeae*) in the Sira Mountains of central Peru—this is the first sighting of the distinctive endemic Peruvian race since 1969 (BirdLife International 2008).

The southern helmeted curassow inhabits dense, humid, lower montane forest and adjacent evergreen forest at 1,476 to 3,936 ft (450 to 1,200 m) (Cordier 1971; Herzog and Kessler 1998). This species prefers nuts of the almendrillo tree (*Byrsonima wadsworthii*) as its major source of food (Cordier 1971). It also consumes other nuts, seeds, fruit, soft plants, larvae, and insects (BirdLife International 2000).

The southern helmeted curassow was previously classified as ''Vulnerable'' on the IUCN Red List. After further assessment, it was uplisted in 2005 to ''Endangered'' because the species is estimated to be declining very rapidly due to uncontrolled hunting and habitat destruction. It has a small range and is known from few locations in a narrow elevational band, which continues to be subject to habitat loss (BirdLife International 2004). The population is estimated at 10,000 to 19,999 birds, with a future projected decline over the next 10 years or 3 generations of 50 to 79 percent (BirdLife International 2007b). Professional hunters have caused a decline in this species in Bolivia; the species is often hunted for meat and its casque, or horn (Collar et al. 1992), which the local people use to fashion cigarette-lighters (Cordier 1971). Other risks to the species include forest clearing for staple and export crops, road building, and rural development (Dinerstein et al. 1995, as cited in BirdLife International 2007a; Fjeldså in litt. 1999, as cited in BirdLife International 2007a; Herzog and Kessler 1998). In Peru, potential oil exploration threatens the species' habitat (MacLeod in litt. 2000, as cited in BirdLife International 2007a) and is opening the foothills to colonization and additional hunting (BirdLife International 2007a).

Large parts of the southern helmeted curassow's range are protected, at least on paper, by inclusion in the Amboro and Carrasco National Parks (300,000 ha (750,000 ac) and 616,413 ha (1,175,000 ac), respectively), which nominally protect the species from hunting and declining habitat resulting from development and road-building, although hunting of the curassow for meat is still reported throughout its range (BirdLife International 2000). The Association Armonia has being conducting field surveys to estimate the population and identify the most important sites for this species, and are evaluating human impact on the species' natural habitat (Llampa 2007). In addition, Armonia is carrying out an environmental awareness project to inform local people about this unique

bird (BirdLife Intenational 2008) and training workshops with the park guards (Llampa 2007).

The southern helmeted curassow does not represent a monotypic genus. It faces threats that are moderate in magnitude as the population is fairly large; however, the population trend has been declining rapidly. The threats to the species are imminent and ongoing. Therefore, it receives a priority rank of 8.

Bogota Rail (*Rallus semiplumbeus*)

The Bogota rail is found in the East Andes of Colombia on the Ubaté-Bogotá Plateau in Cundinamarca and Boyacá. It occurs in the temperate zone, at 2,500–4,000 m (8,202–13,123 ft) (occasionally as low as 2,100 m (6,890 ft)) in savanna and páramo marshes (BirdLife International 2007). This rail frequents wetland habitats with vegetation-rich shallows that are surrounded by tall, dense reeds and bulrushes. It feeds along the water's edge, in flooded pasture land, and along small overgrown dikes and ponds (Varty et al. 1986; Fjeldså and Krabbe 1990 as cited in BirdLife International 2006). This species is omnivorous, consuming a diet that includes aquatic invertebrates, insect larvae, worms, molluscs, dead fish, frogs, tadpoles, and plant material (Varty et al. 1986; BirdLife International 2006).

The Bogota rail is listed as ''Endangered'' by IUCN, primarily because its range is very small and is contracting due to widespread habitat loss and degradation. Furthermore, available habitat has become widely fragmented (BirdLife International 2007). The Ubaté-Bogotá Plateau formerly held enormous marshes and swamps, but few lakes with suitable habitat now remain. All major savanna wetlands are seriously threatened, mainly by drainage, but also by agricultural encroachment, erosion, diking, eutrophication, insecticides, tourism and hunting activities, burning, trampling by cattle, harvesting of reeds, fluctuating water levels, and increased water demand (BirdLife International 2007). The current population is estimated to range between 1,000 and 2,499 individuals, and the trend is decreasing (BirdLife International 2007). Although the Bogota rail is declining, it is still uncommon to fairly common, with some notable populations, including nearly 400 birds at Laguna de Tota, some 50 territories at Laguna de la Herrera, approximately 110 birds at Parque La Florida, and other populations at La Conejera marsh and Laguna de Fuquene (BirdLife International 2007). Some of the birds occur in protected areas such as Chingaza National Park and Carpanta Biological Reserve. However, most savanna wetlands are virtually unprotected.

The Bogota rail does not represent a monotypic genus. Because there are still a number of substantial subpopulations and the species has been recorded at over 21 localities, we find it is subject to threats that are moderate in magnitude. We find that the threats are imminent due to the ongoing degradation of the species' wetland habitat. Therefore, it receives a priority rank of 8.

Takahe (*Porphyrio hochstetteri,* previously known as *P. mantelli*)

The Takahe, a flightless rail endemic to New Zealand, is the world's largest extant member of the rail family (del Hoyo et al. 1996). The species, *Porphyrio mantelli,* has been split into *P. mantelli* (extinct) and *P. hochstetteri* (extant) (Trewick 1996). BirdLife International (2000) incorrectly assigned the name *P. mantelli* to the extant form, while the name *P. hochstetteri* was incorrectly assigned to the extinct form. Fossils indicate that this bird was once widespread throughout the North and South Islands. The Takahe was thought to be extinct by the 1930s until its rediscovery in 1948 in the Murchison Mountains, Fjordland (South Island) (Bunin and Jamieson 1996; New Zealand Department of Conservation (NZDOC) 2008b). Soon after its rediscovery, a Takahe Special Area of 193 $mi^2$ (500 $km^2$) was set aside in Fiordland National Park for the conservation of Takahe (Crouchley 1994; NZDOC 2008c). Today, the species is present in the Murchison and Stuart Mountains and has been introduced to four island reserves (Kapiti, Mana, Tiritiri Mantangi, and Maud) (Collar et al. 1994). The population in the Murchison Mountains is important because it is the only mainland population that has the potential for sustaining a large, viable population (NZDOC 1997).

Originally, the species occurred throughout forest and grass ecosystems. Today, Takahe occupy alpine grasslands (BirdLife International 2007). They feed on tussock grasses during much of the year, with snow tussocks (*Chionochloa pallens, C. flavescens,* and *C. crassiuscula*) being their preferred food (Crouchley 1994). By June, the snow cover usually prevents feeding above tree line, and birds move into forested valleys in the winter and feed mainly on the rhizome of a fern (*Hypolepis millefolium*). Research by Mills et al. (1980) suggested that Takahe require the high carbohydrate concentrations in the rhizomes of the fern to meet the metabolic requirement of thermoregulation in the mid-winter, subfreezing temperatures. The island populations eat introduced grasses (BirdLife International 2007). Takahe form pair bonds that persist throughout life and generally occupy the same territory throughout life (Reid 1967). Their territories are large, and Takahe defend them aggressively against other Takahe, which means that they will not form dense colonies even in very good habitat. They are long-lived birds, probably between 14 and 20 years (Heather and Robertson 1997), which have a low reproductive rate, with clutches consisting of 1–3 eggs. Only a few pairs manage to consistently rear chicks each year. Although under normal conditions this is generally sufficient to maintain the population, populations recover slowly from catastrophic events (Crouchley 1994).

The Takahe is listed as ''Endangered'' on the IUCN Red List, because it has an extremely small population (BirdLife International 2006). When rediscovered in 1948, it was estimated that the population was about 260 pairs (del Hoyo 1996; Heather and Robertson 1997). By the 1970s, Takahe populations had declined dramatically and it appeared that the species was at risk of extinction. In 1981, the population reached a low at an estimated 120 birds. Since then, the population has fluctuated between 100 and 180 birds (Crouchley 1994). At first, translocated populations increased only slowly, probably due to young pair-bonds and the quality of the founding population (Bunin et al. 1997). In recent years, the total Takahe population has had significant growth; in 2004, there was a 13.6 percent increase in the number of adult birds, with the number of breeding pairs up 7.9 percent (BirdLife International 2005). As of August 2007, birds in the Takahe Special Area had increased to 168, and the current national population was 297. Island reserves appeared to be at carrying capacity (NZDOC 2007). Overall, population numbers are slowly increasing due to intensive management of the island reserve populations, but fluctuations in the remnant mainland population continue to occur (BirdLife International 2000).

The main cause of the species' historical decline was competition for tussock grasses by grazing red deer (*Cervus elaphus*), which were introduced after the 1940s (Mills and Mark 1977). The red deer overgrazed the Takahe's habitat, eliminating nutritious plants and preventing some grasses from

seeding (del Hoyo et al. 1996). The NZDOC has controlled red deer through an intensive hunting program in the Murchison Mountains since the 1960s, and now the tussock grasses are close to their original condition (BirdLife International 2005).

Predation by introduced stoats (*Mustela erminea*) is believed to be a current risk to the species (Bunin and Jamieson 1995; Bunin and Jamieson 1996; Crouchley 1994). The NZDOC is running a trial stoat control program in a portion of the Takahe Special Area to measure the effect on Takahe survival and productivity. Initial assessment indicates a positive influence (NZDOC 2007). Other potential competitors or predators include the introduced brush-tailed possum (*Trichosurus vulpecula*) and the threatened weka (*Gallirallus australis*), a flightless woodhen endemic to New Zealand (BirdLife International 2007). In addition, severe weather is a natural limiting factor to this species (Bunin and Jamieson 1995). Weather patterns in the Murchison Mountains vary from year to year. High chick and adult mortality may occur during extraordinarily severe winters, and poor breeding may result from severe stormy weather during spring breeding season (Crouchley 1994). Research confirms that severity of winter conditions adversely affects survivorship of Takahe in the wild, particularly of young birds (Maxwell and Jamieson 1997).

Since 1983, the NZDOC has been involved in managing a captive-breeding and release program to boost Takahe recovery. Excess eggs from wild nests are managed to produce birds suitable for releasing back into the wild population in the Murchison Mountains. Some of these captive-reared birds have also been used to establish four predator-free offshore island reserves. Since 1984, these birds have increased the total population on islands to about 60 birds (NZDOC 2008a). Captive-breeding efforts have increased the rate of survival of chicks reaching 1 year of age from 50 to 90 percent (NZDOC 1997). However, Takahe that have been translocated to the islands have higher rates of egg infertility and low hatching success when they breed, contributing to the slow increase in the islands' populations. Researchers postulated that the difference in vegetation between the native mainland grassland tussocks and that found on the islands might be affecting reproductive success. After testing nutrients from all available food sources, they concluded that there was no effect, and advised that a supplementary feeding program for the birds was not necessary or recommended (Jamieson 2003). Further research on Takahe established on Tiritiri Matangi Island estimated that the island can support up to 8 breeding pairs, but suggested that the ability of the island to support Takahe is likely to decrease as the grass/shrub ecosystem reverts to forest. The researchers concluded that although the four island populations fulfilled their role as an insurance against extinction on the mainland at the time of the study, given impending habitat changes on the islands, it is unclear whether these island populations will continue to be viable in the future without an active management plan (Baber and Craig 2003a; Baber and Craig 2003b). Maxwell and Jamieson (1997) studied survival and recruitment of captive-reared and wild-reared Takahe on Fiordland. They concluded that captive rearing of Takahe for release into the wild increases recruitment of juveniles into the population.

There is growing evidence that inbreeding can negatively affect small, isolated populations. Jamieson et al. (2006) suggested that limiting the potential effects of inbreeding and loss of genetic variation should be integral to any management plan for a small, isolated, highly-inbred island species, such as the Takahe. Failure to address these concerns may result in reduced fitness potential and much higher susceptibility to biotic and abiotic disturbances in the short term and an inability to adapt to environmental change in the long term.

The Takahe does not represent a monotypic genus. The current wild population is small and the species' distribution is extremely limited. It faces threats that are moderate in magnitude because the NZDOC has taken measures to aid the recovery of the species. The NZDOC has implemented a successful deer control program and implemented a captive-breeding and release program to augment the mainland population and establish four offshore island reserves. Predation by introduced species and reduced survivorship resulting from severe winters, combined with the Takahe's small population size and naturally low reproductive rate are threats to this species that are imminent and ongoing. Therefore, this species is assigned a priority rank of 8.

Chatham Oystercatcher (*Haematopus chathamensis*)

The Chatham oystercatcher is endemic to the Chatham Island group (Marchant and Higgins 1993; Schmechel and Paterson 2005), which lies 534 mi (860 km) east of mainland New Zealand. The Chatham Island group comprises two large, inhabited islands (Chatham and Pitt) and numerous smaller islands. Two of the smaller islands (Rangatira (also referred to as South East) and Mangere) are nature reserves, which provide important habitat for the Chatham oystercatcher. The Chatham Island group has a biota (i.e., plants and animals in a particular area) quite different from the mainland. The remote marine setting, distinct climate, and physical makeup have led to a high degree of endemism (i.e., the occurrence of species in a limited area) (Aikman et al. 2001). The southern part of the oystercatcher's range is dominated by rocky habitats with extensive rocky platforms. The northern part of the range is a mix of sandy beach and rock platforms (Aikman et al. 2001).

Pairs of oystercatchers occupy their territory all year, while juveniles and subadults form small flocks or occur alone on a vacant section of the coast. The nest is a scrape usually on a sandy beach just above spring-tide level or among rocks above the shoreline. On offshore islands, nests are usually well away from the territories of brown skua (*Catharacta antarctica lonnbergi*) and are often under the cover of small bushes or rock overhangs (Heather and Robertson 1997).

This species is classified as ''Endangered'' on the IUCN Red List, because it has an extremely small population (BirdLife International 2006). It is listed as ''Critically Endangered'' by the NZDOC (2008a), making it a high priority for conservation management (NZDOC 2007). In the early 1970s the population was approximately 50 birds (del Hoyo 1996). In 1988, based on past productivity information, it was feared that the species was at risk of extinction within 50–70 years (Davis 1988, as cited in Schmechel and Paterson 2005). However, the population increased by 30 percent overall between 1987 and 1999, except trends varied in different areas—increasing (northern Chatham Island, eastern Pitt Island), stable (Mangere Island), or decreasing (south Chatham Island, Rangatira) (Moore et al. 2001). A survey during the summer of 1987–88 recorded 100 to 110 birds (Marchant and Higgins 1993). A census conducted in 1998 revealed 142 birds, with 34 to 41 breeding pairs (Schmechel and O'Connor 1999). A survey undertaken in the breeding season 1999–2000 counted 125 to 126 birds, with 50 pairs (at least 40 breeding pairs). By 2004, the oystercatcher population included 88 breeding pairs and 311 birds, more than double the number of birds counted in 1998, when

the intensive management program began (NZDOC 2008c). Although the population has significantly increased over the last 20 years, the population on Rangatira, an island free of mammalian predators, has gradually declined since the 1970s. The reason for the decline is unknown (Schmechel and O'Connor 1999), but population sizes can fluctuate even on islands free from predators (BirdLife International 2006).

Predation, habitat modification, natural disasters, and disturbance are factors that negatively impact the Chatham oystercatcher population (NZDOC 2001). Domestic cats (*Felis domesticus*), weka (*Gallirallus australis*), possum (*Trichosurus vulpecuta*), hedgehog (*Erinaceus eropaeus*), pigs (*Sus domestica*), black-backed gulls (*Larus dominicanus*), and harriers (*Circus approximans*) are potential predators of the Chatham oystercatcher eggs and young chicks, with cats possibly also preying on adults. Of these potential predators, cats and weka have been recorded on film predating on the species (NZDOC 2001). Rangatira and Mangere Islands are free of mammalian predators. Habitat modification by coastal vegetation—marram (European beachgrass) (*Ammophila arenaria*)—appears to have adversely affected oystercatcher breeding in northern locations on Chatham Island. At sites where marram has become established, the beach profile becomes steeper and the dune face moves closer to the high-water mark. Since oystercatchers prefer to nest in more open areas, the occurrence of marram appears to have forced the oystercatchers to nest further down the beach, where the spring tides or storm surges are more likely to destroy nests. The vegetation also creates a relatively dense cover that can conceal predators. During nesting, Chatham oystercatchers are sensitive to disturbance by people, farm stock, and dogs. Also, vehicles run over nests, and domestic sheep and cattle, which regularly use the beaches in northern Chatham Island, trample nests (NZDOC 2001).

The birds of the Chatham Island group are protected due to human intervention and management. The NZDOC focused conservation efforts in the early 1990s on predator trapping and fencing to limit domestic stock access to nesting areas. Some nests were moved away from the high tide mark, and nest manipulation may have helped to increase hatching success (NZDOC 2008b). In 2001, the NZDOC published a Chatham Island oystercatcher recovery plan covering the period 2001 through 2011. Nest manipulation, fencing, signage, intensive predator control, and a research program aimed at assessing the effects of predators, flooding, and management on breeding success have been underway for several years (BirdLife International 2006).

The Chatham oystercatcher does not represent a monotypic genus. The current population has 311 individuals and the species only occurs on the small Chatham Island group. It faces threats that are moderate in magnitude because the NZDOC has taken measures to aid the recovery of the species. Threats are imminent and ongoing. Therefore, it receives a priority rank of 8.

Orange-Fronted Parakeet (*Cyanoramphus malherbi*)

The orange-fronted parakeet, also known as Malherbe's parakeet, was treated as an individual species until it was proposed to be a color morph of the yellow-crowned parakeet, *C. auriceps*, in 1974 (Holyoak 1974). Further taxonomic analysis suggested that it should once again be considered a distinct species (Kearvell et al. 2003; ITIS 2008).

At one time, the orange-fronted parakeet was scattered throughout most of New Zealand, although the two records from the North Island are thought dubious (Harrison 1970). This species has never been common (Mills and Williams 1979). During the nineteenth century, the species' distribution included South Island, Stewart Island, and a few other offshore islands of New Zealand (NZDOC 2008c). Currently, there are four known remaining populations, all located within an 18.6-mi (30-km) radius in beech (*Nothofagus* spp.) forests of upland valleys within Arthur's Pass National Park and Lake Sumner Forest Park in Canterbury, South Island (NZDOC 2008b) and two populations established on Chalky and Maud Islands (Elliott and Suggate 2007). This species inhabits southern beech forests, with a preference for locales bordering stands of mountain beech (*N. solandri*) (del Hoyo 1997; Snyder et al. 2000; Kearvell 2002). It is reliant on old mature beech trees with natural cavities or hollows for nesting. Breeding is linked with the irregular seed production by *Nothofagus*; in mast years with a high abundance of seeds, parakeet numbers can increase substantially. In addition to eating seeds, the orange-fronted parakeet feeds on fruits, leaves, flowers, buds, and invertebrates (BirdLife International 2000).

The orange-fronted parakeet has an extremely small population and limited range. The species is listed as ''Critically Endangered'' on the IUCN Red List, ''because it underwent a population crash following rat invasions in 1990–2000, and it now has a tiny, severely fragmented, and declining population'' (BirdLife International 2006). It is listed in Appendix II of CITES (CITES 2008). The NZDOC (2008c) considers the orange-fronted parakeet, or kekeriki, to be the rarest parakeet in New Zealand. Because it is classified as ''Nationally Critical'' with a high risk of extinction, the NZDOC has been working intensively with the species to ensure its survival. The population is estimated at 100 to 200 individuals in the wild and declining (NZDOC 2008c).

There are several reasons for the species' continuing decline; one of the most prominent risks to the species is believed to be predation by introduced species, such as stoats (*Mustela erminea*) and rats (*Rattus* spp.) (BirdLife International 2007a). Large numbers of stoats and rats in beech forests cause large losses of parakeets. Stoats and rats are excellent hunters on the ground and in trees. When they exploit parakeet nests and roosts in tree holes, they particularly impact females, chicks, and eggs (NZDOC 2008d). The NZDOC introduced ''Operation ARK,'' an initiative to respond to predator problems in beech forests to prevent species' extinctions, including orange-fronted parakeets. Predators are methodically controlled with traps, toxins in bait stations, bait bags, and aerial spraying, when necessary (NZDOC 2008e). Despite these controls, predation by introduced species is still a threat because they have not been eradicated from this species' range.

Habitat loss and degradation are also considered threats to the orange-fronted parakeet (BirdLife International 2007b). Large areas of native forest have been felled or burnt, decreasing the habitat available for parakeets (NZDOC 2008d). Silviculture of beech forests aims to harvest trees at an age when few will become mature enough to develop suitable cavities for orange-fronted parakeets (Kearvell 2002). The habitat is also degraded by brush-tailed possum (*Trichosurus vulpecula*), cattle, and deer browsing on plants and changing the forest structure (NZDOC 2008d). This is a problem for the orange-fronted parakeet which uses ground and low growing shrubs while feeding (Kearvell et al. 2002).

Snyder et al. (2000) reported that hybridization with yellow-crowned parakeets had been observed at Lake Sumner. Other risks include increased competition between the orange-fronted parakeet and the yellow-crowned parakeet in a habitat substantially modified by humans, competition with introduced finch species, and

competition with introduced wasps (*Vespula vulgaris* and *V. germanica*) for invertebrates as a dietary source (Kearvell et al. 2002).

The NZDOC closely monitors all known populations of the orange-fronted parakeet. Nest searches are conducted, nest holes are inspected, and surveys are carried out in other areas to look for evidence of other populations. In fact, the surveys successfully located another orange-fronted parakeet population in May 2003 (NZDOC 2008e). A new population was established in 2006 on the predator-free Chalky Island. Eggs were removed from nests in the wild and foster parakeet parents incubated the eggs and cared for the hatchlings until they fledged and were transferred to the island. Monitoring later in the year (2006) indicated that the birds had successfully nested and reared chicks. Additional birds will be added to the Chalky Island population, in an effort to increase the genetic diversity of the population (NZDOC 2008e). A second self-sustaining population has been established on Maud Island (NZDOC 2008a).

The orange-fronted parakeet does not represent a monotypic genus. The current wild population ranges between 100 and 200 individuals, and the species' distribution is extremely limited. It faces threats that are moderate in magnitude because the NZDOC has taken important measures to aid in the recovery of the species. The NZDOC implemented a successful captive-breeding program for the orange-fronted parakeet. Using captive-bred birds from the program, NZDOC established two self-sustaining populations of the orange-fronted parakeet on predator-free islands. The NZDOC monitors wild nest sites and is constantly looking for new nests and new populations, as evidenced by the 2003 discovery of a new population. Finally, the NZDOC determined that the species' largest threat is predation and initiated a successful program to remove predators. The threats of competition for food and highly altered habitat are imminent and ongoing. Therefore, this species is assigned a priority rank of 8 (Note: the priority rank was mistakenly listed as 4 in the 2007 Notice of Review; a species that has imminent threats of moderate to low magnitude is assigned a priority ranking of 8, as per the Service's 1983 Listing Priority Guidance (48 FR 43098)).

Uvea Parakeet (*Eunymphicus uvaeensis*)

This species, previously known as *Eunymphicus cornutus*, is currently treated as two species, *E. cornutus* and *E. uvaeensis* (BirdLife International 2007a). The Uvea parakeet is found only on the small island of Uvea in the Loyalty Archipelago, New Caledonia (Territory of France); the island is only 42 $mi^2$ (110 $km^2$) (Juniper and Parr 1998). The Uvea parakeet is found primarily in old-growth forests, notably, those dominated by *Agathis australis* pines (del Hoyo et al. 1997). Most birds occur in about 7.7 $mi^2$ (20 $km^2$) of forest in the north, although some individuals are found in strips of forest on the northwest isthmus and in the southern part of the island, with a total area of potential habitat of approximately 25.5 $mi^2$ (66 $km^2$) (BirdLife International 2007a; CITES 2000b). The Uvea parakeet feeds on the berries of vines and the flowers and seeds of native trees and shrubs (del Hoyo et al. 1997). It also feeds on crops in adjacent cultivated land, and the greatest number of birds occurs close to gardens with papayas, which they utilize as food (BirdLife International 2007a). The species nests in cavities of native trees, and has a clutch size of 2 to 3 eggs with some double clutches (Robinet and Salas 1999).

Early population estimates were alarmingly low—70 to 90 birds and declining (Hahn 1993). Surveys by Robinet et al. (1996) in 1993 yielded estimates of approximately 600 birds. In 1999, it was believed that 742 individuals lived in northern Uvea, with 82 birds living in the south (Primot 1999, as cited in BirdLife International 2007a).

The species is listed as ''Endangered'' in the IUCN Red List, because it occupies a very small, declining area of forest on one small island (BirdLife International 2004). The species was uplisted from Appendix II to Appendix I of CITES in July 2000, due to its small population size, restricted area of distribution, loss of suitable habitat, and unsustainable trade of the species (CITES 2000b).

Identified risks to the Uvea parakeet include habitat loss, capture of juveniles for the pet trade, and predation (BirdLife International 2007b). The forest habitat of the Uvea parakeet is threatened by clearance for agriculture and logging. In 30 years, approximately 30 to 50 percent of primary forest has been destroyed (Robinet et al. 1996). The island has a young and increasing human population of almost 4,000 inhabitants. The increase in population will most probably lead to more destruction of forest for housing, cultivated fields, and plantations, especially coconut palms, the island's main source of income (CITES 2000a). The species is also put at risk by the illegal pet trade, mainly for the domestic market (BirdLife International 2007a). Nesting holes are cut open to extract nestlings, rendering the holes unsuitable for future nesting. The increasing lack of nesting sites is believed to be a limiting factor for the species (BirdLife International 2007a). Also, Robinet et al. (1996) suggested that although the impact of capture of juveniles on the viability of populations is not obvious with long-lived species that are capable of re-nesting, such as the Uvea parakeet, the current capture of 30 to 50 young Uvea parakeets each year by humans for pets may be unsustainable. In a study of the reproductive biology of the Uvea parakeet, Robinet and Salas (1999) found that the main causes of chick death were starvation of the third chick during the first week, raptor (presumably the native brown goshawk (*Accipiter fasciatus*)) predation of fledglings, and human harvest for the pet trade.

Although the Uvea parakeet has a number of predators, the absence of the ship rat (*Rattus rattus*) and Norwegian rat (*R. norvegicus*) on Uvea is a major factor contributing to its survival. There is concern that these rats may be introduced in the future (CITES 2000b). Introductions of Uvea parakeets to the adjacent island of Lifou (to establish a second population) in 1925 and 1963 failed (BirdLife International 2007a), possibly due to the presence of ship rats and Norwegian rats (Robinet in litt. 1997, as cited in Snyder et al. 2000). Robinet et al. (1998) studied the impact of rats in Uvea and Lifou on the Uvea parakeet. They concluded that Lifou is not a suitable place for translocating Uvea parakeets unless active habitat management is carried out to protect it from ship rats. They also suggested that it would be valuable to apply low intensity rat control of the Pacific rat (R. exulans) in Uvea immediately before the parakeet breeding season.

A recovery plan for the Uvea parakeet was prepared for the period 1997–2002, which included strong local participation in population and habitat monitoring (Robinet in litt. 1997, as cited in Snyder et al. 2000). The species has recently increased in popularity and is celebrated as an island emblem (Robinet and Salas 1997; Primot in litt. 1999, as cited in BirdLife International 2007a). Conservation actions, including in-situ management (habitat protection and restoration), recovery efforts (providing nest boxes and food), and public education on the protection of the parakeet and its habitat, are underway (Robinet et al. 1996). Increased awareness of the plight of the species and improvements in law

enforcement capability are helping to address illegal trade of the species. In 1998, a captive-breeding program was initiated to restock the southern portion of Uvea. Measures are now being taken to control predators and prevent further colonization by rats (BirdLife International 2007a). Current Uvea parakeet numbers are increasing, but any relaxation of conservation efforts or introduction of nonnative rats or other predators could lead to a rapid decline of the species (BirdLife International 2007a).

The Uvea parakeet does not represent a monotypic genus. It faces threats that are moderate in magnitude because important management efforts have been put in place to aid in the recovery of the species. However, all of these efforts must continue to function, because this species is an island endemic with restricted habitat in one location. Threats to the species are imminent because illegal trade still occurs and the removal of 30 to 50 percent of the old-growth forest, which the birds are dependent upon for nesting holes, negatively impacts the reproductive requirements of the species. We assign this species a priority rank of 8.

Blue-Throated Macaw (*Ara glaucogularis*)

The blue-throated macaw is endemic to forest islands in the seasonally flooded Beni Lowlands (Lanos de Mojos) of Central Bolivia (Jordan and Munn 1993; Yamashita and de Barros 1997). It inhabits a mosaic of seasonally inundated savanna, palm groves, forest islands, and humid lowlands. This species is found in areas where palm-fruit food is available, especially *Attalea phalerata* (Jordan and Munn 1993; Yamashita and de Barros 1997). It inhabits elevations between 656 and 984 ft (200 and 300 m) (BirdLife International 2008c; Brace et al. 1995; Yamashita and de Barros 1997). These macaws are not found to congregate in large flocks; but are seen most commonly traveling in pairs, and on rare occasions may be found in small flocks (Collar et al. 1992). The blue-throated macaw nests between November and March in large tree cavities where one to two young are raised (BirdLife International 2000).

The taxonomic status of this species was long disputed, primarily because the species was unknown in the wild to biologists until 1992. Previously it was considered an aberrant form of the blue-and-yellow macaw (*A. ararauna*), but the two species are now known to occur sympatrically without interbreeding (del Hoyo et al. 1997). BirdLife International (2008c) estimated there are between 50 and 249 mature individuals in the wild, and the population has some fragmentation and is decreasing.

This species was historically at risk from trapping for the national and international cage-bird trade, and some illegal trade may still be occurring. Between the early 1980s and early 1990s, approximately 400 to 1,200 birds were exported from Bolivia, and many are now in captivity in the European Union and in North America (World Parrot Trust 2003). In 1984, Bolivia outlawed the export of live parrots (Brace et al. 1995). However, in 1993 (Jordan and Munn 1993) it was reported that an Argentinian bird dealer was offering illegal Bolivian dealers a high price for blue-throated macaws. Armonia Association (BirdLife in Bolivia) monitored the wild birds that passed through a pet market in Santa Cruz from August 2004 to July 2005. Although nearly 7,300 parrots were recorded in trade, the blue-throated macaw was absent in the market during the monitoring period, which may point to the effectiveness of the ongoing conservation programs in Bolivia (BirdLife International 2007). There are a number of blue-throated macaws in captivity, with over 1,000 registered in the North American studbook. Because these birds are not too difficult to breed, the supply of captive-bred birds has increased (Waugh 2007), helping to alleviate pressure on illegal collecting of wild birds, but not completely eliminating illegal collection.

The blue-throated macaw is also at risk from habitat loss and possible competition from other birds, such as other macaws, toucans, and large woodpeckers (BirdLife International 2008b; World Parrot Trust 2008). All known sites of the blue-throated macaw are on private cattle ranches, where local ranchers typically burn the pasture annually (del Hoyo 1997). This results in almost no recruitment of palm trees, which are central to the ecological needs of the blue-throated macaw (Yamashita and de Barros (1977)). In addition, in Beni many palms are cut down by the local people for firewood (Brace et al. 1995). Thus, although the palm groves are more than 500 years old, Yamashita and de Barros (1977) concluded that the palm population structure suggests long-term decline.

This species is categorized as ''Critically Endangered'' on the IUCN Red List, ''because its population is extremely small and each isolated subpopulation is probably tiny and declining as a result of illegal trade'' (BirdLife International 2004). It is listed in Appendix I of CITES (CITES 2006) and is legally protected in Bolivia (Juniper and Parr 1998). The Eco Bolivia Foundation patrols existing macaw habitat by foot and motorbike, and the Armonia Association is searching the Beni lowlands for more populations (Snyder et al. 2000). Additionally, the Armonia Association is building an awareness campaign aimed at the cattlemen's association to ensure that the protection and conservation of these birds is at a local level (e.g., protection of macaws from trappers and the sensible management of key habitats, such as palm groves and forest islands, on their property) (BirdLife International 2008a; Llampa 2007; Snyder et al. 2000).

The blue-throated macaw does not represent a monotypic genus. It faces threats that are moderate in magnitude because wild birds are no longer taken for the legal wild-bird trade as a result of the species' CITES listing, and it is also legally protected in Bolivia. Wildlife managers in Bolivia are actively protecting the species and searching for additional populations. Threats to the species are imminent and ongoing because hunters still trap the birds for the illegal bird trade and annual burning on private ranches continues. Therefore, we assigned this species a priority rank of 8.

Helmeted Woodpecker (*Dryocopus galeatus*)

The helmeted woodpecker is endemic to the southern Atlantic forest region of southeastern Brazil, eastern Paraguay, and northeastern Argentina (BirdLife International 2007). It is found in tall lowland and montane primary forest, in forest that has been selectively logged, and generally near large tracts of intact forest (BirdLife International 2007). This woodpecker feeds on beetle larvae which live beneath tree bark. The species forages primarily in the middle canopy of the forest interior (del Hoyo et al. 2002).

Recent field work on the helmeted woodpecker revealed that the species is less rare than once thought (BirdLife International 2007). It is listed as ''Vulnerable'' by the IUCN (BirdLife International 2007). The current population is estimated at between 10,000 and 19,999 individuals and decreasing (BirdLife International 2000). This estimate has a wide range, because the species is almost certainly underreported due to the difficulty of locating birds except when vocalizing, and since they are silent for much of the year. Numerous sightings since the mid-1980s include a pair in the Brazilian State of Santa Catarina in 1998, where the species had not been seen since

1946 (del Hoyo et al. 2002). Research is needed to clarify the species' current distribution and status (del Hoyo et al. 2002).

The greatest threat to the species is widespread deforestation, and the species is not common at any known site (BirdLife International 2007; Cockle 2008). In the Atlantic forest, more than 90% of the forest has been replaced by crops and pastures, and nearly all remaining forest has been subject to selective logging of large trees, with potentially severe consequences for cavity nesting birds such as woodpeckers; selectively logged forest contains significantly fewer nesting cavities than primary forest (Cockle 2008).

The helmeted woodpecker is protected by Brazilian law and populations occur in numerous protected areas throughout its range (BirdLife International 2007). These protections prohibit the following activities with regard to this species: export and international trade, collection and research, captive propagation, and also provide measures which help to protect remaining suitable habitat, such as prohibition of exploitation of the remaining primary forests within the Atlantic forest biome and management of various practices in primary and secondary forests, such as logging, charcoal production, reforestation, recreation, and water resources (ECOLEX 2007). However, for various reasons (*e.g.*, lack of funding, personnel, or local management commitment), Brazil's current capacity to achieve its stated natural resource objectives in protected areas is limited (ADEJA 2007; Bruner et al. 2001; Costa 2007; IUCN 1999; Neotropical News 1996; Neotropical News 1999). Therefore, it is likely that not all of the habitat protections for the helmeted woodpecker would be sufficiently addressed at these sites. The helmeted woodpecker does not represent a monotypic genus. The magnitude of threat to the species is moderate because the population is much larger than previously thought; however, the threat is imminent because the forest habitat, in particular, the availability of nesting cavities upon which the species depends, is being reduced by human activities. It therefore, receives a priority rank of 8.

Okinawa Woodpecker (*Dendrocopos noguchii*, previously known as *Sapheopipo noguchii*)

The Okinawa woodpecker lives in the northern hills of Okinawa Island, Japan. Okinawa is the largest island of the Ryukyus Islands, a small island chain located between Japan and Taiwan (Brazil, 1991; Stattersfield et al. 1998; Winkler et al. 2005). This species is confined to Kunigami-gun, or Yambaru, with its main breeding areas located along the mountain ridges between Mt. Nishime-take and Mt. Iyu-take, although it also nests in well-forested coastal areas (Research Center, Wild Bird Society of Japan 1993, as cited in BirdLife International 2001). It prefers undisturbed, mature, subtropical evergreen broadleaf forests, with tall trees greater than 7.9 in (20 cm) in diameter (del Hoyo 2002; Short 1982). Trees of this size are generally more than 30 years old and are confined to hilltops (Brazil 1991). Places with conifers appear to be avoided (Short 1973; Winkler et al. 1995). The Okinawa woodpecker has been sighted just south of Tanodake in an area of entirely secondary forest that was too young for nest building, but Brazil (1991) thought this may have involved birds displaced by the clearing of mature forests. The Okinawa woodpecker feeds on large arthropods, notably beetle larvae, spiders, moths, and centipedes, fruit, berries, seeds, acorns, and other nuts (del Hoyo 2002; Short 1982; Winkler et al. 2005). They forage in old-growth forests with large, often moribund trees, accumulated fallen trees, rotting stumps, debris, and undergrowth (Brazil 1991; Short 1973). This woodpecker nests in holes excavated in large old trees, often a hollow in *Castanopsis cuspidata* trees (del Hoyo 2002; Short 1982).

Until recently the Okinawa woodpecker was considered to belong to the monotypic genus *Sapheopipo*. This view was based on similarities in color patterns, external morphology, and foraging behavior. Winkler et al. (2005) analyzed partial nucleotide sequences of mitochondrial genes and concluded that this woodpecker belongs in the genus *Dendrocopos*. Given the other species in this genus, the Okinawa woodpecker is no longer considered to belong to a monotypic genus.

The Okinawa woodpecker is considered one of the world's rarest extant woodpecker species (Winkler et al. 2005). The elimination of forests by logging and the cutting and gathering of wood for firewood are the main causes of its small and lessening numbers (Short 1982), but the greatest danger to this woodpecker is the fragmentation of its population into scattered tiny colonies and isolated pairs (Short 1973). The species is categorized on the IUCN Red List as ''Critically Endangered,'' because it is comprised of a single diminutive, declining population, which is put at risk by the continued loss of old-growth and mature forest to logging, dam construction, agricultural clearing, and golf course construction. Its limited range and tiny population make it vulnerable to extinction from disease and natural disasters such as typhoons (BirdLife International 2004). During the 1930s, the Okinawa woodpecker was considered nearly extinct. By the early 1990s, the breeding population was estimated to be about 75 birds (BirdLife International 2008a). The current population estimate ranges between 146 and 584 individuals, with a projected future 10-year decline of 30 to 49 percent (BirdLife International 2008b). The species is legally protected in Japan and occurs in small protected areas on Mt. Ibu and Mt. Nishime (BirdLife International 2008a). The Yambaru, a forest area in the Okinawa Prefecture, was designated as a national park in 1996, and conservation organizations have purchased sites where the woodpecker occurs to establish private wildlife preserves (del Hoyo et al. 2002).

The Okinawa woodpecker faces threats that are moderate in magnitude because the species is legally protected in Japan and its range occurs in several protected areas. However, the threats to the species are imminent because the old-growth habitat, upon which the species is dependent, continues to be removed, and preferable habitat continues to be altered for agriculture and golf courses. It therefore receives a priority rank of 8 (Note: The priority number was changed from 7 to 8 because of the recent research showing that the Okinawa woodpecker belongs to a different genus and is no longer considered a monotypic species).

Yellow-Browed Toucanet (*Aulacorhynchus huallagae*)

The yellow-browed toucanet is known from only two localities in north-central Peru—La Libertad, where it is uncommon, and Rio Abiseo National Park, San Martin, where it is very rare (BirdLife International 2008; del Hoyo et al. 2002; Wege and Long 1995). Its estimated range is only 174 $mi^2$ (450 $km^2$) (BirdLife International 2008). There have been recent reports of the species from Leymebambe (T. Mark in litt. 2003, as cited in BirdLife International 2008). It inhabits a narrow altitudinal range between 6,970 and 8,232 ft (2,125 and 2,510 m), preferring the canopy of humid, ephiphyte-laden montane cloud forests, particularly areas that support *Clusia* trees (del Hoyo et al. 2002; Fjeldså and Krabbe 1990; Schulenberg and Parker 1997). This narrow distributional band may be related to the occurrence of the larger

grey-breasted mountain toucan (*Andigena hypoglauca*) above 7,544 ft (2,300 m) and to the occurrence of the emerald toucanet (*Aulacorhynchus prasinus*) below 6,888 ft (2,100 m) (Schulenberg and Parker 1997). The species' restricted range remains unexplained, and recent information indicates that both of the suggested competitors have wider altitudinal ranges which completely encompass the range of the yellow-browed toucanet (Clements and Shany 2001, as cited in BirdLife International 2008; Collar et al. 1992; del Hoyo et al. 2002; J. Hornbuckle in litt. 1999, as cited in BirdLife International 2008). The yellow-browed toucanet does not appear to occupy all potentially suitable forest available within its range (Schulenberg and Parker 1997). Although it occurs within the large Rio Abiseo National Park, the population in the reserve is thought to be small (BirdLife International 2004; del Hoyo 2002).

Deforestation has been widespread in this region, but has largely occurred below the toucanet's altitudinal range (BirdLife International 2008; Barnes et al. 1995). However, coca growers have taken over forests within its altitudinal range, probably resulting in some reductions in the species' range and population (BirdLife International 2004; Plenge in litt. 1993, as cited in BirdLife International 2008). Nevertheless, much forest remains within the range of the yellow-browed toucanet, and most of the area is only lightly settled by humans; the limited range of this species is not well explained relative to the threats reported (BirdLife International 2008; Schulenberg and Parker 1997).

It is listed as ''Endangered'' on the IUCN Red List, because of its very small range and extant population records from only two locations (BirdLife International 2004). The current population size is unknown, but the population trend is believed to be decreasing (BirdLife International 2008).

The yellow-browed toucanet does not represent a monotypic genus. The magnitude of threat to the species is moderate, since habitat loss is largely recorded outside its range, and non-imminent due to the uncertainty of ongoing habitat loss from cocoa growers. Therefore, it receives a priority rank of 11.

Brasilia Tapaculo (*Scytalopus novacapitalis*)

The Brasilia tapaculo is found in swampy gallery forest, disturbed areas of thick streamside vegetation, and dense secondary growth of the bracken fern *Pteridium aquilinum*, from Goiás, the Federal District, and Minas Gerais, Brazil (Negret and Cavalcanti 1985, as cited in Collar et al. 1992; Collar et al. 1992; BirdLife International 2007). The Brasilia Tapaculo will occasionally colonize disturbed areas near streams (BirdLife International 2003). This species has only been recorded locally within Formas in Goiás, around Brasília. Particular sites where the species has been located, at low densities, include Serra Negra (on the upper Dourados River) and the headwaters of the São Francisco, both in Minas Gerais; and Serra do Cipó and Caraça in the hills and tablelands of central Brazil (BirdLife International 2003).

Although the species was once considered rare (Sick and Texeira 1979, as cited in Collar et al. 1992), it is now found in reasonable numbers in certain areas of Brasilia (D. M. Teixeira, in litt. 1987, as cited in Collar et al. 1992). The population is estimated at more than 10,000 birds, with a decreasing population trend (BirdLife International 2007). The IUCN categorizes *Scytalopus novacapitalis* as ''Near Threatened'' (BirdLife International 2007). The species occupies a very limited range and is presumably losing habitat around Brasilia. However, its distribution now appears larger than initially believed, and the swampy gallery forests where it is found are not conducive for forest clearing, leaving the species' habitat less vulnerable to this threat than previously thought. However, dam building for irrigation on rivers which normally flood gallery forests is an emerging threat (Antas 2007; D. M. Teixeira in litt. 1987, as cited in Collar et al. 1992). The majority of locations of this species lie within established reserves, and both fire risk and drainage impacts are reduced in these areas (Antas 2007). The Brasilia tapaculo is currently protected by Brazilian law (Bernardes et al. 1990, as cited in Collar et al. 1992), and it is found in six protected areas (Machado et al. 1998, Wege and Long 1995; as cited in BirdLife International 2007). Annual burning of adjacent grasslands limits the extent and availability of suitable habitat, as does wetland drainage and the sequestration of water for irrigation (Machado et al. 1998, as cited in BirdLife International 2007).

The Brasilia tapaculo does not represent a monotypic genus. The magnitude of threat to the species is moderate because the population is much larger than previously believed and preferred habitat is swampy and difficult to clear. Threats are imminent, however, because habitat is being drained or dammed for agricultural irrigation, and grassland burning limits the extent of suitable habitat. Therefore, it receives a priority rank of 8.

Codfish Island Fernbird (*Bowdleria punctata wilsoni*)

The Codfish Island fernbird is found only on Codfish Island—a Nature Reserve of 3,448 ac (1,396 ha)—located 1.8 mi (3 km) off the northwest coast of Stewart Island, New Zealand (IUCN 1979; McClelland 2007). There are five subspecies of fernbirds, each restricted to a single island and its outlying islands. The North and South Islands' subspecies are widespread and locally common. The Stewart Island and Snares' subspecies are moderately abundant (Heather and Robertson, 1997). In 1966, the status of the Codfish Island subspecies was considered relatively safe (Blackburn 1967), but estimates dating from 1975 indicated a gradually declining population numbering approximately 100 individuals (Bell 1975, as cited in IUCN 1979). McClelland (2007) wrote that in the past the subspecies was restricted to low shrubland on the top of Codfish Island with a few individuals around the coastal shrubland; the birds are thought to have been eliminated from forest habitat by the Polynesian rat (*Rattus exulans*) (McClelland 2007). The IUCN (1979) concluded that the subspecies' absence from areas of Codfish Island that it had formerly occupied in the mid-1970s evidenced a decline.

Fernbirds are sedentary, and their flight is weak. They are secretive and reluctant to leave cover. They feed in low vegetation or on the ground, eating mainly caterpillars, spiders, grubs, beetles, flies, and moths (Heather and Robertson, 1997).

Codfish Island's native vegetation has been modified by the introduced herbivore, the Australian brush-tailed possum (*Trichosurus vulpecula*). Fernbird populations have also been reduced due to predation by weka (*Gallirallus australis scotti*) and Polynesian rats (Merton 1974, pers. comm., as cited in IUCN 1979). Several conservation measures have been undertaken by the New Zealand DOC. The weka and possum were eradicated from Codfish Island in 1984 and 1987, respectively (McClelland 2007). The Polynesian rat was eradicated in 1997 (Conservation News 2002; McClelland 2007). The Codfish Island fernbird population is rebounding strongly with the removal of invasive predator species. The fernbird invaded the forest habitat, which greatly expanded the species' available habitat. Although there is no accurate estimate on the current size of the population (estimates

are based on incidental encounter rates in the various habitat types on the island), the current population is believed to be several hundred. Thus, McClelland (2007) concluded that it is likely that the population has peaked and is now stable.

To safeguard the Codfish Island fernbird, the NZDOC established a second population on Putauhinu Island—a small (356-ac (144-ha)), privately owned island located approximately 25 mi (40 km) south of Codfish Island. The Putauhinu population established rapidly, and McClelland (2007) reported it is believed to be stable. While there are no accurate data on the population size or trends, the population is estimated to be 200 to 300 birds spread over the island (McClelland 2007).

The Codfish Island fernbird is a subspecies that is now facing threats that are low to moderate in magnitude because the removal of invasive predator species and the establishment of a second population have allowed for a strong rebound in the subspecies' population. Threats are non-imminent because conservation measures have eradicated nonnative predatory species from Codfish Island. However, even though efforts to remove nonnative predators have been successful, there is a continued risk that predators will be re-introduced to the island by boats transporting conservation and research staff to the islands. Given continued low numbers, with two populations in the low hundreds, we find that introduced predators remain a threat to this subspecies, though non-imminent.

The subspecies, therefore, receives a priority rank of 12 (Note: the priority rank was mistakenly listed as 9 in the 2007 Notice of Review; a subspecies that has non-imminent threats of moderate to low magnitude is assigned a priority ranking of 12, as per the Service's 1983 Listing Priority Guidance (48 FR 43098)).

Ghizo White-Eye (*Zosterops luteirostris*)

The Ghizo white-eye is endemic to Ghizo, a very densely populated island in the Solomon Islands in the South Pacific (BirdLife International 2007a). Birds are locally common in the remaining tall or old-growth forest, which is very fragmented and comprises less than 0.39 mi$^2$ (1 km$^2$). It is less common in scrub close to large trees and in plantations (Buckingham et al. 1995 and Gibbs 1996, as cited in BirdLife International 2007a), and it is not known whether these two habitats can support sustainable breeding populations (Buckingham et al. 1995, as cited in BirdLife International 2007a). The IUCN Red List classifies this species as ''Endangered,'' because of its very small population that is considered to be declining due to habitat loss. It further notes that the species would be classified as ''Critically Endangered'' if the species' range was judged to be severely fragmented (BirdLife International 2007c). The population estimate for this species is 250 to 999 birds. While there are no data on population trends, the species is suspected to be declining due to habitat degradation (BirdLife International 2007b). The very tall old-growth forest on Ghizo is still under some threat from clearance for local use as timber, firewood, and gardens, and the areas of other secondary growth, which are suboptimal habitats for this species, are under considerable threat from clearance for agricultural land (BirdLife International 2007a).

The Ghizo white-eye does not represent a monotypic genus. It faces threats that are moderate in magnitude because forest clearing, while a concern, does not appear to be proceeding at a pace to rapidly denude the habitat. Threats are imminent because the old-growth forest which the species is dependent upon is still being cleared for local use, and secondary growth is being converted for agricultural purposes. Therefore, we assign the species a priority rank of 8.

Black-Backed Tanager (*Tangara peruviana*)

The black-backed tanager is endemic to the coastal Atlantic forest region of southeastern Brazil, with records from Rio de Janeiro, Sao Paolo, Parana, Santa Catarina, Rio Grande do Sul, and Espirito Santo (Argel-de-Oliveira in litt. 2000, as cited in BirdLife International 2006). It is largely restricted to coastal sand-plain forest and littoral scrub, or restinga, and has also been located in secondary forests (BirdLife International 2007). The black-backed tanager is generally not considered rare within suitable habitat (BirdLife International 2007). It has a complex distribution with periodic local fluctuations in numbers owing to seasonal movements, at least in Rio de Janeiro and Sao Paolo (BirdLife International 2007). Clarification of the species' seasonal movements will provide an improved understanding of the species' population status and distribution (BirdLife International 2007). Population estimates range from 2,500 to 10,000 individuals (BirdLife International 2007), and it is considered ''Vulnerable'' by the IUCN (BirdLife International 2007). The species is negatively impacted by the rapid and widespread loss of habitat for beachfront development and occasionally appears in the illegal cage-bird trade (BirdLife International 2006).

The black-backed tanager does not represent a monotypic genus. The threat to the species is low to moderate in magnitude due to the species' fairly large population size and range. The threat is, however, imminent because the species is put at risk by ongoing rapid and widespread loss of habitat due to beachfront development. Therefore, we give this species a priority rank of 8 (Note: the priority rank was mistakenly listed as 9 in the 2007 Notice of Review; a species that has imminent threats of moderate to low magnitude is assigned a priority ranking of 8, as per the Service's 1983 Listing Priority Guidance (48 FR 43098)).

Lord Howe Pied Currawong (*Strepera graculina crissalis*)

The Lord Howe pied currawong is a separate subspecies from the five Australian mainland pied currawongs. It is endemic to the Lord Howe Island, New South Wales, Australia. The highly mobile birds can be found anywhere on the 7.7-mi$^2$ (20-km$^2$) island (Hutton 1991), as well as on offshore islands such as the Admiralty group (Garnett and Crowley 2000). The Lord Howe pied currawong breeds in rainforests and palm forests, particularly along streams. Their territories include sections of streams or gullies that are lined by tall timber (Garnett and Crowley 2000). The highest densities of nests are located on the slopes of Mt. Gower and in the Erskine Valley, with smaller numbers on the lower land to the north (Knight 1987, as cited in Garnett and Crowley 2000). The nest is placed high in a tree and is made of a cup of sticks lined with grass and palm thatch (Department of Environment & Climate Change (DECC) 2005). Most of the island is still forested, and the removal of introduced feral animals has resulted in the recovery of the forest understory (World Wildlife Fund (WWF) 2001).

The Lord Howe pied currawong is omnivorous and eats a wide variety of food, including native fruits and seeds (Hutton 1991), and is the only remaining native island vertebrate predator (DECC 2005). It has been recorded taking seabird chicks, poultry, and chicks of the Lord Howe woodhen (*Tricholimnas sylvestris*) and white tern (*Gygis alba*). Currawongs also feed on dead rats and have been observed to catch live rats and eat them (Hutton 1991). A Department of Environmental Conservation (DEC) scientist observed that food brought to nestlings was, in

decreasing order, invertebrates, fruits, reptiles, and nestlings of other bird species (Lord Howe Island Board (LHIB) 2006).

The Lord Howe pied currawong is listed as ''Vulnerable'' under the New South Wales Threatened Species Conservation Act of 1995, because it has a limited range, only occurring on Lord Howe Island (DECC 2004). It also is listed as ''Vulnerable'' under the Commonwealth Environment Protection and Biodiversity Conservation Act of 1999. These laws provide a legislative framework to protect and encourage the recovery of vulnerable species (DEC 2006a). The Lord Howe Island Act of 1953, as amended, established the Lord Howe Island Board (LHIB); made provisions for the LHIB to care for, control, and manage the island; and established 75 percent of the land area as a Permanent Park Preserve (DEC 2006a). In 1982, the island was inscribed on the World Heritage List for its outstanding natural universal values (Department of the Environment and Water Resources 2007).

In the Action Plan for Australian Birds 2000 (Garnett and Crowley 2000), the population was estimated at approximately 80 mature individuals. In 2006, initial results from a color band survey suggested that the population size was about 180 to 200 individual birds (LHIB 2006). Complete results reported by the Foundation for National Parks & Wildlife (2007) estimated the breeding population to be 80 to 100 pairs, with a nesting territory in the tall forest areas of about 12 ac (5 ha) per pair. The population size is limited by the amount of available habitat and the lack of food during the winter (Foundation for National Parks & Wildlife 2007).

The Lord Howe Island draft Biodiversity Management Plan, which was out for comment in 2006, will become the formal National and NSW Recovery Plan (Plan) for threatened species and communities of the Lord Howe Island Group (DEC 2006a). The main current threat identified for the Lord Howe Island currawong is habitat clearing and modification (DEC 2006b). Lord Howe Island is unique among inhabited Pacific Islands in that less than 10 percent of the island has been cleared (WWF 2001) and less than 24 percent has been disturbed (DEC 2006a). Although large-scale clearing of native vegetation no longer occurs on Lord Howe Island, the impact of vegetation clearing on a small scale needs to be assessed (DEC 2006a). A lesser current risk to the species, but one which may account for its historical decline and continued low numbers, is human interactions (Garnett and Crowley 2000). Prior to the 1970s, locals would shoot currawongs due to the bird's habit of preying on nestling birds (Hutton 1991), and the currawongs remain unpopular with some residents. It is unknown what effect this localized killing has on the overall population size and distribution of this species (Garnett and Crowley 2000). Also, currawongs often prey on ship (black) rats and consequently may suffer mortality from non-target poisoning during rat-baiting programs (DEC 2006b). Close monitoring of the population is needed because this small, endemic population is susceptible to the introduction of avian disease or of new predators (Garnett and Crowley 2000). There is a long history of introduction of nonnative fauna (e.g., 18 introduced land birds, and 3 mammals now resident), and the introduction to Lord Howe Island of new exotic fauna and flora (including disease), by air or ship, is considered a major ongoing threat to endemic species, including the Lord Howe pied currawong (DEC 2006a).

The Lord Howe pied currawong is a subspecies facing threats that are low in magnitude and non-imminent. Therefore, it receives a priority rank of 12.

*Invertebrates*

Harris' Mimic Swallowtail (*Eurytides* (syn. *Mimoides) lysithous harrisianus*)

Harris' mimic swallowtail is a subspecies endemic to Brazil (Collins and Morris 1985). Although the *species'* range includes Paraguay, the *subspecies* has not been confirmed there (Collins and Morris 1985; Finnish University and Research Network (Funet) 2004). Occupying the lowland swamps and sandy flats above the tidal margins of the coastal Atlantic Forest, the subspecies prefers alternating patches of strong sun and deep shade (Brown 1996; Collins and Morris 1985). This subspecies is polyphagous, meaning that its larvae feed on more than one plant species (Kotiaho et al. 2005). Information on preferred hostplants and adult nectar-sources was published in the 12-month finding (69 FR 70580). This subspecies mimics at least three *Parides* species, including the fluminense swallowtail; details on mimicry were provided in the 12-month finding (69 FR 70580) and in the 2007 Notice of Review (72 FR 20184). Researchers believe that this mimicry system may cause problems in distinguishing this subspecies from the species that it mimics (Brown, in litt. 2004; Monteiro et al. 2004).

Harris' mimic swallowtail was previously known in Espirito Santo and Rio de Janeiro (Collins and Morris 1985; New and Collins 1991). However, there are no recent confirmations in Espirito Santo. In Rio de Janeiro, Harris' mimic swallowtail has recently been confirmed in three localities. Two colonies are located on the east coast of Rio de Janeiro, at Barra de São João and Macaé, and the other in Poço das Antas Biological Reserve, further inland. The Barra de São João colony is the best-studied colony. Since 1984, it has maintained a stable size, varying between 50 to 250 individuals (Brown 1996; K. Brown, Jr., in litt. 2004; Collins and Morris 1985), and was reported to be viable, vigorous, and stable in 2004 (K. Brown, Jr., in litt. 2004). There are no estimates of the size of the colony in Poço das Antas Biological Reserve, where it had not been seen for 30 years prior to its rediscovery there in 1997 (K. Brown, Jr., in litt. 2004). Population estimates are lacking for the colony at Macaé, where the subspecies was netted in Jurubatiba National Park in the year 2000, after having not been seen in the area for 16 years (Monteiro et al. 2004). The Brazilian Institute of the Environment and Natural Resources (Instituto Brasileiro do a Meio Ambiente de do Recursos Naturais Renováveis; IBAMA) considers this subspecies to be critically imperiled (MMA 2003; Portaria No. 1,522 1989) and ''strictly protected,'' such that collection and trade of the subspecies are prohibited (Brown 1996). Harris' mimic swallowtail was categorized on the IUCN Red List as ''Endangered'' in the 1988, 1990, and 1994 IUCN Red Lists (IUCN 1996). However, it has not been re-evaluated using the 1997 IUCN Red List criteria, nor has it been incorporated into the 2007 IUCN Red List database (IUCN 2007).

Habitat destruction is the main threat to this subspecies (Brown 1996; Collins and Morris 1985), especially urbanization in Barra de São João, industrialization in Macaé (Jurubatiba National Park), and previous fires in the Poço das Antas Biological Reserve. As described in detail for the fluminense swallowtail (below), Atlantic forest habitat has been reduced to 5 to 10 percent of its original cover. More than 70 percent of the Brazilian population lives in the Atlantic forest, and coastal development is ongoing throughout the Atlantic forest region (Butler 2007; Conservation International 2007; Critical Ecosystem Partnership Fund (CEPF) 2007a; Höfling 2007; Hughes et al. 2006; The Nature Conservancy 2007;

Peixoto and Silva 2007; Pivello 2007; World Food Prize 2007; WWF 2007).

Both Barra de São João and the Poço das Antas Biological Reserve, two of the known Harris' mimic swallowtail localities, lie within the São João River Basin. The current conditions at Barra de São João appear to be suitable for long-term survival of this subspecies. The Barra de São João River Basin encompasses a 535,240-ac (216,605-ha) area, 372,286 ac (150,700 ha) of which is managed as protected areas. The preferred landscape of open and shady areas (Brown 1996; Collins and Morris 1985) continues to be present in the region, with approximately 541 forest patches averaging 314 ac (127 ha) in size, covering nearly 68,873 ha (170,188 ac), and a minimum distance between forest patches of 0.17 mi ( 276 m) (Teixeira 2007). In studies between 1984 and 1991, Brown (1996) determined that Harris' mimic swallowtails in Barra de São João flew a maximum distance of 0.62 mi (1000 m); it follows that the average flying distance would be less than this figure. Thus, the average (0.17 mi (276 m)) distance between forest patches in the Barra de São João River Basin is clearly within the flying distance of this subspecies. The colony at Barra de São João has maintained a stable population size for 20 years, indicating that the conditions available there remain suitable.

Harris' mimic swallowtail ranges within two protected areas: Poço das Antas Biological Reserve and Jurubatiba National Park. These protected areas are described in detail for the fluminense swallowtail. In summary, the Poço das Antas Biological Reserve (Reserve) was established to protect the golden lion tamarin (*Leontopithecus rosalia*) (Decree No. 73,791 1974), but the Harris' mimic swallowtail, which occupies the same range, may benefit indirectly by efforts to conserve golden lion tamarin habitat (De Roy 2002; Teixeira 2007; WWF 2003). Habitat destruction caused by fires in Poço das Antas Biological Reserve appears to have abated, and the revised management plan indicates that the Reserve will be used for research and conservation, with limited public access (CEPF 2007a; IBAMA 2005). The Jurubatiba National Park (Park) is located in a region that is undergoing continuing development pressures from urbanization and industrialization (Brown 1996; CEPF 2007b; IFC 2002; Khalip 2007; Otero and Brown 1984; Savarese 2008), and there is no management plan in place for the Park (CEPF 2007b). However, as discussed for the fluminense swallowtail, the Park is considered to be in a very good state of conservation (Rocha et al. 2007).

Harris' mimic swallowtail does not represent a monotypic genus, but it is a subspecies. Based on the above information, we have determined that habitat destruction is a threat to the subspecies. The magnitude of the threat is low because suitable habitat continues to exist for this polyphagous subspecies; the best-studied colony has maintained a stable and viable size for nearly 2 decades; an additional locality has been confirmed; the subspecies is strictly protected by Brazilian law; and two colonies are located within protected areas. While the protected areas in which this subspecies is found continue to be threatened with potential habitat destruction from urbanization and industrialization, the threat of habitat destruction is non-imminent because such destruction within those protected areas is not ongoing at this time. Therefore, the subspecies is designated a priority rank of 12.

Jamaican Kite Swallowtail (*Eurytides marcellinus*)

The Jamaican kite swallowtail is endemic to Jamaica, preferring wooded, undisturbed habitat containing the West Indian lancewood (*Oxandra lanceolata*), the only known larval hostplant for this monophagous species (Bailey 1994; Collins and Morris 1985), meaning that its larvae feed only on a single plant species (Kotiaho et al. 2005). Adult plant preferences have not been reported. Since the 1990s, adult Jamaican kite swallowtails have been observed in the Parishes of St. Thomas and St. Andrew in the east; westward in St. Ann, Trelawny, and St. Elizabeth; and in the extreme western coast Parish of Westmoreland (Bailey 1994; Harris 2002; Möhn 2002; Smith et al. 1994; WRC 2001). The species was most recently sighted in mid-2007 in the Blue and John Crow Mountains National Park (see description below), where 4 individuals were observed (Jamaica Conservation and Development Trust (JCDT) and Green Jamaica 2007a). There is only one known breeding site in the eastern coast town of Rozelle (St. Thomas Parish) (Bailey 1994; Collins and Morris 1985; Garraway et al. 1993; Smith et al. 1994). Rozelle may also be referred to in the literature as Roselle (e.g., Anderson et al. 2007). According to Dr. Robert Robbins (in litt. 2004), it is possible that other breeding sites exist given the widely dispersed nature of the larval food plant. The Jamaican kite swallowtail maintains a low population level and occasionally becomes locally abundant in Rozelle during the breeding season in early summer and occasionally again in early fall (Bailey 1994; Brown and Heineman 1972; Collins and Morris 1985; Garraway et al. 1993; Smith et al. 1994). It experiences episodic population explosions, as described in the 12-month finding (69 FR 70580) and in the 2007 Notice of Review (72 FR 20184). The species is protected under Jamaica's Wildlife Protection Act of 1998 and is included in Jamaica's National Strategy and Action Plan on Biological Diversity, which has established specific goals and priorities for the conservation of Jamaica's biological resources (Schedules of The Wildlife Protection Act 1998). Beginning in 1985, the Jamaican kite swallowtail was categorized on the IUCN Red List as ''Vulnerable;'' it has not been re-evaluated using the 1997 criteria (Gimenez Dixon 1996).

Habitat modification is the primary threat to the Jamaican kite swallowtail. Monophagous butterflies tend to be more threatened than polyphagous species, in part due to their specific habitat requirements (Kotiaho et al. 2005). West Indian lancewood, the Jamaican kite's only known larval food plant, has been cleared for cultivation and felled for the commercial timber industry (Collins and Morris 1985; Windsor Plywood 2004). Although West Indian lancewood remains widely dispersed throughout the island (R. Robbins, in litt. 2004), the harvest and clearing of West Indian lancewood habitat reduces the availability of the plant (Bailey 1994; Collins and Morris 1985).

In Rozelle, the only known breeding site for this species (Bailey 1994; Collins and Morris 1985; Garraway et al. 1993; Smith et al. 1994), there has been extensive habitat modification for agricultural and industrial purposes, such as mining (Gimenez Dixon 1996; WWF 2001). The effect of historical habitat modification negatively impacts the swallowtail today, because the Jamaican kite does not thrive in disturbed habitats (Collins and Morris 1985). Rozelle is also subject to naturally occurring, high impact stochastic events, such as regularly-occurring hurricanes, as elaborated in the 2007 Notice of Review (72 FR 20184). According to the Economic Commission for Latin America and the Caribbean (ECLAC), United Nations Development Programme (UNDP), and Planning Institute of Jamaica (PIOJ) (2004), hurricane-related weather damage in the last 2 decades along the coastal zone of Rozelle has been more intense than in previous decades, resulting in the erosion and virtual disappearance of this once-extensive recreational beach. In 1988, it was estimated that Hurricane Gilbert caused

a 75 percent reduction of Rozelle Beach due to erosion (UNEP-CEP 1989). Most recently, Hurricane Ivan, a Category 5 hurricane that hit the island in 2004, caused severe local damage to Rozelle Beach, including erosion of the cliff face and shoreline (ECLAC et al. 2004). Thus, while we do not consider stochastic events to be a primary threat factor for this species, the damage caused by hurricanes that have been increasing in severity and frequency within the past two decades is an unpredictable contributor to habitat loss.

Habitat destruction occurs in western Parishes, where adult Jamaican kite swallowtails have been observed. Cockpit Country, encompassing 30,000 ha (74,131 ac) of rugged forest-karst (a specialized limestone habitat) terrain, spans four western Parishes, including Trelawny and St. Elizabeth, where adult Jamaican kite swallowtails have been observed (Gordon and Cambell 2006). Although eighty-one percent of Cockpit Country remains forested (Tole 2006), fragmentation is occurring as a result of human-induced activities. Current threats to Cockpit Country include bauxite mining, unregulated plant collecting, extensive logging, conversion of forest to agriculture, illegal drug cultivation, and expansion of human settlements. These activities contribute to degradation of the hydrology system from in-filling, siltation, accumulation of solid waste, and invasion by nonnative, invasive species (Cockpit Country Stakeholders Group and JEAN (Gordon and Cambell 2006; Jamaica Environmental Advocacy Network 2007; Tole 2006). In 2003, the Jamaican National Environment and Planning Agency identified Rozelle and Cockpit Country (which spans at least four western Parishes, including Trelawny and St. Elizabeth, where adult Jamaican kites have been observed) as priority locations to receive protected area status within the next 5 to 7 years (NEPA 2003). The status of this proposal is not included in the 2007 Environmental Action Plan Status Report (NEPA 2007).

Currently, the Blue and John Crow Mountains National Park is the only protected area in which adult Jamaican kite swallowtails have been observed, including the most recent observation in mid-2007 (Bailey 1994; JCDT 2006; JCDT and Green Jamaica 2007a). Located on the inland portions of St. Thomas and St. Andrew and the southeast portion of St. Mary Parishes, the Park was created in 1993, encompassing 122,367 ac (49,520 ha) of mountainous, forested terrain that ranges in elevation from 492 to 7,402 ft (150 m to 2,256 m). The Park is considered one of the best-managed protected areas in Jamaica (JCDT 2006). Since 2006, regular patrols by Park Rangers have averaged 11 per month, resulting in interdiction of illegal activities including hunting, logging, and dumping (JCDT and Green Jamaica 2007b). Moreover, since December 2006, the Park has instituted ''Kite butterfly patrols'' to locate the Jamaican kite swallowtail, which resulted in the most recent observation of 4 individuals in mid-2007 (JCDT and Green Jamaica 2007a). However, deforestation is currently a threat to the species' habitat in the Blue Mountains (Tole 2006), and enforcement within the Park is hampered by lack of vehicles, limited computer access, and a lack of clearly defined Park boundaries.

The Jamaican kite swallowtail has been collected for commercial trade (Collins and Morris 1985; Melisch 2000; Schütz 2000) and has been protected under the Jamaican Wildlife Protection Act since 1998. This Act carries a maximum penalty of 1,439 USD (100,000 Jamaican dollars (J$)) or 12 months imprisonment and appears to be effectively protecting this species from illegal trade (NEPA 2005). This species is not listed under CITES, nor is it listed on the European Commission's Annex B (Eur-Lex 2008), both of which regulate international trade in animals and plants of conservation concern. However, we are not aware of any recent seizures or smuggling of this species into or out of the United States (Office of Law Enforcement, U.S. Fish and Wildlife Service, Arlington, Virginia, in litt. 2008) and we are unaware of any ongoing trade in this species. Therefore, we believe that overutilization is not currently a contributory risk factor to the Jamaican kite swallowtail.

The Jamaican kite swallowtail does not represent a monotypic genus. Habitat modification is the primary threat to this species and we have determined that overutilization is not currently a contributory risk factor. The current threat from habitat modification includes: (1) Historical habitat modification at the species' only known breeding site, which has lasting impacts on this species given that the species does not thrive in disturbed habitats; (2) ongoing habitat alteration throughout its adult range (including the felling of this species' larval plant food); and (3) the potential for stochastic events, such as hurricanes, to contribute to habitat loss. However, this threat is moderate in magnitude because Jamaica has taken regulatory steps to preserve the species and its habitat, and adults are being regularly observed within at least one protected area, indicating that the species continues to be viable. The threat from habitat modification is imminent because habitat destruction is ongoing. Therefore, it receives a priority rank of 8.

Fluminense Swallowtail (*Parides ascanius*)

The fluminense swallowtail is endemic to Brazil's ''restinga'' habitat within the Atlantic Forest region (Thomas 2003). Restingas form on sandy, acidic, and nutrient-poor soils in the tropical and subtropical moist broadleaf forests of coastal Brazil. Restinga habitat, also referred to as ''fluminense vegetation,'' is characterized by medium-sized trees and shrubs that are adapted to coastal conditions (Kelecom 2002). The species is monophagous (Otero and Brown 1984), meaning that its larvae feed only on a single plant species (Kotiaho et al. 2005); information on larval hostplant preferences is provided in the 2007 Notice of Review (72 FR 20184).

The species was historically reported in Rio de Janeiro, Espirito Santo, and Sao Paulo. However, there are no recent confirmations in Espirito Santo or Sao Paulo. In Rio de Janeiro, the species is reported in five localities, including: Barra de São João and Macaé (in the Restinga de Jurubatiba National Park), along the coast; and, Poço das Antas Biological Reserve, further inland (Keith S. Brown, Jr., Livre-Docent, Universidade Estadual de Campinas, Brazil, in litt. 2004; Soler 2005). Uehara-Prado and Fonseca (2007) recently reported a verified occurrence within Área de Tombamento do Mangue do rio Paraíba do Sul. Fluminense swallowtail has also been reported in Parque Natural Municipal do Bosque da Barra (Instituto Iguacu 2008).

The fluminense swallowtail is sparsely distributed throughout its range, reflecting the patchy distribution of its preferred habitat (Otero and Brown 1984; Tyler et al. 1994; Uehara-Prado and Fonseca 2007). However, the species can be seasonally common, with sightings of up to 50 individuals in one morning in the Barra de São João location. The population estimate in Barra de São João ranges from 20 to 100 individuals (Otero and Brown 1984). The colony within Poço das Antas Biological Reserve (Reserve) was rediscovered in 1997, after a nearly 30-year absence from this locality (K. Brown, Jr., in litt. 2004). Researchers noted only that ''large numbers'' of swallowtails were observed (K. Brown, Jr., in litt. 2004; Dr. Robert Robbins, Research Entomologist, National Museum of Natural History, Department of Entomology, Smithsonian Institution,

Washington, D.C., in litt. 2004). There are no population estimates for the other colonies. However, individuals from the viable population in Barra de São João migrate widely in some years, which is likely to enhance inter-population gene flow among existing colonies (K. Brown, Jr., in litt. 2004).

Brazil considers the fluminense swallowtail to be ''Imperiled'' (MMA 2003; Portaria No. 1,522 1989). According to the 2007 IUCN Red List (Gimenez Dixon 1996), the fluminense swallowtail has been categorized as ''Vulnerable'' since 1983, based on its small distribution and a decline in the number of populations caused by habitat fragmentation and loss. However, this species has not been re-evaluated using the 1997 IUCN Red List categorization criteria.

Habitat destruction has been the main threat to this species (Brown 1996; Collins and Morris 1985; Gimenez Dixon 1996). Monophagous butterflies tend to be more threatened than polyphagous species (Kotiaho et al. 2005), and the restinga habitat preferred by fluminense swallowtails is a highly specialized environment that is restricted in distribution (K. Brown, Jr., in litt. 2004; Otero and Brown 1986; Uehara-Prado and Fonseca). Moreover, fluminense swallowtails require large areas to maintain viable populations (K. Brown, Jr., in litt. 2004; Otero and Brown 1986; Uehara-Prado and Fonseca). The Atlantic Forest habitat, which once covered 540,543 $mi^2$(1.4 million $km^2$), has been reduced to 5 to 10 percent of its original cover and harbors more than 70 percent of the Brazilian population (Butler 2007; Conservation International 2007; Critical Ecosystem Partnership Fund (CEPF) 2007a; Hfling 2007; The Nature Conservancy 2007; World Wildlife Fund (WWF) 2007). The restinga habitat upon which this species depends, has been reduced by 6.56 $mi^2$ (17 $km^2$2) each year between 1984 and 2001, equivalent to a loss of 40 percent of restinga vegetation over the 17-year period (Temer 2006). The major ongoing human activities that have resulted in habitat loss, degradation, and fragmentation include conversion for agriculture, plantations, livestock pastures, human settlements, hydropower reservoirs, commercial logging, subsistence activities, and coastal development (Butler 2007; Hughes et al. 2006; Pivello 2007; The Nature Conservancy 2007; Peixoto and Silva 2007; World Food Prize 2007; WWF 2007).

Uehara-Prado and Fonseca (2007) estimated that Rio de Janeiro contains 4,140,127 ac (1,675,457 ha) of suitable habitat (Uehara-Prado and Fonseca 2007). While the presence of suitable habitat should not be used to infer the presence of a species, this research should facilitate more focused efforts to identify and confirm additional localities and conservation status of the fluminense swallowtail (Uehara-Prado and Fonseca 2007). Analyzing the correlation between the distribution of fluminense swallowtail and the existing protected areas within Rio de Janeiro, Uehara-Prado and Fonseca (2007) found that only two known occurrences of the fluminense swallowtail correlated with protected areas, including the Poço das Antas Biological Reserve. The researchers concluded that the existing protected area system may be inadequate for the conservation of this species.

The Poço das Antas Biological Reserve and the Jurubatiba National Park are the only two protected areas considered large enough to support viable populations of the fluminense swallowtail (K. Brown, Jr., in litt. 2004; Otero and Brown 1984; R. Robbins, in litt. 2004). The Poço das Antas Biological Reserve (Reserve), established in 1974, encompasses 13,096 ac (5,300 ha) of inland Atlantic Forest habitat (CEPF 2007a; Decree No. 73,791 1974). According to the 2005 revised management plan (IBAMA 2005), the Reserve is used solely for protection, research, and environmental education. Public access is restricted, and there is an emphasis on habitat conservation, including protection of the Ro São João. This river runs through the Reserve and is integral to creating the restinga conditions preferred by the fluminense swallowtail. The Reserve was plagued by fires in the late 1980s through the early 2000s, but there have been no recent reports of fires. Between 2001 and 2006, there was an increase in the number of private protected areas near or adjacent to the Poço das Antas Biological Reserve and Barra de São João (Critical Ecosystem Partnership Fund (CEPF) 2007a). Corridors are being created between existing protected areas and 13 privately protected forests, by planting and restoring habitat previously cleared for agriculture or by fires (De Roy 2002).

The Jurubatiba National Park (14,860 ha; 36,720 mi), located in Macaé and established in 1998 (Decree of April 29 1998), is one of the largest contiguous restingas (specialized sandy, coastal habitats) under protection in Brazil (CEPF 2007b; Rocha et al. 2007). The Macaé River Basin forms the outer edge of the Jurubatiba National Park (Park) (International Finance Corporation (IFC) 2002) and creates the restinga habitat preferred by the fluminense swallowtail (Brown 1996; Otero and Brown 1984). Rocha et al. (2007) described the habitat as being in a very good state of conservation, but lacking a formal management plan (Rocha et al. 2007). Threats to the Macaé region include industrialization for oil reserve and power development (IFC 2002) and intense population pressures (including migration and infrastructural development) (Brown 1996; CEPF 2007b; IFC 2002; Khalip 2007; Otero and Brown 1984; Savarese 2008).

Commercial exploitation has been identified as a potential threat to the fluminense swallowtail (Collins and Morris 1985; Melisch 2000; Schütz 2000). The species is easy to capture, and species with restricted distributions or localized populations, such as the fluminense swallowtail, tend to be more vulnerable to over-collection than those with a wider distribution (K. Brown, Jr., in litt. 2004; R. Robbins, in litt. 2004). This species has not been formally considered for listing in the Appendices of CITES (*http://www.cites.org*). However, the European Commission listed fluminense swallowtail on Annex B of Regulation 338/97 in 1997. (Dr. Ute Grimm, German Scientific Authority to CITES (Fauna), Bonn, Germany, in litt. 2008), and the species continues to be listed on this Annex (Eur-Lex 2008). This listing requires that imports from a non-European Union country be accompanied by a permit that is only issued if the Scientific Authority has made a positive non-detriment finding, a determination that trade in the species will not be detrimental to the survival of the species in the wild (U. Grimm, in litt. 2008). There has been no legal trade in this species into the European Union since its listing on Annex B (U. Grimm, in litt. 2008), and we are not aware of any recent reports of seizures or smuggling in this species into or out of the United States (Office of Law Enforcement, U.S. Fish and Wildlife Service, Arlington, Virginia, in litt. 2008). The fluminense remains strictly protected from commerce in Brazil (K. Brown, Jr., in litt. 2004). For the reasons outlined above, we believe that overutilization is not currently a contributory threat factor for the fluminense swallowtail.

Parasitism could be a factor threatening the fluminense swallowtail. Recently, Tavares et al. (2006) discovered four species of parasitic chalcid wasps (*Brachymeria* and *Conura* species; Hymenoptera family) associated with fluminense swallowtails. Parasitoids are species whose immature stages develop on or within an insect host of another species, ultimately killing the host (Weeden et al. 1976).

This is the first report of parasitoid association with fluminense swallowtails (Tavares et al. 2006). To date, there is no information as to the extent and effect that these parasites are having on the fluminense swallowtail.

Although Harris' mimic swallowtail and the fluminense swallowtail face similar threats, there are several dissimilarities that influence the magnitude of these threats. Fluminense swallowtails are monophagous (Otero and Brown 1984), meaning that its larvae feed only on a single plant species (Kotiaho et al. 2005). In contrast, Harris' mimic swallowtail is polyphagous (Brown 1996; Collins and Morse 1985), such that its larvae feed on more than one species of plant (Kotiaho et al. 2005). In addition, although their ranges overlap, Harris' mimic swallowtails tolerate a wider range of habitat than the highly specialized restinga habitat preferred by fluminense swallowtail. Also unlike the Harris' mimic swallowtail, fluminense swallowtails require a large area to maintain a viable population (K. Brown, Jr., in litt. 2004; Monteiro et al. 2004).

The fluminense swallowtail does not represent a monotypic genus. The species is currently at risk from habitat destruction and potentially from parasitism; however, we have determined that overutilization is not currently a contributory threat factor for the fluminense swallowtail. The current threat of habitat destruction is of high magnitude because the species: (1) Occupies highly specialized habitat; (2) requires large areas to maintain a viable colony; and (3) is only found within two protected areas considered to be large enough to support viable colonies. However additional populations have been reported, increasing previously known population numbers and distribution. The threat of habitat destruction is non-imminent because most habitat modification is the result of historical destruction that has resulted in fragmentation of the current landscape; however, the potential for continued habitat modification exists, and we will continue to monitor the situation. On the basis of this information, the fluminense swallowtail receives a priority rank of 5.

Hahnel's Amazonian Swallowtail (*Parides hahneli*)

Hahnel's Amazonian swallowtail is endemic to Brazil, found only on ancient sandy beaches, where the habitat is overgrown with dense scrub vegetation (Collins and Morris 1985; New and Collins 1991; Tyler et al. 1994). The species is likely to be monophagous; information on larval and adult hostplant preferences was provided in the 12-month finding (69 FR 70580) and in the 2007 Notice of Review (72 FR 20184).

Hahnel's Amazonian swallowtail is known in three localities along the tributaries of the middle and lower Amazon River basin in the states of Amazonas and Pará (Brown 1996; Collins and Morris 1985; New and Collins 1991; Tyler et al. 1994). Two of these colonies were rediscovered in the 1970s (Brown 1996; Collins and Morris 1985). The species is highly localized, reflecting the localized distribution of its highly specialized preferred habitat (K. Brown, Jr., in litt. 2004). We are unaware of any population estimates for this species, other than the fact that ''the area of its range is very lightly populated'' (K. Brown, Jr., in litt. 2004). This species is not nationally protected (MMA 2003; Portaria No. 1,522 1989), although Pará has included this species as ''Endangered'' on its newly created list of threatened species (Decreto No. 802 2008; Resolução 054 2007; Secco and Santos 2008). This listing requires the Pará government to monitor, protect, conserve, and restore the species and its habitat within the state, which will add to our understanding of the species' ecology (Resolução 054 2007). This species continues to be listed as ''Data Deficient'' by the IUCN Red List (Gimenez Dixon 1996).

Habitat alteration (e.g., for dam construction and waterway crop transport) and destruction (e.g., clearing for agriculture and cattle grazing) are ongoing in the states of Pará and Amazonas, where this species is found (Fearnside 2006; Hurwitz 2007). Because of this species' dependence on highly localized and extremely limited habitat, habitat alteration could be deleterious to the species (New and Collins 1991; Wells et al. 1983). However, because this species' ecological requirements continue to be poorly understood, we are unable to determine whether this species is currently being threatened by habitat alteration.

Hahnel's Amazonian swallowtail is collected for commercial trade (Collins and Morris 1985; Melisch 2000; Schütz 2000), as described in the 2007 Notice of Review (72 FR 20184). In the United States, there continues to be limited trade in the species over the internet, although it is unclear whether the specimens were recently collected. It is not illegal to trade this species in the United States, but possession of wildlife must be declared upon crossing U.S. borders. We are not aware of any recent seizures or smuggling of this species into or out of the United States (Office of Law Enforcement, U.S. Fish and Wildlife Service, Arlington, Virginia, in litt. 2008). This species has not been formally considered for listing in the Appendices of CITES (www.cites.org), but has been listed on Annex B of the European Union's (EU) Regulation 338/97 since 1997 (Eur-Lex 2008); Annex B listings are described under the fluminense swallowtail, above. According to Dr. Ute Grimm (German Scientific Authority to CITES (Fauna), Bonn, Germany, in litt. 2008), there has been no legal trade in this species in the EU since its listing. However, a French importer of exotic specimens is selling Amazonian swallowtail on the internet; multiple specimens of males, females and pairs are available for 18 Euros (28 USD); 20 Euros (32 USD); and 35 Euros (55 USD), respectively. This species is not nationally protected in Brazil (MMA 2003; Portaria No. 1,522 1989). Although the state of Pará recently prohibited capture of this species for purposes other than research (Decreto No. 802 2008), insufficient time has elapsed to determine how effectively this will prevent any wild collection of the species. There have been no recent discoveries of additional populations of Hahnel's Amazonian swallowtail (K.S. Brown, Jr., in litt. 2004) and, of the three known localities, two populations are in the State of Amazonas (Brown 1996; Collins and Morris 1985). Thus, of the populations, two-thirds are not protected from collection. According to experts, species with restricted distributions or localized populations, such as the Hahnel's Amazonian swallowtail, are more vulnerable to over-collection than those with a wider distribution (K. Brown, Jr., in litt. 2004; R. Robbins, in litt. 2004). Therefore, we believe that overutilization for commercial purposes, combined with insufficient regulatory mechanisms, constitute a threat to the Hahnel's Amazonian swallowtail.

Competition has been identified as a potential threat to this species. Researchers have posited that the Hahnel's Amazonian swallowtail might suffer from host-plant competition with any of three other butterfly species that occupy a similar range (Brown 1996; Collins and Morris 1985; Wells 1983) (See 2007 Notice of Review (72 FR 20184)). Therefore, competition may be a contributory threat factor for the Hahnel's Amazonian swallowtail.

Hahnel's Amazonian swallowtail does not represent a monotypic genus. The main threat to this species is overcollection combined with inadequate regulatory mechanisms to mitigate this threat. Habitat destruction and host-plant competition may be

contributory threats. We are currently aware of only a small amount of trade in this species, so we rank the threat of overutilization as low to moderate and non-imminent. Thus, this species receives a priority rank of 11.

Kaiser-I-Hind Swallowtail (*Teinopalpus imperialis*)

The Kaiser-I-Hind swallowtail is native to the Himalayan regions of Bhutan, China, India, Laos, Myanmar, Nepal, Thailand, and Vietnam (Baral et al. 2005; Food and Agriculture Organization (FAO) 2001; FRAP 1999; Igarashi 2001; Masui and Uehara 2000; Osada et al. 1999; Shrestha 1997; TRAFFIC 2007; Tordoff et al. 1999; Trai and Richardson 1999). This species prefers undisturbed (primary), heterogeneous broad-leaved evergreen forests or montane deciduous forests, and flies at altitudes of 4,921 to 10,000 ft (1,500 to 3,050 m) (Collins and Morris 1985; Igarashi 2001; Tordoff et al. 1999). Information on this polyphagous species' biology and food plant preferences is provided in the 2007 Notice of Review (72 FR 20184). It should be noted that Collins and Morris (1985) reported that the adult Kaiser-I-Hind swallowtails do not feed. This is a correction to the 2007 Notice of Review (72 FR 20184), which stated that the adult food plant preferences were unknown. Since 1996, the Kaiser-I-Hind swallowtail has been categorized on the IUCN Red List as a species of ''Least Concern''; it has not been re-evaluated using the 1997 criteria (Gimenez Dixon 1996). The species is considered ''Rare'' by Collins and Morris (1985). Despite its widespread distribution, local populations are not abundant (Collins and Morris 1985). The known localities and conservation status of the species within each range country follows:

*Bhutan:* The species was reported to be extant in Bhutan (Gimenez Dixon 1996; FRAP 1999), although details on localities or status information were not provided.

*China:* The species has been reported in Fuji, Guangxi, Hubei, Jiangsu, Sichuan, and Yunnan Provinces (Collins and Morris 1985; Gimenez Dixon 1996; Igarashi and Fukuda 2000; Sung and Yan 2005; United Nations Environment Programme-World Conservation Monitoring Center (UNEP–WCMC) 1999). The species is classified by the 2005 China Species Red List as ''Vulnerable'' (China Red List 2006).

*India:* Assam, Manipur, Meghalaya, Sikkim, and West Bengal (Bahuguna 1998; Collins and Morris 1985; Gimenez Dixon 1996; Ministry of Environment and Forests 2005). There is no recent status information on this species (N. Chaturvedi, Curator, Bombay Natural History Society, Mumbai, India, in litt. 2007).

*Laos:* The species has been reported (Osada et al. 1999), but no further information is available (Southiphong Vonxaiya, CITES Coordinator, Vientiane, Lao, in litt. 2007).

*Myanmar:* The species has been reported in Shan, Kayah (Karen) and Thaninanthayi (Tenasserim) states (Collins and Morris 1985; Gimenez Dixon 1996). There is no status information.

*Nepal:* The species has been reported in Nepal (Collins and Morris 1985; Gimenez Dixon 1996), in the Central Administrative Region at two localities: Phulchoki Mountain Forest (Baral et al. 2005; Collins and Morris 1985) and Shivapuri National Park (Nepali Times 2002; Shrestha 1997). There is no status information.

*Thailand:* The species has been reported in the northern province of Chang Mai (Pornpitagpan 1999). The Scientific Authority of Thailand recently confirmed that the species has limited distribution in the high mountains (>1,500 m (4,921 ft)) of northern Thailand and is found within three national parks. However, no biological or status information was available (S. Choldumrongkul, Forest Entomology and Microbiology Group, Department of National Parks, Bangkok, Thailand, in litt. 2007).

*Vietnam:* The species has been confirmed in three Nature Reserves (Tordoff et al. 1999; Trai and Richardson 1999), and the species is listed as ''Vulnerable'' in the 2007 Vietnam Red Data Book, due to declining population sizes and area of occupancy (Dr. Le Xuan Canh, Director of the Institute of Ecology and Biological Resources, CITES Scientific Authority, Hanoi, Vietnam, in litt. 2007).

Habitat destruction is the greatest threat to this species, which prefers undisturbed high altitude habitat (Collins and Morris 1985; Igarashi 2001; Tordoff et al. 1999). In China and India, the Kaiser-I-Hind swallowtail populations are at risk from habitat modification and destruction due to commercial and illegal logging (Yen and Yang 2001; Maheshwari 2003). In Nepal, the species is at risk from habitat disturbance and destruction resulting from mining, fuel wood collection, agriculture, and grazing animals (Baral et al. 2005; Collins and Morris 1985; Shrestha 1997). Nepal's Forest Ministry considered habitat destruction to be a critical threat to all biodiversity, including the Kaiser-I-Hind swallowtail, in the development of their biodiversity strategy (HMGN 2002). Habitat degradation and loss caused by deforestation and land conversion for agricultural purposes is a primary threat to the species in Thailand (Hongthong 1998; FAO 2001). The species is afforded some protection from habitat destruction in Vietnam, where it has been confirmed in three Nature Reserves that have low levels of disturbance (Tordoff et al. 1999; Trai and Richardson 1999).

The Kaiser-I-Hind swallowtail is highly valued and has been collected for commercial trade, despite range country regulations prohibiting or restricting such activities (Collins and Morris 1985; Schutz 2000). In China, where the species is protected by the Animals and Plants (Protection of Endangered Species) Ordinance (1989), which restricts import, export and possession of the species, species purportedly derived from Sichuan were being advertised for sale on the internet for 60 USD. In India, the Kaiser-I-Hind swallowtail is listed on Schedule II of the Indian Wildlife Protection Act of 1972, which prohibits hunting without a license (Collins and Morris 1985; Indian Wildlife Protection Act 2006). However, between 1990 and 1997, illegally collected specimens were selling for 500 Rupees (12 USD) per female and 30 Rupees (0.73 USD) per male (Bahuguna 1998). In Nepal, the Kaiser-I-Hind swallowtail is protected by the National Parks and Wildlife Conservation Act of 1973 (His Majesty's Government of Nepal (HMGN) 2002). However, the Nepal Forestry Ministry determined in 2002 that the high commercial value of its ''Endangered'' species on the local and international market may result in local extinctions of species such as the Kaiser-I-Hind (HMGN 2002). In Thailand, the Kaiser-I-Hind swallowtail and 13 other invertebrates are listed under Thailand's Wildlife Reservation and Protection Act (WARPA) of 1992 (B.E. 2535 1992), which makes it illegal to collect wildlife (whether alive or dead) or to have the species in one's possession (S. Choldumrongkul, in litt. 2007; FAO 2001; Hongthong 1998; Pornpitagpan 1999). In addition to prohibiting possession, WARPA prohibits hunting, breeding, and trading; import and export are only allowed for conservation purposes (Jeerawat Jaisielthum, CITES Management Authority, Bangkok, Thailand, in litt. 2007). According to the Thai Scientific Authority, there are no captive breeding programs for this species; however, the species is offered for sale by the Lepidoptera Breeders Association (2008), being marketed as derived from a captive breeding

program in Thailand. In Vietnam, Kaiser-I-Hind swallowtails are reported to be among the most valuable of all butterflies (World Bank 2005). The species was recently listed on Schedule IIB of Decree No. 32 (2006) on ''Management of endangered, precious and rare forest plants and animals.'' A Schedule IIB-listing restricts the exploitation or commercial use of species with small populations or considered by the country to be in danger of extinction (L.X. Canh, in litt. 2007). In a recent survey conducted by TRAFFIC Southeast Asia (2007), of 2000 residents in Hanoi, Vietnam, the Kaiser-I-Hind swallowtail was among 37 Schedule IIB-species that were actively being collected, and the majority of the survey respondents were unaware of legislation prohibiting collection of Schedule IIB-species. Thus, overutilization for illegal domestic and possibly international trade via the internet is a threat to this species, and within-country protections are inadequate to protect the species from illegal collection throughout its range.

The Kaiser-I-Hind swallowtail has been listed in CITES Appendix II since 1987 (UNEP–WCMC 2008a). Between 1991 and 2005, 160 Kaiser-I-Hind swallowtail specimens were traded internationally under CITES permits (UNEP WCMC 2006). The most recent CITES trade data are available for the year 2006. The only recorded international trade in this year was one shipment of two specimens, imported as personal effects into the United States from Vietnam (UNEP WCMC 2008b). Reports that the Kaiser-I-Hind swallowtail is being captive-bred in Taiwan (Yen and Yang 2001) remain unconfirmed. Since 1993, there have been no reported seizures or smuggling of this species into or out of the United States (Office of Law Enforcement, U.S. Fish and Wildlife Service, Arlington, Virginia, in litt. 2008). Therefore, on the basis of global trade data, we do not consider legal international trade to be a contributory threat factor to this species.

The Kaiser-I-Hind swallowtail does not represent a monotypic genus. The current threats of habitat destruction and collection are moderate to low in magnitude due to the species' wide distribution, but imminent due to ongoing habitat destruction, high market value for specimens, and inadequate domestic protections for the species or its habitat. Therefore, it receives a priority rank of 8.

**Preclusion and Expeditious Progress**

Below we describe the actions that continue to preclude the immediate proposal of listing rules for the 20 species described above. In addition, we summarize the expeditious progress we are making, as required by section 4(b)(3)(B)(iii)(II) of the Act, to add qualified species to the lists of endangered or threatened species and to remove from these lists species for which protections of the Act are no longer necessary.

Section 4(b) of the Act states that the Service may make warranted-but-precluded findings only if it can demonstrate that (1) An immediate proposed rule is precluded by other pending proposals and that (2) expeditious progress is being made on other listing actions. Preclusion is a function of the listing priority of a species in relation to the resources that are available and competing demands for those resources. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a proposed listing regulation or whether promulgation of such a proposal is warranted but precluded by higher priority listing actions.

The listing of foreign species under the Act is carried out by a different Service program than the domestic Endangered Species Program. The Division of Scientific Authority (DSA), within the Service's International Affairs program, is solely responsible for the development of all listing proposals for foreign species and promulgation of final rules, whether internally driven or as the result of a petition.

In the upcoming year, publication of proposed rules for the 20 species described above is precluded by the need to complete pending listing actions as described below. Of the actions listed below, preparation of a final listing rule for the six species of Procellariids is DSA's highest priority.

DSA will be working on a final listing determination for six species of foreign Procellariids that we proposed for listing on December 17, 2007 (72 FR 71298). Reaching a final decision on this proposed rule is consistent with the statutory deadlines under sections 4(b)(5) and 4(b)(6) of the Act and takes precedence over proposed listings that are warranted but precluded by higher priorities.

On January 23, 2008, the United States District Court ordered the Service to propose listing rules for five foreign bird species, actions which we previously considered to be warranted but precluded. These species are: the Chilean woodstar (*Eulidia yarrellii*), Andean flamingo (*Phoenicoparrus andinus*), medium tree-finch (*Camarhynchus pauper*), black-breasted puffleg (*Eriocnemis nigrivestis*), and the St. Lucia forest thrush (*Cichlherminia herminieri sanctaeluciae*). We, therefore, have a court-ordered responsibility to publish proposed listing rules for these five species by December 31, 2008.

The government of Mexico, through the National Commission for the Understanding and Use of Biodiversity (CONABIO), has petitioned us to delist the Morelet's crocodile (*Crocodylus moreletii*), a species that is under its jurisdiction and is listed under the Act. The petition was received by the Service on May 26, 2005. A 90-day finding was published on June 28, 2006 (71 FR 36743), indicating that the petitioned action may be warranted. The status review is currently in progress, and we must complete work on the 12-month finding on this petition, consistent with our responsibilities under section 4(b)(3) of the Act.

The government of Argentina has petitioned us to reclassify the broad-snouted caiman (*Caiman latirostris*) in Argentina from endangered to threatened under the Act. The petition was dated November 5, 2007. A 90-day finding was published on June 16, 2008 (73 FR 33968), indicating that the petitioned action may be warranted. The status review is currently in progress, and we must complete work on the 12-month finding on this petition, consistent with our responsibilities under section 4(b)(3) of the Act.

We are also in the process of making a final determination on whether to delist the Mexican bobcat (*Lynx rufus escuinapae*). The United States, with support from Mexico and other countries, proposed to transfer the Mexican bobcat from CITES Appendix I to Appendix II, based on the Mexican bobcat's widespread and stable status in Mexico and the questionable taxonomy of the subspecies. The U.S. proposal was accepted and the change went into effect on November 6, 1992. On July 8, 1996, we received a petition from the National Trappers Association, Inc. to delist the Mexican bobcat. Our 12-month finding and proposed rule were published on May 19, 2005 (70 FR 28895). Under section 4(b)(6) of the Act, we have a statutory responsibility to make a final determination.

We are also making a final determination on whether to delist the scarlet-chested parakeet (*Neophema splendida*) and the turquoise parakeet (*Neophema pulchella*). On September 22, 2000, we announced a review of all endangered and threatened foreign species in the Order Psittaciformes as part of a 5-year review under section 4(c)(2) of the Act (65 FR 57363). One commenter suggested we consider these

two species for delisting. The individual provided substantial scientific information, including information and correspondence with the government of Australia (the range country of these species) regarding the status of both species. Under section 4(b)(6) of the Act, we have a statutory responsibility to complete this rulemaking process.

On January 4, 2005, we received a petition from 14 county officials representing 13 western States to list the Northern snakehead fish (*Channa argus*) as threatened or endangered under the Act, and further, to designate the Chesapeake Bay region as critical habitat. On March 5, 2005, we received a petition from a private individual to delist the tiger (*Panthera tigris*). On December 3, 2007, we received a petition from Canada's wood bison recovery team to reclassify the wood bison (*Bison bison athabascae*) under the Act. On January 31, 2008, we received a petition from the Environmental Law Clinic at the University of Denver on behalf of Friends of Animals to list 14 species of foreign parrots as endangered or threatened under the Act. The petitioned species include: Blue-throated macaw (*Ara glaucogularis*), blue-headed macaw (*Propyrrhura couloni*), crimson shining parrot (*Prosopeia splendens*), great green macaw (*Ara ambiguous*), grey-cheecked parakeet (*Brotogeris pyrrhoptera*), hyacinth macaw (*Anodorhynchus hyacinthinus*), military macaw (*Ara militaris*), Philippine cockatoo (*Cacatua haematuropygia*), red-crowned parrot (*Amazona viridigenalis*), scarlet macaw (*Ara macao*), thick-billed parrot (*Rhynchopsitta pachyrhyncha*), white cockatoo (*Cacatua alba*), yellow-billed parrot (*Amazona collaria*), and yellow-crested cockatoo (*Cacatua sulphurea*). We have a statutory responsibility under section 4(b)(3) of the Act to process these petitions.

At the current time, we are also preparing proposed listing rules for 25 additional species, petitioned actions that have been determined to be warranted in this Notice of Review. Finally, during the upcoming year, we will be preparing the 2009 Notice of Review, which will set priorities for the next set of listing actions. Using our best efforts to meet our statutory responsibilities under the Act is a high priority.

Despite the priorities which preclude publishing proposed listing rules, we are making expeditious progress in adding to and removing species from the Federal lists of threatened and endangered species. Our expeditious progress since publication of the 2007 Notice of Review, April 23, 2007, to the current date includes preparing and publishing the following: (1) Final rule listing the black stilt (*Himantopus novaezelandiae*), caerulean paradise-flycatcher (*Eutrichomyias rowleyi*), giant ibis (*Pseudibis gigantea*), Gurney's pitta (*Pitta gurneyi*), long-legged thicketbird (*Trichocichla rufa*), and Socorro mockingbird (*Mimus graysoni*) as endangered under the Act, published January 16, 2008 (73 FR 3146); (2) Proposed rule to list the Chatham petrel (*Pterodroma axillaris*), Fiji petrel (*Pterodroma macgillivrayi*), and the magenta petrel (*Pterodroma magentae*) as endangered, and the Cook's petrel (*Pterodroma cookii*), Galapagos petrel (*Pterodroma phaeopygia*), and the Heinroth's shearwater (*Puffinus heinrothi*) as threatened under the Act, published December 17, 2007 (72 FR 71298); (3) Notice of 90-day petition finding and initiation of status review of the broad-snouted caiman to determine if reclassification of the population in Argentina, as petitioned, is warranted under the Act, published June 16, 2008 (73 FR 33968); and (4) Notice of 90-day finding on a petition submitted by the Center for Biological Diversity (CBD) to list 12 species of penguin as threatened or endangered under the Act, published July 11, 2007 (72 FR 37695). The 12 penguin species in the CBD petition include: Emperor penguin (*Aptenodytes forsteri*), southern rockhopper penguin (*Eudyptes chrysocome*), northern rockhopper penguin (*Eudyptes moseleyi*), fiordland crested penguin (*Eudyptes pachyrhynchus*), snares crested penguin (*Eudyptes robustus*), erect-crested penguin (*Eudyptes sclateri*), macaroni penguin (*Eudyptes chrysolophus*), royal penguin (*Eudyptes schlegeli*), white-flippered penguin (*Eudyptula albosignata*), yellow-eyed penguin (*Megadyptes antipodes*), African penguin (*Spheniscus demersus*), and Humboldt penguin (*Spheniscus humboldti*). In our 90-day finding on this petition, we found that listing 10 of the 12 penguin species may be warranted, and we initiated a status review of these 10 species. We found that the petition did not provide substantial scientific or commercial information indicating that listing of either the snares crested penguin or royal penguin may be warranted. The 12-month petition finding addressing the other 10 species listed above is pending Departmental review.

Our expeditious progress also includes work on pending listing actions described above in our ''precluded finding,'' but for which decisions had not been completed at the time of this publication, including: (1) Final listing determination for six species of foreign Procellariids; (2) proposed listing rules for five foreign bird species that were court-ordered for publication; (3) proposed listing rules for 25 additional foreign bird species that were the subjects of listing petitions determined to be warranted in this Notice of Review; (4) 90-day finding on a petition to list the Northern snakehead fish as threatened or endangered under the Act; and (5) 90-day finding on a petition to list 14 species of foreign parrots as endangered or threatened under the Act.

We have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations and the constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, such as by batching related actions together. Despite higher listing priorities that preclude us from issuing listing proposals for the 20 species mentioned in this Notice of Review, the actions described above collectively constitute expeditious progress.

**Monitoring**

Section 4(b)(3)(C)(iii) of the Act requires us to ''implement a system to monitor effectively the status of all species'' for which we have made a warranted-but-precluded 12-month finding, and to ''make prompt use of the [emergency listing] authority [under section 4(b)(7)] to prevent a significant risk to the well being of any such species.'' For foreign species, the Service's ability to gather information to monitor species is limited. The Service welcomes all information relevant to the status of these species, because we have no ability to gather data in foreign countries directly and cannot compel another country to provide information. Thus, this ANOR plays a critical role in our monitoring efforts for foreign species. With each ANOR, we request information on the status of the species included in the notice. Information and comments on the annual findings can be submitted at any time. We review all new information received through this process as well as any other new information we obtain using a variety of methods. We collect information directly from range countries by correspondence, from the peer-reviewed scientific literature, unpublished literature, scientific meeting proceedings, and CITES documents (including species proposals and reports from scientific committees). We also obtain information through the permit

application processes under CITES, the Act, and the Wild Bird Conservation Act. We also consult with staff members of the Service's Division of International Conservation and the IUCN species specialist groups, and we attend scientific meetings to obtain current status information for relevant species. As previously stated, if we identify any species for which emergency listing is appropriate, we will make prompt use of the emergency listing authority under section 4(b)(7) of the Act.

**Request for Information**

We request the submission of any further information on the species in this notice as soon as possible, or whenever it becomes available. We especially seek information: (1) Indicating that we should remove a taxon from warranted status; (2) documenting threats to any of the included taxa; (3) describing the immediacy or magnitude of threats facing these taxa; (4) pointing out taxonomic or nomenclatural changes for any of the taxa; (5) suggesting appropriate common names; or (6) noting any mistakes, such as errors in the indicated historic ranges.

**References Cited**

A list of the references used to develop this notice is available upon request (see **ADDRESSES** section).

**Authors**

This Notice of Review was authored by the staff of the Division of Scientific Authority, U.S. Fish and Wildlife Service (see **ADDRESSES** section).

**Authority**

This Notice of Review is published under the authority of the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

TABLE 1.—CANDIDATE REVIEW

[C = listing warranted by precluded; P = to be proposed to be listed]

| Status | | Scientific name | Family | Common name | Historic range |
|---|---|---|---|---|---|
| *Birds* Category | Priority | | | | |
| P | N/A | *Podiceps taczanowskii* | Podicipedidae | Junin flightless grebe | Peru. |
| P | N/A | *Leptoptilos dubius* | Ciconiidae | greater adjutant stork | South Asia. |
| P | N/A | *Phoenicopterus andinus* | Phoenicopteridae | Andean flamingo | Argentina, Bolivia, Chile, Peru. |
| P | N/A | *Mergus octosetaceus* | Anatidae | Brazilian merganser | Brazil. |
| P | N/A | *Penelope perspicax* | Craciidae | Cauca guan | Colombia. |
| C | 8 | *Pauxi unicornis* | Craciidae | southern helmeted curassow. | Bolivia, Peru. |
| P | N/A | *Crax alberti* | Craciidae | blue-billed curassow | Colombia. |
| P | N/A | *Tetrao urogallus cantabricus* | Tetraonidae | Cantabrian capercaillie | Spain. |
| P | N/A | *Odontophorus strophium* | Odontophoridae | gorgeted wood-quail | Colombia. |
| P | N/A | *Laterallus tuerosi* | Rallidae | Junin rail | Peru. |
| C | 8 | *Rallus semiplumbeus* | Rallidae | Bogota rail | Colombia. |
| C | 8 | *Porphyrio hochstetteri* | Rallidae | Takahe | New Zealand. |
| C | 8 | *Haematopus chathamensis* | Haematopodidae | Chatham oystercatcher | Chatham Islands, New Zealand. |
| P | N/A | *Rhinoptilus bitorquatus* | Glareolidae | Jerdon's courser | India. |
| P | N/A | *Numenius tenuirostris* | Scolopacidae | slender-billed curlew | Africa, Algeria, Bulgaria, southern Europe, Greece, Hungary, Italy, Kazakhstan, Morocco, Romania, Russia, Tunisia, Turkey, Ukraine, and Yugoslavia. |
| P | N/A | *Ducula galeata* | Columbidae | Marquesan imperial-pigeon. | Marquesas Islands, French Polynesia. |
| P | N/A | *Cacatua moluccensis* | Cacatuidae | salmon-crested cockatoo | South Moluccas, Indonesia. |
| C | 8 | *Cyanoramphus malherbi* | Psittacidae | orange-fronted parakeet | New Zealand. |
| C | 8 | *Eunymphicus uvaeensis* | Psittacidae | Uvea parakeet | Uvea, New Caledonia. |
| C | 8 | *Ara glaucogularis* | Psittacidae | blue-throated macaw | Bolivia. |
| P | N/A | *Neomorphus geoffroyi dulcis* | Cuculidae | southeastern rufous-vented ground cuckoo. | Brazil. |
| P | N/A | *Phaethornis malaris margarettae.* | Trochilidae | Margaretta's hermit | Brazil. |
| P | N/A | *Eriocnemis nigrivestis* | Trochilidae | black-breasted puffleg | Ecuador. |
| P | N/A | *Eulidia yarrellii* | Trochilidae | Chilean woodstar | Chile, Peru. |
| P | N/A | *Acestrura berlepschi* | Trochilidae | Esmeraldas woodstar | Equador. |
| C | 8 | *Dryocopus galeatus* | Picidae | helmeted woodpecker | Argentina, Brazil, Paraguay. |
| C | 8 | *Dendrocopus noguchii* | Picidae | Okinawa woodpecker | Okinawa Island, Japan. |
| C | 11 | *Aulacorhynchus huallagae* | Ramphastidae | yellow-browed toucanet | Peru. |
| P | N/A | *Cinclodes aricomae* | Furnariidae | royal cinclodes | Bolivia, Peru. |
| P | N/A | *Leptasthenura xenothorax* | Furnariidae | white-browed tit-spinetail | Peru. |
| P | N/A | *Formicivora erythronotos* | Thamnophilidae | black-hooded antwren | Brazil. |
| P | N/A | *Pyriglena atra* | Thamnophilidae | fringe-backed fire-eye | Brazil. |
| P | N/A | *Grallaria milleri* | Formicariidae | brown-banded antpitta | Colombia. |

TABLE 1.—CANDIDATE REVIEW—Continued

[C = listing warranted by precluded; P = to be proposed to be listed]

| Status | | Scientific name | Family | Common name | Historic range |
|---|---|---|---|---|---|
| *Birds* Category | Priority | | | | |
| C | 8 | *Scytalopus novacapitalis* | Conopophagidae | Brasilia tapaculo | Brazil. |
| P | N/A | *Hemitriccus kaempferi* | Tyrannidae | Kaempfer's tody-tyrant | Brazil. |
| P | N/A | *Anairetes alpinus* | Tyrannidae | ash-breasted tit-tyrant | Bolivia, Peru. |
| P | N/A | *Phytotoma raimondii* | Phytotomidae | Peruvian plantcutter | Peru. |
| P | N/A | *Cichlherminia iherminieri sanctaeluciae.* | Turdidae | St. Lucia forest thrush | St. Lucia Island, West Indies. |
| P | N/A | *Acrocephalus caffer aquilonis* | Sylviidae | Eiao Polynesian warbler | Marquesas Islands, French Polynesia. |
| C | 12 | *Bowdleria punctata wilsoni* | Sylviidae | Codfish Island fernbird | Codfish Island, New Zealand. |
| C | 8 | *Zosterops luteirostris* | Zosteropidae | Ghizo white-eye | Solomon Islands. |
| P | N/A | *Camarhynchus pauper* | Thraupidae | medium tree-finch | Floreana Island, Galapagos Islands, Ecuador. |
| P | N/A | *Nemosia rourei* | Thraupidae | cherry-throated tanager | Brazil. |
| C | 8 | *Tangara peruviana* | Thraupidae | black-backed tanager | Brazil. |
| C | 12 | *Strepera graculina crissalis* | Cracticidae | Lord Howe pied currawong. | Lord Howe Islands, New South Wales. |
| Status | | Scientific name | Synonyms | Common name | Historic range |
| *Invertebrates* Category | Priority | | | | |
| C | 12 | *Eurytides lysithous harrisianus.* | *Graphium lysithous harrisianus; Mimoides lysithous harrisianus.* | Harris' mimic swallowtail | Brazil, Paraguay. |
| C | 8 | *Eurytides marcellinus* | *Graphium marcellinus; Neographium marcellinus; Protographium marcellinus* (*nom. inv.*)*; Protesilaus marcellinus.* | Jamaican kite swallowtail | Jamaica. |
| C | 5 | *Parides ascanius* | n/a | Fluminense swallowtail | Brazil. |
| C | 11 | *Parides hahneli* | n/a | Hahnel's Amazonian swallowtail. | Brazil. |
| C | 8 | *Teinopalpus imperialis* | n/a | Kaiser-I-Hind swallowtail | Bhutan, China, India, Laos, Myanmar, Nepal, Thailand, Vietnam. |

Dated: July 18, 2008.

**Kenneth Stansell,**

*Deputy Director, Fish and Wildlife Service.*

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# Part IV

# Department of Education

## 34 CFR Part 200

## Improving the Academic Achievement of the Disadvantaged; Migrant Education Program; Final Rule

**DEPARTMENT OF EDUCATION**

**34 CFR Part 200**

**RIN 1810–AA99**

**[Docket Id 2007–ED–OESE–130]**

## Improving the Academic Achievement of the Disadvantaged; Migrant Education Program

**AGENCY:** Office of Elementary and Secondary Education, Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends the regulations governing the Migrant Education Program (MEP) administered under Part C of Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA). These final regulations adjust the base amounts of the MEP Basic State Formula grant allocations for fiscal year (FY) 2006 and subsequent years (as well as for supplemental MEP allocations made for FY 2005); establish requirements to strengthen the processes used by State educational agencies (SEAs) to determine and document the eligibility of migratory children under the MEP; and clarify procedures SEAs use to develop a comprehensive statewide needs assessment and service delivery plan.

**DATES:** These regulations are effective August 28, 2008. However, affected parties do not have to comply with the new information collection requirements in §§ 200.83 and 200.89 until the Department of Education publishes in the **Federal Register** the control number assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control number notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

**FOR FURTHER INFORMATION CONTACT:** James J. English, U.S. Department of Education, 400 Maryland Avenue, SW., Room 3E315, 20202–6135. Telephone: (202) 260–1394 or via Internet: *james.english@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

**SUPPLEMENTARY INFORMATION:** These regulations implement requirements of the Migrant Education Program (MEP) as authorized under Part C of Title I of the ESEA, as amended. On May 4, 2007, the Secretary published a notice of proposed rulemaking (NPRM) for the MEP in the **Federal Register** (72 FR 25228). In the preamble to the NPRM, the Secretary discussed on pages 25230 through 25236 the major regulatory changes proposed in that document. These proposed changes consisted of the following:

- Amending § 200.81 to add to and improve program definitions governing who is considered an eligible migratory child.
- Amending § 200.83 to clarify that a State's comprehensive needs assessment and plan for service delivery must, as required by the ESEA, include measurable program outcomes for the MEP that relate to the performance targets the State has established for all children.
- Adding a new § 200.89(a) to establish a procedure for the Secretary to use State defect rates that the Secretary accepts as the basis for adjusting the 2000–2001 counts of eligible migrant children, and, thereby determine the base amount of a State's MEP award for FY 2006 and subsequent years. This proposed regulation also required, as a condition to an SEA's receipt of its final FY 2006 and subsequent-year MEP awards, that an SEA conduct a thorough re-documentation of the eligibility of all children (and the removal of all ineligible children) included in the SEA's 2006–2007 MEP child counts).
- Adding a new § 200.89(b) to establish the minimum requirements an SEA must meet in conducting—(a) retrospective re-interviewing, where needed, to examine and validate the accuracy of its statewide eligibility determinations under the MEP, and (b) annual prospective re-interviewing in order to ensure ongoing quality control in all future eligibility determinations.
- Adding a new § 200.89(c) to—(1) establish the minimum requirements an SEA must meet in documenting its eligibility determinations under the MEP (including the use of a standard Certificate of Eligibility (COE) form), and (2) clarify that the SEA is responsible for accurate determinations of program eligibility.
- Adding a new § 200.89(d) to establish minimum requirements for a system of quality controls that an SEA must implement in order to promote accurate migrant child eligibility determinations.

These final regulations contain the following changes from the NPRM:

- The definitions of *agricultural work* and *fishing work* in § 200.81(a) and (b), respectively, have been modified to remove the terms ''generally'' and ''in rare cases'' when referring to work done for wages or personal subsistence.
- The definitions of *in order to obtain* and *move or moved* in § 200.81(c) and (g), respectively, have been revised to—(1) remove contradictory language and clarify that a move, for purposes of determining MEP eligibility, must occur due to economic necessity, (2) clarify that individuals who state that a purpose of their move was to seek any type of employment, i.e., workers who moved with no specific intent to find employment in a particular job, are deemed to have moved with a purpose of obtaining qualifying work if the worker obtains such work soon after the move, and (3) clarify the information that an SEA must have to determine that a worker who did not obtain qualifying work soon after a move did move in order to obtain qualifying work.
- The definition of *migratory agricultural worker* in § 200.81(d) has been revised to clarify that agricultural work includes dairy work.
- The definition of principal means of livelihood in proposed § 200.81(i) has been removed.
- The definitions of *migratory agricultural worker* and *migratory fisher* in §§ 200.81(d) and (f), respectively, have been revised to remove the reference to ''principal means of livelihood'' and clarify that, in order to establish MEP eligibility, a move as defined in § 200.81(g) made by a migratory agricultural worker or migratory fisher must occur due ''to economic necessity.''
- Section 200.81(h) has been revised to clarify that the term *personal subsistence* means that the worker and his or her family, as a matter of the family's economic necessity, consume, as a substantial portion of their food intake, the crops, dairy products, and livestock they produce or the fish that they catch.
- To simplify the definition of *in order to obtain,* we have added a new definition of *qualifying work* in § 200.89(i) to mean temporary employment or seasonal employment in agricultural work or fishing work.
- The definition of *seasonal employment* in § 200.81(j) has been revised to clarify that seasonal employment is employment that occurs only during a certain period of the year due to the cycles of nature and that, by its nature, may not be continuous or carried on throughout the year.
- The definition of *temporary employment* in § 200.81(k) has been

revised to simplify how temporary employment is determined and to provide greater clarity and flexibility as to how (when and how often) an SEA must validate that employment that appears to be constant and year-round can reasonably be considered temporary employment.

• Section 200.89(a)(2) has been revised to clarify that the ''thorough re-documentation'' referred to in this paragraph means that an SEA must examine its rolls of all currently identified migratory children and remove from the rolls all children it judges to be ineligible based on the types of problems identified in its statewide retrospective re-interviewing as causing defective eligibility determinations.

• Section 200.89(b)(1)(i) has been revised to clarify that, in addition to those States that have not yet conducted retroactive re-interviewing, any SEA that submitted a State defect rate that is not accepted by the Secretary, or that has a problem in identification and recruitment that is subject to corrective action, will also need to conduct retrospective re-interviewing.

• Section 200.89(b)(2)(iii) has been revised to permit, in prospective re-interviewing, use of alternative interviewing methods including telephone re-interviews if face-to-face re-interviewing is found to be impractical without regard to whether, as the NPRM would have required, the circumstances making face-to-face re-interviewing impractical would be considered ''extraordinary.''

• Section 200.89(d)(3) has been revised to permit more flexibility in how an SEA transmits its responses to eligibility policy questions to all its local operating agencies (LOAs).

• Section 200.89(d)(7) has been revised to clarify that an SEA's policy for implementing corrective actions includes addressing monitoring or audit findings of the Secretary, as well as those of the State.

These changes are explained more fully in the *Analysis of Comments and Changes* section that follows.

## Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 26 parties submitted over 125 comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows. We discuss substantive issues primarily under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes—and suggested changes the law does not authorize the Secretary to make.

### General

*Comments:* Several commenters noted generally that the proposed regulations clarified and more fully explained some confusing elements of the current regulations and non-regulatory guidance. One commenter, however, suggested that in light of Congress' plans to reauthorize the ESEA, the Department should wait to issue any of the new regulations and, instead, revise the Department's non-regulatory guidance on the MEP. Three other commenters suggested that we not change the program definitions prior to reauthorization of the ESEA.

*Discussion:* The Secretary appreciates the commenters' recognition that the proposed regulations represent an attempt to clarify confusing issues in the current regulations and non-regulatory guidance.

The Secretary does not agree that issuance of final regulations should await the next ESEA reauthorization. We do not know when Congress will reauthorize the ESEA and the MEP, and the issues addressed in these regulations—improved definitions, an updated allocations process, and defined quality control procedures—are needed now in order to resolve serious problems and implement essential improvements in program operations. Moreover, the Secretary believes that the definitions established in these final regulations will continue to be useful, even after reauthorization, in helping to standardize and otherwise improve the clarity and accuracy of State eligibility determinations. These definitions will help to ensure the basic integrity of the MEP and that the MEP benefits those children it is designed to serve.

*Changes:* None.

### Paperwork Burden and Potential Costs and Benefits

*Comments:* Five commenters expressed concerns about the potential costs and burden associated with several sections of the proposed regulations. Three commenters expressed concern about the estimated $4.5 million of annual additional costs of collecting information needed to implement the proposed regulations [72 FR 25236]. While acknowledging that States already conduct some of these activities in order to implement their statutory responsibilities, these commenters stated that much of these additional costs would be attributable to unnecessary activities that the regulation would require. Another commenter questioned the accuracy of our statement in the NPRM [72 FR 25236] that the proposed regulations would not add significantly to the costs of implementing the MEP. Still another commenter noted that the estimates of time and funds in the associated OMB information collection package 1810–0662 did not differentiate between States that receive large and small MEP allocations, and that requiring each State to spend a total of 20,691 hours to comply with the regulations would overwhelm States with small MEP allocations and negatively affect their ability to provide direct services to migratory children. The commenter also questioned the accuracy of the Department's assertion in the preamble to the NPRM [72 FR 25232] that much of the annual survey in proposed § 200.81(k), regarding the definition of *temporary employment,* reflects work States already do to update information on eligibility and continued residency of previously identified migratory children. Three commenters also expressed concern about the ability of States with small MEP allocations to fulfill their responsibilities under § 200.89(c) to document child eligibility, and stated that the paperwork burden associated with meeting these requirements might compel these States to end their participation in the MEP.

Another commenter stated that we had, in our OMB information collection package (1810–0662), greatly underestimated the average time needed to complete re-interviews, determine eligibility, complete and update COEs, and implement the other quality control procedures identified in the proposed regulations. The commenter suggested that States would need four hours rather than two hours to conduct each re-interview, four hours rather than one and one-half hours to make an eligibility determination, and two hours rather than one-third hour to complete a COE.

*Discussion:* The Secretary appreciates the commenters' concerns. However, for the most part, the estimated $4.5 million of ''additional'' costs of information collection under this regulation are not new. Rather, these costs and associated information burden are ''additional'' only in that they would now be attributable to these specific MEP regulations instead of the requirements of the statute and applicable sections of EDGAR.

We estimate that SEAs and their local operating agencies (LOAs) [see definition in section 1309(1) of ESEA] have historically expended approximately these amounts implementing various eligibility determination activities under the general authority of the statute and the

general requirements for documentation and program monitoring that are in 34 CFR 76.731 (section 76.31 of the Education Department General Administrative Regulations (EDGAR)). For example, those provisions have always required SEAs and their LOAs to document the basis for determining that a child meets the MEP eligibility requirements, whether on a COE or in another written record. They also have required SEAs to review COEs in terms of content and completeness, and ensure training and oversight of staff conducting identification and recruitment. As we explained in the information collection package associated with these final regulations that the Department submitted to OMB [1810–0662], the annual total cost to collect, review and update COEs—now to be required by § 200.89(c), but responsibilities that SEAs and their LOAs already have—accounts for over 60 percent of the estimated ''additional'' $4.5 million annual cost.

In addition, the cost and burden-hour estimates identified in the preamble to the NPRM and the associated information collection package represent an average across all States. The Secretary expects that States with smaller MEP allocations will expend considerably fewer hours and considerably less program funds in implementing these regulations than the averages referred to in the preamble to the NPRM in and the information collection package. Of course, conversely, States with large MEP allocations will likely expend somewhat greater amounts of effort and program funds than the averages, but they also receive proportionally more annual MEP funding.

Finally, with regard to the cost of validating the temporary nature of work that otherwise appears to be constant and year-round, the Secretary continues to believe that such validation can be accomplished at little or no additional expense or burden as part of the process that SEAs now conduct to annually update prior eligibility and continued residency of migrant children. However, as discussed elsewhere in these final regulations, the Secretary is simplifying this requirement.

The Secretary continues to believe, based on both the expertise of Departmental staff with prior State-level experience and discussions with State MEP staff, that the Department's cost estimates for re-interviews, determining eligibility, and updating COEs represent a reasonable estimate of the average time needed to carry out these activities. However, we note that the public will have another opportunity to comment on the burden as estimated in the OMB information package [1810–0662] before the information requirements of the final regulation become effective. The Secretary will take into consideration any other comments received from the public on these issues.

*Changes:* None.

*Section 200.81 Program definitions.*

*Section 200.81(a) and (b)—Agricultural work and Fishing work.*

*Comments:* Two commenters indicated that they had no substantive concerns with the proposed changes to these definitions. However, other commenters expressed concern that the proposed changes would unnecessarily restrict MEP eligibility or create problems in identifying exactly which workers perform temporary or seasonal agricultural or fishing work.

As a point of reference, current regulations (34 CFR 200.81(a)(1)) define an *agricultural activity* to include ''[a]ny activity directly related to the * * * processing of crops, dairy products, poultry or livestock for initial commercial sale or personal subsistence.'' The current definition of a *fishing activity* in 34 CFR 200.81(b) contains a similar phrase. Aside from proposing to change the term ''activity'' to ''work'' in each definition so as to conform to the terms used in the statutory definition of *migratory child,* we proposed to revise the phrase ''processing * * * for initial commercial sale'' in both definitions to state simply ''for initial processing.'' We also proposed to eliminate the phrase ''directly related to'' in both definitions.

With respect to these proposed changes, several commenters stated that it would be difficult to determine when ''initial processing'' ends, i.e., what particular phases or types of agricultural or fish processing work would be considered ''initial processing.'' One commenter asked whether planting or clearing a farm field might be considered ''initial processing.'' Some commenters suggested that the final regulations define the term ''initial processing;'' one of these commenters suggested that the term cover multiple stages of activity, perhaps up through the point of initial commercial sale either because it will be difficult to decide when ''initial processing'' ends, or because there may be processes constituting refinement of the raw product that occur after ''initial processing'' that should still reasonably be considered a qualifying activity. Other commenters recommended that before adopting final regulations, the Secretary further study the various processing industries to identify which activities can reasonably be considered ''initial processing.''

Another commenter asked that we retain the language, ''any activity directly related to,'' that is in the current definitions because it helps a State distinguish between workers who are handling the crops and, therefore, would be eligible for the MEP, and the crew chiefs, mechanics, and other workers (e.g., inventory clerks) who might be employed on a farm but would not be eligible. Another commenter stated that we should retain the language ''initial commercial sale'' because it establishes a point after which work is no longer qualifying for purposes of the MEP.

With regard to our proposal to include in the definition of *fishing work* a statement that this work ''consists of work generally performed for wages or in rare cases personal subsistence,'' two commenters recommended that we remove the phrase ''in rare cases'' because some States have substantial populations that fish for subsistence purposes rather than fish for wages.

Finally, another commenter recommended including the hunting or harvesting of whales, walruses, and seals in the definition of *fishing work* because these activities are conducted for personal subsistence.

*Discussion:* We proposed to remove the phrases ''an activity directly related to'' and ''initial commercial sale'' that are in the current definitions because we found that these phrases were vague, difficult to apply, and applied differently in different States. We believe that referring to ''initial processing,'' which as stated in the NPRM [72 FR 25230] involves working with ''raw products,'' will enable State and local MEP personnel to identify more precisely the particular (and more limited) types of work, especially processing work, that can reasonably be considered agricultural or fishing work for purposes of establishing eligibility under the MEP.

We do not agree that the regulations should define the term ''initial processing'' more specifically. We think that States may find it more helpful for the Department to address in non-regulatory guidance how this term applies in specific circumstances. This approach will provide SEAs with greater flexibility to consider particular situations in different processing industries—each of which has different sets of jobs that can reasonably be considered ''initial processing'' and different points in the processing cycle where ''initial processing'' (i.e., of a raw product into a more refined product) might reasonably be determined to end.

With respect to the last sentence of the definitions of both *agricultural work* and *fishing work* that, as proposed, provided that the work would be performed ''generally for wages'' or ''in rare cases personal subsistence,'' the Secretary believes that migratory work for purposes of personal subsistence is, in general, a rare occurrence nationally and that most of the work is performed for wages. However, the Secretary agrees to remove the phrases ''generally'' and ''in rare cases'' to avoid any further confusion.

Finally, the Secretary does not agree that the hunting or harvesting of whales, walruses, or seals should be included in the definition of *fishing work* as the commenter suggested. The ESEA provides that eligibility under the MEP depends on work in agriculture or fishing. While the Secretary recognizes that whales, walruses, or seals are harvested for personal subsistence, these animals are not fish, and catching or processing them cannot be considered to be fishing work. Moreover, excluding the catching or processing of these animals from eligible agricultural or fishing work is consistent with the Department's longstanding policy that hunting of deer, moose, or elk or their processing into venison is not an agricultural activity and so, likewise, cannot support a child's eligibility under the MEP.

*Changes:* The definitions of *agricultural work* in § 200.81(a) and *fishing work* in § 200.81(b) have been revised to remove the language ''generally'' and ''in rare cases'' from the last sentence of the definition.

*Section 200.81(c) In order to obtain.*

*Comments:* We received a number of comments about our proposed definition of *in order to obtain*. This term is used in section 1309(2) of the ESEA, which defines a migratory child as a child who is, or whose parent or spouse is, a migratory agricultural worker, including a migratory dairy worker, or a migratory fisher, and who in the preceding 36 months, has moved from one school district to another ''in order to obtain'' temporary or seasonal employment in agricultural or fishing work.

Believing that the statutory phrase ''in order to obtain'' means that MEP eligibility hinges on making a move for the purpose of seeking or obtaining this work, yet acknowledging that workers may move to a particular location for a number of reasons, the Secretary proposed in the NPRM to define the phrase ''in order to obtain'' more flexibly than in our current non-regulatory guidance. Specifically, while the current non-regulatory guidance speaks of a worker's ''primary purpose'' being to obtain temporary or seasonal employment in agricultural or fishing work, we proposed that *in order to obtain* mean that obtaining this work might be one of several purposes for the worker's move.

Several of the commenters asserted that the proposed definition was inconsistent with legislative intent as well as language contained in earlier Departmental non-regulatory guidance, which provided, with a number of exceptions, that a move qualified if the worker had obtained the work ''as a result of the move.'' These commenters asserted that the Department's rationale for proposing this change was incorrect, and that Congress included the phrase ''in order to obtain'' in the definition of a *migratory child* only to clarify that a family who moves to obtain qualifying work but is unable to obtain such work may still be eligible for the MEP.

Other commenters stated that the proposed definition would unduly complicate program eligibility determinations and, therefore, the definition was impractical and unreasonable. Some commenters suggested that the Department's interpretation would require recruiters to interrogate families in order to probe their intent for making a move, which in turn would so alienate families that they would choose not to participate in the program—causing eligible children to go without MEP services.

Commenters also noted that permitting eligibility only if parents assert that the purpose of their move was to obtain qualifying work is problematic. They noted that workers often: may move for several reasons; may lack the education or language ability to explain the intent of a move; may be unwilling to disclose their intent; and may give different reasons for the same move depending on which family member is asked.

Several of the commenters recommended that the Department's final regulations provide that a child is eligible for the MEP if a family simply moves across school district lines, obtains or seeks temporary or seasonal employment in agricultural or fishing work in the new district, and meets all other eligibility criteria. These commenters stressed that the family should not have to clearly articulate or demonstrate that one of the purposes of the move was to seek or obtain seasonal or temporary employment in agricultural or fishing work.

Other commenters recommended that the regulations be modified to provide that families who move with the intent of obtaining either non-qualifying work or any work, but who subsequently obtain temporary or seasonal employment in agricultural or fishing work, should be eligible for MEP services.

*Discussion:* The Secretary continues to believe, as expressed in the NPRM [72 FR 25231], that the statutory definition of a *migratory child* in section 1309(2) of the ESEA requires that MEP eligibility be based on a worker's move from one school district to another for the purpose of obtaining temporary or seasonal employment in agricultural or fishing work. The statutory definition applies to each child eligible for the MEP. While we have endeavored to do so, we simply are unable to read the phrase that a worker moved ''in order to obtain'' temporary or seasonal employment in agricultural or fishing work in such a way as those commenters, who wish to eliminate the need for the move to be made at least in part for a qualifying purpose or intent to move, would have us do. The statutory phrase ''in order to obtain'' can only mean purpose or intent, and the Department has no authority to interpret the statute otherwise. Moreover, we are aware of no legislative history that reveals that Congress intended the definition of a migratory child to mean something other than that the worker move ''in order to obtain,'' *i.e.*, with a purpose or intent of obtaining, after the move, temporary or seasonal employment in agricultural or fishing work.

Thus, we are unable to construe the phrase ''in order to obtain'' to apply only to workers who move and who only then look for or find temporary or seasonal employment in agriculture or fishing work. Similarly, we are unable to construe the phrase and its underlying concept of intent to apply only to those workers who move to seek but, thereafter, do not find temporary or seasonal employment in agricultural or fishing work.

However, the Secretary is satisfied that the regulations can be modified, consistent with the statutory language, to address and accommodate what we understand to be the commenters' principal objections and objectives.

The Secretary recognizes the very real challenges SEAs face in determining and documenting, after the fact, whether or not each individual worker has moved in order to obtain temporary or seasonal employment in agricultural or fishing work. Any number of factors, including a family's poverty, the inability to adequately articulate the English language, a desire for privacy, a desire for children to receive the supplemental services the MEP may

offer, or a need for employment of any kind even if realistically the worker is likely only to obtain temporary or seasonal employment in agricultural or fishing work, can significantly impair a recruiter's ability to discern through an interview whether or not a particular worker has moved ''in order to obtain'' work that can establish eligibility under the statute.

These final regulations include within the definition of *in order to obtain* not only (1) the provision that a worker who has moved (now for economic necessity) in order to obtain qualifying work if one of the worker's purposes in making a move was to obtain this work, but also (2) a provision that a worker who states that a purpose of the move was to seek any type of employment, i.e., the worker who has moved with no specific intent to find work in a particular job, but who finds qualifying work soon after the move, has moved ''in order to obtain'' qualifying employment. In making this change, we have considered the public comments, and drawn on prior discussions with MEP practitioners and knowledge we have gained reviewing audit findings regarding efforts to confirm MEP eligibility. We believe it is common knowledge that many migrant workers would accept a permanent job if they could find one, and state the same in general terms when interviewed to determine their children's eligibility for the MEP. Often, however, these same workers are unable, after a move, to obtain any employment other than temporary or seasonal employment in agricultural or fishing work and, therefore, accept such qualifying work. Indeed, the fact that these individuals find temporary or seasonal employment in agricultural or fishing work soon after they move can often be an indication of their intent in making a move.

The fact that these individuals may not express a clear intent to move and obtain qualifying work creates a tension with the statutory requirement that a worker must move ''in order to obtain'' such work. It also creates very evident costs and anxieties on the part of SEA and LOA officials and staff related to how to correctly determine and fully document that a worker meets the MEP's current definition of a *migratory worker*. In those situations where a worker's intent is not clearly expressed, the Department is satisfied that an SEA may infer that individuals who, for example, express only a generalized intent to have moved ''for work'' or ''to obtain work,'' or would ''take any job,'' or without any specificity ''hope to find a permanent job'' have in effect expressed that one of the purposes of their move is to obtain temporary or seasonal employment in agricultural or fishing work. Of course, if an individual expresses a specific intent to obtain only a job in work that does not qualify under the MEP, a State could not determine that this individual moved in order to obtain the requisite qualifying work.

*Changes:* The Secretary has revised the definition of *in order to obtain* to provide that in circumstances in which a worker expresses an intent to have moved for any type of employment, as opposed to a specific intent to obtain only non-qualifying employment, an SEA may deem that one of the purposes of the individual's move was to obtain qualifying employment if the worker obtains such work soon after the move.

*Comment:* Two commenters expressed concern that the second sentence of the proposed definition of *in order to obtain* could be read as preventing those who do not have an offer or potential offer of employment in temporary or seasonal employment in agricultural or fishing work prior to moving from being eligible for the MEP. This sentence, as proposed, stated:

> ''A worker has not moved in order to obtain temporary employment or seasonal employment in agricultural work or fishing work if the worker would have changed residence even if temporary employment or seasonal employment in agricultural work or fishing work were unavailable.''

Another commenter expressed concern that the proposed definition could be read in exactly the opposite way to exclude individuals who move knowing that they have a job, since they are not moving in order to seek or obtain work. This commenter was also concerned that the definition might exclude individuals who moved without knowing that the temporary or seasonal agricultural or fishing work they traditionally performed in a location was unavailable because of unusual circumstances such as a flood or a drought.

*Discussion:* The language of the proposed definition was not meant to restrict the eligibility of families migrating in any of the three scenarios presented by the commenters. However, to avoid any further confusion, and to promote program integrity, the Secretary has revised the definition to clarify that in the case where a worker does not secure qualifying work soon after a move, more information than just a statement by the worker is needed to confirm that the worker moved in order to obtain that qualifying work. Such additional information would be—either a prior history of moving to obtain qualifying work or, especially for those who never before migrated and so have no work history, some other credible evidence that the worker actively sought the qualifying work soon after the move (*e.g.*, a work application at various local farms or processors; a farmer's affirmation that the worker applied for work but none was available; newspaper clippings documenting a recent drought in the area).

*Changes:* The Secretary has revised the definition of *in order to obtain* to clarify that—

(1) If a worker states that a purpose of the move was to seek any type of employment, *i.e.*, the worker moved without a specific intent to find work in a particular job, the worker is deemed to have moved with a purpose of obtaining qualifying work if the worker obtains qualifying work soon after the move, but that—

(2) A worker who did not obtain qualifying work soon after a move may be considered to have moved in order to obtain qualifying work only if the worker states that at least one purpose of the move was specifically to seek this work, and (a) the worker is found to have a prior history of moves to obtain qualifying work, or (b) there is other credible evidence that the worker actively sought qualifying work soon after the move but, for reasons beyond the worker's control, the work was not available.

*Section 200.81(d) Migratory agricultural worker.*

*Comments:* Several commenters expressed concern that the proposed removal of the phrase ''including dairy work'' from the definition of a *migratory agricultural worker* would lessen the acceptance of such work as an appropriate migratory activity even though the definition of *agricultural work* refers to ''the production or initial processing of * * * *dairy products* [emphasis added].'' These commenters asked that the Secretary not remove this phrase.

*Discussion:* The proposed removal of the reference to dairy work from the definition of *migratory agricultural worker* was purely editorial given that the proposed new definition of *agricultural work* clearly includes the production and processing of dairy products. However, upon further consideration of the comments, the Secretary agrees to make the change requested by the commenter.

*Changes:* We have modified the definition of *migratory agricultural worker* to include a reference to ''dairy work.''

*Section 200.81(e) Migratory child.*

*Comments:* Several commenters expressed support for the proposed definition of a *migratory child,* noting

that it would be helpful in clarifying that an emancipated youth who moves in his or her own right as a migratory agricultural worker or a migratory fisher would meet the definition. One commenter stated that additional guidance would be necessary regarding how to document eligibility for these children who move on their own to seek or obtain temporary or seasonal agricultural or fishing work.

Two commenters asked that we clarify our statement in the preamble of the NPRM [72 FR 25231] that a migratory child includes both a child who accompanied a migratory worker and a child who has joined a migratory worker in a reasonable period of time. The commenters recommended that the Secretary provide a definition of ''a reasonable period of time.'' With respect to a child who joins a worker after the worker has moved, one commenter recommended that we revise the definition to clarify that this type of ''to join'' move includes a move where children move ahead of the parent—e.g., when a worker secures work in a new town that does not begin immediately but sends the child first to live with family or friends in the new town and so start school there without any educational disruption.

Finally, another commenter suggested that we revise the definition to specify that a migratory child is ''a child or youth between * * * 3 and 21 years of age.''

*Discussion:* The Secretary does not agree that it is necessary or desirable to (1) define in regulations how close in time to the parent's move a child's move must be in order to permit the child to have moved to join the migratory worker, or (2) address specific fact situations, such as when a move is made by a child in advance of a move made by the parent. These issues can be better and more fully addressed in non-regulatory guidance. Revising the definition to specify the age range of an eligible migratory child as between 3 and 21 is also not needed. First, the upper age limit of any ''child'' who would be served by the MEP and any other of the Title I programs is already established in the definition of *child* in the Title I regulations in 34 CFR 200.103(a). Moreover, the age range of 3 through 21 only applies to the migratory children counted and reported by the SEAs for purposes of determining the MEP State grant allocations using the formula under section 1303 of ESEA. Consistent with their comprehensive needs assessment and service delivery plan (see section 1306(a) of the ESEA and § 200.83), as well as § 200.103 (which allows services to preschool children) and sections 1115(b)(1) and 1304(c)(2) of the ESEA (which allow services to children below school-age), SEAs may provide eligible migrant children below the age of three with MEP services.

*Changes:* None.

*Section 200.81(f) Migratory fisher.*

*Comments:* One commenter expressed concern that the proposed definition of a *migratory fisher* did not address several specific fact situations, such as when an individual involved in fishing crosses school district lines but does not leave the fishing boat, or when an individual makes a number of moves of short duration during the fishing season.

*Discussion:* The Secretary does not believe it is desirable or possible to have the regulations address specific fact patterns regarding migratory fishing, such as those the commenter raised. The issues raised by this commenter can be better and more fully addressed in non-regulatory guidance. The Department intends to issue such guidance following the issuance of these final regulations.

*Changes:* None.

*Section 200.81(g) Move or Moved.*

*Comments:* We received a number of comments on the proposed definition of *move or moved.* One commenter suggested that we delete the definition because it would not consider workers who move and return to previously held employment to have made a move for purposes of the MEP.

Several commenters generally agreed that travel for vacation, holidays, or other personal reasons unrelated to obtaining work should not be considered moves for purposes of the MEP. Some commenters, however, expressed concern about the meaning of the terms ''vacation'' and ''holiday,'' noting that these terms could be understood differently by migratory families and MEP administrators due to cultural differences. A number of commenters also expressed concern that the meaning of the phrase ''during or after'' a vacation or holiday was unclear and confusing. These commenters asked whether the use of the word ''during'' should be read to exclude all travel that occurs on or overlaps either a specific holiday such as Christmas, or that occurs during a scheduled school holiday or the summer vacation from school. Commenters noted that reading the definition in this manner could penalize families who wait for breaks in schooling to move so as not to cause their children to experience educational interruption. The commenters stated that using this definition as proposed could create a perverse incentive for families to make moves during the school year in order to continue to be eligible for the MEP.

Commenters also said that they thought the word ''after'' in the phrase ''during or after a vacation or holiday'' was ambiguous. They asked if moving after a vacation or holiday meant that any move by a family ''after'' a vacation would not be considered a move for purposes of the MEP, or how long a period after a vacation or holiday must pass before a family's next move to seek or obtain temporary or seasonal agricultural or fishing work would be considered a move for purposes of the MEP. One commenter expressed the opinion that the time at which a move occurs is irrelevant so long as the move meets the basic conditions in the statute. Various commenters noted that some migrant families move for work during a school vacation period, and some suggested revising the definition either to delete the phrase ''during or after a vacation or holiday'' entirely or to clarify what we mean by the phrase. In that regard, two commenters suggested that we consider the fact that in some cultures travel of more than 30 days, without pay, and with a clear break in employment would not be considered a vacation.

Several commenters noted that the proposed definition of *move or moved* was inconsistent with the proposed definition of *in order to obtain.* They commented that the proposed definition of *move or moved* did not allow travel for certain specific reasons—i.e., vacations or holidays, or any personal reasons unrelated to seeking or obtaining temporary or seasonal employment in agricultural or fishing work—while the proposed definition of *in order to obtain* would more generally have allowed a move to be made for multiple purposes so long as one of the purposes was to seek or obtain temporary or seasonal employment in agricultural or fishing work. The commenters expressed concern that the proposed definition of *move or moved* could prevent a family from qualifying for the MEP if it moved both to seek or obtain temporary or seasonal employment in agricultural or fishing work and for another personal reason. One commenter suggested revising the definition to clarify that moves that occur *only* as a result of a vacation, holiday or other personal reasons are not considered to be moves for purposes of the MEP even if temporary or seasonal employment in agricultural or fishing work is sought or obtained.

Finally, two commenters asked that we clarify the meaning of the term ''residence'' and the phrase a ''change from one residence to another

residence'' in the proposed definition. They variously recommended that the Department clarify whether boats, vehicles, tents, trailers, or relatives' homes would be considered residences under the definition. Given these considerations, a commenter suggested changing the term ''residence'' to ''location.''

*Discussion:* The statutory definition of *migratory child* in section 1309(2) of the ESEA, as in all similar definitions contained in prior authorizations of the MEP, focuses on the need for a worker to move in order to obtain certain kinds of employment. Yet, recent audit findings [1] have highlighted situations in which children were found eligible for the program based on moves, such as those made during periods of school vacations, that a family makes in order to return to the children's regular school community. Given the desirability of clarifying when a move of this kind can qualify a child for MEP eligibility and when it cannot, the proposed regulations were designed to identify more clearly those situations in which a family's move would not be sufficient to establish MEP eligibility.

In reviewing the comments, the Secretary agrees that the proposed definition was inconsistent with the definition of *in order to obtain.* To address the concerns raised by the commenters, we are revising the definition of *move or moved* in the final regulations to provide that the change must be from one residence to another residence that occurs due to economic necessity. This change fits the purposes of the MEP and clarifies that for the MEP, a move that is not made due to economic necessity is not a ''move'' for purposes of MEP eligibility. With this change, it is not necessary to address in the regulations the particularities of moves that were made for vacation, holiday, or personal reasons unrelated to the family's economic need. This change also eliminates the inconsistency between this definition and the definition of *in order to obtain.*

The Secretary agrees it will be useful to provide clarification about what constitutes a residence, as well as what constitutes economic necessity. These clarifications— as well as others, such as when and how to recognize a move that constitutes a true vacation (e.g., to/from a resort, visits to family and friends) and thus does not involve economic necessity—will also be provided in non-regulatory guidance following issuance of the final regulations.

*Changes:* The Secretary has revised the definition of *move or moved* to provide that, for purposes of establishing eligibility under the MEP, a move must be a change from one residence to another residence that occurs due to economic necessity.

*Section 200.81(h) Personal subsistence.*

*Comments:* Several commenters supported the proposed definition of personal subsistence. Other commenters expressed several concerns. One commenter said that the phrase ''in order to survive'' is somewhat subjective and may set a different standard than is required for ''principal means of livelihood.'' Another commenter asked whether the definition requires a differentiation between a worker and grower, and a farmer or consumer, and whether a person who works land he or she leases would be covered under the definition. Two of the commenters recommended either removing the definition of *personal subsistence* or changing the phrase ''in order to survive'' to ''as an important part of personal consumption.''

*Discussion:* The Secretary agrees that the language of the proposed definition did not adequately describe the concept of personal subsistence, and we have revised the definition to provide a better description. However, in making the revisions, the Secretary does not agree that the differences between worker, grower, farmer, consumer or lease-holder are relevant to, or need to be specifically addressed in, this definition. We believe that these differences are clear in the definitions of *agricultural work* and *fishing work,* which specifically provide that the work must be performed only for wages or personal subsistence.

*Changes:* We have revised the definition of *personal subsistence* to provide that the worker and his or her family, as a matter of economic necessity, consume, as a substantial portion of their food intake, the crops, dairy products, or livestock they produce or the fish they catch.

*Section 200.81(i) Principal means of livelihood.*

*Comments:* Several commenters recommended that we eliminate the definition of *principal means of livelihood* and remove the term from the definitions of *migratory agricultural worker* and *migratory fisher.* (Those definitions had provided that the temporary or seasonal employment in agricultural work or fishing work a migratory worker obtains must be a ''principal means of livelihood''—i.e., that it must play an important part in providing a living for the worker and his or her family.) Three commenters questioned the legal basis for this regulatory requirement. Several commenters were concerned that requiring the qualifying work to be a principal means of livelihood might be interpreted in some places as requiring an income or means test for determining MEP eligibility. Another commenter suggested that the definition is unnecessary because it is clear most migratory families live in extreme poverty, and because the questions some recruiters may ask to determine principal means of livelihood can be viewed by the migratory families as offensive and intrusive and can lead to refusals to participate in the program.

*Discussion:* The proposed definition of *principal means of livelihood* is in the current regulations and we did not propose to modify it in the NPRM. As discussed at length in the preamble to the final regulations for the MEP published in the **Federal Register** on July 3, 1995 [60 FR 34826], the Department established the principal means of livelihood requirement to ensure that, consistent with congressional purpose, the MEP focuses on children who have a significant economic tie to migratory agricultural or fishing work. This said, upon consideration of the comments, the Secretary agrees that, with the other changes being made to these regulations, the principal means of livelihood requirement is no longer needed. The Secretary believes that the other changes, which clarify that a migratory agricultural worker or a migratory fisher is a person who moves due to economic necessity in order to obtain temporary or seasonal employment in agricultural or fishing work, will satisfactorily address the purpose of the principal means of livelihood requirement.

*Changes:* The definition of *principal means of livelihood* in proposed § 200.81(i) has been deleted and the term has been removed from the definitions of *migratory agricultural worker* and *migratory fisher.*

*Section 200.81(i) Qualifying work.*

*Comments:* None.

*Discussion:* As revised, the definition of the phrase *in order to obtain* would be very cumbersome without a term that could be used to abbreviate the phrase ''temporary employment or seasonal employment in agricultural work or fishing work.'' We believe the public generally understands this longer phrase to mean ''qualifying work,'' and so we are including a new definition of this term in these final regulations.

[1] See, e.g., the Department's Office of Inspector General audit of the California MEP, report No. ED OIG/A05G0032.

*Change:* A new definition of *qualifying work* has been added in new § 200.81(i) that provides that such work means temporary employment or seasonal employment in agricultural work or fishing work.

*Section 200.81(j) Seasonal employment.*

*Comments:* Two commenters supported our proposed definition of *seasonal employment.* However, several others expressed concern that the definition was too narrow because it indicated that the employment is dependent on the cycles of nature due only to the specific meteorological or climactic conditions. One commenter suggested that this definition did not account for work that is seasonal in nature due to choices made by the employers or the workforce. Three other commenters expressed concern that the emphasis on ''specific meteorological or climatic conditions'' was too limited because some crops, such as mushrooms, are grown indoors and, therefore, would not be affected by meteorological or climatic conditions. Commenters also noted that other crops, such as citrus fruit and other crops grown in warmer climates such as Florida and California, have to be harvested because of their specific growth cycle rather than due to meteorological or climatic conditions. Another commenter noted that Webster's dictionary defines a ''season'' as ''a period of the year characterized by or associated with a particular activity or phenomenon.'' Two commenters noted that fern harvesting in Volusia County, Florida is an example of a seasonal activity that is an established annual pattern or event that occurs between November and June not because of weather conditions but because holidays occurring during that time create a higher demand for ferns.

One commenter recommended that the Secretary either not define the term or conduct a study of the range of seasonal employment so as to develop a better definition. Other commenters suggested amending the definition to include other reasons for seasonal farmwork such as growth cycles. Another commenter suggested changing the word ''meteorological'' to ''weather.''

*Discussion:* While disagreeing with some of the commenters examples, which the Secretary believes are ''temporary'' rather than ''seasonal'' employment, the Secretary agrees with the commenters that the language of the proposed definition may have been too limited. The Secretary has revised the definition to reflect the commenters' underlying concerns, and a definition of *seasonal employment* used by the Department of Labor [see 29 CFR Section 500.20(s)(1)], so as to better describe what constitutes seasonal employment.

*Changes:* The definition of *seasonal employment* has been changed to state that seasonal employment is employment that occurs only during a certain period of the year because of the cycles of nature and that, by its nature, may not be continuous or carried on throughout the year.

*Section 200.81(k) Temporary employment.*

*Comments:* Many commenters expressed concern about the provision in § 200.81(k) that an SEA may only deem specific types of employment to be temporary if it (1) documents through an annual survey that, given the nature of the work, virtually no workers who perform this work remain employed more than 12 months even if the work is available on a year-round basis, and (2) conducts this survey separately for each employer and job site. Commenters stated that conducting the proposed annual survey at each job site would be extremely costly and labor-intensive, particularly on dairy farms, because of the large number of sites at which States would be required to conduct the survey. Some commenters suggested that there would be substantial administrative costs and staff time associated with conducting the annual surveys and that, because the proposed regulations would not have provided for additional funds to pay for costs of conducting the surveys, the proposal would adversely affect the level of MEP services States could provide to needy children.

Several other commenters observed that the proposed survey requirement represented an extreme and unwarranted change to existing Department practice, would be highly burdensome, and would eliminate many families from being identified or served. Still other commenters stated that the proposed requirement to conduct annual surveys (by individual job site) would be impossible to implement because employees and employers are often unwilling to give an SEA complete and valid data about turnover rates. One commenter questioned the practicality of expecting SEAs to conduct valid surveys of each employer and site. Two commenters noted that at every livestock processing plant in the Nation there are at least several workers who remain employed year round, and the commenter expressed concern that no child of a worker in these plants would be eligible to receive MEP services under the proposed regulation.

*Discussion:* While section 1309(2) of the ESEA requires that a migratory worker move in order to obtain temporary or seasonal employment in agricultural or fishing work, the law does not define ''temporary'' employment. As explained more fully in response to other comments, the temporary nature of employment that is sought or obtained is generally determined either by the worker or the employer. However, the Department also recognizes that there are other jobs, such as may exist in processing plants or dairy farms, in which the employment is constant and year-round but for various reasons workers typically do not stay long at these jobs.

In consideration of employment in these kinds of jobs, the Department developed another way SEAs may determine that the employment an individual seeks or obtains is ''temporary'' for purposes of the MEP. In particular, the Department's most recent non-regulatory guidance permits SEAs, for jobs that are constant and year-round, to determine the work to be temporary on the basis of an ''industrial survey'' that establishes, from personnel data supplied by employers, a high turnover rate—at levels specified by the Department—for each job category.

The Secretary's proposal in the NPRM responded to widespread dissatisfaction of local, State, and Federal program officials with this guidance. Much of this dissatisfaction has been due to the great difficulties, if not impossibility, of State or local MEP staff obtaining turnover data from employers, and the lack of completeness and accuracy of the data that employers did provide. The proposed regulation would not have required employers to provide such data. Indeed, the preamble to the NPRM [72 FR 25232] clarified the Secretary's intent that the necessary attrition data could be easily obtained from workers when SEA or local MEP staff conduct their annual updates to confirm eligibility and continued residency of eligible children identified previously—a task they regularly perform in order to compile accurate SEA and local program child counts and to determine if new qualifying moves have been made. Thus, the Secretary believes that the regulations as proposed addressed those pre-existing concerns and similar concerns raised by the commenters.

Moreover, the Secretary does not believe that there will be substantial additional costs and data collection burden associated with the process the regulation permits for validating whether certain types of year-round work can be considered temporary

employment. Notwithstanding our use of the word survey in the proposed definition of *temporary employment,* we did not intend the validation process to be a complex and expensive effort that would require SEAs to gather a large amount of detailed personnel data annually from employers or workers. Rather, as imperfectly explained in the NPRM [72 FR 25232], we envisioned that this validation process would involve asking only those workers whose children were determined eligible based on the seemingly year-round jobs that the State had previously designated as temporary (or the children themselves if they are the workers) the following simple question: has the worker remained employed by the same employer for more than one year.

After further consideration of the comments, however, the Secretary believes that this definition can be revised to provide greater flexibility for States and still ensure that program objectives related to ensuring that workers are legitimately considered to have moved ''in order to obtain'' a ''temporary'' job are met. Accordingly, we have revised the definition to provide that instead of having to conduct annual surveys to document the temporary nature of work that is seemingly constant and year-round, an SEA now need only document, within 18 months after the effective date of this regulation and at least once every three years thereafter, that, given the nature of the work, of those workers whose children were previously determined to be eligible based on the State's prior determination of the temporary nature of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months.

We will provide further details about recommended procedures—such as combining the process to validate that particular types of employment are temporary with existing eligibility checks and updates, and whether all or a sample of employers or job sites should be examined—in non-regulatory guidance.

*Change:* The Secretary has revised the definition of *temporary employment* to clarify how an SEA may determine specific types of constant and year-round employment to be temporary. The SEA may do so if it documents, within 18 months after the effective date of this regulation and at least once every three years thereafter, that, given the nature of the work, of those workers whose children were previously determined to be eligible based on the State's prior determination of the temporary nature of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months.

*Comments:* With respect to States' determination of whether certain year-round employment would be considered temporary, we asked in the NPRM for input on whether the terms ''a few months'' and ''virtually no workers * * * will remain employed more than 12 months'' should continue to be used for the final regulation, or whether and what firmer time limits, numbers, or percentages might be used instead. Several commenters responded to this question by recommending that these terms be removed because, as written, they were too vague, would create confusion, could provide opportunities for abuse, would be expensive to implement, and would exclude a large percentage of children currently considered eligible for the MEP by their States.

Several commenters asked the Department to clarify the meaning of the term ''virtually no workers.'' One commenter suggested that the term is not quantifiable, and another indicated that a given percentage of employees leaving over the course of a year may be more or less significant given the overall size of the processing plant. Still another commenter expressed the opinion that, even though the Department indicated in the preamble to the NPRM that the term was used to avoid setting arbitrary limits, the term is tantamount to establishing an arbitrary 100 percent rate.

Several commenters stated that it would be nearly impossible to classify food processing or dairy-farm work as temporary under the proposed definition because most processing plants and dairy farms employ at least a few workers for longer than 12 months. One commenter noted that the Department's own study of processing [2] indicates that poultry processing has turnover rates from 50 percent to over 100 percent.

Some commenters recommended either eliminating the proposed definition entirely and continuing to rely on the procedures outlined in current non-regulatory guidance, or establishing the non-regulatory guidance procedures by regulation. In this regard, several commenters recommended using the provisions of the industrial survey process contained in the current non-regulatory guidance, which specify a job as temporary if an employer provides information to the SEA that the job has greater than a 50 percent annual turnover rate. In the commmenters' opinions, the industrial survey process described in the current non-regulatory guidance establishes a clearer and easier method for determining whether year-round employment is temporary. Two commenters offered the opinion that a turnover rate of greater than 50 percent was a clear indication of the temporary nature of work. Another commenter suggested using a turnover rate of 75 to 100 percent.

*Discussion:* The Secretary appreciates the commenters' responses to the question in the NPRM. We do not agree, however, that the terms ''virtually all'' and ''a few months''—as used in the definition of *temporary employment*—are overly vague or confusing or that they will result in abuse or excessive costs. While the terms ''virtually all'' and ''a few months'' are neither exact nor precisely quantifiable, these terms should be read to mean that 100 percent, or nearly 100 percent, of workers with children identified as eligible under the program stay on the job generally for only a brief period of weeks or months, and only rarely stay for 12 months. The Secretary does not believe it is desirable to establish further regulatory limitations relative to these terms. Rather, as noted in the NPRM [72 FR 25232], the regulatory language will allow SEAs the flexibility they need to address situations such as the one raised by several commenters whereby a few workers in the dairy and food processing industries may remain employed by the same employer somewhat beyond 12 months. Moreover, by not requiring that 100 percent of workers no longer be employed after 12 months, the regulation will allow the SEA to exercise some discretion to determine whether specific job categories can reasonably be considered temporary employment.

As we have noted previously, the Secretary does not agree that procedures to determine whether specific types of year-round work are temporary will be expensive to implement, but we have revised the language of the definition to give greater flexibility as to how to do so.

The Secretary also does not agree with the suggestions that turnover rates of ''greater than 50 percent'' or ''75 to 100 percent'' over a 12- or 18-month time period, as reflected in the Department's prior guidance for the MEP, are better measures for determining the temporary nature of work. As explained elsewhere in this preamble, such turnover rates,

[2] RTI International: ''Literature Review: Agricultural and Fish Processing,'' June, 2004. [Prepared for the U.S. Department of Education].

based on data that employers have provided to the SEAs, are flawed. In this regard, according to information the Department received during a 2004 meeting with representatives from various processing industries, it appears that their job turnover rates usually only take into account movement of workers in or out of a particular job; they do not usually account for situations in which the particular worker continues to remain employed by the employer at the same work site in a succession of jobs and, thus, is actually a permanent employee. Under this methodology, persons initially hired in jobs considered temporary based on high reported turnover rates as measured based on this flawed job turnover rate metric may in fact remain employed by the same employer for years—a situation indicative of permanent (constant year-round), not temporary, employment. Thus, continuing to rely on job-specific turnover rates is inappropriate. Given the flawed nature of the job turnover rates, the Secretary believes that examining whether persons hired to perform such jobs that the SEA believes, on some credible basis (such as market research), to be temporary employment continue to be employed for more than a year would be a better measure of whether it is reasonable to continue to identify and serve such workers' families under the program.

Also, the Secretary notes that allowing the use of a turnover rate as low as 50 or 75 percent to establish a particular job as temporary employment would extend program eligibility to a substantial number of children (i.e., the children of the 25 or 50 percent of workers who remain employed year-round) who would not meet the definition of *migratory child* and therefore should not be considered eligible for the MEP. The Secretary therefore believes that the turnover rates specified in the current non-regulatory guidance are too low to establish the temporary nature of the work for the purpose of extending eligibility to the children of all workers in these jobs.

*Change:* None.

*Comments:* In the preamble to the NPRM [72 FR 25232], we also asked for input as to whether there are additional regulatory requirements that would improve the proposed annual survey by improving the quality and consistency of the data or by providing more effective methods to collect the data. In response, two commenters recommended that the definition of *temporary employment* be qualified by inserting the phrase ''usually lasting no longer than 12 months'' which is consistent with the definition of *temporary employment* in the current non-regulatory guidance. Other commenters proposed that the definition of *temporary employment* include jobs that last for more than 12 months if a State can demonstrate either high turnover rates or a pattern of temporary work at the work site or by the worker. Two other commenters suggested that the time period for a job to be considered temporary be extended to 18 months. These commenters noted that, in some industries such as dairy, temporary employment can last for longer than 12 months and that the Department's proposal, consequently, would substantially reduce the number of eligible migrant children in certain geographic areas.

*Discussion:* Given that eligibility for the MEP depends on a worker's move to a new location in order to seek or obtain temporary or seasonal employment in agricultural or fishing work, the Secretary believes that the time period in which individuals work in these jobs should be brief and not reflect employment that is constant and year-round. While reflecting an approach that is more precise and less flexible than is contained in the non-regulatory guidance, the Secretary believes that someone who works for 12 months has year-round employment, and as such, 12 months represents the outside limit for distinguishing temporary employment from non-temporary employment. The Secretary believes this same 12-month limit should be applied to the validation process for determining whether certain types of employment available year-round can reasonably be deemed temporary. The Secretary notes that this requirement on the length of temporary work is consistent with the Department of Labor's definitions of temporary work in 29 CFR 500.20 and 20 CFR 655.100 for its migrant and seasonal farmworker programs.

Given that the Secretary expects temporary employment to usually last briefly—for a few months—and that temporary employment lasting as long as 12 months is expected to be a rarity, the Secretary agrees to add the phrase ''but no longer than 12 months'' to the definition. However, as explained above, the Secretary cannot agree that employment that lasts for more than 12 months—e.g., for 18 months—should be considered temporary, and so also cannot agree that the period should be extended even if an SEA can demonstrate for this longer period either high turnover rates or a pattern of temporary work at the work site or by the worker. Of course, if a worker expresses an intent to have moved in order to work for a period of a few months (not greater than one year), the SEA could find the worker to have moved in order to obtain temporary work on the basis of the worker's purpose in making the move rather than on the basis of documenting attrition in such employment.

We turn finally to comments expressing concern about the impact an absolute 12-month rule would have on children of workers in industries like the dairy industry, where workers are reported to stay in jobs somewhat longer than 12 months. While the commenters expressed concern about the impact of a definition of *temporary work* that is limited to 12 months, they offer no specific data to corroborate their statements. The Secretary believes that establishing a 12-month time period is not only reasonable, but is concerned that, absent establishment of this time period, SEAs will continue to extend MEP eligibility to individuals who have moved to a new location with at best only a marginal purpose of obtaining temporary or seasonal employment. Given this concern about program integrity, the Secretary declines to accept the recommendation that the 12-month period be extended to 15 or 18 months.

*Change:* We are modifying the definition of *temporary employment* to clarify that such employment is for a limited period, usually lasting only a few months, and cannot last longer than 12 months.

*Comment:* One commenter expressed concern about how the proposed validation process could be implemented in that, given the retrospective nature of the proposed annual survey, an SEA would need to wait a year to determine if a job could be considered temporary and, by then, the family will have moved away. The commenter suggested that the process, as proposed, was therefore unworkable.

*Discussion:* The Secretary recognizes the commenter's concern; however the final regulation will require documenting the attrition only of those workers whose children were determined eligible (or the children themselves if they are workers) based on the workers' employment in those year-round jobs that the SEA, consistent with these regulations, had *previously* designated as temporary on some reasonable basis. If the SEA tries to question these workers 18 months later, the Secretary would agree the SEA may infer that those workers who have moved away and cannot be located are no longer employed at the same plant. These workers, then, would be deemed

to be part of the plant's worker attrition for that year and, so, would help support a determination that employment in that plant was temporary.

*Change:* None.

*Comments:* Several commenters recommended that States not be required to conduct annual surveys and should instead be allowed to establish their own methodology and criteria to document the temporary nature of employment. One commenter noted that States are in a better position than the Federal government to gauge local industry and substantiate whether employment is temporary. One of the commenters suggested that one way that States should be allowed to certify year-round work as temporary would be through providing additional information on a supplemental form. Another suggested that we require States to conduct surveys to gather turnover rates every three years, as currently recommended in non-regulatory guidance, or permit recruiters to find work to be temporary based on conversations with other workers who confirm a high turnover rate. The commenter believed that these would be more realistic options than requiring the retrospective annual survey proposed in the NPRM.

*Discussion:* As stated previously, the Secretary strongly believes that whether they are implemented once every three years or annually, the procedures for calculating turnover rates as described in the Department's current non-regulatory guidance for the MEP are unacceptably flawed. Therefore, the Secretary declines to make the specific change suggested by the commenter.

However, the Secretary generally agrees that the final regulations can provide more flexibility regarding how an SEA may determine and validate the temporary nature of agricultural or fishing work. In particular, we are removing from the proposed regulation references to various examples of types of temporary employment and the suggestions that these are the only kinds of employment that can be considered temporary on the basis of a survey. Instead, the final regulations focus on the use of credible sources of information, including worker and employer affirmations as well as other reasonable determinations by the SEA. They also eliminate the references to an annual survey of employment that might be deemed temporary, notwithstanding that it appears to be constant and year-round, to be conducted separately for each employer and job site. Instead, these final regulations require SEAs to document, within 18 months of the effective date of these regulations and at least once every three years thereafter, that such employment can continue to be deemed temporary because virtually no workers whose children were determined eligible on the basis of such work deemed temporary (or the children themselves if they are such workers) remained employed by the same employer for over 12 months.

*Change:* The Secretary has revised and simplified the definition of *temporary employment* by clarifying that: (1) such work is conducted for a limited time frame—usually only a few months but no longer than 12 months—as stated by the employer or the worker, or as otherwise determined by the SEA on some reasonable basis; and (2) any work that is constant and year-round can only be considered temporary if the SEA, within 18 months after the effective date of this regulation and at least once every three years thereafter, documents that, given the nature of the work, of those workers whose children were previously determined to be eligible based on the State's prior determination of the temporary nature of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months.

*Comments:* Three commenters requested clarification about the type of documentation a State would need to provide and the type of tests that a State would need to conduct to classify year-round employment as temporary. Commenters requested that the final regulations specify the content of the survey, the type of survey required, and the dates when surveys would be conducted.

*Discussion:* The Secretary appreciates the commenters' detailed and constructive suggestions but believes that, given the greater flexibility now afforded by the final regulations, it would be better to address the commenters' concerns in non-regulatory guidance to be issued after the final regulations are issued.

*Change:* None.

*Comments:* Two commenters suggested that the States' recent voluntary changes in quality control processes including re-interviewing, as well as such research as a Departmental study of the poultry processing industry,[3] should be sufficient to demonstrate to the Department that processing is temporary employment.

*Discussion:* The Secretary believes that neither the State's recent quality control improvements nor the research and information the Department has collected on the processing industries provide an adequate basis for the Department to conclude that the work that occurs at each processing plant throughout the Nation is temporary. In fact, based on discussions with researchers and meat-processing industry representatives, it is the Department's understanding that the degree to which a particular work activity in agricultural or fish processing is temporary or permanent varies greatly from plant to plant because of differences in how each site carries out the work activity (e.g., with a greater or lesser degree of mechanization) and the particular working conditions provided in each plant (e.g., salary, benefits, opportunities for advancement). Accordingly, the Secretary will require SEAs to use the validation process described in the final regulations.

*Change:* None.

*Section 200.83 Responsibilities of SEAs to implement projects through a comprehensive needs assessment and a comprehensive State plan for service delivery.*

*Comments:* Several commenters addressed our proposal to require that an SEA include measurable program outcomes tied to the State's performance targets in its MEP Comprehensive Needs Assessment and Service Delivery Plan. One commenter stated that, while the proposed change seemed to assume that MEP services do not have measurable program outcomes, the proposed language was redundant with statutory requirements given that all States are required to include migratory children in the State accountability system. Three of the commenters stated that they recognize that there should be measurable program outcomes for MEP services. However, they also noted that the supplemental nature of the MEP—the fact that it often offers services for a relatively short period of time (e.g., in a summer program), at a limited level of engagement (e.g., in a 50-minute tutoring session three times a week during the regular school day), and through support services that are educationally related but are not themselves necessarily instructional—requires that any measurable program outcomes and performance targets for the MEP be realistic, and should not require precise quantification of results. These commenters were concerned that the proposed regulatory provision was overly inclusive and believed the Department should not overreach in its expectation that grantees establish quantifiable program goals, outcomes and targets.

[3] RTI International, op. cit.

*Discussion:* The Secretary recognizes the supplemental nature of the MEP. As noted in the preamble to the NPRM [72 FR 25233], the proposed change to § 200.83 simply conforms the regulatory language with the language in section 1306(a)(1)(D) of the ESEA, which requires that an SEA's comprehensive plan include both the specific performance targets it has established for all children (including migratory children) and its measurable program outcomes relative to those targets for the MEP. The change eliminates any ambiguity about whether a State must address measurable program outcomes in the MEP comprehensive plan that may have resulted from the inadvertent omission of the requirement in the prior regulations.

*Changes:* None.

*Section 200.89(a) Allocation of funds under the MEP for fiscal year (FY) 2006 and subsequent years.*

*Section 200.89(a)(1).* Several commenters addressed our proposal in this section under which the Secretary would adjust, for purposes of making FY 2006 and subsequent year MEP awards, each SEA's FY 2002 base-year allocation by applying a defect rate established through a State re-interviewing process to the State's 2000–2001 base-year child counts.

*Comments:* Four commenters questioned whether it was appropriate for the Department to change, through regulations, the statutory procedure for calculating the FY 2006 allocations when several States have not conducted re-interviewing or submitted defect rates to the Secretary.

*Discussion:* The Secretary appreciates the commenters' concern. However, this concern is largely addressed by the requirement in § 200.89(b)(1), which requires those few States that have not carried out a voluntary re-interviewing process and submitted a defect rate to the Secretary to do so as a condition for their continued receipt of MEP funds. We also note that currently only three States have not submitted defect rates, and one of these States, Rhode Island, has indicated it no longer wishes to operate an MEP because of its small number of migratory children.

*Changes:* None.

*Comments:* Two commenters expressed concern about using the State-reported defect rates established through the voluntary re-interviewing process to adjust the 2000–2001 base-year child counts because a standard process was not employed by all States. Both commenters were concerned that not all States used independent re-interviewers. One of these commenters recommended that the Secretary require that every State use an independent re-interviewer to establish the State's defect rate. In this regard, the commenter noted that the Department was using an outside contractor to review the processes States used to develop their defect rates, and expressed the opinion that this use of a contractor reflected dissatisfaction by the Department with the defect rates as generated by disparate procedures. In the commenter's view, using the existing defect rates, which States developed using imperfect and disparate procedures, to adjust funding would be inappropriate.

*Discussion:* As noted in the NPRM [72 FR 25234], the Secretary recognizes that the State defect rates the Secretary ultimately accepts will not perfectly correct the 2000–2001 migrant child counts. However, the Secretary firmly believes that their use will result in the distribution of FY 2006 and subsequent-year MEP funds in a way that better reflects the intent of the statutory allocation formula than would continued use of the original 2000–2001 base-year counts.

As the commenter noted, the Secretary has used an outside contractor to review the SEA-submitted defect rates and the SEAs' associated re-interviewing and calculation procedures. However, this was done in order to obtain independent expert opinion as to whether each SEA's submitted defect rate was based upon adequate procedures and sufficient technical rigor.

While it is true that not all SEAs submitting defect rates used independent re-interviewers, the Secretary does not believe that the decision not to do so should necessarily invalidate the defect rates they reported. Due to the voluntary nature of the re-interviewing initiative, the Secretary does not believe it is reasonable—or necessary—to require retrospective re-interviewing by all SEAs that did not use independent re-interviewers provided the Secretary is satisfied that the process an SEA used met reasonable standards for technical rigor and gives confidence that the reported defect rate is itself reasonable.

However, under paragraph (b)(1) of this section, the Department will require any State with a defect rate the Secretary determines to be unacceptable, or that used procedures the Secretary determines to be unacceptable, to conduct another statewide retrospective re-interviewing process. As the regulations are intended to ensure that these SEAs do this work in ways that are statistically and methodologically sound, this process will need to include, as a required element, the use of independent re-interviewers.

*Changes:* None.

*Comments:* Two commenters questioned the appropriateness of continuing to base FY 2006 and subsequent year allocations on the 2000–2001 child counts. These commenters expressed concern that doing so would not appropriately direct MEP funding to States that have experienced substantial increases in their migratory child populations over the intervening years. The commenters noted that the estimated ten percent national average defect rate clearly suggests that non-eligible children are being served in many States at the expense of eligible children and that the use of the current formula does not allow the funds to flow appropriately to eligible children in the commenters' States. The commenters proposed that the provisions of the statute requiring allocations after FY 2002 to continue to be based on the 2000–2001 child counts be amended to provide that funds ''follow the child'' based on use of updated yearly counts of migratory children.

*Discussion:* The Secretary understands that the continued use of base-year allocation amounts derived from the States' 2000–2001 migrant child counts does not reflect the current distribution of migratory children in the States. However, unless the Secretary knows that a State would be receiving more MEP funds than it needs (see section 1303(c)(2)(A) of the ESEA), section 1303(a)(2) of the ESEA requires the continued and exclusive use of the base-year counts for any fiscal year in which Congress has appropriated MEP funds in an amount less than or equal to the amount it appropriated for FY 2002. As the commenters note, eliminating the use of the base-year counts requires a statutory change. In this regard, the Department has requested that Congress, in the upcoming ESEA reauthorization, eliminate the requirement to make the MEP allocations using base-year child counts.

*Changes:* None.

*Comment:* One commenter recommended revising the regulations to permit, as was permitted under the ESEA as reauthorized in 1988 (Pub. L. 100–297), a State to have up to a five-percent error rate in its counts of eligible migratory children before the Department could impose any type of allocation adjustment. The commenter stated that a zero-percent error rate is unrealistic and that every industry has some non-zero error rate.

*Discussion:* While section 1201(b)(1) of the ESEA as reauthorized by Public Law 100–297 (the Hawkins Stafford School Improvement Amendments of 1988) contained a provision for a five-percent error rate in State eligibility determinations, this provision was removed when Title I, Part C of the ESEA was subsequently reauthorized by Public Law 103–382 (the Improving America's Schools Act). The provision also is not part of the current ESEA, and the Department does not have authority to adopt it by regulation. Such a regulation would also conflict with the clear intent of the statute that only children who meet the statutory definition of a migratory child may be identified and served with the limited funds appropriated for the MEP.

*Changes:* None.

*Comments:* While acknowledging that in some situations States made errors, both intentional and negligent, in determining the eligibility of students for the MEP, three commenters questioned whether the Department should be using the term ''defect rate'' to describe the findings of a State's re-interview process. These commenters suggested that the term ''disparity rate'' would be more appropriate because the rates do not in all cases demonstrate clear errors in eligibility but may simply represent a disparity between written records of eligibility determinations made several years ago and more recent attempts to verify the information by new interviews. The commenters noted several possible procedural and cultural reasons for the disparities, including the considerable time lag between the initial eligibility determinations and the re-interviews, a lack of adequate monitoring, and a lack of clarity in certain eligibility criteria provided by the Department.

*Discussion:* The Secretary recognizes and appreciates the concerns raised by commenters but does not believe that the suggested change should be made. In the various announcements, guidance documents, and oral presentations the Department has made and provided to SEA officials on the re-interview initiative, the Department asked each State to determine, on the basis of reasonable sampling and re-interview procedures, its ''defect rate'', i.e., the percentage of children in a State's re-interview sample that the SEA determined to be ineligible under its re-interview process. While acknowledging that an SEA's efforts might be subject to subsequent audit, the Department specifically left to each SEA the decision to determine when a disparity in the information received should be reflected in its State defect rate. The Secretary is confident that the States understood the meaning of ''defect rate'' when they undertook their efforts and that the phrase ''defect rate'', as used in the NPRM and these regulations, is appropriate.

*Changes:* None.

*Section 200.89(a)(2).* Four individuals or organizations submitted comments on § 200.89(a)(2), which would require SEAs to use the results of the retrospective re-interviewing to conduct a thorough re-documentation of the eligibility of all children for the MEP (and the removal of all ineligible children) included in the 2006–2007 MEP child counts.

*Comment:* One commenter requested clarification of the term, ''thorough re-documentation.'' The commenter stated his belief that given the cost of re-interviewing a sample of the State's migrant children, re-documenting the eligibility of all children in the State's migrant child count would be very expensive.

*Discussion:* As discussed in the preamble to the NPRM [72 FR 25234], the Secretary intended the proposed requirement to conduct ''a thorough re-documentation'' to mean that, after completing its retrospective re-interviewing, an SEA would examine its rolls of all currently identified migratory children and remove from the rolls all children it judges to be ineligible based on the types of problems identified in its retrospective re-interviewing as causing defective eligibility determinations. The Secretary expects that an SEA will be able to undertake this re-documentation effort, at little additional cost, when it carries out its annual activities to examine whether children previously identified as eligible in a prior performance year (and who would retain eligibility based on a 36-month eligibility period following a migratory move) still reside in the State and so are still eligible to be counted and served under the program. The Secretary has revised the language of this requirement in the final regulation in order to better explain the process required.

*Changes:* The Secretary has revised § 200.89(a)(2) to clarify that in carrying out the re-documentation, an SEA must examine its rolls of all currently identified migratory children and remove from the rolls all children it judges to be ineligible based on the types of problems identified in its statewide retrospective re-interviewing as causing defective eligibility determinations.

*Comment:* Another commenter stated that the requirements in proposed § 200.89(a)(2) are unnecessary, and that they should not apply to those States with a declining population of migratory children that have proactively implemented procedures to improve quality control.

*Discussion:* The Secretary disagrees with the commenter. In order to demonstrate the integrity of the program statewide and nationally, it is necessary for *all* SEAs to carry out the requirements of this section to ensure the accuracy of the State counts of migrant children and the correctness of the State eligibility determination of each child. The fact that an SEA reports a non-zero percent as its defect rate based on a random sample of children included in its retrospective re-interviewing implies statistically that the overall population of identified migratory children in the State will contain approximately this same percentage of ineligible children. An SEA, therefore, needs to generalize from its defect rate to estimate the percentage (and actual number) of ineligible children in its statewide population of migratory children and, then, based on application of the re-interview findings regarding the types of problems that caused the defect rate, search for, locate, identify, and stop serving (and remove from the rolls of eligible migratory children) all children found to be ineligible in the overall statewide population of identified migratory children. For example, finding 20 ineligible children out of a representative sample of 400 (i.e., 5 percent defect rate) implies that, out of an overall population of 5,000 identified migratory children, approximately 250 children (5 percent of 5000 and not just the 20 identified from the sample) would also be ineligible across the State. The SEA must, therefore, begin to implement a re-documentation process to identify and terminate services to all of these ineligible children.

*Changes:* None.

*Comment:* Two commenters questioned the value of the proposed re-documentation requirement, given the burden and associated costs. One commenter stated that the requirement might be appropriate for certain high-risk grantees but not for all States participating in the MEP. The other commenter stated that the expense would be unnecessary, given the current level of attention that has already been focused on MEP quality control issues nationally. One commenter asserted that the annualized costs associated with data burden that we estimated for conducting re-documentation were misleading because we had assigned costs to each State regardless of the size of a State's population of migratory

children. Both commenters also expressed concern that the costs of a thorough re-documentation would be very high for their respective States if meeting the requirement involved the same level of effort States expended when they conducted their voluntary re-interviewing.

*Discussion:* The Secretary does not agree that the costs of the re-documentation will be particularly high because, as noted previously, the re-documentation can be conducted at the same time that SEAs carry out their usual processes for updating the eligibility and continued residency of migratory children identified as eligible in a prior performance year. The Secretary also strongly believes that this re-documentation effort is an essential step that must be implemented by all SEAs in order to ensure the accuracy and integrity of the States' programs and of the MEP nationally. Such re-documentation is necessary to ensure that MEP funds are used only to provide services to eligible migratory children. This is the case since any MEP funds used to serve ineligible children are not available to serve those who are eligible. Moreover, the provision of service to ineligible children, when ultimately discovered by Departmental monitoring or audit, may require SEAs and LOAs to return funds improperly expended, reductions in future MEP allocations, and the assessment of penalties and/or damages.

*Changes:* None.

*Comment:* One commenter suggested that the re-documentation requirement is unnecessary because, according to the commenter, it would be duplicative of current regulatory requirements that already require annual re-certification of eligibility of each migratory family.

*Discussion:* While the ESEA generally requires that SEAs submit accurate counts of and serve only eligible migratory children, current Departmental regulations do not require, explicitly or implicitly, that SEAs re-certify the eligibility of migratory children annually. If an SEA includes a child in its State child counts based on a prior year's eligibility determination, the SEA must only confirm that the child has lived in the State during the reporting period and that the child made an eligible move not more than 36 months before reporting the child in the State's counts of migratory children. An SEA may conduct an annual re-certification as part of its State-established program requirements, and, in its MEP non-regulatory guidance, the Department has recommended that SEAs conduct such re-certifications as a voluntary quality control measure. However, MEP regulations have never required that States conduct re-certifications.

*Changes:* None.

*Section 200.89(b) Responsibilities of SEAs for re-interviewing to ensure the eligibility of children under the MEP.*

*Comment:* One commenter objected to the re-interviewing requirements proposed in § 200.89(b), stating that, in the commenter's opinion, requiring any further re-interviewing would constitute a waste of program funds given the amount of funds that have already been expended on the voluntary retrospective re-interviewing process. The commenter recommended eliminating the re-interviewing requirements.

*Discussion:* The Secretary disagrees. The voluntary retrospective re-interviewing process was valuable in identifying serious deficiencies in eligibility determinations in a number of States, and it is necessary, from the point of fairness, to require it in § 200.89(b)(1) of all SEAs that did not participate voluntarily or did not provide what the Secretary determines to be an acceptable defect rate. Similarly, it is necessary to require prospective re-interviewing in § 200.89(b)(2) to ensure a complete system of quality control. For reasons expressed elsewhere in this notice, the Secretary is satisfied that the costs associated with re-interviewing are reasonable and manageable.

*Change:* None.

*Section 200.89(b)(1) Retrospective Re-interviewing.* In all, six individuals or organizations submitted comments on the requirements in § 200.89(b)(1), in which the Department proposed to establish certain minimum technical requirements regarding sample selection, re-interview procedures, and reporting for retrospective re-interviewing.

*Comments:* Four commenters supported the proposed requirement to conduct retrospective re-interviewing. One commenter stated that the proposal was a good idea and would make every State responsible for the re-interviewing process and its results. Two commenters indicated that the re-interviewing requirement would not apply to their State because the State had already conducted re-interviewing under the voluntary re-interview initiative. Another commenter stated that she had no comments concerning the requirements unless the Department does not accept the commenter's State defect rate.

*Discussion:* While the Secretary appreciates these supportive comments, they raise a concern that the language in paragraph (b)(1) of the proposed regulation was not sufficiently clear about which SEAs would need to conduct retrospective re-interviewing. We note those requirements here and have revised the language in the regulations to clarify the requirements.

Under these regulations, retrospective re-interviewing will be required by: (1) Those few SEAs that do not implement the process voluntarily prior to the effective date of these final regulations; (2) any SEA that submitted a defect rate that the Secretary does not accept; and (3) any SEA implementing it as a corrective action of the Secretary based on prospective re-interviewing results [§ 200.89(b)(2)(vii)] or other quality control checks [§ 200.89(d)(7)].

Currently, SEAs in only two States with operating MEPs have not conducted voluntary re-interviewing and submitted a defect rate to the Department. These two SEAs will be required to conduct retrospective re-interviewing once these final regulations have become effective. Of the remaining SEAs, i.e., those that conducted voluntary re-interviewing and submitted their defect rates to the Secretary, the Secretary has been able to determine all but a small number to be acceptable. After these regulations become effective, the Secretary will notify those few SEAs that submitted unacceptable defect rates that, if the matter of their defect rates is not resolved, they, too, will need to conduct retrospective re-interviewing. Additionally, retrospective re-interviewing may be required of an SEA in the future as a corrective action if necessary under § 200.89(b)(2)(vii) or § 200.89(d)(7).

*Change:* The Secretary has revised § 200.89(b)(1)(i) to clarify that, in addition to those SEAs that have not yet conducted retrospective re-interviewing, any SEA that did so but submitted a defect rate that is not accepted by the Secretary will also be subject to the requirement to conduct retrospective re-interviewing. The revised regulation also now clarifies that the Secretary may require retrospective re-interviewing as a corrective action in order to respond to problems identified through the prospective re-interviewing process (§ 200.89(b)(2)(vii)) or through other quality control checks, including audit and monitoring findings of the Secretary (§ 200.89(d)(7)).

*Comments:* One commenter expressed concern about the sampling requirements for retrospective re-interviewing. This commenter stated that the proposed sample size for retrospective re-interviewing would be similar to the sample size for prospective re-interviewing and that

this would require each State to expend an additional 8,700 person hours annually.

*Discussion:* The commenter has misunderstood the proposed sampling requirements and the amount of effort needed for both prospective and retrospective re-interviewing. First, the statement in the preamble to the NPRM [72 FR 25235] that an estimated 8,700 hours would need to be expended for prospective re-interviewing refers to the estimated total hours to be expended nationally across all States participating in the MEP, not to the effort to be expended by a single State. Second, the sample size and the estimated data burden for retrospective re-interviewing are not the same as for prospective re-interviewing. Rather, both sample size and data burden on staff and migratory families are greater for retrospective re-interviewing than for prospective re-interviewing.

As noted more clearly in the OMB information collection package [1810–0662] and the section of the NPRM entitled *Paperwork Reduction Act of 1995* [72 FR 25238], we estimate that on average only 152 hours of staff time (and 25 hours of migrant parents' time across an estimated statewide sample of 50 migratory parents) per State will be needed to conduct prospective re-interviewing, while an estimated average of 1,580 staff hours and 150 person hours (across an estimated average statewide sample of 300 migrant parents) per State will be needed to conduct retrospective re-interviewing. As we have noted, however, most SEAs have already conducted their retrospective re-interviewing process and will not incur this burden. Only those SEAs that have not conducted retrospective re-interviewing prior to the effective date of these final regulations, those SEAs that have a defect rate that the Secretary does not accept, or those under corrective actions that require retrospective re-interviewing will still have to meet the retrospective re-interviewing requirements established by these final regulations.

*Changes:* None.

*Comments:* One commenter stated that the costs associated with hiring independent re-interviewers to conduct retrospective re-interviewing would be significant and would require States to divert funds and services away from migrant children. The commenter expressed the opinion that imposing these costs was inconsistent with the *Summary of Potential Costs and Benefits* in the NPRM, in which the Department stated that the proposed regulations would not add significantly to the costs of implementing the MEP. The commenter recommended either providing funds to States to hire independent re-interviewers or eliminating the requirement for independent re-interviewers except in cases where the Secretary determines a significant error rate.

*Discussion:* Consistent with the need for retrospective re-interviewing to ensure the integrity of a State's MEP, the Secretary believes that the use of independent re-interviewers is necessary in conducting retrospective re-interviewing. The Secretary recognizes that hiring and training interviewers independent of the initial eligibility determinations will be somewhat more expensive than using existing program personnel (although existing program personnel may still need to receive training in the re-interviewing process, and SEA or LEA staff already on-staff but paid from non-MEP funds (e.g., State/local audit staff, monitoring staff from other Federal or State programs) may also be considered independent re-interviewers). However, the Secretary believes that any extra costs incurred through the use of independent re-interviewers are an allowable and necessary use of MEP funds and justified by the need to establish the quality and impartiality of a State's re-interviewing process. In any case, the retrospective re-interviewing is only to be conducted in situations where there are significant questions raised about the accuracy of a State's eligibility determinations as identified either through its ongoing quality control processes (including prospective re-interviewing) or because the State did not conduct a retrospective re-interviewing process that resulted in a defect rate that the Secretary accepts.

*Changes:* None.

*Comment:* One commenter asked that we clarify which year States must use for the target child count required for retrospective re-interviewing.

*Discussion:* The Secretary will determine which year's migrant child count an SEA must examine in retrospective re-interviewing based on the reason the SEA is being required to conduct such re-interviewing, i.e., if the SEA did not conduct retrospective re-interviewing prior to the effective date of this final regulation; if a previously submitted defect rate was found to be unacceptable based on the Department's review of the State's re-interviewing process; or if the Department requires it as a corrective action.

*Change:* None.

*Section 200.89(b)(2) Prospective Re-interviewing.* In all, 15 individuals or organizations submitted comments on proposed § 200.89(b)(2), which would require annual prospective re-interviewing and establish certain minimum technical requirements regarding sample selection, re-interview procedures, reporting, and corrective actions.

*Comments:* One commenter supported our proposal to require prospective re-interviewing because it would ensure that all States actively monitor their eligibility determinations. Two other commenters indicated that their States were already conducting prospective re-interviewing on a sample of children annually.

*Discussion:* The Secretary appreciates the commenters' expressions of support for the proposal to require prospective re-interviewing.

*Changes:* None.

*Comments:* Several commenters expressed concern that the prospective re-interviewing requirements would be costly and burdensome for States to implement. In some cases, the commenters based their concerns on their prior experiences with the Department's voluntary (retrospective) re-interviewing initiative. In other cases, commenters assumed that the 8,700 hours referred to in the preamble to the NPRM represented the burden per State, rather than nationally. Several commenters also were concerned that their States, especially States with small MEP allocations or those with low MEP base-allocation amounts that have experienced influxes of migrant children since FY 2002, would not have sufficient funds to conduct extensive re-interviewing in order to verify eligibility and still be able both to continue to serve migrant children and identify and recruit eligible children for MEP services.

Several of the commenters expressed concern about re-interviewing costs in light of the statement in the preamble to the NPRM [72 FR 25235] that States would need to conduct prospective re-interviews of 100 migrant families annually. These commenters stated that it would be too burdensome and expensive, and in some cases impossible, for States with small MEP allocations to conduct this number of re-interviews on an annual basis. Several commenters asked that the prospective re-interviewing requirement either be eliminated or somehow modified to take into account the differences in the amounts of MEP funding that each State MEP receives. Several commenters suggested increasing each State's MEP allocation to cover the costs associated with prospective re-interviewing. One commenter recommended including a specific line item for this task.

*Discussion:* The Secretary does not agree that the prospective re-interviewing process required in § 200.89(b)(2) will be overly burdensome. As noted elsewhere in this preamble, as well as in the preamble to the NPRM [72 FR 25234], the Secretary believes that prospective re-interviewing constitutes an essential activity in an overall system of quality control.

In reviewing these comments, however, we believe there were some misunderstandings regarding the regulatory requirements and associated burden costs of prospective re-interviewing.

- First, commenters appeared to believe that prospective re-interviewing will be as extensive and difficult as the voluntary retrospective re-interviewing that most SEAs carried out prior to issuance of this regulation;
- Second, commenters appeared to believe that the burden for prospective re-interviewing will be an average of approximately 8,700 hours per State, rather than nationally; and
- Third, there was a misunderstanding that each SEA would be required to prospectively re-interview 100 families per year.

With regard to the first concern, the Secretary recognizes that the voluntary retrospective re-interviewing process that most SEAs conducted was costly and time-consuming. That was the case because the retrospective re-interviewing process entailed: (1) Using a statewide random sample and considerable over-sampling to ensure adequate replacement for those families that could not be located, so that the results could be generalized statewide; and (2) conducting re-interviews after a considerable amount of time had passed between the initial eligibility determination and the re-interview. Prospective re-interviewing, however, will not pose the same difficulties. As we stated in the preamble to the NPRM [72 FR 25235], the sample used for prospective re-interviewing (unlike the sample used for retrospective re-interviewing) does not need to be large enough to generalize to the statewide population of migratory children. Rather, it only needs to be of sufficient size and scope to serve as an early warning system for potential eligibility problems. Additionally, SEAs can and should be conducting their prospective re-interviews relatively soon after the initial eligibility determination is made.

With regard to the second concern, the Secretary believes the misunderstanding stems from a statement in the preamble to the NPRM [72 FR 25235]—that the prospective re-interview burden would be less than 8,700 hours annually—that was unclear. The 8,700 hours estimated to be required to conduct prospective re-interviewing represents the estimated annual burden in total *nationally*, not per State. As was noted more clearly in the section of the NPRM entitled Paperwork Reduction Act of 1995 [72 FR 25238] and in the OMB information collection package [1810–0662], we estimate that on average only 152 hours of staff time (and 0.5 hours of time for each of 50 migrant parents) per State per year would be needed to conduct prospective re-interviewing.

With regard to the third concern, the Secretary regretfully notes that the reference to prospective re-interviewing of 100 families in the preamble was an error. In fact, as included in the OMB information collection package [1810–0662] and identified in the section of the preamble to the NPRM entitled Paperwork Reduction Act of 1995 [72 FR 25238], the Department's cost and burden estimates for prospective re-interviewing are based on the expectation that, on average, only 50 families would be prospectively re-interviewed per State per year. Accordingly, the language in the preamble to the NPRM should have provided that States ''on average'' would prospectively re-interview ''on an annual basis * * * no more than 50 families.''

Further, our use of the terms, ''no more than'' and ''on average'', when taken together, means that we recognize that under some situations, and especially in the case of States with small numbers of migrant children and, thus, small MEP allocations, an SEA may be able to draw meaningful inferences about the quality of recruiters' eligibility decisions from prospective re-interviews with fewer than 50 families per year and still satisfy the regulatory requirement in § 200.89(b)(2)(ii) to annually sample a ''sufficient number of eligibility determinations'' randomly on a statewide basis or based on relevant subgroups. Conversely, an SEA in a State with a relatively large number of migrant children and, thus, with a relatively large MEP allocation may find it desirable to re-interview more than 50 families in order to obtain meaningful inferences about the quality of eligibility decisions that its recruiters are making. Issues of sample size will be more fully addressed in non-regulatory guidance on re-interviewing after the publication of this final regulation.

With regard to the other concerns regarding costs, we estimated in the OMB information collection package [1810–0662], which the NPRM invited the public to review and comment upon, that the average cost per State of the prospective re-interviewing (using the correct average of 50 families per State) will be about $2,300 annually. Given this estimate, the Secretary does not believe that any SEA will find its costs of undertaking prospective re-interviewing to be unmanageable, and so does not believe that this requirement will result in any significant reduction of direct services to migrant children. SEAs, of course, may use their State MEP allocations to pay for the cost of prospective re-interviewing.

With regard to the recommendations to increase or specifically reserve funds to help States pay the cost of conducting prospective re-interviewing, absent a statutory change the Secretary cannot increase a State's MEP allocation or specifically reserve funds to compensate for the small amount of MEP funds that each State participating in the MEP will have to use to pay for prospective re-interviewing. Nor could the Secretary increase each State's allocation unless the appropriation for the program increases.

*Changes:* None.

*Comment:* Two commenters asked whether the proposed regulations would require that States conduct two, overlapping prospective re-interviewing processes—one activity to be conducted by MEP staff every year and a second activity to be conducted in a given year along with the first activity, at least every third year, by non-MEP re-interviewers.

*Discussion:* The regulations do not require two separate and overlapping procedures for conducting prospective re-interviewing. Section 200.89(b)(2) establishes one annual prospective re-interview process. In conducting the annual prospective re-interview process, the SEA must use independent re-interviewers, rather than MEP-funded re-interviewers, to conduct that re-interviewing at least once every three years. So, for example, if an SEA uses MEP-funded re-interviewers to conduct the annual prospective re-interviews in years 1 and 2, it must use independent re-interviewers to conduct that process in year 3. In order to assist SEAs in implementing these new prospective re-interviewing regulatory requirements, we will be issuing non-regulatory guidance regarding recommended re-interviewing processes following issuance of these final regulations.

*Changes:* None.

*Comment:* In response to our request in the NPRM for input on whether prospective re-interviewing should occur on a less frequent interval than

annually, several commenters stated that prospective re-interviewing should be required less frequently—e.g., either on a biennial basis or once every three years. One commenter recommended conducting re-interviewing ''periodically.'' Another commenter suggested annual re-interviewing is not necessary given the requirements in § 200.89(d), which establishes a number of other quality control procedures.

*Discussion:* The Secretary appreciates the commenters' input. After due consideration of the comments, we have concluded that prospective re-interviewing may not occur less frequently than annually. A requirement that prospective re-interviewing be conducted only periodically would not be sufficiently precise. Requiring that the process be conducted biennially or even less frequently, rather than annually, would not be justified in light of the substantial benefit to program integrity that will accrue from conducting the process annually. In this regard, we cannot overemphasize that the national re-interviewing initiative revealed significant problems with eligibility decisions in many parts of the nation. While we are confident that SEAs have taken seriously their responsibility to correct the underlying problems that created this situation, the Secretary believes that continued vigilance is still needed.

Prospective re-interviewing is meant to identify, based on a review of a small sample of families with children found eligible for the MEP, potential problems with eligibility determinations early on—before they become severe. Hence, conducting prospective re-interviewing less frequently than annually would mean that SEAs would have less frequent opportunities to find potential eligibility determination problems, increasing the risk that an eligibility problem will fester or become more widespread and more difficult for the SEA to correct.

*Changes:* None.

*Comment:* Several commenters stated that they believed § 200.89(b)(2) was overly prescriptive. In particular, three commenters suggested that face-to-face re-interviews with migrant families are not necessary and that telephone interviews are sufficient. One of the commenters suggested that the Secretary modify the language of the regulation to provide that the SEA determines what constitutes a reasonable process for conducting prospective re-interviewing.

*Discussion:* The Secretary does not agree that the provisions in this section are overly prescriptive. Rather, while the provisions do establish certain minimum requirements for prospective re-interviewing, they do so in such a way as to give SEAs considerable flexibility to establish a process that is reasonable based on State-specific circumstances, including the State's population of migrant children, and specific migratory patterns. For example, paragraph (b)(2)(ii), which describes minimum sampling requirements for prospective re-interviewing, gives SEAs flexibility as to whether to test on a statewide basis or within particular categories and risk factors. It also suggests but does not require absolute use of any or all of several risk factors that might be used to define the particular categories on which re-interviewing might be focused in a given year.

Despite the flexibility already offered in the NPRM, the Secretary, in response to the comments, has revised the language in paragraph (b)(2)(iii) to provide further flexibility by noting that an alternative to face-to-face interviewing may be used if face-to-face interviewing is determined to be impractical, and specifically noting telephone interviewing is one allowable alternative. This revision removes the language that was contained in the proposed regulations that required an SEA to show that extraordinary circumstances made it impractical to conduct face-to-face interviewing.

*Changes:* The Secretary has revised paragraph (b)(2)(iii) to provide that SEAs must use a face-to-face approach to conduct prospective re-interviews unless circumstances make the face-to-face re-interviews impractical and necessitate the use of an alternative method such as telephone re-interviews.

*Comment:* Several commenters expressed concerns about the sample size requirements for prospective re-interviewing. One commenter recommended modifying the regulations to require a smaller sample size for prospective re-interviewing than the average of 100 families that the NPRM suggested. Three commenters expressed concerned that the proposed regulatory language regarding sample size was too imprecise, and recommended that the Secretary clearly define terms such as ''random sampling'' and ''sufficient sample,'' and establish five percent or another specific percentage of families that each State must re-interview prospectively. One commenter asked that we clarify how the proposed requirement to use ''a statewide random sample with a confidence interval of 5 percent'' could be applied in a State with a large migrant population if only 100 families a year are re-interviewed.

*Discussion:* With respect to the comment regarding use of an average of 100 families for the sample size for re-interviewing, we previously noted that this reference was an error and that the correct sample size would generally be no more than 50 families, on average.

The Secretary does not agree that the language in paragraph (b)(2)(ii) is imprecise; we believe this language provides an appropriate level of detail for a regulation and permits a State some flexibility depending on specific circumstances. By the term ''sufficient sample,'' we mean a smaller and less precise sample than the one required for retrospective re-interviewing. We mean the term ''random sample'' to have the meaning generally used in the field of statistics. This said, we intend to provide further guidance to States on random sampling, sample sizes, and other aspects of the re-interviewing requirements in non-regulatory guidance following the issuance of these final regulations.

The requirement to use a statewide random sample (at a 95 percent confidence level with a confidence interval of plus or minus five percent) refers only to the requirements for retrospective re-interviewing; in contrast, for prospective re-interviewing the SEA need only select a sample of sufficient size and scope to enable the process to serve as an adequate early warning system about potential eligibility problems.

*Changes:* None.

*Comment:* Three commenters expressed concern about the costs and effort needed if independent re-interviewers (i.e., non-MEP personnel) are required for prospective re-interviewing.

*Discussion:* As we have discussed previously, we do not believe that implementing the prospective re-interviewing requirement, including the provisions for use of independent re-interviewers, will create significant cost or burden particularly when compared to the benefit of using independent re-interviewers at least once every three years to verify the eligibility determinations for the sample selected. Using independent re-interviewers periodically allows States to avoid even the appearance of a possible conflict of interest in making decisions about program eligibility determinations that affect the size of grant and subgrant amounts and, thus, contributes to ensuring the ongoing integrity of the MEP. Also, such independent re-interviewers may already be on staff at an SEA or local site—e.g., monitoring or audit staff for another program—and so already have their salaries paid. They would be considered ''independent re-interviewers'' so long as they do not

operate or administer the MEP or are not responsible for the initial eligibility determinations they are reviewing.

*Changes:* None.

*Comment:* Three commenters objected to our proposal to require States to use re-interviewing as the sole or primary method for ensuring the quality of eligibility determinations. The commenters recommended that States' primary focus in ensuring quality should be on providing training and technical assistance to recruiters and other relevant personnel. The commenters indicated that a verification process should be undertaken, but not involve annual re-interviewing of substantial numbers of families. These commenters recommended that States be required to develop and implement a system of internal controls, such as testing of recruiters, certification of recruiters' training, checking recruiters' work and certificates of eligibility closely, and related activities, in order to ensure that procedures are appropriate and followed conscientiously. Additionally, the commenters recommended that we require States to more closely scrutinize eligibility determinations in geographic areas that experience a change in demographics, in areas where there are new recruiters, and in areas where there have been findings of mistakes.

Three commenters stated that the institutionalization of the prospective re-interviewing process in regulations and requiring the reporting of a new ''defect rate'' each year would be unwarranted and detrimental. The commenters argued that if a family is deemed to be ineligible through the State's other existing quality control processes, the family should simply be removed from the list of children to be served. The commenters suggested that, if proper training and support are in place and the Department conducts appropriate site visit monitoring, there should be no noticeable or worrisome problems with the eligibility determination process in the future. The commenters recommended that the States be required to adopt a ''verification of eligibility plan'' that would be submitted to the Secretary for approval.

*Discussion:* The Secretary is in general agreement with the commenters. The Secretary agrees that prospective re-interviewing is not and should not be the sole or primary focus of a State's MEP quality control process, and that it is important that SEAs examine eligibility determinations based on specific risk factors and other criteria. The Secretary believes that this approach is already reflected in the language in § 200.89(d), which outlines the minimum components of a State's quality control system, and in § 200.89(b)(2)(ii), which indicates that the sample selected for prospective re-interviewing may be based on categories associated with particular risk factors. Additionally, the Secretary agrees that prospective re-interviewing should not need to involve annual re-interviewing of ''substantial numbers'' of families—that 50 families per year would generally be sufficient.

The Secretary does not agree that prospective re-interviewing is unnecessary or detrimental. As we explained in the NPRM and in this preamble, conducting prospective re-interviewing is essential, as one part of an SEA's overall quality control system, for maintaining a high degree of program integrity in the State and nationally. Conducting prospective re-interviewing annually is necessary to help promote SEA vigilance in checking on the accuracy of State MEP eligibility determinations shortly after they are made, rather than allowing several years to pass before eligibility problems can be identified and corrected.

We note that the Department never intended the prospective re-interviewing process to result in an annual computation of a ''defect rate.'' Rather, we intended it to serve as a part of an SEA's early warning system for eligibility problems. In this regard, if an SEA uncovers eligibility problems through prospective re-interviewing of the sample of children previously found eligible (or by the other review processes described in paragraph (d)), the SEA may have uncovered a problem that is far more pervasive than the ineligibility of the child or children on which the prospective re-interviewing focused. Simply removing these children from the rolls of eligible children as suggested by the commenters, without investigating whether the problem is broader, would not constitute a sufficient or responsible response to the findings. Instead, depending on the nature of the problems identified, the SEA must take corrective action as called for in paragraphs (b)(2)(vii) and (d)(7), including where appropriate, more extensive re-interviewing, to examine the extent of the problem, and then correct it.

Finally, the Secretary declines to adopt the commenters' recommendation that we require States to develop and submit a ''verification of eligibility plan,'' in place of the prospective re-interviewing, since requiring the development and submission of such a plan would impose additional burden on States while not providing useful information other than a list of promised activities similar to those we have included in the regulations.

*Changes:* None.

*Section 200.89(c) Responsibilities of SEAs to document the eligibility of migratory children.*

*Comments:* Ten commenters addressed the proposed provisions in § 200.89(c) establishing requirements for States to follow when documenting the eligibility of migrant children.

Two commenters supported our proposal to require States to use a national COE. However, one of these commenters expressed concern regarding when and how the national COE would be developed and implemented. One commenter noted that the proposal for use of a national COE should provide greater consistency of information and training on completing the documentation.

Several other commenters expressed concerns about the proposal to require use of a national COE. One commenter noted that each State has different patterns of work and mobility, and the information necessary for a determination of eligibility in one State may not be necessary in another State. Several commenters suggested that the Secretary establish a basic COE of required information that States could add to, but not subtract from, to document eligibility. Another commenter suggested that, rather than requiring the use of a single national form, the Department specify certain required data fields to be included on each State's individual form. Still another commenter suggested that, rather than require use of a national COE, the Department should allow States to submit their COEs to the Department for approval. According to the commenter, this approach would provide States with flexibility in developing the COE and still ensure that each State's COE contains the minimum data necessary to document eligibility.

Several commenters stated that additional cost and effort will be required to change existing individual State forms to a national form and to align existing migratory student data systems to the national COE. One commenter noted that each subsequent change to a national COE would necessitate changes to the forms and databases used by the States.

One commenter stated that we should not require parental signatures on the COE. The commenter noted that inclusion of the parental signature placed the burden for accuracy on the migratory parent, rather than on the program recruiter who completes the

COE. The commenter also stated that the COE would have to be translated into Spanish, so that parents who only speak Spanish could understand what they are signing. The commenter also noted that the Department should consider how the requirement would be applied if the migratory parents were illiterate.

The commenter also suggested that the Department clarify the legal consequences if it finds that a COE completed by a recruiter and signed by the parent contains false information.

One commenter expressed concern that the proposed COE does not include information about how the data collected will be shared. The commenter believed that including such a statement on the COE was necessary under the Family Educational Rights and Privacy Act (FERPA).

Finally, one commenter requested that we clarify what would be considered ''additional documentation'' under § 200.89(c)(2). The commenter stated that without this clarification, the commenter's agency would be unable to assess the impact of this aspect of the proposed regulation. Another commenter also stated that this term could be interpreted differently from State to State and, therefore, suggested that it be clarified.

*Discussion:* As discussed in the NPRM [72 FR 25235], the Secretary believes that the establishment and use of a national COE, as proposed in § 200.89(c)(1), are necessary to (1) ensure consistency among the various State programs in recording, retaining and transferring MEP records; and (2) help prevent incorrect eligibility decisions that might occur because of a State's use of a COE the SEA had produced that is not fully adequate. The Secretary understands the desire expressed by commenters for continued use of their own States' COEs or for an alternative that would have the Secretary establish only the minimum content of their States' COEs. However, the Secretary believes that information gathered in the course of State audits and the national re-interview initiative confirm that SEAs have used too many different iterations of COEs that in one way or another are problematic, and that program integrity now demands use of a common reporting form that all States will use when making determinations about migrant eligibility.

The Secretary recognizes that the use of the national COE will require some SEAs to change somewhat their existing practices for documenting eligibility, and that these changes will have implications in the short run relative to costs and staff time. However, given that all SEAs have for many years voluntarily used some form of COE to document eligibility that contains most if not all the required data fields in the proposed national COE, the Secretary does not believe that costs and staff time (all of which may be paid with MEP funds) associated with substituting the national COE for their State COEs and revising their databases accordingly will be so great as to outweigh the advantages to the MEP as a whole of using a standard national COE.

The Secretary thanks the commenters for their input on the final format and content of the COE, including the requirement for the COE to be signed by the parent. We are currently working with OMB to finalize this data collection and will be considering these comments in making revisions to the national COE. The public also will have a further opportunity to comment on the revised national COE and the associated information collection package [1810–0662] following the publication of these final regulations, and we will consider those comments as we finalize the data collection. Once the complete information collection package is approved by OMB, we will provide training and technical assistance on use of the national COE, on issues that include the need for the parental signature and the rights and responsibilities of COE signatories under FERPA and the False Claims Act, through non-regulatory guidance and the Department's Migrant Education Resource Center (MERC).

We now address comments about the meaning of the requirement in § 200.89(c)(2) that the SEA and its operating agencies ''develop and maintain such additional documentation as may be necessary to confirm that each child found eligible for this program meets all of the eligibility definitions in § 200.81,'' and that different States may require different information to be collected to document eligibility. We proposed this provision in recognition of the fact that, depending on the circumstances of individual children, a State may determine that documentation of a child's eligibility for the MEP requires more than the mere summary of a parental interview as recorded on the national COE. Such additional documentation might include, for example, information validating temporary employment, explaining the specific circumstances regarding personal subsistence or economic necessity, or re-interviewing results. The additional documentation requirement also permits inclusion of any other items of information currently collected by States that are, according to several commenters, not included on the national COE.

*Changes:* None.

*Section 200.89(d) Responsibilities of an SEA to establish and implement a system of quality controls for the proper identification of eligible migratory children.*

*Comments:* Seven commenters addressed one or more elements of the proposed quality control requirements in § 200.89(d).

Three commenters indicated that the proposed quality control procedures in § 200.89(d) would adequately ensure high quality in program eligibility determinations, and that their implementation, in concert with other suggestions these commenters made regarding the re-interviewing requirements in § 200.89(b), would reduce the need for substantial, annual face-to-face re-interviewing and thereby preserve program resources and reduce alienation from the program. One commenter recommended that the Department reconsider regulating on how SEAs implement quality control procedures. This commenter suggested that many States have addressed their previously identified quality control problems. The commenter also stated that the proposed regulatory requirements in this section would be costly to implement and would require States to reallocate program funds that are currently spent on services to children, without effectively reducing defective eligibility determinations beyond the current levels. This commenter also proposed that States that have effective quality control systems in place and can document a defect rate that is lower than the national average should be exempt from the proposed quality control requirements in this section.

One commenter expressed concern that the formal process for resolving eligibility questions and distributing written rulings required in paragraph (d)(3) was overly prescriptive and burdensome. Another commenter, while expressing various concerns about the quality of the identification and recruitment practices in the commenter's State, suggested that the Secretary establish, by regulation, several additional quality control requirements regarding the qualifications, hourly pay, and training of recruiters.

*Discussion:* As discussed in the preamble to the NPRM (72 FR 25236), the Secretary believes that, given that defective eligibility determinations were uncovered in virtually every State during the voluntary re-interviewing

initiative, it is necessary to establish, through regulation, a minimum set of responsibilities that all States must establish for quality control of their MEP identification and recruitment procedures. The Secretary recognizes that most SEAs are currently implementing some or all of these requirements voluntarily and that, in cases where an SEA is not now implementing one or more of the regulatory requirements, that SEA will face an increased expenditure of time, effort and funds to implement the other regulatory requirements of this section. However, given that the Secretary believes that the regulations represent a *minimum* set of requirements, the Secretary does not believe that situations noted by the commenters (having a defect rate lower than the national average, voluntarily implementing one or another quality control activity, or the increased effort and expenditures that would need to be devoted to implementing all of the proposed quality control procedures) justify exempting any SEA from the responsibility to establish and implement all of these quality control measures.

Moreover, if, as the commenters suggest, most SEAs already have addressed their identified quality control problems by voluntarily implementing some or all of these procedures, the requirements in paragraph (d) will not place an undue burden on State and local MEP staff. This said, the Secretary agrees that the language in paragraph (d)(3), as proposed, may be overly prescriptive in that requiring written copies of all policy determinations to be transmitted to all LOAs might not always be needed in order to meet the basic intent of this regulatory provision—ensuring the sharing of SEA policy interpretations regarding program eligibility with local program personnel.

Finally, the Secretary believes that more technical aspects of quality control, such as the qualifications and training of recruiters, are matters better addressed through suggested best practices in non-regulatory guidance, rather than as regulatory requirements.

*Change:* We have amended § 200.89(d)(3) to remove the requirement that answers to eligibility questions be transmitted from the SEA to its LOAs in written form.

*Comment:* None.

*Discussion:* As part of our internal review of the final regulations, we have determined that a technical edit needed to be made to paragraph (d)(7) of § 200.89 in order to clarify that the corrective actions mentioned in that paragraph may also result from monitoring or audit findings of the Secretary or the State.

*Changes:* We have modified the language in paragraph (d)(7) to clarify that Federal monitoring or audit findings, as well as internal State audit findings and recommendations, may also trigger the SEA's process for implementing corrective actions.

**Executive Order 12866**

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments, or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is significant under section 3(f)(4) of the Executive order.

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, we have determined that the benefits of the regulations justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

**Summary of Potential Costs and Benefits**

These regulations require SEAs to establish specific procedures to standardize and improve the accuracy of program eligibility determinations and clarify requirements for development of comprehensive statewide needs assessments and service delivery plans. The primary impact of the regulations is on SEAs that receive MEP funds and the children who are eligible for services under the MEP. By requiring SEAs to establish procedures to improve the accuracy of their eligibility determinations, the regulations will ensure that program funds and the services they fund are directed only to children who are eligible to receive services and reduce the possibility that children who are not eligible for services receive program benefits. The regulations issued through this notice also add clarity where the statute is ambiguous or unclear.

The Department estimates that the additional annual cost to recipients to comply with these regulations will be approximately $4.5 million:

- Adding measurable program outcomes to the State comprehensive MEP service delivery plan [§ 200.83] will cost approximately $600 annually in total across all SEAs;
- Re-interviewing samples of students [§ 200.89(b)] will cost approximately $220,000 annually in total across all SEAs;
- Documenting the eligibility of migratory children, including the use of a standard COE [§ 200.89(c)] will cost approximately $2.8 million annually in total across all SEAs; and
- Institution of specific quality control procedures [§ 200.89(d)] will cost approximately $1.5 million annually in total across all SEAs.

This estimate is based on and further explained in the information collection package required under the Paperwork Reduction Act of 1995 and discussed in more detail elsewhere in this notice in the sections entitled *Analysis of Comments and Changes* and *Paperwork Reduction Act of 1995*.

These regulations will not add significantly to the costs of implementing the MEP since we estimate that the SEAs are currently expending approximately these amounts implementing various eligibility determination activities, but the regulations will add significantly to the consistency of eligibility determinations by standardizing the eligibility determination process nationally. The activities required by these regulations will be financed through the

appropriation for Title I, Part C (MEP) and will not impose a financial burden that SEAs and local educational agencies will have to meet from non-Federal resources.

The regulations will help maintain public confidence in the program and ensure its continued operational integrity. Department analyses have shown that, on average, close to 12 percent of the children identified by SEAs as eligible for services for school year 2003–04 did not meet the statutory eligibility criteria. The regulations provide a benefit by ensuring that program funds are directed only to eligible migratory children. Increased accuracy will also ensure that program funds are allocated in the proper amounts and to the locations where eligible children reside. If implementation of the regulations results in 12 percent of currently participating children being determined ineligible, then some $46 million annually (12 percent of the appropriation) would be redirected from services to statutorily ineligible children to serving children who meet the statutory criteria. Because the statute is intended to focus on eligible children who have a genuine need for services (as a result of having made a qualifying move), there is a clear societal benefit to ensuring that program funds are used only to serve eligible students.

More specifically, society as a whole benefits when migratory children receive educational services targeted to their specific needs. As noted in numerous studies since the nineteen sixties,[4] the migratory children who are eligible to receive program benefits constitute a particularly needy and vulnerable school population. Migrant families tend to live in poverty, speak limited English, and lack access to preventive medical care. Few children from migrant families attend preschool, and they are often enrolled in high-poverty schools. Migratory youth are at high risk for dropping out of school without attaining a high school diploma. Access to education can help mitigate the effect of these risk factors. Preschool education prepares small children for the demands of elementary education and encourages parents to become active learners along with their children. Children who receive educational services targeted to address their specific needs are more likely to be successful in school and to receive other marginal services, such as vaccinations and health screenings, that are associated with school attendance. Youth who complete high school generally earn more in their lifetime than those who don't earn a high school diploma. These regulations benefit society because they require safeguards to ensure that the neediest migrant children will be identified and receive the services that will help them succeed in school.

There is also a potential cost to migratory children if these regulations are not enacted. In the absence of regulations, recipients have diluted the quantity and quality of services available to children who are legitimately eligible for services under the program by serving significant numbers of children who are not eligible. Since MEP services are only available to eligible children for a short period of time, preventing truly eligible migratory children from receiving the services they are entitled to may have an adverse effect on their educational attainment.

**Paperwork Reduction Act of 1995**

The regulations listed in the following chart contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to OMB for its review.

| Regulatory section | Collection information | Collection |
|---|---|---|
| § 200.83 | Requires SEAs to add measurable program outcomes into the comprehensive MEP State plan for service delivery. | "Migrant Education Program (MEP) Regulations and Certificate of Eligibility (COE)." OMB No. 1810–0662. |
| § 200.89(b)(1) | Requires SEAs to conduct retrospective re-interviewing | "Migrant Education Program (MEP) Regulations and Certificate of Eligibility (COE)." OMB No. 1810–0662. |
| § 200.89(b)(2) | Requires SEAs to conduct prospective re-interviewing | "Migrant Education Program (MEP) Regulations and Certificate of Eligibility (COE)." OMB No. 1810–0662. |
| § 200.89(c) | Requires SEAs to document the eligibility of migratory children. | "Migrant Education Program (MEP) Regulations and Certificate of Eligibility (COE)." OMB No. 1810–0662. |
| § 200.89(d) | Requires SEAs to establish a system of quality controls | "Migrant Education Program (MEP) Regulations and Certificate of Eligibility (COE)." OMB No. 1810–0662. |

Respondents to this collection consist of SEAs and their LOA subgrantees (usually, but not exclusively, LEAs) as well as parents of migratory children. The collection of information is necessary to accurately identify and serve eligible migratory children. The proposed frequency of response is no more than annually.

The estimated total annual reporting and recordkeeping burden that will result from the collection of information is 510,456 hours. The estimated average burden hours per response are approximately 1,580 hours per each of 15 State respondents (i.e., SEA and subgrantee staff), and 0.5 hours per each of 4,500 migrant parent respondents to address (on a one-time basis) the requirements of § 200.89(b)(1) for retrospective re-interviewing. We estimate that it will require approximately 152 hours per each of 49 State respondents and 0.5 hours per each of 2,450 migrant parent respondents to address (annually) the requirements of § 200.89(b)(2) for prospective re-interviewing. We estimate that it will require approximately 17,347 hours per each of 49 States and 1.5 hours per each of 300,000 parents (overall) to address the requirements of § 200.89(c) for documenting the eligibility of migratory children. We estimate that it will require approximately 1,220 hours per each of 49 States to address (annually) the requirements of § 200.89(d) to establish and implement adequate quality controls. We also estimate that the data burden associated with the proposed change in § 200.83 to add measurable program outcomes into the comprehensive MEP State plan for service delivery will not total more than one hour per SEA.

If you want to comment on the information collection requirements,

[4] See, for example, *Invisible Children: A portrait of migrant education in the United States,* National Commission on Migrant Education, U.S. Govt. Printing Office, Sept. 23, 1992; and *The same high standards for migrant students: Holding Title I schools accountable,* United States Department of Education, Washington DC, 2002.

please address your comments to the Desk Officer for Education, Office of Information and Regulatory Affairs, OMB, and send via e-mail to *OIRA_DOCKET@omb.eop.gov* or via fax to (202) 395–6974. Commenters need only submit comments via one submission medium. You may also send a copy of these comments to the Department representative named in the **FOR FURTHER INFORMATION CONTACT** section of this preamble. We consider your comments on these proposed collections of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring 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.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication.

**Intergovernmental Review**

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, we intend this document to provide early notification of the Department's specific plans and actions for this program.

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(Catalog of Federal Domestic Assistance Number 84.011: Title I, Education of Migrant Children.)

**List of Subjects in 34 CFR Part 200**

Administrative practice and procedure, Adult education, Allocation of funds, Children, Coordination, Education of children with disabilities, Education of disadvantaged children, Elementary and secondary education, Eligibility, Family, Family-centered education, Grant programs—education, Indians—education, Institutions of higher education, Interstate coordination, Intrastate coordination, Juvenile delinquency, Local educational agencies, Local operating agencies, Migratory children, Migratory workers, Neglected, Nonprofit private agencies, Private schools, Public agencies, Quality control, Re-interviewing, Reporting and recordkeeping requirements, State-administered programs, State educational agencies, Subgrants.

Dated: July 18, 2008.

**Kerri L. Briggs,**

*Assistant Secretary for Elementary and Secondary Education.*

■ For the reasons discussed in the preamble, the Secretary amends part 200 of title 34 of the Code of Federal Regulations as follows:

## PART 200—TITLE I—IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

■ 1. The authority citation for part 200 continues to read as follows:

**Authority:** 20 U.S.C. 6301 through 6578, unless otherwise noted.

■ 2. Revise § 200.81 to read as follows:

### § 200.81 Program definitions.

The following definitions apply to programs and projects operated under subpart C of this part:

(a) *Agricultural work* means the production or initial processing of crops, dairy products, poultry, or livestock, as well as the cultivation or harvesting of trees. It consists of work performed for wages or personal subsistence.

(b) *Fishing work* means the catching or initial processing of fish or shellfish or the raising or harvesting of fish or shellfish at fish farms. It consists of work performed for wages or personal subsistence.

(c) *In order to obtain,* when used to describe why a worker moved, means that one of the purposes of the move is to seek or obtain qualifying work.

(1) If a worker states that a purpose of the move was to seek any type of employment, i.e., the worker moved with no specific intent to find work in a particular job, the worker is deemed to have moved with a purpose of obtaining qualifying work if the worker obtains qualifying work soon after the move.

(2) Notwithstanding the introductory text of this paragraph (c), a worker who did not obtain qualifying work soon after a move may be considered to have moved in order to obtain qualifying work only if the worker states that at least one purpose of the move was specifically to seek the qualifying work, and—

(i) The worker is found to have a prior history of moves to obtain qualifying work; or

(ii) There is other credible evidence that the worker actively sought qualifying work soon after the move but, for reasons beyond the worker's control, the work was not available.

(d) *Migratory agricultural worker* means a person who, in the preceding 36 months, has moved, as defined in paragraph (g), from one school district to another, or from one administrative area to another within a State that is comprised of a single school district, in order to obtain temporary employment or seasonal employment in agricultural work, including dairy work.

(e) *Migratory child* means a child—

(1) Who is a migratory agricultural worker or a migratory fisher; or

(2) Who, in the preceding 36 months, in order to accompany or join a parent, spouse, or guardian who is a migratory agricultural worker or a migratory fisher—

(i) Has moved from one school district to another;

(ii) In a State that is comprised of a single school district, has moved from one administrative area to another within such district; or

(iii) As the child of a migratory fisher, resides in a school district of more than

15,000 square miles, and migrates a distance of 20 miles or more to a temporary residence.

(f) *Migratory fisher* means a person who, in the preceding 36 months, has moved, as defined in paragraph (g), from one school district to another, or from one administrative area to another within a State that is comprised of a single school district, in order to obtain temporary employment or seasonal employment in fishing work. This definition also includes a person who, in the preceding 36 months, resided in a school district of more than 15,000 square miles and moved, as defined in paragraph (g), a distance of 20 miles or more to a temporary residence in order to obtain temporary employment or seasonal employment in fishing work.

(g) *Move* or *Moved* means a change from one residence to another residence that occurs due to economic necessity.

(h) *Personal subsistence* means that the worker and the worker's family, as a matter of economic necessity, consume, as a substantial portion of their food intake, the crops, dairy products, or livestock they produce or the fish they catch.

(i) *Qualifying work* means temporary employment or seasonal employment in agricultural work or fishing work.

(j) *Seasonal employment* means employment that occurs only during a certain period of the year because of the cycles of nature and that, by its nature, may not be continuous or carried on throughout the year.

(k) *Temporary employment* means employment that lasts for a limited period of time, usually a few months, but no longer than 12 months. It typically includes employment where the employer states that the worker was hired for a limited time frame; the worker states that the worker does not intend to remain in that employment indefinitely; or the SEA has determined on some other reasonable basis that the employment is temporary. The definition includes employment that is constant and available year-round only if, within 18 months after the effective date of this regulation and at least once every three years thereafter, the SEA documents that, given the nature of the work, of those workers whose children were previously determined to be eligible based on the State's prior determination of the temporary nature of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months.

■ 3. Amend § 200.83 as follows:

■ a. Redesignate paragraphs (a)(3) and (a)(4) as paragraphs (a)(4) and (a)(5), respectively, and add a new paragraph (a)(3).

■ b. Revise the introductory text of redesignated paragraph (a)(4).

The revision and addition read as follows:

**§ 200.83 Responsibilities of SEAs to implement projects through a comprehensive needs assessment and a comprehensive State plan for service delivery.**

(a) * * *

(3) *Measurable program outcomes.* The plan must include the measurable program outcomes (i.e., objectives) that a State's migrant education program will produce to meet the identified unique needs of migratory children and help migratory children achieve the State's performance targets identified in paragraph (a)(1) of this section.

(4) *Service delivery.* The plan must describe the strategies that the SEA will pursue on a statewide basis to achieve the measurable program outcomes in paragraph (a)(3) of this section by addressing—

* * * * *

■ 4. Add § 200.89 to read as follows:

**§ 200.89 MEP allocations; Re-interviewing; Eligibility documentation; and Quality control.**

(a) *Allocation of funds under the MEP for fiscal year (FY) 2006 and subsequent years.* (1) For purposes of calculating the size of MEP allocations for each SEA for FY 2006 and subsequent years (as well as for supplemental MEP allocations for FY 2005), the Secretary determines each SEA's FY 2002 base allocation amount under section 1303(a)(2) and (b) of the Act by applying, to the counts of eligible migratory children that the SEA submitted for 2000–2001, the defect rate that the SEA reports to the Secretary and that the Secretary accepts based on a statewide retrospective re-interviewing process that the SEA has conducted.

(2)(i) The Secretary conditions an SEA's receipt of final FY 2007 and subsequent-year MEP awards on the SEA's completion of a thorough re-documentation of the eligibility of all children (and the removal of all ineligible children) included in the State's 2007–2008 MEP child counts.

(ii) To carry out this re-documentation, an SEA must examine its rolls of all currently identified migratory children and remove from the rolls all children it judges to be ineligible based on the types of problems identified in its statewide retrospective re-interviewing as causing defective eligibility determinations.

(b) *Responsibilities of SEAs for re-interviewing to ensure the eligibility of children under the MEP.*

(1) *Retrospective re-interviewing.*

(i) As a condition for the continued receipt of MEP funds in FY 2006 and subsequent years, an SEA that received such funds in FY 2005 but did not implement a statewide re-interviewing process prior to the enactment of this regulation, as well as an SEA with a defect rate that is not accepted by the Secretary under paragraph (a)(1) of this section, or an SEA under a corrective action issued by the Secretary under paragraph (b)(2)(vii) or (d)(7) of this section, must, within six months of the effective date of these regulations or as subsequently required by the Secretary,—

(A) Conduct a statewide re-interviewing process consistent with paragraph (b)(1)(ii) of this section; and

(B) Consistent with paragraph (b)(1)(iii) of this section, report to the Secretary on the procedures it has employed, its findings, its defect rate, and corrective actions it has taken or will take to avoid a recurrence of any problems found.

(ii) At a minimum, the re-interviewing process must include—

(A) Selection of a sample of identified migratory children (from the child counts of a particular year as directed by the Secretary) randomly selected on a statewide basis to allow the State to estimate the statewide proportion of eligible migratory children at a 95 percent confidence level with a confidence interval of plus or minus 5 percent.

(B) Use of independent re-interviewers (i.e., interviewers who are neither SEA or local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested) trained to conduct personal interviews and to understand and apply program eligibility requirements; and

(C) Calculation of a defect rate based on the number of sampled children determined ineligible as a percentage of those sampled children whose parent/guardian was actually re-interviewed.

(iii) At a minimum, the report must include—

(A) An explanation of the sample and procedures used in the SEA's re-interviewing process;

(B) The findings of the re-interviewing process, including the determined defect rate;

(C) An acknowledgement that, consistent with § 200.89(a), the Secretary may adjust the child counts for 2000–2001 and subsequent years

downward based on the defect rate that the Secretary accepts;

(D) A summary of the types of defective eligibility determinations that the SEA identified through the re-interviewing process;

(E) A summary of the reasons why each type of defective eligibility determination occurred; and

(F) A summary of the corrective actions the SEA will take to address the identified problems.

(2) *Prospective re-interviewing.* As part of the system of quality controls identified in § 200.89(d), an SEA that receives MEP funds must, on an annual basis, validate current-year child eligibility determinations through the re-interview of a randomly selected sample of children previously identified as migratory. In conducting these re-interviews, an SEA must—

(i) Use, at least once every three years, one or more independent interviewers (i.e., interviewers who are neither SEA or local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested) trained to conduct personal interviews and to understand and apply program eligibility requirements;

(ii) Select a random sample of identified migratory children so that a sufficient number of eligibility determinations in the current year are tested on a statewide basis or within categories associated with identified risk factors (e.g., experience of recruiters, size or growth in local migratory child population, effectiveness of local quality control procedures) in order to help identify possible problems with the State's child eligibility determinations;

(iii) Conduct re-interviews with the parents or guardians of the children in the sample. States must use a face-to-face approach to conduct these re-interviews unless circumstances make face-to-face re-interviews impractical and necessitate the use of an alternative method such as telephone re-interviewing;

(iv) Determine and document in writing whether the child eligibility determination and the information on which the determination was based were true and correct;

(v) Stop serving any children found not to be eligible and remove them from the data base used to compile counts of eligible children;

(vi) Certify and report to the Department the results of re-interviewing in the SEA's annual report of the number of migratory children in the State required by the Secretary; and

(vii) Implement corrective actions or improvements to address the problems identified by the State (including the identification and removal of other ineligible children in the total population), and any corrective actions, including retrospective re-interviewing, required by the Secretary.

(c) *Responsibilities of SEAs to document the eligibility of migratory children.* (1) An SEA and its operating agencies must use the Certificate of Eligibility (COE) form established by the Secretary to document the State's determination of the eligibility of migratory children.

(2) In addition to the form required under paragraph (a) of this section, the SEA and its operating agencies must maintain any additional documentation the SEA requires to confirm that each child found eligible for this program meets all of the eligibility definitions in § 200.81.

(3) An SEA is responsible for the accuracy of all the determinations of the eligibility of migratory children identified in the State.

(d) *Responsibilities of an SEA to establish and implement a system of quality controls for the proper identification and recruitment of eligible migratory children.* An SEA must establish and implement a system of quality controls for the proper identification and recruitment of eligible migratory children on a statewide basis. At a minimum, this system of quality controls must include the following components:

(1) Training to ensure that recruiters and all other staff involved in determining eligibility and in conducting quality control procedures know the requirements for accurately determining and documenting child eligibility under the MEP.

(2) Supervision and annual review and evaluation of the identification and recruitment practices of individual recruiters.

(3) A formal process for resolving eligibility questions raised by recruiters and their supervisors and for ensuring that this information is communicated to all local operating agencies.

(4) An examination by qualified individuals at the SEA or local operating agency level of each COE to verify that the written documentation is sufficient and that, based on the recorded data, the child is eligible for MEP services.

(5) A process for the SEA to validate that eligibility determinations were properly made, including conducting prospective re-interviewing as described in paragraph (b)(2).

(6) Documentation that supports the SEA's implementation of this quality-control system and of a record of actions taken to improve the system where periodic reviews and evaluations indicate a need to do so.

(7) A process for implementing corrective action if the SEA finds COEs that do not sufficiently document a child's eligibility for the MEP, or in response to internal State audit findings and recommendations, or monitoring or audit findings of the Secretary.

**Authority:** 20 U.S.C. 6391–6399, 6571, 7844(d); 18 U.S.C. 1001.

[FR Doc. E8–16859 Filed 7–28–08; 8:45 am]

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Federal Register

Tuesday,
July 29, 2008

# Part V

# Department of Labor

## Secretary's Order 5–2008; Notice

## DEPARTMENT OF LABOR

### Office of the Secretary

### Secretary's Order 5–2008

*Subject:* Management of United States Government Accountability Office Reports.

1. *Purpose.* To delegate authority and assign overall responsibility for coordinating, reviewing, and processing United States Government Accountability Office (GAO) reports.

2. *Authority.* This Order is issued under the authority of 5 U.S.C. 301 (Departmental Regulations); 29 U.S.C. 551 (Establishment of Department: Secretary; Seal); Reorganization Plan No. 6 of 1950 (5 U.S.C. Appendix 1); 31 U.S.C. 711–720 (Government Accountability Office, General Duties and Powers); and Office of Management and Budget (OMB) Circular A–50 (Audit Follow-up).

3. *Redelegations/Transfer of Authority.* Unless provided otherwise in this or another Secretary's Order, the authority delegated in this Order may be redelegated or transferred, as permitted by law or regulation.

4. *Reservation of Authority.* The submission of reports and recommendations to the President and the Congress concerning the administration of statutory or administrative provisions is reserved to the Secretary.

5. *Directives Affected.* Secretary's Order 02–2006 is cancelled. This Secretary's Order does not affect the authorities and responsibilities of the Office of the Inspector General under the Inspector General Act of 1978, as amended, or under Secretary's Order 4–2006 or any other Departmental directive. This Order does not affect the authorities and responsibilities assigned by any other Secretary's Order, unless otherwise expressly so provided in this or another Order.

6. *Background.* Title 31, Chapter 7 of the United States Code establishes GAO as an independent instrumentality of the U.S. Government independent of executive departments, and sets forth the duties and powers of its head, the Comptroller General. Among these duties is the responsibility to investigate the use of public money (31 U.S.C. 712); evaluate programs and activities of the U.S. Government (31 U.S.C. 717); and report to Congress on agency expenditures, contracts, administrative controls, and the status of fiscal accounts (31 U.S.C. 719). Federal agencies are charged with giving the Comptroller General specified information and permitting GAO inspection of agency records (31 U.S.C. 716); agencies also may be afforded an opportunity to comment on draft GAO reports (31 U.S.C. 718). In addition, 31 U.S.C. 720 requires that following issuance of a GAO report that contains recommendations to the head of an Agency, the Agency must submit a written statement to the Senate Committee on Homeland Security and Governmental Affairs, the House Committee on Government Reform, the Committees on Appropriations of the Senate and the House; the Agency's statement must indicate the action taken by the Agency on the recommendations. Office of Management and Budget (OMB) Circular A–50 provides policies and procedures for use by executive agencies when considering reports issued by GAO where follow-up is necessary. OMB Circular A–50 also specifies those GAO reports for which Agency Heads will submit statements to OMB. Secretary's Order 2–2006 assigned responsibility for coordination of GAO reports to the Chief Financial Officer. As the focus of GAO reports shifts toward policy and programmatic issues and away from inquiries about financial matters, the Department has concluded that it is more appropriate for the Assistant Secretary for Policy to serve as the GAO liaison for the Department. This Order thus reassigns the role of GAO liaison to the Assistant Secretary for Policy. This shift will more closely align GAO liaison and coordination activities with agency mission.

7. *Scope.* These delegations apply to draft and final GAO reports as well as to related correspondence addressed to the Secretary of Labor or other DOL officials.

8. *Policy.* Findings, recommendations, or suggestions presented to the Department in a GAO report will be given prompt and careful consideration. DOL Agency Heads must act promptly on all recommendations that merit action. The action Agency will comment timely on the findings in a GAO report, indicating whether the recommendations will be adopted, considered further, or have been found to be unnecessary or unacceptable. Comments indicating agreement must include planned corrective actions and, where appropriate, dates for implementing these actions. If the recommendations are found to be unacceptable, the reasons for disagreement shall be fully explained. When disagreement is based on interpretation of law, regulation, or the authority of officials to take or not to take action, the response must include the legal basis.

9. *Delegation of Authority and Assignment of Responsibilities.*

A. *The Assistant Secretary for Policy* is delegated overall authority and assigned responsibility regarding the handling of GAO reports and will:

(1) Act as the DOL control official for all GAO audits, studies, and reports and all correspondence received from the Congress and other governmental agencies relating to such GAO matters.

(2) Serve as the GAO Liaison and point of contact for all GAO audits and studies (hereinafter, ''reviews'').

(3) Review all written comments on draft and final GAO reports.

(4) Resolve all disagreements that may arise between DOL agencies regarding responses to GAO reports, both draft and final.

(5) Act as DOL's liaison to other Federal Departments and agencies for GAO report matters.

(6) Notify appropriate DOL agencies promptly of planned GAO work.

(7) Designate action agencies to prepare responses to GAO reports and stipulate the deadline required for such responses.

(8) Maintain liaison with GAO concerning all reports and responses.

(9) Provide oversight of DOL's responses to GAO reports, both draft and final, monitor DOL's implementation of accepted recommendations, and provide periodic reports to the Deputy Secretary.

(10) Provide advice and assistance to Agency Heads with regard to GAO findings, recommendations, or suggestions.

(11) Establish policies and procedures for DOL's responses to GAO reviews and reports.

(12) Apprise the Deputy Secretary on a quarterly basis, or other timeframe as designated by the Deputy Secretary, of active GAO reviews and reports relating to the Department.

(13) Provide semi-annual reports to the Secretary on the status of all unresolved reports over six months old.

*B. DOL Agency Heads will:*

(1) Expeditiously review and comment on GAO's findings and recommendations, and submit all responses to the Office of the Assistant Secretary for Policy (OASP) for clearance through the Executive Secretariat.

a. Draft GAO reports: In general, DOL must provide responses to draft GAO reports in ten business days; therefore, all agency responses are due to OASP at least six business days before the response is due to GAO so there is sufficient time for the clearance process. Technical responses to draft GAO reports generally do not require

clearance, unless the subject of the report is of such significance or importance that OASP recommends clearance. In such instances, OASP will so notify the Agency that the response will be sent to Exec Sec for clearance.

b. Final GAO reports: DOL is required by law to respond to final GAO reports and recommendations within 60 calendar days. Therefore, agency responses to final GAO reports are due to OASP 14 calendar days before the response is due to Congress, GAO and OMB.

(2) Establish sufficient controls to ensure timely preparation of comments on final GAO reports which are to be furnished to Congressional committees, OMB, and GAO; and timely implementation of accepted recommendations.

(3) Designate an individual and an alternate within the Agency to serve as the central contact for the OASP regarding GAO review and report activities and related matters.

(4) Inform OASP of all communications received from the GAO, Congress, or other government agencies pertaining to GAO reports.

(5) Ensure that appropriate departmental clearances on responses to GAO reports are obtained, including coordinating with SOL to obtain OMB clearances when the agency's response expresses views on proposed or pending legislation or deals with other agencies or with executive branch budget policies. Items found at issue during the response clearance phase will promptly be brought to the attention of the OASP.

(6) Ensure that cleared responses to GAO reports are properly prepared and signed and transmitted to Congressional committees, OMB, and/or GAO within mandated time frames, as required.

C. In addition to programmatic responsibilities assigned under section B, *the Assistant Secretary for Administration and Management* is delegated authority and assigned responsibility for:

(1) Ensuring that any transfer of budgetary resources arising from this Order is fully consistent with the established requirements of the Department.

(2) Assuring that performance standards of appropriate officials reflect effectiveness in resolving and implementing GAO recommendations.

D. In addition to programmatic responsibilities assigned under section B, *the Chief Financial Officer* is delegated authority and assigned responsibility for providing advice and assistance to DOL agencies in response to GAO reports concerning issues of financial management.

E. In addition to programmatic responsibilities assigned under section B, *the Solicitor of Labor* is delegated authority and assigned responsibility to:

(1) Provide legal advice and assistance to all officials of the Department relating to the authorities of this Order.

(2) Review proposed agency submissions of records and responses.

F. *The Assistant Secretary for Congressional and Intergovernmental Affairs* is delegated the authority and responsibility as follows:

(1) Review of, along with other agencies through the Executive Secretariat clearance process, proposed agency submissions and responses.

(2) Communication with congressional committees and members of Congress on matters related to GAO reports. Such communications shall include handling inquiries from committees and members as well as making arrangements for briefings, hearings, and other meetings as necessary. OCIA shall coordinate with both the Agency having responsibility for the subject of a GAO report and with OASP.

(3) Transmittal of copies of DOL's response to GAO reports to congressional committees and members of Congress, as appropriate.

10. *Effective Date.* This Order is effective immediately.

Dated: July 23, 2008.

**Elaine L. Chao,**

*Secretary of Labor.*

[FR Doc. E8–17332 Filed 7–28–08; 8:45 am]

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Federal Register

Tuesday,
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# Part VI

# The President

**Proclamation 8276—Anniversary of the Americans with Disabilities Act, 2008**

**Proclamation 8277—Parents' Day, 2008**

**Executive Order 13469—Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe**

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# Presidential Documents

**Title 3—**

**The President**

**Proclamation 8276 of July 24, 2008**

## Anniversary of the Americans with Disabilities Act, 2008

**By the President of the United States of America**

**A Proclamation**

The Americans with Disabilities Act (ADA) has helped tear down barriers for millions of people living with disabilities. On the anniversary of this important legislation, our Nation underscores our commitment to ensuring that all individuals have an equal opportunity to realize their full potential.

On July 26, 1990, President George H. W. Bush signed this groundbreaking Act into law, better enabling citizens with disabilities to participate fully in all aspects of life. Over the course of nearly two decades, this Act has made our schools and workplaces more welcoming, helped change attitudes that once seemed unchangeable, and expanded opportunity for many exceptional Americans. The ADA is one of the most successful civil rights laws in our history and has been an essential part of countless American lives.

My Administration is committed to working to empower those with disabilities so that all our people can achieve the American dream. Building on the success of the ADA, the New Freedom Initiative of 2001 has had a positive impact for many of our citizens. Technological advances have helped individuals gain greater access to everyday life. Students with disabilities are given the tools they need to succeed, and in the workplace, innovative hiring and employment practices are helping to integrate Americans with disabilities into the workforce. The Ticket to Work and AbilityOne programs have helped them become more self-sufficient by expanding access to employment. Our Nation has benefited from the progress we have made since the enactment of the ADA, and it is our responsibility to continue working toward a country where all people are treated with the respect and dignity they deserve.

On this anniversary, we highlight our commitment to the ADA and celebrate the progress that has been made toward full participation of people with disabilities in our society.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim July 26, 2008, as a day in celebration of the 18th Anniversary of the Americans with Disabilities Act. I call on all Americans to celebrate the vital contributions of individuals with disabilities as we work towards fulfilling the promise of the ADA to give all our citizens the opportunity to live with dignity, work productively, and achieve their dreams.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of July, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

[FR Doc. 08–1478
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Federal Register
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Tuesday, July 29, 2008

# Presidential Documents

**Title 3—**

## The President

**Proclamation 8277 of July 24, 2008**

## Parents' Day, 2008

**By the President of the United States of America**

**A Proclamation**

Parents teach their children timeless values to help them make the most of life's opportunities and overcome its challenges. On Parents' Day, we pay tribute to the parents who provide their children with guidance, support, and unconditional love and who help make our country a better place.

Mothers and fathers are a source of stability and great comfort in society, and they have a vital obligation to love and care for their children. Through patient instruction and a loving example, they instill in children the principles that make our Nation strong and ensure that children have the skills to lead lives of character and integrity. As a child's primary teachers, parents are responsible for their child's education, and their efforts will contribute to a more hopeful future for our country. Parents can help shape our Nation by encouraging young people to make the right choices, become responsible citizens, and achieve their dreams.

My Administration remains dedicated to promoting Federal, State, and faith-based and community programs to assist American families and support healthy marriages and responsible parenting. We are committed to helping parents and schools enable the next generation of Americans to realize their full potential.

On Parents' Day, we honor mothers and fathers and thank them for their many years of patience and selflessness. We take this opportunity also to recognize parents of adopted children and foster parents, who generously provide children with a loving family to call their own. We also recognize the parents who serve in our Armed Forces and the parents of the brave men and women wearing our Nation's uniform. The members of our Armed Forces are defending our freedom with dignity and honor, and America is grateful for the sacrifices that they and their families make in the name of duty.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States and consistent with Public Law 103-362, as amended, do hereby proclaim Sunday, July 27, 2008, as Parents' Day. I call upon citizens, private organizations, and governmental bodies at all levels to engage in activities and educational efforts that recognize, support, and honor parents, and I encourage American sons and daughters to convey their love, respect, and appreciation to their parents.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of July, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

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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.

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Raisins Produced From Grapes Grown In California; Use of Estimated Trade Demand to Compute Volume Regulation Percentages; comments due by 8-4-08; published 7-18-08 [FR 08-01447]

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Finding of Attainment for 1-Hour Ozone for the Chicago-Gary-Lake County, IL-IN Area; comments due by 8-6-08; published 7-7-08 [FR E8-15331]

California State Implementation Plan:

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California State Implementation Plan; Revision:

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Direct Final Approval of Revised Municipal Waste Combustor State Plan for Designated Facilities and Pollutants:

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**HEALTH AND HUMAN SERVICES DEPARTMENT**

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## LIST OF PUBLIC LAWS

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**H.R. 3403/P.L. 110–283**

New and Emerging Technologies 911 Improvement Act of 2008 (July 23, 2008; 122 Stat. 2620)

**H.R. 3712/P.L. 110–284**

To designate the United States courthouse located at 1716 Spielbusch Avenue in Toledo, Ohio, as the "James M. Ashley and Thomas W.L. Ashley United States Courthouse". (July 23, 2008; 122 Stat. 2627)

**Last List July 24, 2008**

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