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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 946

[Docket No. AMS–FV–08–0036; FV08–946–1 IFR]

Irish Potatoes Grown in Washington; Relaxation of Handling and Import Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule relaxes the size requirement prescribed under the Washington potato marketing order. The marketing order regulates the handling of Irish potatoes grown in Washington, and is administered locally by the State of Washington Potato Committee (Committee). This rule decreases the minimum size required for all fresh market red, yellow fleshed, and white types of potatoes from 1 inch (25.4 mm) to ¾ inch (19.1 mm) in diameter, if the potatoes otherwise meet the requirements of U.S. No. 1 grade. This rule will also decrease the minimum size requirement from July 1 through September 30 of each year for imported red-skinned, round type potatoes under the import regulations as required by section 8e of the Agricultural Marketing Agreement Act of 1937. The Committee recommended this change in response to the recently revised U.S. Standards for Grades of Potatoes which added a definition for Creamer potatoes. This change is intended to provide potato handlers with greater marketing flexibility, growers with increased returns, consumers with a greater supply of small potatoes, and to bring the section 8e potato import regulation into conformity with the marketing order.

DATES: Effective September 11, 2008; comments received by November 10, 2008 will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Fax:* (202) 720–8938; or *Internet: http://www.regulations.gov*. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*.

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

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 946, as amended (7 CFR part 946), regulating the handling of Irish potatoes grown in Washington, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

This interim final rule is also issued under section 8e of the Act, which provides that whenever certain specified commodities, including potatoes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities. Section 8e also provides that whenever two or more marketing orders regulating the same commodity produced in different areas of the United States are concurrently in effect, a determination must be made as to which of the areas produces the commodity in most direct competition with the imported commodity. Imports must meet the same or comparable requirements established for that particular area. The requirements for red-skinned, round type potatoes imported from July 1 through September 30 are based on the Washington potato marketing order requirements.

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

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

This rule decreases the size required for all fresh market red, yellow fleshed, and white types of potatoes produced in Washington State from 1 inch (25.4 mm) to ¾ inch (19.1 mm) minimum, if the potatoes otherwise meet the requirements of U.S. No. 1 grade. This change is intended to provide potato

handlers with greater marketing flexibility, growers with increased returns, and consumers with a greater supply of small potatoes. As provided under section 8e of the Act, the size modification will also apply to all red-skinned, round type potatoes imported from July 1 through September 30. This rule will not affect the current import requirements for all other round type or long type potatoes.

Section 946.52 of the order authorizes the establishment of grade, size, quality, or maturity regulations for any variety or varieties of potatoes grown in the production area. Section 946.52 also authorizes the regulation of the size, capacity, weight, dimensions, pack, and marking or labeling of the container, or containers, which may be used in the packing or handling of potatoes, or both. Section 946.51 further authorizes the modification, suspension, or termination of regulations issued under § 946.52. Section 946.60 provides that whenever potatoes are regulated pursuant to § 946.52 such potatoes must be inspected by the Federal or Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations.

Section 946.336 of the order's administrative rules and regulations prescribes the quality, size, maturity, cleanness, pack, and inspection requirements for fresh market Washington potatoes. Section 946.336(a)(2) prescribes the size requirements. Relevant import regulations are contained in § 980.1 and § 980.501 of the vegetable import regulations.

During a video conference meeting held on April 16, 2008, with a follow-up mail vote, the Committee unanimously recommended changing the minimum size requirement for all U.S. No. 1 grade fresh market red, yellow fleshed, and white types of potatoes produced under the order from 1 inch to ¾ inch in diameter.

The Committee recommended this change in response to the recently revised U.S. Standards for Grades of Potatoes (Standards) which became effective on April 21, 2008 (73 FR 15051, March 21, 2008). The revised Standards added a definition for Creamer potatoes. The revised Standards define the Creamer size designation as ¾ inch minimum diameter and 1⅝ inch maximum diameter with no minimum or maximum weight.

Before the Standards were revised to include a Creamer size designation, various states developed their own standards for Creamer potatoes in an attempt to meet the increasing consumer demand for small potatoes. The Washington potato industry had previously considered Creamer potatoes to have a 1 inch minimum diameter. The Committee recommended reducing the minimum diameter to ¾ inch so that the handling regulation would correspond with the revised Standards and to ensure that the industry was being responsive to the desires of consumers. The Committee also believes that inconsistency between what was marketed in Washington as Creamer potatoes and the Standards would have caused confusion in the marketplace.

Within the past several years, consumer demand has increased for small potatoes which often command premium prices. Decreasing the minimum size requirement from 1 inch to ¾ inch will help handlers in Washington meet the needs of their customers.

Committee statistics show that approximately 25 percent (2,483,219 hundredweight) of fresh market Washington potatoes (9,932,874 hundredweight) are red, yellow fleshed and white types of potatoes. The decrease in the size requirement is expected to increase the volume of red, yellow fleshed, and white types of potatoes that meet minimum size requirements. Shipping a larger portion of the crop to market would help meet consumer demand and is expected to increase returns to growers.

As mentioned earlier, section 8e of the Act provides that when certain domestically produced commodities, including potatoes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Section 8e also provides that whenever two or more marketing orders regulating the same commodity produced in different areas of the United States are concurrently in effect, a determination must be made as to which of the areas produces the commodity in most direct competition with the imported commodity. Imports must meet the requirements established for that particular area.

Grade, size, quality, and maturity regulations have been issued regularly under marketing orders No. 945 (Idaho-Eastern Oregon potatoes), No. 948 (Colorado potatoes, Area No. 2 and Area No. 3), No. 946 (Washington potatoes), and No. 953 (Southeastern potatoes) since the marketing orders were established. Section 980.1 of the vegetable import regulations specifies that import requirements for potatoes are to be based on the seasonal categories of potatoes produced in all marketing order areas. In that regard, imported red-skinned, round type potatoes must meet the requirements of the Washington potato marketing order during the months of July through September and the Area No. 2 Colorado potato marketing order during the months of October through the following June. This rule will not affect the current import requirements for all other round type or long type potatoes.

Initial Regulatory Flexibility Analysis

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

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

Import regulations issued under the Act are based on regulations established under Federal marketing orders which regulate the handling of domestically produced products.

Currently, there are approximately 45 handlers of Washington potatoes who are subject to regulation under the marketing order and approximately 267 potato producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $6,500,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

During the 2006–2007 marketing year, 9,932,874 hundredweight of Washington potatoes were inspected under the order and sold into the fresh market by 43 handlers, according to Committee data. The Committee reports that an industry consensus estimate of an average fresh potato f.o.b. price is $8.45 per hundredweight. Multiplying the 2006–2007 fresh shipments of 9,932,874 hundredweight by the average f.o.b. price of $8.45 yields a handler-level fresh market crop value of $83.933 million. Dividing $83.933 million by 43 handlers gives an average annual sales value per handler estimate of about $1.952 million. The Committee estimates that 41, or about 95 percent of these 43 handlers, had annual receipts of less than $6,500,000.

A comparable computation can be made to estimate annual average revenue per producer. Based on information provided by the National Agricultural Statistics Service, the 2006 season average producer price for Washington potatoes was $6.25 per hundredweight. Multiplying the 2006–2007 fresh shipments of 9,932,874 hundredweight by the average producer price of $6.25 provides a producer-level fresh market crop value of $62.08 million. Dividing $62.08 million by 267 Washington potato producers yields an average annual fresh market sales value per producer of approximately $232,500.

In view of the foregoing, it can be concluded that the majority of the Washington potato producers and handlers may be classified as small entities. Although it is not known how many importers of potatoes may be classified as small entities, we believe that many of the importers of potatoes can be classified as such.

This rule decreases the minimum size required for all fresh market red, yellow fleshed, and white types of potatoes produced under the order from 1 inch to ¾ inch in diameter, if they otherwise meet the requirements of U.S. No. 1 grade. This change enables handlers with the ability to respond to the consumer demand for small potatoes. As provided under section 8e of the Act, this change will also apply to all imported red-skinned, round type potatoes between July 1 through September 30 of each year. While no change will be required in the language of § 980.1, all imported red-skinned, round type potatoes from July 1 through September 30 will be required to meet the minimum size requirement of ¾ inch in diameter.

The authority for the grade and size requirements is provided in § 946.52 of the order. Section 946.336(a)(2) of the order's administrative rules and regulations prescribes the size requirement. Relevant import regulations are contained in § 980.1 and § 980.501 of the vegetable import regulations.

Regarding the impact of this rule on affected entities, decreasing the size requirement for these potatoes is expected to benefit handlers, importers and growers. There should be no extra cost to producers or handlers because current harvesting and handling methods can accommodate the sorting of these smaller potatoes. By decreasing the minimum size requirement for these potatoes, a greater quantity of potatoes will meet the order's handling regulations and the import regulations. This could translate into an increased market for small potatoes and greater returns for handlers, importers, and growers.

As small potatoes have grown in popularity with consumers, the market demand has outpaced the quantity of small, high quality potatoes available from Washington. The Committee believes that a decrease in the size requirement will increase the available supply of small potatoes. The small potato market is a minor segment of the Washington potato market. As such, the Committee believes that these small potatoes do not compete directly with most of the fresh market potatoes and that this action will not adversely affect the overall Washington potato market.

By providing Washington handlers the flexibility to pack the smaller red, yellow fleshed, and white types of potatoes, the Committee believes the industry will remain competitive in the marketplace. The Creamer potato market is a premium market and this action is expected to further increase sales of Washington Creamer potatoes to benefit the Washington potato industry. The benefits of this rule are not expected to be disproportionately greater or lesser for small entities than large entities.

The Committee discussed several alternatives to this recommendation, including not changing the minimum size requirement. However, the Committee believes that it is important that the Washington potato handling regulations be consistent with the revised Standards to reduce confusion during the inspection and marketing of these types of potatoes. The Committee also determined that decreasing the minimum size requirement for these potatoes will provide the greatest benefit to the industry by augmenting the developing market for small potatoes and increasing grower returns.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large potato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

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

Further, the Committee's meeting was widely publicized throughout the Washington potato industry and all interested persons were invited to participate in Committee deliberations. Like all Committee meetings, the April 16, 2008, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. In addition, the World Trade Organization and known importers of potatoes will be notified of this action. Finally, interested persons are invited to submit comments on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on a relaxation of the size requirement prescribed under the Washington potato marketing order and the potato import regulations. Any comments received will be considered prior to finalization of this rule.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this rule.

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

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) Any changes resulting from this rule should be effective as soon as practicable because the Washington potato shipping season begins in July; (2) the Committee unanimously recommended these changes at a public meeting and all interested parties had an opportunity to provide input; (3) handlers are aware of this action and want to take advantage of this relaxation as soon as possible; and (4) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 946

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 946 is amended as follows:

PART 946—IRISH POTATOES GROWN IN WASHINGTON

■ 1. The authority citation for 7 CFR part 946 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 946.336, paragraph (a)(2)(i) is revised to read as follows:

§ 946.336 Handling regulation.

* * * * *

(a) * * *

(2) *Size:* (i) At least 1⅞ inches in diameter, except that all red, yellow fleshed, and white types may be ¾ inch (19.1 mm) minimum diameter, if they otherwise meet the requirements of U.S. No. 1.

* * * * *

Dated: September 5, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–20999 Filed 9–5–08; 4:15 pm]

BILLING CODE 3410–02–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 8

[Docket No. OCC–2008–0013]

RIN 1557–AD06

Assessment of Fees

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is adopting as final and without change the interim final assessments rule issued on February 19, 2008. The interim final rule added two new asset-size categories to the table in 12 CFR 8.2(a) used to calculate each national bank's semiannual assessment. The addition of these categories is warranted to take account of significant structural changes in the national banking system since 1992, when the table was last revised, and has enabled the OCC to realign assessments to better reflect industry structure and OCC's corresponding expenses of operations. No comments were received in response to the request for comment on the interim final rule.

DATES: *Effective Date:* Effective September 10, 2008 the rule published on February 19, 2008 (73 FR 9012) and corrected at 73 FR 9625, Feb. 21, 2008 is adopted as final without change.

FOR FURTHER INFORMATION CONTACT: MaryAnn Nash, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090; Stuart Feldstein, Assistant Director, Legislative and Regulatory Activities Division, (202) 874–5090; or Colette Baylson, Accounting Operations Manager, Financial Management, (202) 874–4403, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

Background

The National Bank Act authorizes the OCC to fund the expenses of its operations through assessments on national banks.[1] Under this authority, the OCC collects semiannual assessments from national banks in accordance with part 8 of our regulations and with the OCC's Notice of the Comptroller of the Currency Fees (Notice of Fees).[2]

Part 8 establishes categories, or brackets, each of which comprises a range of size values for a national bank's total assets. Each national bank's assessment is the sum of a base amount, which is the same for every national bank in that asset-size bracket, plus a marginal amount, which is computed by applying a marginal assessment rate to the amount of total assets in excess of the lower boundary of the asset-size bracket.[3] The marginal assessment rate declines as asset size increases, reflecting economies of scale in bank examination and supervision, which factor into the OCC's overall cost of operations. Both the base amounts and the marginal rates applicable to each asset-size bracket are published at least once a year in the OCC's Notice of Fees.[4]

Prior to the issuance of the interim final rule, the national bank assessments were based on asset-size brackets that had been last updated in 1992[5] and no longer reflected the structure and distribution of assets in the national banking system as a whole. For example, since 1992, there has been a significant increase not only in the amount of assets held by the largest banks, but also in the assets held by national banks in other asset-size brackets, resulting in a general upward shift in the distribution of the population of national banks on the asset-size bracket table in 12 CFR 8.2(a). The growth in the average assets held by national banks reflects the consolidation in the banking industry that has occurred since 1992.

Given these developments, the OCC has determined that it is appropriate to update the existing asset-size brackets to reflect the current structure of the national banking system. The interim final rule has enabled the OCC to adjust the assessment framework to better reflect industry structure and the OCC's corresponding expenses of operations.

Interim Final Rule and Comments

On February 19, 2008, the OCC published and requested comment on an interim final rule that expanded the number of asset-size assessment brackets in the table at 12 CFR 8.2(a) by revising the current top bracket, presently $40 billion and above, to cover banks with assets between $40 billion and $250 billion.[6] In addition, the interim final rule created a new top bracket that applies to banks with assets in excess of $250 billion.

The OCC also made a conforming change to delete the word ''ten'' from the description of the asset-size brackets in § 8.2(a)(1) of the assessment rules since it no longer accurately described the number of brackets.

The OCC received no comments in response to the interim final rule and has determined that it is appropriate to adopt as final the interim final rule as originally published on February 19, 2008.

Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (Pub. L. 96–354, Sept. 19, 1980) (RFA) applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b).[7] Pursuant to the Administrative Procedure Act (APA), at 5 U.S.C. 553(b)(B), notice and an opportunity for public comment are not required prior to the issuance of a final rule if an

[1] 12 U.S.C. 482.

[2] Under part 8, the OCC also collects assessments from Federal branches and Federal agencies. The changes provided for in this final rule will also apply to assessments of Federal branches and Federal agencies.

[3] *See* 12 CFR 8.2(a) (listing the asset-size brackets).

[4] *See, e.g.,* OCC Bulletin 2007–46, ''Notice of the Comptroller of the Currency Fees for Year 2008'' (December 1, 2007). The OCC's regulations provide for the annual publication of the Notice of Fees and also authorize the publication of interim, or amended, notices of fees ''from time to time throughout the year as necessary.'' 12 CFR 8.8.

[5] 57 FR 22413 (May 28, 1992).

[6] 73 FR 9012 (February 19, 2008).

[7] 5 U.S.C. 601(2).

agency, for good cause, finds that ''notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' [8]

As we have described, the asset brackets in the assessments table in 12 CFR 8.2(a) were last revised in 1992 and did not reflect the current structure of the national banking industry. The OCC adopted the changes to that framework in the form of an interim final rule because completion of notice and comment rulemaking procedures prior to issuing the interim final rule would have required delaying implementation of the new asset brackets beyond the next scheduled assessment date. Such a delay would have been contrary to the public interest since it would have resulted in national banks' continued payment of assessments under a framework that the OCC has determined is no longer representative of current industry structure and the OCC's corresponding expenses of operation. Issuance of the interim final rule also furthered the public interest and reduced regulatory burden because it allowed the OCC, as appropriate, to issue an amended Notice of Fees that better reflects the structure of the national banking system and allocates the OCC's expenses of operation on that basis. For the same reasons, the OCC found good cause to publish the interim final rule with an immediate effective date. *See* 5 U.S.C. 553(d)(1), 553(d)(3).[9]

Because the OCC determined for good cause that the APA did not require public notice and comment on the interim final rule, we did not publish a general notice of proposed rulemaking. Thus, the RFA, pursuant to 5 U.S.C. 601(2), does not apply to this final rule because it is not a rule for which the OCC was required to publish a general notice of proposed rulemaking pursuant to section 553(b) of the APA.

Executive Order 12866

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995 Determinations

Section 202 of the Unfunded Mandates Reform Act of 1995 [10] (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. The OCC has determined that this final rule will not result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 appendix A.1), we have reviewed the final rule to assess any information collections. There are no collections of information as defined by the Paperwork Reduction Act in the final rule.

Lists of Subjects in 12 CFR Part 8

Assessment of fees.

PART 8—ASSESSMENT OF FEES

■ Accordingly under the authority at 12 U.S.C. 482 the interim rule amending 12 CFR part 8 which was published at 73 FR 9012 on February 19, 2008, and corrected at 73 FR 9012, Feb. 21, 2008 is adopted as final without change.

Dated: August 11, 2008.

John C. Dugan,

Comptroller of the Currency.

[FR Doc. E8–20905 Filed 9–9–08; 8:45 am]

BILLING CODE 4810–33–P

[8] 5 U.S.C. 553(b)(B).

[9] Although notice and comment were not required prior to the effective date of the interim final rule, the OCC nonetheless invited comments on all aspects of this interim final rule and intended to revise the interim final rule if necessary or appropriate in light of the comments received. As explained above, however, the OCC received no comments on the interim final rule.

[10] 2 U.S.C. 1532.

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

19 CFR Part 122

[CBP Dec. 08–39]

Technical Amendment to List of User Fee Airports: Addition of Valley International Airport, Harlingen, TX

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule; technical amendment.

SUMMARY: This document amends the Customs and Border Protection (CBP) Regulations by revising the list of user fee airports to reflect the recent user fee airport designation for Valley International Airport in Harlingen, Texas. User fee airports are those airports which, while not qualifying for designation as international or landing rights airports, have been approved by the Commissioner of CBP to receive, for a fee, the services of CBP officers for the processing of aircraft entering the United States, and the passengers and cargo of those aircraft.

DATES: *Effective Date:* September 10, 2008.

FOR FURTHER INFORMATION CONTACT: Scott Welch, Office of Field Operations, 202–344–2642.

SUPPLEMENTARY INFORMATION:

Background

Title 19, Code of Federal Regulations (CFR), sets forth at Part 122 regulations relating to the entry and clearance of aircraft in international commerce and the transportation of persons and cargo by aircraft in international commerce.

Generally, a civil aircraft arriving from a place outside of the United States is required to land at an airport designated as an international airport. Alternatively, the pilot of a civil aircraft may request permission to land at a specific airport, and, if landing rights are granted, the civil aircraft may land at that landing rights airport.

Section 236 of Public Law 98–573 (the Trade and Tariff Act of 1984), codified at 19 U.S.C. 58b, created an option for civil aircraft desiring to land at an airport other than an international airport or a landing rights airport. A civil aircraft arriving from a place outside of the United States may ask for permission to land at an airport designated by the Secretary of Homeland Security [1] as a user fee airport.

Pursuant to 19 U.S.C. 58b, an airport may be designated as a user fee airport if the Commissioner of CBP as delegated by the Secretary of Homeland Security determines that the volume of business at the airport is insufficient to justify customs services at the airport and the

[1] Sections 403(1) and 411 of the Homeland Security Act of 2002 (''the Act,'' Pub. L. 107–296) transferred the United States Customs Service and its functions from the Department of the Treasury to the Department of Homeland Security; pursuant to section 1502 of the Act, the President renamed the ''Customs Service'' as the ''Bureau of Customs and Border Protection.'' Effective on March 31, 2007, DHS changed the name of ''Bureau of Customs and Border Protection'' to ''U.S. Customs and Border Protection (CBP)'' (*See* 72 FR 20131, April 23, 2007).

governor of the state in which the airport is located approves the designation. Generally, the type of airport that would seek designation as a user fee airport would be one at which a company, such as an air courier service, has a specialized interest in regularly landing.

As the volume of business anticipated at this type of airport is insufficient to justify its designation as an international or landing rights airport, the availability of customs services is not paid for out of appropriations from the general treasury of the United States. Instead, customs services are provided on a fully reimbursable basis to be paid for by the user fee airport on behalf of the recipients of the services.

The fees which are to be charged at user fee airports, according to the statute, shall be paid by each person using the customs services at the airport and shall be in the amount equal to the expenses incurred by the Commissioner of CBP in providing customs services which are rendered to such person at such airport, including the salary and expenses of those employed by the Commissioner of CBP to provide the customs services. To implement this provision, generally, the airport seeking the designation as a user fee airport or that airport's authority agrees to pay a flat fee for which the users of the airport are to reimburse the airport/airport authority. The airport/airport authority agrees to set and periodically review the charges to ensure that they are in accord with the airport's expenses.

The Commissioner of CBP designates airports as user fee airports pursuant to 19 U.S.C. 58b. *See* 19 CFR 122.15. If the Commissioner decides that the conditions for designation as a user fee airport are satisfied, a Memorandum of Agreement (MOA) is executed between the Commissioner of CBP and the local responsible official signing on behalf of the state, city or municipality in which the airport is located. In this manner, user fee airports are designated on a case-by-case basis. Section 19 CFR 122.15 sets forth the grounds for withdrawal of a user fee designation and sets forth the list of designated user fee airports. Periodically, CBP updates the list of user fee airports at 19 CFR 122.15(b) to reflect those that have been currently designated by the Commissioner. This document updates that list of user fee airports by adding Valley International Airport, in Harlingen, Texas to the list. On May 28, 2008, the Commissioner signed an MOA approving the designation of user fee status for Valley International Airport.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because this amendment merely updates the list of user fee airports to include an airport already designated by the Commissioner of CBP in accordance with 19 U.S.C. 58b and neither imposes additional burdens on, nor takes away any existing rights or privileges from, the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary, and for the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

The Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. This amendment does not meet the criteria for a ''significant regulatory action'' as specified in Executive Order 12866.

Signing Authority

This document is limited to a technical correction of CBP regulations. Accordingly, it is being signed under the authority of 19 CFR 0.1(b).

List of Subjects in 19 CFR Part 122

Air carriers, Aircraft, Airports, Customs duties and inspection, Freight.

Amendment to Regulations

■ Part 122, Code of Federal Regulations (19 CFR part 122) is amended as set forth below:

PART 122—AIR COMMERCE REGULATIONS

■ 1. The authority citation for part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

■ 2. The listing of user fee airports in section 122.15(b) is amended as follows: by adding, in alphabetical order, in the ''Location'' column ''Harlingen, Texas'' and by adding on the same line, in the ''Name'' column, ''Valley International Airport.''

Dated: September 4, 2008.

Jason P. Ahern,

Acting Commissioner, U.S. Customs and Border Protection.

[FR Doc. E8–20990 Filed 9–9–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF STATE

22 CFR Part 122

[Public Notice 6353]

Amendment to the International Traffic in Arms Regulations: Correction

AGENCY: Department of State.

ACTION: Correction of final rule.

SUMMARY: This document makes a correction to the RIN stated in the final rule published on July 18, 2008 (*73 FR 41258*) pertaining to ''Renewal of Registration.'' RIN 1400–AC50 should be RIN 1400–AC51.

DATES: *Effective Date:* September 10, 2008.

FOR FURTHER INFORMATION CONTACT: Mary Sweeney, Office of Defense Trade Controls Policy, Bureau of Political-Military Affairs, Department of State, (202) 663–2865.

SUPPLEMENTARY INFORMATION: The Department of State published a final rule (Public Notice 6300) in the **Federal Register** of July 18, 2008, amending Part 122 of the International Traffic in Arms Regulations.

In rule FR Doc. E8–16537 published on July 18, 2008 (73 FR 41258), make the following correction.

1. On page 41258, second column, ''RIN 1400–AC50'' should read ''RIN 1400–AC51.''

Dated: September 4, 2008.

Robert S. Kovac,

Managing Director, Directorate of Defense Trade Controls, Department of State.

[FR Doc. E8–21018 Filed 9–9–08; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 210

RIN 1510–AB00

Federal Government Participation in the Automated Clearing House

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Final rule.

SUMMARY: We are amending our regulation governing the use of the Automated Clearing House (ACH) system by Federal agencies. The rule adopts, with some exceptions, the ACH Rules developed by NACHA—The Electronic Payments Association (NACHA) as the rules governing the use of the ACH Network by Federal

agencies. We are issuing this rule to address changes to the ACH Rules set forth in NACHA's 2006 ACH Rules book and 2007 ACH Rules book. We are adopting all of the changes that NACHA published in the 2006 ACH Rules book and 2007 ACH Rules book, except certain changes to the self-audit provisions of the ACH Rules, which we have previously determined are not appropriate for the Federal government. This rule follows publication of a January 9, 2008 proposed rule and adopts the provisions of the proposed rule without change.

In addition, the rule provides two exceptions to existing deposit account requirements. Generally, an ACH credit entry representing a Federal payment other than a vendor payment must be deposited into a deposit account at a financial institution in the name of the recipient. On April 25, 2005, Treasury waived this requirement in order to allow some or all of the amount to be reimbursed to a Federal employee for official travel credit card charges to be disbursed directly to the credit card issuing bank. The rule codifies this waiver. The rule also provides an exception from existing deposit account requirements in cases where a Federal payment is to be disbursed through a debit card, stored value card, prepaid card or similar payment card program established by the Financial Management Service (Service).

DATES: This rule is effective October 10, 2008. The incorporation by reference of the publication listed in the rule is approved by the Director of the Federal Register as of October 10, 2008.

ADDRESSES: You can download this rule at the following Web site: *http://www.fms.treas.gov/ach*.

FOR FURTHER INFORMATION CONTACT: Bill Brushwood, Financial Program Specialist, at (202) 874–1251 or *bill.brushwood@fms.treas.gov*; or Natalie H. Diana, Senior Counsel, at (202) 874–6680 or *natalie.diana@fms.treas.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Title 31 CFR part 210 (Part 210) governs the use of the ACH Network by Federal agencies. The ACH Network is a nationwide electronic fund transfer (EFT) system that provides for the inter-bank clearing of electronic credit and debit transactions and for the exchange of payment related information among participating financial institutions. Part 210 incorporates the ACH Rules adopted by NACHA, with certain exceptions. From time to time we amend Part 210 in order to address changes that NACHA periodically makes to the ACH Rules or to revise the regulation as otherwise appropriate.

Proposed Rulemaking

On January 9, 2008, we published a notice of proposed rulemaking (NPRM) requesting comment on a number of proposed amendments to Part 210. 73 FR 1560. We proposed to amend Part 210 to address changes to the ACH Rules set forth in the 2006 ACH Rules book and the 2007 ACH Rules book. We also proposed to amend Part 210 to codify a waiver allowing for split disbursements of Federal employee travel payments. In addition, we proposed to amend Part 210 to provide that where a Federal payment is to be disbursed through a debit card, stored value card, prepaid card or similar payment card program established by the Service, the Federal payment may be deposited to an account at a financial institution designated by the Service to operate the program as Treasury's financial or fiscal agent, and the Service may specify the title, access terms and other provisions governing the account.

We received two comment letters on the NPRM. NACHA submitted a comment letter generally supporting the amendments. NACHA requested clarification that the proposed amendments relating to payment card programs and split disbursement of Federal employee travel reimbursements would not impose any express or implied requirement on financial institutions to match the name on the entry to the name on the account. As discussed in Section II below, neither of these amendments in any way affects the right of financial institutions to rely on account numbers alone in posting entries.

The Association for Financial Professionals (AFP) also commented on the NPRM. AFP's comment letter primarily addressed the conversion of business checks to ACH debits. AFP supported the proposed incorporation of the ACH Rules regarding the conversion of checks at accounts receivable and back office locations. However, AFP expressed concern that the proposed rule would permit the conversion of business checks at points-of-purchase without written authorization. AFP pointed out that business staff persons paying for purchases at points-of-purchase may not be authorized to make decisions about payment methods and may not be educated about the need to read posted notices. Although the Service recognizes that corporate staff may not be authorized to make decisions about payment methods at a point-of-purchase, businesses that do not want checks converted at points-of-purchase can prevent conversion by utilizing an identifier within the Auxiliary On-Us Field within the MICR line of the check. Accordingly, we do not believe that the unauthorized conversion of corporate checks at points-of-purchase is likely to be a significant problem.

Final Rule

We are adopting, without change, all of the changes to Part 210 that were proposed in the NPRM. Those changes consist of the following:

- The codification of a waiver allowing for split disbursements of Federal employee travel payments;
- The adoption of a provision stating that where a Federal payment is to be disbursed through a debit card, stored value card, prepaid card or similar payment card program established by the Service, the Federal payment may be deposited to an account at a financial institution designated as a financial or fiscal agent, and the Service may specify the title, access terms and other provisions governing the account; and
- The adoption of all changes to the ACH Rules set forth in the 2006 ACH Rules book and the 2007 ACH Rules book, except changes to the self-audit rules.

II. Discussion of Amendments to Part 210

Split Travel Reimbursements

Section 210.5 generally requires that an ACH credit entry representing a Federal payment to a payee (other than a vendor payment) be deposited into a deposit account at a financial institution in the name of the recipient. On August 5, 2005, the Office of Management and Budget (OMB) revised Circular No. A–123 (Management's Responsibility for Internal Control). This revision became effective in fiscal year 2006 (October 1, 2005). OMB Circular No. A–123, Appendix B (Improving the Management of Government Charge Card Programs), sec. 4.4 requires, as a general matter, that Federal executive branch agencies implement split disbursement when reimbursing employees for official travel charges. This requirement applies when the individual cardholder is responsible for making payment to the charge card vendor, i.e., the travel card issuing bank. Split disbursement ''is the process of dividing a travel voucher reimbursement between the charge card vendor and traveler.'' OMB Circular No. A–123, Appendix B, sec. 4.4.1. Under split disbursement, the ''balance owed

to each is sent directly to the appropriate party.'' Id.

In April 2005, the Department of the Treasury, under the authority of 31 CFR 210.5(b)(3), waived the section 210.5 requirement that an ACH entry be deposited into a deposit account at a financial institution in the name of the recipient for purposes of permitting split disbursement. This was necessary in order to implement OMB's split disbursement policy since an account maintained by the travel card issuing bank in the name of an employee is not a deposit account at a financial institution within the meaning of section 210.5. We are amending section 210.5 to codify the terms of the split disbursement waiver into the rule.[1]

From a general cash management perspective, the Service supports split disbursement because it may benefit Federal agencies by reducing the number of travel card delinquencies. Split disbursement may also benefit Federal employee travelers by facilitating payment of their travel card liabilities (although employees remain responsible for having their accounts current).

The final rule does not establish or amend substantive Federal regulations or policies pertaining to Federal employee travel or reimbursement for official travel expenses. Such regulations and policies are established by, among other authorities, the Federal Travel Regulation (FTR), 41 CFR chapters 300–304. The FTR is within the purview of the General Services Administration (GSA). GSA issued GSA Bulletin FTR 05–08 on December 2, 2005, which advised Federal agencies of OMB Circular No. A–123 requirements, including the requirement for split disbursement.

In its comment letter on the proposed rule, NACHA requested clarification that the use of split travel disbursements by agencies does not affect the right of financial institutions to rely on account numbers alone in crediting those entries. As is the case with any entry representing a Federal payment, financial institutions may rely on account numbers alone when posting entries.

Card Programs Established by the Service

In addition to amending section 210.5 to allow for split disbursement, we are amending section 210.5 to provide that where a Federal payment is to be disbursed through a debit card, stored value card, prepaid card or similar payment card program established by the Service, the Federal payment may be deposited to an account at a financial institution designated by the Service to operate the program as Treasury's financial or fiscal agent, and the Service may specify the title, access terms and other provisions governing the account. This provision applies only in those cases when the Service directs its financial or fiscal agent bank to set up a card program.

The requirement that an account to which Federal payments are delivered be a deposit account in the name of the recipient is designed to ensure that a payment reaches the intended recipient. In some cases in which the Service directs its financial or fiscal agent banks to set up a card program to facilitate the delivery of Federal payments, the most effective approach may be to utilize an account in which each cardholder's interest is recorded, but each individual's name is not included in the account title. In these programs, the Service can ensure that the beneficial interests of Federal payment recipients are protected because the Service controls the terms and conditions of the programs. The section 210.5 requirements serve little purpose in this context, and add to the complexity of operating these programs. We are therefore adopting an exception to section 210.5 which will provide the Service with greater flexibility in setting up payment card programs. We are also confirming, as requested by NACHA in its comment letter, that financial institutions may rely on account numbers alone when posting entries representing Federal payments to a card account.

ACH Rule Changes

Since we last addressed changes to the ACH Rules in 2005, NACHA has made a number of changes to the ACH Rules. The first set of changes was published in NACHA's 2006 ACH Rules book and a subsequent set of changes was published in NACHA's 2007 ACH Rules book.[2] We are adopting all of the changes set forth in the 2006 and 2007 ACH Rules books except those relating to the self-audit provisions of the ACH Rules, which we have previously determined not to incorporate in part 210. The rule changes that we are adopting consist primarily of modifications to the ACH Rules that have a minimal impact on participants in the ACH Network and that we believe will not significantly affect Federal agencies' use of the ACH Network. However, there are a few rule changes that could have a significant impact on the Federal government's use of the ACH Network.

A. Changes to ACH Rules Published in 2006 ACH Rules Book

The changes published in the 2006 ACH Rules book include a number of minor operational efficiency and return issues changes, and a more significant rule change related to the identification of business checks ineligible for conversion to ACH entries for Accounts Receivable (ARC) entries and Point-of-Purchase (POP) entries. The more significant rule change amended the ACH Rules to enable Receivers[3] to identify business checks that are not to be converted to ARC or POP entries. For ARC entries, the rule change allows a Receiver to notify the Originator[4] directly that the Receiver's checks are not to be converted, or to utilize checks that include an identifier within the Auxiliary On-Us Field within the MICR line. For POP entries, Receivers may opt out either by utilizing checks that include an identifier within the Auxiliary On-Us Field within the MICR line, or by refusing to sign the required written authorization.[5]

Part 210 allows agencies to convert business checks at points-of-purchase and lockboxes by using the Corporate Credit or Debit (CCD) entry format. However, the great majority of checks converted by agencies are consumer checks, and in 2004 we indicated that as we continued to implement check conversion we would not convert business checks at new over-the-counter or lockbox locations. NACHA's rule change provides a way for agencies to clearly identify, in an automated

[1] The waiver issued by the Department of the Treasury in April 2005 also waived the sister deposit account regulation codified at 31 CFR part 208 (Management of Federal Agency Disbursements). We plan to issue a separate Notice of Proposed Rulemaking in the **Federal Register** for the purpose of amending part 208 to codify the terms of the split disbursement waiver into that rule as well.

[2] NACHA has promulgated additional rule changes since the publication of the 2007 ACH Rule book. We plan to address those changes in a future rulemaking.

[3] In an ARC or POP transaction, the Receiver is the person or entity making the payment (i.e., the remitter or payor) by presenting the check that is converted to an ACH debit.

[4] In an ARC or POP transaction, the Originator is the person or entity originating the debit entry to the account of the payor by accepting the payor's check and converting it to an ACH debit.

[5] Part 210 does not require written authorization for POP entries originated by Federal agencies. Consumers who wish to opt out of POP at an agency location may do so utilizing checks that include an identifier within the Auxiliary On-Us Field within the MICR line or by utilizing another payment method.

fashion, whether a business check is ineligible for conversion to an ARC or POP entry.[6] We believe the rule change solves a problem that the ACH rules previously presented for agencies: how to identify business checks that are ineligible for conversion that are received in collection streams. Because NACHA's rule change eliminates the need to address the conversion of business checks in part 210, we are deleting those provisions from the regulation. The rule change does not mean that we intend to begin converting all eligible business checks to ACH entries. Rather, the rule change allows for greater flexibility in determining the most advantageous way for the government to handle business checks. Thus, we may continue to process business checks by using image presentment or presenting the original items, as appropriate, but we will also have the option of converting eligible business checks in situations where it is more efficient and cost-effective to do so.

The minor rule changes published in the 2006 Rules book include:

- Changes related to the Company Name Field definition for ARC entries;
- A requirement for the Originating Depository Financial Institution (ODFI) to enter into a contractual relationship with Third-Party Senders;
- Removal of redundant language regarding use of encryption technology for Internet-initiated (WEB) entries;
- Inclusion of language with respect to an ODFI's liability for breach of specific Telephone-initiated (TEL) warranties;
- Addition of definitions for Automated Accounting Advice (ADV) and Notification of Change (COR) entries;
- Minor modifications of definitions associated with various Return Reason codes; and
- Consolidation of Dishonored Return Reason codes.

We are adopting all the foregoing rule changes, which we believe improve the operation of the ACH Network and the clarity of the ACH Rules.

B. Changes to ACH Rules Published in 2007 ACH Rules Book

The rule changes published in NACHA's 2007 Rules book involve a number of changes that have a minimal impact on ACH Network participants, as well as three rule amendments with a significant impact either on the private sector or on Federal agencies. Those three amendments are: changes to NACHA's voting and funding requirements; changes to the requirements for ARC entries and POP entries; and changes to implement a new application, Back Office Conversion (BOC) entries, for converting checks received at points-of-purchase and manned bill payment locations to ACH debit entries in a back-office environment.

Voting and Funding Requirements

Effective January 1, 2007, NACHA amended the ACH Rules to provide for the assessment of new Network administration fees to cover the costs related to management of the ACH Network. These fees include a per-entry fee for each commercial, inter-bank or Federal Government entry transmitted or received by the participating Depository Financial Institution (DFI). The amount of the transaction fee will be established from time to time by the NACHA Board of Directors based on projected costs and volumes. For calendar year 2008, the per-entry fee is $.0001. In addition to providing for fees, NACHA also modified the procedures for the amendment of the ACH Rules to clarify the specific allocation of votes required for approval of an amendment by the voting membership.

We support this rule change because of its importance in providing for the long term funding of NACHA's Network management activities, including risk management. The Service will pay these fees on behalf of agencies for which we disburse and collect payments.

ARC and POP Entries

NACHA has amended its check conversion rules to keep the rules consistent with Regulation E (12 CFR part 205) and its associated commentary, which the Federal Reserve revised by amendments effective January 1, 2007. NACHA's rule changes ensure that the ACH Rules are consistent with Regulation E by making corresponding changes to the check conversion applications established by the ACH Rules. Specifically, NACHA's amendment (1) modifies the ACH Rules with respect to the notice requirement for ARC entries, and (2) incorporates a notice obligation into the authorization requirements for POP Entries. This amendment also includes other minor revisions to the ACH Rules to clarify that (1) an ARC source document may not be presented for payment unless the ARC entry is returned by the Receiving Depository Financial Institution (RDFI); (2) ARC entries for which the Receiver opted out of check conversion constitute a valid reason for recredit to the Receiver and return by the RDFI; and (3) a POP entry is considered to be unauthorized if the requirements for both written authorization and notice are not met. In addition, effective March 16, 2007, the requirement that ARC source documents be destroyed within 14 days of the settlement of the entry has been deleted. A new rule has been added to provide that Originators must use commercially reasonable methods to securely store all source documents, as well as all banking information relating to ARC entries, until destruction. Finally, NACHA: (1) Modified the ARC and POP rules governing requirements for MICR capture of source document information, and (2) made corresponding modifications/additions to the audit requirements regarding MICR capture obligations for ARC and POP entries to ensure consistency of rule wording among various check conversion applications.

The ACH rule changes incorporate Regulation E safe harbor language for the notice required to be provided to Receivers whose checks are converted using ARC entries. Under the newly revised ACH Rules, agencies would be required to use the following language, or language that is substantially similar, for their notices:

> ''When you provide a check as payment, you authorize us either to use information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction.''

Until January 1, 2010, the following or substantially similar additional language must be included: ''When we use information from your check to make an electronic fund transfer, funds may be withdrawn from your account as soon as the same day we receive your payment, and you will not receive your check back from your financial institution.''

The new ACH Rule changes provide that an Originator may convert a check presented at a point-of-purchase, provided that a required notice is posted in a prominent and conspicuous location, and that a copy of the notice is provided to the Receiver at the time of the transaction. The notice and copy of the notice must include the following or substantially similar language:

> ''When you provide a check as payment, you authorize us either to use information from your check to make a one-time electronic fund transfer from your account or

[6] In 2007, NACHA adopted a rule change to implement a new application for converting checks received at points-of-purchase and manned bill payment locations to ACH debit entries in a back-office environment (see discussion in Section II(B)). As with POP and ARC, Receivers may opt out of back-office conversion by utilizing checks that include an identifier within the Auxiliary On-Us Field within the MICR line.

to process the payment as a check transaction.''

Until January 1, 2010, the following or substantially similar additional language must be included in the notice: ''When we use information from your check to make an electronic fund transfer, funds may be withdrawn from your account as soon as the same day you make your payment, and you will not receive your check back from your financial institution.''

Agencies are currently required by part 210 to use specifically worded disclosures for POP and ARC check conversion. Those disclosures, which are set out in Appendices A, B and C to part 210, are substantially similar to (but much longer than) the foregoing POP and ARC required notices. We are deleting Appendices A, B and C from part 210, which means that agencies may either continue to use the same disclosures they are currently using or, alternatively, begin using the shorter disclosures published in the ACH Rules.

Back Office Conversion Entries

Effective March 16, 2007, NACHA established a new electronic check conversion application, Back Office Conversion (BOC) entries, that will allow retailers and billers to accept checks at the point-of-purchase or at manned bill payment locations and convert the checks to ACH debits during back office processing. In order to use a check to originate a BOC entry, the Originator must post a notice in a prominent and conspicuous location that states: ''When you provide a check as payment, you authorize us either to use the information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction. For inquiries, please call [retailer phone number].'' Until January 1, 2010, the posted notice must also state: ''When we use information from your check to make an electronic fund transfer, funds may be withdrawn from your account as soon as the same day you make your payment, and you will not receive your check back from your financial institution.'' A copy of the notice, or language that is substantially similar, must be provided to the Receiver at the time of the transaction. In addition, the Originator must provide the Receiver the ability to opt out of the conversion of his check to an ACH debit entry. To opt out, the Receiver must notify the Originator at the time of purchase that the check being used to make payment does not authorize an ACH debit entry.

We are adopting most of the ACH rule changes implementing the BOC application. In 2003, we amended part 210 to allow agencies to convert checks to ARC entries in certain circumstances that fall outside typical accounts receivable and point-of-purchase settings. Our rule enabled Federal agencies to convert checks in circumstances in which check conversion would not have been possible under NACHA's then-existing ARC and POP rules. For example, when Army pay officers travel to remote, off-base locations in order to cash checks for soldiers, pay officers cannot bring along the necessary equipment to scan and return voided checks, as is required by the ACH rules governing POP entries. Nor could these checks be converted to ARC entries under the ACH rules, because a pay officer's acceptance of checks in these circumstances does not constitute an accounts receivable (lockbox) setting. To provide for the conversion of checks in a variety of circumstances falling outside typical accounts receivable and point-of-purchase settings, we adopted in part 210 a provision to allow agencies to convert checks delivered in person in circumstances in which an agency cannot contemporaneously image and return the check.

Because the BOC application addresses the Government's need for flexibility in these situations, there is no longer a need to retain this provision in part 210. Instead, agencies can now convert these checks using the BOC application. We therefore adopt the rule changes implementing the BOC application, with the exception of the audit requirements associated with the BOC entry type as reflected within Appendix Eight (Rule Compliance Audit Requirements), Sections 8.2 and 8.3 of the ACH Rules.

Treasury needs to make the programming and operational changes necessary to implement the BOC application. Accordingly, we expect that for some period of time after the adoption of a final rule, it will be necessary to continue our existing process of converting items to ARC entries in circumstances other than typical lockbox and point-of-purchase settings.

Rules With a Minor Impact on the ACH Network

NACHA published in the 2007 Rules book the following amendments that have a minor impact on the ACH Network:

- *Description of Corrected Data Within Contested Dishonored Return Reason Code R74*—Previously, the description of Return Reason Code R74 (Corrected Return), related to the correction of the Individual Identification Number/Identification Number Field within the Entry Detail Record, did not reflect all applicable SEC Codes that contain these fields. This amendment modified the description of Return Reason Code R74 within Appendix Five, Section 5.4 (Table of Return Reason Codes), as it relates to the Individual Identification Number/Identification Number, to add the following additional SEC Codes to be consistent with current industry practice: CBR, CTX, DNE, ENR, PBR, TEL, TRX, and WEB.
- *Direct Financial Institution and Payment Association Definitions*—The terms ''Direct Financial Institution'' and ''Payment Association'' were referenced within the procedures for amendment of the ACH Rules in Article Thirteen but not defined within the ACH Rules. This amendment added definitions for these terms to Article Fourteen (Definition of Terms) of the ACH Rules.
- *Time Frame to Re-initiate Entries*—Previously, the ACH Rules defined under what conditions an ACH entry that is returned may be re-initiated, but did not prescribe any limitations on the time period within which such re-initiation must occur. To preclude attempts to re-initiate extremely stale entries, NACHA amended the rules to establish the period of time after which returned entries cannot be re-initiated. Specifically, an entry may not be re-initiated more than 180 days after the settlement date of the original transaction.
- *Available ACH Characters*—This amendment modified the definition of ''alphameric'' within Article Fourteen and the data specification requirements within Appendix One to clarify that lowercase alpha characters are permitted within ACH entries, except where explicitly noted otherwise.
- *Name and Definition of Cash Concentration or Disbursement (CCD) Standard Entry Class Code*—This amendment modified the name and description of the CCD format to clarify that CCD entries can be used more broadly than just for intra-corporate payments. The name of the CCD format was changed from ''Cash Concentration or Disbursement'' to ''Corporate Credit or Debit'' and the description was revised to indicate that this code may also be used for a transfer of funds from the account of one organization to the account of another organization.
- *Formatting Requirements for TEL (Telephone-Initiated) and WEB (Internet-Initiated) Entries*—This amendment redefined the Individual Name Field within the Entry Detail Record of both TEL and WEB entries (and related returns) from Required to

Mandatory to facilitate ACH Operators' use of various risk filters to monitor the field for possible fraudulent content. Operator edits within Appendix Three, as they relate to Return Reason Code R26 (Mandatory Field Error), were also modified to permit the return of any TEL or WEB entry within which this field contains all spaces or all zeros.

• *Additional Addenda Code for Dishonored Return Reason Code R69*—This amendment added, under the description of Return Reason Code R69 (Field Errors), an additional criterion under which an entry containing incorrect information may be dishonored. This change enables an ODFI to dishonor a return if the original Effective Entry Date was incorrectly copied from the forward entry.

We support the foregoing ACH Rules changes. The changes clarify certain ACH Rules that were previously unclear or ambiguous, and provide greater flexibility and operational efficiency for users of the ACH Network. We believe these changes are beneficial and are incorporating them into part 210.

III. Section-by-Section Analysis

In order to incorporate in part 210 the ACH rule changes that we are accepting, we are replacing references to the 2005 Rules book with references to the 2007 ACH Rules book.

Sec. 210.2(d)

We are amending the definition of applicable ACH Rules at § 210.2(d) to reference the rules published in NACHA's 2007 Rules book rather than the rules published in NACHA's 2005 Rules book.

Sec. 210.3(b)

We are amending § 210.3(b) by replacing the references to the ACH Rules as published in the 2005 Rules book with references to the ACH Rules as published in the 2007 Rules book.

Sec. 210.5

We are amending § 210.5(b) by adding a new paragraph (b)(3) to allow for the issuance of part or all of a Federal employee's travel reimbursement to the employee's travel card account at the card-issuing bank. We are also adding a new paragraph (b)(4), which provides that where a Federal payment is to be disbursed through a debit card, stored value card, prepaid card or similar payment card program established by the Service, the Federal payment may be deposited to an account at a financial institution designated as a financial or fiscal agent. The Service may specify the account title, access terms, and other account provisions, and thereby protect the interest of payment recipients. This paragraph would apply in those cases when the Service directs its financial or fiscal agent bank to set up a card program.

Sec. 210.6(g)

We are revising current § 210.6(g) to reflect the revision of the ACH Rules governing POP entries. We believe that, as revised, the ACH Rules governing POP entries are appropriate in most respects for agencies. Unlike the ACH Rules, however, part 210 will continue to allow agencies to originate POP entries without a written authorization, as long as a notice required by the ACH Rules is posted and the Receiver is provided with a copy of the notice. This approach is consistent with the authorization requirements of Regulation E.

Sec. 210.6(h)

We are deleting the text of current § 210.6(h). We believe that, as revised, the ACH Rules governing accounts receivable check conversion are appropriate for agencies, and therefore, a separate rule within part 210 is no longer necessary. We are revising the text of current § 210.6(i) and renumbering it as § 210.6(h). The revision clarifies that in order to debit a Receiver's account for an insufficient funds service fee, the agency must have independent authority to collect fees for items returned due to insufficient funds. An agency that has such authority may originate an ACH debit entry to collect a one-time service fee in connection with an ARC, POP or BOC entry that is returned due to insufficient funds, provided that the agency discloses the service fee in the notices required for the ARC, POP or BOC entry. The required disclosure that must be given in order to debit an account for an insufficient funds service fee is unchanged, but has been relocated to § 210.6(h) from Appendices A, B, and C, which we are removing from the regulation.

IV. Procedural Requirements

Request for Comment on Plain Language

Executive Order 12866 requires each agency in the Executive branch to write regulations that are simple and easy to understand. We invite comment on how to make the rule clearer. For example, you may wish to discuss: (1) Whether we have organized the material to suite your needs; (2) whether the requirements of the rules are clear; or (3) whether there is something else we could do to make these rules easier to understand.

Regulatory Planning and Review

The rule does not meet the criteria for a ''significant regulatory action'' as defined in Executive Order 12866. Therefore, the regulatory review procedures contained therein do not apply.

Regulatory Flexibility Act Analysis

It is hereby certified that the rule will not have a significant economic impact on a substantial number of small entities. The changes to the regulation related to ARC, POP, and BOC check conversion will not result in significant costs for individuals or financial institutions affected by the changes, including financial institutions that are small entities. New ACH fees will be borne by the government, and will not affect other parties sending or receiving Federal ACH transactions, including small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not required.

Unfunded Mandates Act

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. We have determined that the rule will not result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement or specifically addressed any regulatory alternatives.

List of Subjects in 31 CFR Part 210

Automated Clearing House, Electronic funds transfer, Financial institutions, Fraud, and Incorporation by reference.

Words of Issuance

■ For the reasons set out in the preamble, we are amending 31 CFR part 210 as follows:

PART 210—FEDERAL GOVERNMENT PARTICIPATION IN THE AUTOMATED CLEARING HOUSE

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 5 U.S.C. 5525; 12 U.S.C. 391; 31 U.S.C. 321, 3301, 3302, 3321, 3332, 3335, and 3720.

■ 2. In § 210.2, revise paragraph (d) to read as follows:

§ 210.2 Definitions.

* * * * *

(d) *Applicable ACH Rules* means the ACH Rules with an effective date on or before September 21, 2007, as published in Parts II, III and VI of the ''2007 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH Network'' except:

(1) ACH Rule 1.1 (limiting the applicability of the ACH Rules to members of an ACH association);

(2) ACH Rule 1.2.2 (governing claims for compensation);

(3) ACH Rules 1.2.4 and 2.2.1.12; Appendix Eight; and Appendix Eleven (governing the enforcement of the ACH Rules, including self-audit requirements);

(4) ACH Rules 2.2.1.10; 2.6; and 4.8 (governing the reclamation of benefit payments);

(5) ACH Rule 9.3 and Appendix Two (requiring that a credit entry be originated no more than two banking days before the settlement date of the entry—see definition of ''Effective Entry Date'' in Appendix Two);

(6) ACH Rule 2.11.2.3 (requiring that originating depository financial institutions (ODFIs) establish exposure limits for Originators of Internet-initiated debit entries); and

(7) ACH Rule 2.13.3 (requiring reporting regarding unauthorized Telephone-initiated entries).

* * * * *

■ 3. In § 210.3, revise paragraph (b) to read as follows:

§ 210.3 Governing law.

* * * * *

(b) *Incorporation by reference—applicable ACH Rules.*

(1) This part incorporates by reference the applicable ACH Rules, including rule changes with an effective date on or before September 21, 2007, as published in Parts II, III, and VI of the ''2007 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH Network.'' The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the ''2007 ACH Rules'' are available from NACHA—The Electronic Payments Association, 13450 Sunrise Valley Drive, Suite 100, Herndon, Virginia 20171, *http://www.nacha.org*. Copies also are available for public inspection at the Financial Management Service, 401 14th Street, SW., Room 400A, Washington, DC 20227, (202) 874–1251, 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.*

(2) Any amendment to the applicable ACH Rules that is approved by NACHA—The Electronic Payments Association after January 1, 2007 shall not apply to Government entries unless the Service expressly accepts such amendment by obtaining approval of the amended incorporation by reference from the Director of the Federal Register and publishing an amendment to this part in the **Federal Register**. An amendment to the ACH Rules that is accepted by the Service and approved by the Director of the Federal Register for incorporation by reference shall apply to Government entries on the effective date specified by the Service in the **Federal Register** rulemaking expressly accepting such amendment.

* * * * *

■ 4. In § 210.5, redesignate paragraph (b)(3) as paragraph (b)(5), and add new paragraphs (b)(3) and (b)(4) to read as follows:

§ 210.5 Account requirements for Federal payments.

* * * * *

(b)(3) Where an agency is issuing part or all of an employee's travel reimbursement payment to the official travel card issuing bank, as authorized or required by Office of Management and Budget guidance or the Federal Travel Regulation, the ACH credit entry representing the payment may be deposited to the account of the travel card issuing bank for credit to the employee's travel card account at the bank.

(4) Where a Federal payment is to be disbursed through a debit card, stored value card, prepaid card or similar payment card program established by the Service, the Federal payment may be deposited to an account at a financial institution designated by the Service as a financial or fiscal agent. The account title, access terms and other account provisions may be specified by the Service.

* * * * *

■ 5. In § 210.6, revise paragraphs (g) and (h) to read as follows, and remove paragraph (i):

§ 210.6 Agencies.

* * * * *

(g) *Point-of-purchase debit entries.* An agency may originate a Point-of-Purchase (POP) entry using a check drawn on a consumer or business account and presented at a point-of-purchase unless the Receiver opts out in accordance with the ACH Rules. The requirements of ACH Rules 2.1.2 and 3.12 shall be met for such an entry if the Receiver presents the check at a location where the agency has posted the notice required by the ACH Rules and has provided the Receiver with a copy of the notice.

(h) *Returned item service fee.* An agency that has authority to collect returned item service fees may do so by originating an ACH debit entry to collect a one-time service fee in connection with an ARC, POP or BOC entry that is returned due to insufficient funds. An entry originated pursuant to this paragraph shall meet the requirements of ACH Rules 2.1.2 and 3.5 if the agency includes the following statement in the required notice(s) to the Receiver: ''If the electronic fund transfer cannot be completed because there are insufficient funds in your account, we may impose a one-time fee of $ [_____] against your account, which we will also collect by electronic fund transfer.''

Appendices A Through C to Part 210 [Removed]

■ 6. Remove Appendices A, B and C.

Dated: August 27, 2008.

Kenneth E. Carfine,

Fiscal Assistant Secretary, Department of the Treasury.

[FR Doc. E8–20575 Filed 9–9–08; 8:45 am]

BILLING CODE 4810–35–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[EPA–HQ–OW–2006–0765; FRL–8712–7]

RIN 2040–AE99

NPDES Voluntary Permit Fee Incentive for Clean Water Act Section 106 Grants; Allotment Formula

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule revises the allotment formula contained in EPA's Clean Water Act (CWA) Section 106

Water Pollution Control grant regulations to include a financial incentive for States to voluntarily collect adequate National Pollutant Discharge Elimination System (NPDES) permit fees. EPA is amending its existing CWA Section 106 grant allotment. This amendment provides the Agency with the flexibility to annually allot separately an amount up to three percent of the FY 2008 base funds allocated to States from CWA Section 106 grants appropriated by Congress. This rule will begin in FY 2009. The incentive will not impact the FY 2008 base funds. It will be set-aside for allotment only if funds allotted to the States are greater than the amount allotted in FY 2008.

DATES: This rule is effective on September 10, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2006–0765. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.* , CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is publicly available only in hard copy. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Robyn Delehanty, Office of Water, Office of Wastewater Management, 4201M, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; *telephone number*: (202) 564–3880; *fax number:* (202) 501–2346; *e-mail address: delehanty.robyn@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

Affected Entities: State Agencies that are eligible to receive grants under Section 106 of the Clean Water Act (CWA).

II. Background

Section 106 of the CWA authorizes the EPA to provide grants to State and interstate agencies [1] to administer programs for the prevention, reduction, and elimination of water pollution, including the development and implementation of groundwater protection strategies. Section 106(b) of the CWA directs the EPA Administrator to make allotments ''in accordance with regulations promulgated by him on the basis of the extent of the pollution problem in the respective States.'' EPA's regulations implementing Section 106 can be found at 40 CFR 35.160 *et seq.* EPA's current allotment formula for Section 106 grants includes an allotment ratio for each State based on six components selected to reflect the extent of the water pollution problem in the respective States. These six components are surface water area, ground water use, water quality impairment, potential point sources, nonpoint sources, and the population of urbanized areas. 40 CFR 35.162(b)(1)(i). By including a component related to point sources, EPA recognizes the important role they play in determining the extent of pollution in a State.

EPA proposed this rule amending the CWA Section 106 allotment formula on January 4, 2007 (72 FR 293) and requested comments from interested parties. EPA received 717 comments on the proposed rule. A summary of the significant public comments and the Agency's responses are included in this preamble in Section III below. This preamble also summarizes the two changes to the final rule which EPA determined necessary. These changes involve delaying implementation of this rule until FY 2009 and changing the base fiscal year which the Agency will use to determine if an allotment for this purpose should be made. EPA's responses to all comments received on this rulemaking are included in the docket described above.

This final rule amends the State allotment formula to incorporate financial incentives for States to implement adequate NPDES fee programs. The Agency recognizes the importance of States' flexibility in program management. Therefore, this final rule is purely an incentive; it is voluntary and will *not* impact State's base funds. This rule will only be invoked if there is an increase above the FY 2008 level in the total amount of funds allotted to States under 40 CFR 35.162(b).

The Clean Water Act prohibits the discharge of any pollutant from point sources except in compliance with other provisions of the statute. 33 U.S.C. 1311(a). One of these provisions is CWA Section 402, under which pollutant discharges can be authorized by an NPDES permit. 33 U.S.C. 1342(a). EPA oversees the NPDES program and also approves applications from States to administer and enforce the NPDES program in those States. Currently, 45 States are authorized by EPA to administer all or some parts of the NPDES program.

State water quality programs are funded with a mixture of State and federal dollars. The growing complexity of water quality issues has prompted more States to implement NPDES permit fee programs. An estimated 41 States currently have permit fee programs in place, with such fees paying for all or a portion of the cost of the State's permit program.

A number of States still operate their permit programs with little or no reliance on permit fees. States can address permit program budget shortfalls through the implementation of permit fee programs that collect funds to cover the cost of issuing and administering permits. Funding permit programs with the support of permit fees allows States to use CWA Section 106 funds for other critical water quality programs, which address the prevention, reduction, and elimination of water pollution.

EPA is committed to making State surface water protection programs more sustainable through better resource management. As State agencies carry out most of the day-to-day aspects of water quality functions, their responsibilities are expanding while they are simultaneously facing increasingly severe funding constraints. As a nation, billions of federal funds under the Water Pollution Control grants, together with State resources, have been spent to establish and maintain adequate measures for the prevention and control of surface and groundwater resources. Federal and State governments cannot carry out this responsibility alone. EPA is committed to finding effective and efficient solutions to maintaining sustainable State water pollution control programs that continue to provide this nation with clean and protected water. All levels of government and the private sector must share in this commitment.

The purpose of this rule is to encourage States to *voluntarily* collect NPDES permit fees adequate to meet their program costs. This amendment to the allotment formula is designed to provide an incentive for States to *voluntarily* move toward greater sustainability in the way they manage

[1] CWA Sections 106 and 518 authorize EPA to award such grants to eligible Indian Tribes, but this rule does not affect those grants.

and budget for environmental programs and to shift part of the financial burden to those who benefit from NPDES permits. No State is required to collect permit fees under this rule. To ensure that no States receive a reduction from their current allotment amount, no funds will be set aside for this permit fee incentive unless funds designated for distribution in FY 2009 and subsequent fiscal years under 40 CFR 35.162(b) are greater than $171 million, which is the amount of funds set aside under 40 CFR 35.162(b) in FY 2008. If 40 CFR 35.162(b) funds in FY 2009 or later fiscal years are not greater than $171 million, then EPA will not be able to invoke the permit incentive. This rule is intended to increase overall available funding for CWA 106 eligible activities.

The amount of any permit fee incentive allotment set-aside would be limited to three percent of the funds allotted under 40 CFR 35.162(b) in FY 2008, or $5.1 million. And, in order to ensure that the incentive to each qualifying State is modest, the rule caps the maximum share of the incentive at 50% of the amount a State received under 40 CFR 35.162(b) in the previous year. As a result of this rule, beginning in FY 2009, EPA would allot the State and interstate CWA 106 grant funds in the following order: 2.6 percent will be set aside for allotment to the eligible interstate agencies in accordance with the existing interstate allotment formula in 40 CFR 35.162(c); next, funds may be allotted for specific water pollution control elements under 40 CFR 35.162(d); next, funds may be allotted to States in accordance with the permit fee incentive allotment formula under 40 CFR 35.162(e), which requires that ''there is an increase above the FY 2008 level in the total amount of funds allotted to States under subsection (b)''; and finally, the balance will be allotted to the States in accordance with the existing allotment formula under 40 CFR 35.162(b).

The only States which will be eligible for this set-aside are those States which have been authorized by EPA to implement the NPDES program by the first day of the fiscal year, October 1, for which funds are appropriated by Congress. Under this rule, these States must also submit annually a certification to EPA (to the attention of the Regional Administrator). For FY 2009, the certification must be postmarked by November 14, 2008. For every year thereafter, the required certification must be postmarked by October 1. The certification must meet the following two requirements. First, the certification must include the total NPDES State program costs, the percentage of NPDES program costs recovered by the State through permit fee collections during the most recently completed State fiscal year, and a statement that the amount of permit fees collected is used by the State to defray NPDES program costs. This rule defines NPDES program costs as all activities relating to permitting, enforcement, and compliance. Second, the certification must include a statement that State recurrent expenditures for water quality programs have not decreased from the previous State fiscal year, or indicate that a decrease in such expenditures is attributable to a non-selective reduction of the programs of all executive branch agencies of the State government. The concept of non-selective reduction is derived from the statutory requirements related to maintenance of effort from Clean Air Act Section 105 grants and EPA's implementing regulations found at 40 CFR 35.146. Under the Clean Air Act, EPA is prohibited from awarding grants to air pollution control agencies if State recurrent expenditures are not at least equal to such expenditures during the preceding State fiscal year. EPA can still award a grant even if there are decreases in such expenditures if EPA determines that the reduction is attributable to a non-selective reduction of all State programs. This situation would occur, for example, when a State legislature enacts budget cuts across all State agencies and does not target the air program. EPA is adopting a similar approach in this rulemaking.

After EPA determines the number of eligible States which have met the certification requirements, each State will be able to receive up to a full share of the set-aside amount. EPA will determine the amount of a full share by dividing the set-aside amount by the number of eligible States which have met the certification requirements. A full share will be the same amount for each State. The percent of a full share that each State will receive, however, will be determined by the following formula, based on the certification information described above.

(A) A State will receive 25 percent of a full share if that State has collected permit fees which equal or exceed 75 percent of total State NPDES program costs; or

(B) A State will receive 50 percent of a full share if that State has collected permit fees which equal or exceed 90 percent of total State NPDES program costs; or

(C) A State will receive a full share if that State has collected permit fees which equal 100 percent of total State NPDES program costs.

In other words, in its certification, a State must inform EPA of its total NPDES program costs and the percentage of which are recovered through permit fees. EPA would use the information from this certification to determine any additional amount a State would receive in its Section 106 grant based on this financial incentive allotment formula. If, for example, there is an increase in Section 106 funding of $5.1 million and EPA has verified that 5 States will qualify for the Permit Fee Incentive, the first step would be to determine the value of a full share. This would be calculated by dividing $5.1 million by 5 states with a full share equaling $1.02 million. Next, based on the State's certification, the percent of fees collected will be used to calculate the amount of the incentive for each qualifying state. For example; State A collects 75% of their NPDES permit program costs, State B collects 90%, State C collects 75%, State D collects 100%, and State E collects 75%. Once again a full share equals $1.02 million. State A will receive 1/4 of $1.02 million which calculates to be $255,000. State B will receive 1/2 of $1.02 million or $510,000. State C will receive 1/4 of $1.02 million or $255,000. State D will receive a full share, $1.02 million and finally, State E will receive 1/4 of $1.02 million or $255,000. A total incentive of $2,295,000 will be distributed to the 5 States with a remaining balance of $2,805,000. Since 100% of the incentive pool was not allotted per 40 CFR 35.162(f) (*e.g.,* because some or all qualifying States do not cover 100% of their NPDES program costs with fees), then the remainder of the incentive pool will be allotted per the formula under 40 CFR 35.162 (b). A more simplified example would be if a State's total NPDES program costs are $1 million, and the State collected $750,000 in NPDES permit fees, a State would receive 25% of a full share in addition to the grant amount allotted to it under the current CWA Section 106 allotment formula. It should be noted that the rule caps the maximum share of the incentive at 50% of the amount a State received under 40 CFR 35.162(b) in the previous year. States receiving the incentive, either in part or in full, are free to allocate those funds per the individual State's water quality program priorities, which address the prevention, reduction, and elimination of water pollution and are eligible under CWA Section 106.

III. Response to Comments

A. EPA's Authority To Issue This Rule

Multiple commenters questioned the Agency's authority to create the incentive program for various reasons. The Agency maintains that it clearly has the legal authority to establish conditions for the distribution of grant funding consistent with the approach reflected in the rule. Section 106(b) of the CWA states: ''*From the sums appropriated in any fiscal year, the Administrator shall make allotments to the several States and interstate agencies in accordance with regulations promulgated by him on the basis of the extent of the pollution problem in the respective States.*'' 33 U.S.C. 1256(b). EPA complies with this statutory requirement and makes allotments on the basis of the extent of the pollution problem in the States. EPA has codified this basis at 40 CFR 35.162(b)(1), which lists six components the agency takes into account to determine this allotment: Surface water area, ground water use, water quality impairment, potential point sources, nonpoint sources, and population of urbanized areas. We also list associated elements, sub elements, and supporting data for each component. This is not, however, the only basis the agency uses to make allotments to the States, and we do not read the above statutory provision as requiring that the extent of pollution be the only basis for the allotment process. Section 106(b) does not state that allotments shall be made *only* on the basis of the extent of pollution. Thus, we do not read this language to prohibit other bases for the overall allotment of Section 106 grant funds. Further, the statutory language includes the phrase ''[*f*]*rom* the sums appropriated, the Administrator shall make allotments [emphasis added] * * *'' implying that not all of the funds appropriated must be allotted on this basis.

In fact, EPA has promulgated other bases for allotting 106 funds. For example, our regulation at 40 CFR 35.162(b)(2) imposes a funding floor; 40 CFR 35.162(b)(4) includes an inflation adjustment; 40 CFR 35.162(b)(5) imposes a cap on funding increases; and 40 CFR 35.162(b)(6) imposes a cap on the component ratio of the six elements. In addition, we allot to the interstate agencies based on a percentage of funds appropriated for Section 106 purposes (40 CFR 35.162(c)). Finally, we also have the ability to use an alternative allotment formula when the appropriations process indicates that some of the Section 106 funds should be used for specific water pollution control elements (40 CFR 35.162(d)).

Other language in Section 106 also lends support to our interpretation of our authority. Section 106(c) authorizes the Administrator to pay States for their water quality programs two different ways, whichever is the lesser: Either the allotment under 106(b) or ''the reasonable costs as determined by the Administrator of developing and carrying out a [State] pollution program * * *'' Section 106(g) allows EPA to reallot any sums allotted under 106(b) when funds originally allotted are not paid to the State. This reallotment is not required to be conducted in accordance with 106(b). Both of these provisions indicate to EPA that Congress gave the Agency flexibility to allot to the States and interstates not only on the basis of the extent of pollution in the States but also on the basis of other factors. Further, because the permit fee rule is related to fees charged to dischargers, it does, in fact, fit within the extent of pollution basis used in the current allotment formula. Under the current allotment formula found at 40 CFR 35.162(b), one of the six components evaluated is the number of potential point sources. Similarly, the incentive allotment is based in part on evaluating the number of point sources in a State and collection of fees from dischargers. Finally, no State has challenged the allotment formulae summarized above that have been implemented by EPA for several years.

Two commenters, citing 40 CFR 35.162(d), stated that EPA lacks the authority to engage in the rulemaking absent Congressional authorization and that we failed to consult with States as required under this provision. We disagree. No Congressional action is required to execute this rulemaking (see discussion above). The President's FY 2007 Budget Request for EPA did include language directing EPA to promulgate this rule, but that language was never enacted into statute. As stated above, EPA has the statutory authority to promulgate this rule under Section 106 of the Clean Water Act. In addition, EPA will submit the final rule to Congress in accordance with the Congressional Review Act.

Regarding the applicability of 40 CFR 35.162(d), this rule does not fall within the scope of that provision because this rule does not allot a portion of the funds for a specific water pollution control element, such as assessment of impaired water bodies. (See, Table 1 of 40 CFR 35.162, Formula Component No. 3). The provision at 40 CFR 35.162(d) was promulgated to address a situation like that which occurred in FY 2006 in which both the President's Budget Request and EPA's Appropriation targeted Section 106 grants funds to support enhanced water quality monitoring efforts. As EPA stated when it promulgated 40 CFR 35.162(d), the application of 35.162(d) is limited to ''situations where the appropriations process has indicated that funds should be used for a specific purpose'' (71 FR 17, January 3, 2006). Because this rule does not fall within this situation, any consultation requirement is not applicable.

B. EPA's Rulemaking Process

Commenters also questioned whether the Agency complied with all applicable statutory and executive order reviews relating to the rulemaking process. EPA maintains we met all of our obligations and have even gone beyond that which is required.

Some commenters asserted that EPA did not adequately consult with the states on the details of the rulemaking as required in Executive Order 13132, ''Federalism''. We disagree that this rule has federalism implications that would trigger the requirements of Executive Order 13132. Actions that have ''federalism implications'' are defined in the Executive Order to include regulations and regulatory policies that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This rule is a voluntary incentive that does not have substantial direct compliance costs on States. Nor will this rule substantially impact the relationship between the national government and the States or the distribution of power between the national government and the States, as contemplated under the Executive Order.

These commenters also suggested that EPA failed to consult under Executive Order 13132. Although this Executive Order is not applicable, EPA, in fact, took several steps to ensure that input from the States was solicited and considered. State representatives nominated by the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and the Environmental Council of the States were provided an opportunity to provide input at the outset of rule development. EPA held a series of work group teleconferences in 2006 and discussed the proposed rule with attendees at the 2006 annual ASIWPCA meeting. EPA carefully considered feedback received during work group meetings prior to the publication of the proposed rule. As a result of the comments received from the States and

other entities prior to publication of the proposed rule, the proposal was modified significantly.

Some commenters asserted that EPA did not comply with Executive Order 12866, as amended by Executive Order 13258 and Executive Order 13422. We disagree. EPA disagrees with assertions that the rule will 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. However, upon further consideration, the Agency has determined that the rule is a ''significant regulatory action'' under Executive Order 12866 because it raises novel policy issues. Therefore, this rule will be submitted to OMB for review.

Additionally, some commenters asserted that this rule does not meet the ''compelling public need'' test included in Executive Order 12866. EPA disagrees that Executive Order 12866 contains a test that mandates Agency rules have a compelling public need. The requirements of the Executive Order are clearly distinct from the ''Statement of Regulatory Philosophy and Principles'' that contains the compelling public need language. However, EPA has complied with the Agency responsibilities included in Section 6 of Executive Order 12866.

A few commenters contended that EPA has not complied with the Unfunded Mandates Reform Act (UMRA) and the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). We disagree. By its terms, the RFA only applies to rulemakings which require notice and comment rulemaking under 5 U.S.C. 553(b) or any other statute. Grant rules are expressly excluded from the coverage of 5 U.S.C. 553(b) by the provisions of 5 U.S.C. 553(a). Similarly, UMRA applies to ''federal mandates,'' which exclude ''conditions of Federal assistance.'' 2 U.S.C. 658(5), (6) & (7). Because this is a grant rule, by definition this rule is not subject to the RFA or Sections 202 and 205 of UMRA. Additionally, UMRA generally excludes from the definition of ''Federal intergovernmental mandate'' duties that arise from participation in a voluntary federal program, such as the fee incentive program established by this rule.

C. Financial Impact of Proposed Rule

Many commenters expressed concerns regarding the potential financial impact of the proposed rule. Commenters' concerns included: That the costs of working to qualify for the incentive would exceed the value of the incentive, that increased permit fees would adversely impact small communities and businesses, and that States may see a decline in general revenue funding from their legislatures if they begin collecting permit fees. Many of the comments drew conclusions based on the premise that EPA was requiring States to impose permit fees on point source-dischargers.

The incentive program is voluntary. It is designed to encourage States to consider establishing or expanding permit fee programs. However, States are under no obligation to apply for these funds. Each State should continue to make their permit fee decisions based on sound economic and programmatic information.

As a result of comments received during the development of the proposed rule, EPA did make changes prior to the proposal of the rule to promote responsible decision making regarding permit fees and participation in the incentive program. EPA established the pool at a modest amount (no more than three percent of FY 2008 core program funding). The Agency considers the incentive pool to be sufficient to generate State interest but not large enough to significantly impact the amount of core Section 106 funding available. The incentive pool will not be taken from existing core program funding but will only be created from State grant increases above FY 2008 levels. No State will receive reduced funding as a result of this rule. The total incentive will never exceed approximately $5.1 million. Future increases in Section 106 funding above FY 2008 levels may be distributed through the current distribution mechanism using the allotment formula found at 40 CFR 35.162.

Some comments also focused on the challenges that States may potentially encounter in attempting to comply with the rule, including collection and reporting of cost information to EPA in a timely manner. EPA will work with the States to provide assistance in applying for a share of the incentive. As necessary, EPA will provide any clarifications on the application process, including guidance and Q&A documents. The Agency postponed rule implementation until FY 2009 to provide States additional time to establish new or expand existing permit fee programs.

Multiple commenters objected to the use of grant ''set-asides.'' The comments suggested that designating funds for specific purposes eliminates State flexibility to use the funding to address the highest State priorities. As use of approximately 85 percent of State grant funding is still at the discretion of the States (with EPA approval), EPA has ensured that States continue to have wide latitude in targeting funding according to State priorities. EPA has designated the remaining funding to address Administration priorities and to ensure that the funds are used as Congress intended. In addition, States receiving the incentive, either in part or in full are free to allocate those funds per the individual State's water quality program priorities. Furthermore, recovering permit program costs through fees will make resources available for other water quality program activities, creating a net increase in the amount of funds that States can devote to addressing their water quality priorities.

D. State Discretion and the Role of State Legislatures and General Funds

Commenters provided information regarding how States fund their NPDES programs, and the restrictions that some States face in implementing or expanding permit fee programs. Some noted that their NPDES permits are funded through States' general revenue. Some commenters expressed concerns that the proposed rule would interfere with State discretion regarding how States manage and fund State water quality programs. Commenters also noted that it may be difficult or even impossible to receive legislative approval for implementation of a permit fee system or increases in existing fees.

EPA emphasizes that the incentive program is voluntary. The incentive program promotes the use of permit fees as a mechanism for funding water quality activities. EPA recognizes that there are a number of revenue streams that States may employ to support State water quality programs, including federal support, State general funds, and revenue from those who benefit from the activity (permit fees). EPA also recognizes that there may currently be limitations in place that prevent States from increasing permit fees or implementing permit fee programs in time to qualify for the incentive in FY 2009.

Ultimately, States have the option to collect fees and apply for the incentive funds or to choose other mechanisms for funding their activities. States that do not qualify for the incentive during the first year that it is available will not be precluded from receiving a share of the incentive in future years.

Recovering permit program costs through fees will make resources

available for other water quality program activities, creating a net increase in the amount of funds that States can devote to addressing their water quality priorities. A State may choose not to apply for funds if State officials decide that meeting the qualifying threshold is not in the best interest of the State. EPA intentionally limited the size of the incentive pool to protect core funding for all States, in recognition of the fact that not every State will qualify or attempt to qualify for the incentive program.

E. Objective and Intent of Proposed Rule

Many commenters stated that EPA has not clearly articulated the objective of the rule or demonstrated that the incentive will serve the intended purpose of shifting more of the financial burden for program operation to NPDES permit holders. As stated above, the purpose of this rule is to encourage States to voluntarily collect NPDES permit fees adequate to meet their program costs. This rule is designed to provide an incentive for States to move toward greater sustainability in the way they manage and budget for environmental programs and to shift part of the financial burden to those who benefit from NPDES permits.

F. Promoting Water Quality Protection

Some commenters contended that the creation of an incentive pool would limit funding to State water quality programs, thereby potentially adversely impacting a State's ability to protect and improve water quality. These comments were based on the belief that the incentive pool represents a reduction in 106 funding and may signal EPA's intent to eliminate all federal funding for State water quality programs in the future. EPA has ensured that the rule creates an incentive that is sufficient to encourage States to increase or maintain the sustainability of their water quality programs while protecting core 106 funding for those States that currently do not, or choose not to, qualify for the incentive. The incentive pool will be created only from program funding increases above FY 2008 funding levels (up to three percent of FY 2008 core program funding) and can only be applied to support Section 106 eligible activities. In addition, following distribution of incentives to qualifying States, all remaining incentive funds will be distributed to all States through the existing formula (40 CFR 35.162(b)).

Some commenters also stated that EPA has failed to demonstrate that the incentive program will have a positive environmental impact. EPA acknowledges that States which fail to qualify for the incentive will receive fewer grant dollars than if all of the funds were distributed through the existing formula. However, EPA does not believe that this will negatively impact a State's ability to protect water quality or unfairly penalize those States that are currently unable to qualify for the incentive. Ultimately, the Agency believes that the new fee revenue that States will generate, coupled with the incentive, may significantly increase the available funding for water quality programs, justifying EPA's decision to set aside a modest portion of 106 funding. EPA also believes that this increase in available funding will allow States to build more sustainable water quality programs that are better equipped to address water quality problems.

G. Impact on Non-Authorized States

Some commenters expressed concern regarding the impact of the proposed rule on non-authorized States. EPA reiterates that base grant funding for State water quality programs is protected under this rule. The incentive pool will be created only from future State Section 106 increases greater than FY 2008 funding. The total incentive will never exceed approximately $5.1 million. Therefore, the amount of funding diverted from any one State as a consequence of this rule will be relatively modest, should not adversely impact a State's ability to effectively implement their water quality program, and should not be a pivotal factor in any State program approval decision.

H. Permit Fees for EPA-Regulated Dischargers

Some commenters noted that the rule does not apply to federal facilities, tribal lands, and other EPA-regulated dischargers in non-authorized States. EPA reiterates that this rule is not solely intended to collect fees. It is intended to support the implementation of high quality NPDES programs in authorized States while at the same time build more sustainable State water programs. EPA does not collect user fees in non-authorized States. In addition, the distribution of permit program responsibilities among the non-authorized States and EPA varies by State. While none of the non-authorized States issue permits, many carry out a number of permit program-related activities.

I. Resources Needs Gap

A few commenters were concerned that EPA's focus on permit fees detracts from efforts to address the resources needs gap identified in the State Water Quality Management Resource Analysis Task Force's Interim 2002 report. EPA agrees that action needs to be taken to address the resource needs gap and believes that this rule responds directly to the State Resource Analysis Report. The Agency asserts that if States establish or expand permit fee programs to qualify for the incentive funds established under this rule, they will ultimately realize a net increase in the amount of funding available for their water quality programs. EPA also believes that recovering all or most of program costs through permit fees represents a more sustainable approach to program management and budgeting.

J. Measuring the Success of NPDES Programs

A few commenters stated that the success of NPDES programs should be measured by improvements in water quality, rather than the amount of permit fees a State generates. EPA agrees with this position and does not consider the criteria set forth in today's rule regarding permit program costs recovered to be an environmental measure of NPDES program success or a measure of NPDES program adequacy. The purpose of this rule is to encourage States to voluntarily collect NPDES permit fees adequate to meet their program costs.

K. Self-Certification and Reporting Requirements

Many commenters stated that the proposed rule would impose a significant administrative burden on the States. Additionally, some commenters indicated that the incentive would not be sufficient to justify the expenses necessary to meet the certification requirements of the proposed rule. In addition to ensuring the integrity of the incentive program, EPA believes the reporting required under the incentive program will help States to understand and document program costs and identify more opportunities to ensure program sustainability.

The rule provides for a modest incentive to further encourage States to establish or expand their permit fee programs. EPA anticipates that the additional revenue streams created from both the extra fees and the incentive awards will provide sufficient revenue to generate interest among States and cover the costs of creating or expanding a permit fee program and meeting all accounting and reporting requirements outlined in this rule. Since this rule establishes a voluntary incentive program, EPA advises States to carefully analyze all options before pursuing any fee strategy.

L. Defining NPDES Activities

Some commenters requested clarification and definitions for several terms used in the proposed rule, including ''NPDES program'' and an ''adequate'' NPDES fee program. As necessary, EPA will provide additional guidance regarding those activities the Agency considers to be included in the program's scope.

M. Current Status of State NPDES Programs

Some commenters provided information regarding the current status and structure of, and funding mechanisms for State NPDES programs. This information is included in the comments which can be found in the public docket, available at www.regulations.gov.

N. Alternatives to Proposed Incentive

Some commenters suggested alternatives to the proposed rule. While the Agency has determined that some of these suggestions are not viable, others are not mutually exclusive of the rule we are finalizing today. EPA commits to continue to work with the States on these ideas.

Conclusion

After careful evaluation of the comments received, the Agency has decided to finalize this rule with only two minor modifications: (1) Changing the implementation date of the rule from FY 2008 to FY 2009 (*e.g.*, beginning October 1, 2008) and (2) changing the base fiscal year the Agency will use to determine if a permit fee allotment is made from FY 2006 to FY 2008.

Statutory and Executive Order Reviews: Under Executive Order 12866 (58 FR 51735, October 4, 1993), this rule is a ''significant action'' because it involves novel policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action. Because this rule is not subject to notice and comment requirements under the Administrative Procedures Act or any other statute, it is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Today's rule contains no Federal mandates (under the regulatory provisions of Title 2 of the Unfunded Mandates Reform Act of 1999 (UMRA)) for State, local, or tribal governments or the private sector that would subject the rule to Sections 202 and 205 of the UMRA) (Pub. L. 104–4). The rule imposes no enforceable duty on any State, local, or Tribal governments or the private sector. In addition, this rule does not significantly or uniquely affect small governments. Although this rule proposes to create new binding legal requirements, such requirements do not substantially and directly affect Indian Tribes under Executive Order 13175 (63 FR 67249, November 9, 2000). EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. This rule will not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes federal executive policy on environmental justice. EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it is a grant rule that does not affect the level of protection provided to human health or the environment. This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects. This rule does not involve technical standards; thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an additional information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on September 10, 2008.

List of Subjects in 40 CFR Part 35

Environmental protection, Administrative practices and procedures, Reporting and recordkeeping requirements, Water pollution control.

Dated: September 4, 2008.

Benjamin H. Grumbles,

Assistant Administrator, Office of Water.

■ EPA amends 40 CFR part 35 as follows:

PART 35—[AMENDED]

Subpart A—[Amended]

■ 1. The authority citation for part 35, Subpart A continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 300f *et seq.*; 42 U.S.C. 6901 *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 42 U.S.C. 13101 *et seq.*; Public Law 104–134, 110 Stat. 1321, 1321–299 (1966); Public Law 105–65, 111 Stat. 1344, 1373 (1997).

■ 2. Section 35.162 is amended by adding paragraph (e) to read as follows:

§ 35.162 Basis for allotment.

* * * * *

(e) *Permit fee incentive allotment formula.* If there is an increase above the FY 2008 level in the total amount of funds allotted to States under subsection (b), EPA may award this increase as the permit fee incentive allotment to eligible States in accordance with this section. The amount of this annual allotment shall not be greater than three percent of the funds allotted under paragraph (b) of this section in FY 2008, and any funds above this amount shall be allotted to States under paragraph (b) of this section.

(1) Each eligible State may receive up to a full share of this allotment, as determined by the following formula. A full share is the allotment amount divided by the number of eligible States:

(i) A State will receive 25 percent of a full share if that State has collected permit fees which equal or exceed 75 percent of total State NPDES program costs; or

(ii) A State will receive 50 percent of a full share if that State has collected permit fees which equal or exceed 90 percent of total State NPDES program costs; or

(iii) A State will receive a full share if that State has collected permit fees

which equal 100 percent of total State NPDES program costs.

(2) The maximum share to any State under this subsection shall not exceed 50 percent of the State's previous year's total Section 106 allotment determined under paragraph (b) of this section.

(3) Any funds left remaining after all shares have been allotted under this subsection will be re-allotted to the States under paragraph (b) of this section.

(4) In order for a State to be eligible for this incentive, a State must: be authorized by EPA to implement the NPDES program by the first day of the Federal fiscal year, October 1, for which the funds have been appropriated; and submit to EPA a certification meeting the requirements of paragraph (e)(5) of this section.

(5) The certification required under paragraph (e)(4) of this section must meet the following requirements:

(i) The certification must be submitted annually to EPA (to the attention of the Regional Administrator). For FY 2009, the certification must be postmarked by November, 14, 2008. For every year thereafter the certification must be postmarked by October 1; and

(ii) The certification must include the total NPDES State program costs and the percentage of NPDES program costs, as defined in paragraph (e)(6) of this section, recovered by the State through permit fee collections during the most recently completed State fiscal year, and a statement that the amount of permit fees collected is used by the State to defray NPDES program costs; and

(iii) The certification must include a statement that State recurrent expenditures for water quality programs have not decreased from the previous State fiscal year or indicate that a decrease in such expenditures is attributable to a non-selective reduction of the programs of all executive branch agencies of the State government.

(6) NPDES program costs are defined as all permitting, enforcement, and compliance costs.

[FR Doc. E8–21046 Filed 9–9–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 174

[EPA–HQ–OPP–2007–0573; FRL–8380–1]

Bacillus thuringiensis Cry2Ae in Cotton; Temporary Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a temporary exemption from the requirement of a tolerance for residues of the *Bacillus thuringiensis* Cry2Ae in or on cotton and its food and feed commodities when used as a Plant-Incorporated Protectant (PIP) in accordance with the terms of Experimental Use Permit 264–EUP–143. Bayer CropScience LP submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting the temporary tolerance exemption. This regulation eliminates the need to establish a maximum permissible level for residues of *Bacillus thuringiensis* Cry2Ae. The temporary tolerance exemption expires on December 31, 2012.

DATES: This regulation is effective September 10, 2008. Objections and requests for hearings must be received on or before November 10, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0573. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Shanaz Bacchus, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8097; e-mail address: *bacchus.shanaz@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 174 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0573 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before November 10, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2007–0573, by one of the following methods.

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background and Statutory Findings

In the **Federal Register** of August 8, 2007 (72 FR 44521–44523) (FRL–8139–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 7F7192) by Bayer CropScience LP, P.O. Box 12014, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709. The petition requested that 40 CFR be amended by establishing a temporary exemption from the requirement of a tolerance for residues of *Bacillus thuringiensis* Cry2Ae in or on cotton when used as a Plant-Incorporated Protectant (PIP). Bayer has requested an Experimental Use Permit (EUP), EPA File Symbol 264–EUP–143, under which it seeks to use Cry2Ae as a PIP on 1,919 acres of cotton. A summary of the petition prepared by the petitioner was included in the docket. There were no comments received in response to the notice of filing.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe '' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Pursuant to section 408(c)(2)(B) of FFDCA, in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in section 408(b)(2)(C) of FFDCA, which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....'' Additionally, section 408(b)(2)(D) of FFDCA requires that the Agency consider ''available information concerning the cumulative effects of a particular pesticide's residues'' and ''other substances that have a common mechanism of toxicity.''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Toxicological Profile

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The following toxicological profile is based on summaries of the Agency's reviews of the petitioner's data submissions (Ref. 1).

A. Acute Oral Toxicity

Bayer CropScience has submitted acute oral toxicity data demonstrating the lack of mammalian toxicity at high levels of exposure to the pure Cry2Ae protein. An acute oral toxicity study in mice indicated that Cry2Ae is non-toxic to humans. The acute oral toxicity of Cry2Ae was assessed by administering *Bacillus thuringiensis*-produced Cry2Ae protein by oral gavage at a dose of 2,000 milligrams/kilogram of body weight (mg/kg b.w.) to groups of five female mice. There were no mortalities, and no treatment-related adverse effects observed. Therefore, the acute oral LD_{50} of the Cry2Ae protein is greater than 2,000 mg/kg body weight (Ref. 2).

For microbial products, further toxicity tests and residue data (Tiers II and III) are only required to verify and clarify adverse effects observed during Tier I testing. In the submitted studies for this PIP, no adverse acute effects were observed in the Tier I acute oral or acute injection studies. Therefore, Tier II and Tier III studies were not required. Thus, EPA concluded that these data demonstrate the safety of the product at a level well above maximum possible exposure levels that are reasonably anticipated in the crop. Basing this conclusion on acute oral toxicity data without requiring further toxicity testing and residue data is similar to the Agency position regarding toxicity testing and the requirement of residue data for the microbial *Bacillus thuringiensis* products from which this PIP was derived (See 40 CFR 158.2140).

When proteins are toxic, they are known to act via acute mechanisms and at very low dose levels (Ref. 3). Therefore, since no acute effects were shown to be caused by Cry2Ae, even at relatively high dose levels, the Cry2Ae protein is not considered toxic. Further, amino acid sequence comparisons showed no similarities between the Cry2Ae and known toxic proteins in protein databases that would raise a safety concern.

B. Cry2Ae Allergenicity Assessment

Since Cry2Ae is a protein, allergenic potential was also considered. Currently, no definitive tests for determining the allergenic potential of novel proteins exist. Therefore, EPA uses a weight-of-evidence approach where the following factors are considered: Source of the trait; amino acid sequence comparison with known allergens; and biochemical properties of the protein, including *in vitro* digestibility in simulated gastric fluid (SGF) and glycosylation. This approach is consistent with the approach outlined in the Annex to the Codex Alimentarius ''Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants.'' The allergenicity assessment for Cry2Ae is based on the potential of the source of the protein, the similarity of its amino acid sequence to known allergens, its glycosylation and its digestibility. The applicant submitted data to demonstrate that Cry2Ae: (1) Originates from a non-allergenic source (Ref. 4); (2) has no sequence similarities with known

allergens (Ref. 5); (3) is not glycosylated (Ref. 6); and (4) is rapidly digested in simulated gastric fluid (Ref. 7). Thus EPA has concluded that the potential for Cry2Ae to be an allergen is minimal (Ref. 1).

IV. Aggregate Exposures

In examining aggregate exposure, section 408 of FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure—Food and Drinking Water

As discussed in Unit III, laboratory tests show that Cry2Ae demonstrates a very low to minimal acute oral toxicity and allergenicity potential. Thus, EPA does not expect any harm to human adults, infants and children exposed to Cry 2Ae via consumption of food commodities related to cotton.

Oral exposure, at very low levels, may occur from ingestion of processed cotton products and, theoretically, drinking water. Based on the lack of adverse effects during the acute oral toxicity study conducted in mice (LD_{50} greater than 2,000 mg/kg), the Agency does not expect any harm via dietary exposure, including exposure to drinking water.

B. Other Non-Occupational Exposure—Dermal and Inhalation

Non-occupational dermal and inhalation exposure is expected to be negligible or non-existent.

Exposure via the skin or inhalation is not likely since the Plant-Incorporated Protectant is contained within plant cells. Thus, exposure and risk via dermal and inhalation routes are essentially negligible or eliminated. In addition, even if exposure can occur through inhalation, the potential for Cry2Ae to be an allergen is low, as discussed above in Unit III. Although the allergenicity assessment focuses on potential to be a food allergen, the data also indicate a low potential for Cry2Ae to be an inhalation allergen. Furthermore, non-occupational dermal and inhalation exposure via residential or lawn use to human adults, infants and children is also not expected because the use sites for the Cry2Ae protein are agricultural.

V. Cumulative Effects

Pursuant to FFDCA section 408(b)(2)(D)(v), EPA has considered available information on the cumulative effects of such residues and other substances that have a common mechanism of toxicity. These considerations included the cumulative effects on infants and children of such residues and other substances with a common mechanism of toxicity. Because there is no indication of mammalian toxicity from the Plant-Incorporated Protectant, we conclude that there are no cumulative effects for the Cry2Ae protein.

VI. Determination of Safety for U.S. Population, Infants and Children

A. Toxicity and Allergenicity Conclusions

The data submitted and cited regarding potential health effects for the Cry2Ae protein include the characterization of the expressed Cry2Ae protein in cotton, as well as the acute oral toxicity study, amino acid sequence comparisons to known allergens and toxins, and *in vitro* digestibility of the protein. The results of these studies were used to evaluate human risk, and the validity, completeness, and reliability of the available data from the studies were also considered.

The acute oral toxicity data submitted support the prediction that the Cry2Ae protein would be non-toxic to humans. As mentioned above in Unit III no treatment-related adverse effects were shown to be caused by the Cry2Ae protein, even at relatively high dose levels and Tier I studies showed no adverse effects. Thus, Tiers II and III studies were not required and the Cry2Ae protein is not considered toxic.

Since Cry2Ae is a protein, potential allergenicity is also considered as part of the toxicity assessment. Considering all of the available information: (1) Cry2Ae originates from a non-allergenic source; (2) Cry2Ae has no sequence similarities with known allergens; (3) Cry2Ae is not glycosylated; and (4) Cry2Ae is rapidly digested in simulated gastric fluid; EPA has concluded that the potential for Cry2Ae to be an allergen is minimal.

The lack of mammalian toxicity at high levels of exposure to the Cry2Ae protein, as well as the minimal potential to be a food allergen, demonstrate the safety of the product at levels well above possible maximum exposure levels anticipated.

B. Infants and Children Risk Conclusions

FFDCA section 408(b)(2)(C) provides that EPA shall assess the available information about consumption patterns among infants and children, special susceptibility of infants and children to pesticide chemical residues and the cumulative effects on infants and children of the residues and other substances with a common mechanism of toxicity. In addition, FFDCA section 408(b)(2)(C) also provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children.

In this instance, based on all the available information, the Agency concludes that there is a finding of no toxicity for the Cry2Ae protein. Thus, there are no threshold effects of concern and, as a result, the provision requiring an additional margin of safety does not apply. Further, the considerations of consumption patterns, special susceptibility, and cumulative effects do not apply.

C. Overall Safety Conclusion

There is a reasonable certainty that no harm will result from aggregate exposure to the U.S. population, including infants and children, to the Cry2Ae protein. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. The Agency has arrived at this conclusion because, as discussed above, no toxicity to mammals has been observed, nor any indication of allergenicity potential for the Plant-Incorporated Protectant.

VII. Other Considerations

A. Endocrine Disruptors

The pesticidal active ingredient is a protein, derived from a source that is not known to exert an influence on the endocrine system. Therefore, the Agency is not requiring information on the endocrine effects of the Plant-Incorporated Protectant, *Bacillus thuringiensis* Cry2Ae protein at this time.

B. Analytical Method(s)

Because this is only a temporary exemption from the requirement of a tolerance, EPA is not requiring an analytical detection method at this time.

C. Codex Maximum Residue Level

No Codex Maximum Residue Level (MRL) exists at this time for the Plant-Incorporated Protectant *Bacillus thuringiensis* Cry2Ae protein.

VIII. References

1. USEPA BPPD memorandum dated February 12, 2008 from Rebecca Edlestein to Shanaz Bacchus.
2. Master Record Identification Number (MRID No.) 47076902, USEPA, BPPD memo 2/12/2008).
3. Sjoblad, Roy D., et al., ''Toxicological Considerations for Protein Components of Biological Pesticide Products,'' *Regulatory Toxicology and Pharmacology* 15, 3–9 (1992).
4. MRID 47125101.
5. MRID 46708903.
6. MRIDs 46708903 and 46708907.
7. MRIDs 46708905 and 47125102.

IX. Statutory and Executive Order Reviews

This final rule establishes an exemption from the requirement of a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

X. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 174

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 25, 2008.

Marty Monell,

Acting Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 174—[AMENDED]

■ 1. The authority citation for part 174 continues to read as follows:

Authority: 7 U.S.C. 136–136y; 21 U.S.C. 346a and 371.

■ 2. Section 174.530 is added to subpart W to read as follows:

§ 174.530 Bacillus thuringiensis Cry2Ae protein in cotton; Temporary exemption from the requirement of a tolerance.

Residues of *Bacillus thuringiensis* Cry2Ae protein in or on the food commodities of cotton, cotton; cotton, undelinted seed; cotton, refined oil; cotton, meal; cotton, hay; cotton, hulls; cotton, forage; and cotton, gin byproducts are exempt temporarily from the requirement of a tolerance when *Bacillus thuringiensis* Cry2Ae protein in cotton plants is used as a Plant-Incorporated Protectant in accordance with the terms of Experimental Use Permit 264–EUP–143. This temporary exemption from the requirement of a tolerance will expire on December 31, 2012.

[FR Doc. E8–20728 Filed 9–9–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0507; FRL–8378–8]

Hexythiazox; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation amends the established tolerances for combined residues of hexythiazox in or on citrus dried pulp; citrus oil; pome fruit, crop group 11; wet apple pomace; and meat byproducts of cattle, goat, horse, and sheep. Gowan Company requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective September 10, 2008. Objections and requests for hearings must be received on or before November 10, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0507. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in

regulations.gov. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Olga Odiott, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9369; e-mail address: *odiott.olga@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0507 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before November 10, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2007–0507, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of October 24, 2007 (72 FR 60367) (FRL–8154–1), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of pesticide petitions (PP 7F7211 and PP 7F7223) by Gowan Company, 370 S. Main Street, Yuma, AZ 85364. The petitions requested that 40 CFR 180.448 be amended by revising the established tolerances for combined residues of the insecticide hexythiazox, trans-5-(4-chlorophenyl)-N-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety (expressed as parent), in or on citrus dried pulp from 1.5 parts per million (ppm) to 0.6 ppm; and citrus oil from 0.9 ppm to 24 ppm (PP 7F7223); pome fruit, crop group 11 from 1.7 ppm to 0.25 ppm; wet apple pomace from 2.5 ppm to 0.40 ppm; and meat byproducts of cattle, goat, horse, and sheep from 0.12 ppm to 0.02 ppm (PP 7F7211). That notice referenced a summary of the petition prepared by Gowan Company, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue.''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for combined residues of hexythiazox on citrus dried pulp; citrus oil; pome fruit, crop group 11; wet apple

pomace; and meat byproducts of cattle, goat, horse, and sheep. EPA's assessment of exposures and risks associated with establishing tolerances follows.

On March 22, 2006 the Agency published in the **Federal Register** a final rule (71 FR 14409, FRL–7768–3) establishing tolerances for combined residues of hexythiazox on apple, wet pomace at 2.5 ppm; citrus, dried pulp at 1.5 ppm; citrus, oil at 0.90 ppm; fruit, pome, group 11 at 1.7 ppm; and cattle, goat, horse, and sheep meat by products at 0.12 ppm. The tolerances were based on an exaggerated use rate from the wettable powder (WP) formulation residue trials and the maximum factor by which the emulsifiable concentrate (EC) formulation exceeded the WP formulation in the apple side-by-side field trials. Since the tolerances were likely to overestimate actual expected residues following application of hexythiazox as labeled, the Agency requested an orange processing study and apple and pear field trial data for the EC formulation as conditions of registration.

On May 28, 2008 the Agency published in the *Federal Register* a final rule (73 FR 30498, FRL–8365–2) establishing tolerances for combined residues of hexythiazox on corn, field, grain at 0.02 ppm; corn, field, stover at 2.5 ppm; and corn, field, forage at 6.0 ppm.

When the Agency conducted the acute dietary risk assessments in support of the 2006 and 2008 tolerance actions it assumed residues of hexythiazox would be present in the aforementioned commodities at the currently published levels. For the chronic/cancer dietary assessments the Agency assumed that average field trial residue levels of hexythiazox would be present. The data submitted to fulfill the conditions of registration mentioned above indicate that with the exception of citrus oil, the subject petitioned-for tolerances should be reduced. Acute, chronic, and cancer dietary analyses conducted to address the increase in the citrus oil tolerance resulted in no exposure for all subpopulations and scenarios from citrus oil. Therefore, the increase in the orange oil tolerance from 0.90 to 24 ppm will not result in an increased dietary human health risk and the assumptions used for the 2006 and 2008 risk assessments remain appropriate. EPA relies upon those risk assessments and the findings made in the Federal Register documents in support of this action.

Based on the risk assessments discussed in the final rules published in the **Federal Register** of May 28, 2008 and March 22, 2006, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to hexythiazox residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

The Pesticide Analytical Manual Volume II (PAM II) of the Food and Drug Administration (FDA) includes suitable analytical methods for the determination of hexythiazox and metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety (AMR-985-87) in pome fruits, citrus, and livestock tissue.

B. International Residue Limits

Codex maximum residues limits (MRLs) for apple, pear, and citrus are established for residues of hexythiazox per se. The Agency has previously determined that the residues of concern for application of hexythiazox to fruit crops are hexythiazox and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety (expressed as parent). Since the Codex and EPA tolerance expression differ, harmonization is not possible.

V. Conclusion

Therefore, 40 CFR 180.448 is amended by revising the established tolerances for combined residues of hexythiazox, trans-5-(4-chlorophenyl)-N-cyclohexyl-4-methyl-2-oxothiazolidine-3-carboxamide and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety (expressed as parent), in or on citrus dried pulp to 0.60 ppm; citrus oil to 24 ppm; pome fruit, crop group 11 to 0.25 ppm; wet apple pomace to 0.40 ppm; and meat byproducts of cattle, goat, horse, and sheep at 0.02 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will

submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 26, 2008.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.448 is amended in paragraph (a), in the table by revising the entries for the following commodities to read as follows:

§180.448 Hexythiazox; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * *	* *
Apple, wet pomace	0.40
* * *	* *
Cattle, meat byproducts	0.02
Citrus, dried pulp	0.60
Citrus, oil	24
* * *	* *
Fruit, pome, group 11	0.25
* * *	* *
Goat, meat byproducts	0.02
* * *	* *
Horse, meat byproducts	0.02
* * *	* *
Sheep, meat byproducts	0.02
* * *	* *

[FR Doc. E8–20513 Filed 9–9–08; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0940; FRL–8379–9]

Fludioxonil; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of fludioxonil in or on avocado; canistel; citrus, oil; mango; papaya; sapodilla; sapote, black; sapote, mamey; star apple; tomatillo; tomato; vegetable, cucurbit, crop group 9; vegetable, leaves of root and tuber, crop group 2; vegetable, root, except sugar beet, subgroup 1B; and vegetable, tuberous and corm, except potato, subgroup 1D. The Interregional Research Project Number 4 (IR-4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA) on behalf of the registrant, Syngenta Crop Protection, Greensboro, NC 27409.

DATES: This regulation is effective September 10, 2008. Objections and requests for hearings must be received on or before November 10, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0940. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Sidney Jackson, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305-7610; e-mail address: *jackson.sidney@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation

and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007-0940 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before November 10, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2007-0940, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of October 24, 2007 (72 FR 60369) (FRL–8150–8), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7E7234) by the Interregional Research Project Number 4 (IR-4), IR-4 Project Headquarters, 500 College Road East, Suite 201 W, Princeton, NJ 08540. The petition requested that 40 CFR 180.516 be amended by establishing tolerances for residues of the fungicide fludioxonil, 4-(2,2-difluoro-1,3-benzodioxol-4-yl)-1H-pyrrole-3-carbonitrile, in or on tomato at 0.4 parts per million (ppm); tomatillo at 0.4 ppm; tomato, paste at 1.0 ppm; avocado at 0.45 ppm; black sapote at 0.45 ppm; canistel at 0.45 ppm; mamey sapote at 0.45 ppm; mango at 0.45 ppm; papaya at 0.45 ppm; sapodilla at 0.45 ppm; star apple at 0.45 ppm; herb, subgroup 19A, fresh at 13 ppm; herb, subgroup19A, dried at 55 ppm; leaves of root and tuber vegetables at 40 ppm; root vegetables, except sugar beet, subgroup at 0.5 ppm; lemon at 0.25 ppm; lime at 0.25 ppm; cucurbits at 0.6 ppm; and tuberous and corm vegetables, except potato subgroup at 4.0 ppm. Additionally, IR-4 proposed that upon establishment of the above new tolerances, 40 CFR 180.516 be amended by removing the established tolerances for fludioxonil in or on the food commodities; herb, subgroup 19A, fresh at 10 ppm; herb, subgroup 19A, dried at 65 ppm; carrot at 0.75 ppm; and turnip, greens at 10 ppm. That notice referenced a summary of the petition prepared by Syngenta Crop Protection, Greensboro, NC 27409, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA made changes or modifications to some of the proposed tolerances and/or commodity listings as detailed in this document—Unit IV.C. Revisions to Petitioned-For Tolerances.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue * * *.''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for residues of fludioxonil in or on tomato at 0.4 ppm; tomatillo at 0.4 ppm; tomato, paste at 1.0 ppm; avocado at 0.45 ppm; black sapote at 0.45 ppm; canistel at 0.45 ppm; mamey sapote at 0.45 ppm; mango at 0.45 ppm; papaya at 0.45 ppm; sapodilla at 0.45 ppm; star apple at 0.45 ppm; herb, subgroup 19A, fresh at 13 ppm; herb, subgroup19A, dried at 55 ppm; leaves of root and tuber vegetables at 40 ppm; root vegetables, except sugar beet subgroup at 0.5 ppm; lemon at 0.25 ppm; lime at 0.25 ppm; cucurbits at 0.6 ppm; and tuberous and corm vegetables, except potato subgroup at 4.0 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Fludioxonil is of low acute toxicity and is not a dermal sensitizer. For subchronic and chronic toxicity, the primary effects in the mouse and rat were similar and included decreased body weight and food consumption associated with clinical pathological and histopathological effects in the liver and kidney. In the subchronic dog study, diarrhea was the most sensitive indicator of toxicity. In contrast, decreased weight gain in females was the most sensitive indicator of toxicity in the chronic toxicity study in dogs. Liver toxicity was observed in both dog studies at higher doses. The available data did not indicate a need for acute or subchronic neurotoxicity studies. Fludioxonil was not teratogenic in rabbits. In a rat developmental toxicity study, it caused an increase in fetal incidence and litter incidence of dilated renal pelvis at the limit dose (1,000 mg/kg/day). There was no quantitative or qualitative evidence of increased susceptibility following *in utero* exposure to rats and rabbits or following pre-/post-natal exposure to rats.

EPA determined that fludioxonil was not classifiable as to human carcinogenicity but nonetheless poses a negligible cancer risk. This conclusion was based on the fact that cancer studies with fludioxonil only showed marginal evidence of cancer in one sex of the species. There was no evidence of carcinogenicity in mice when tested up to the limited dose 7,000 ppm. There

was no evidence of carcinogenicity in male rats, but there was a statistically significant increase, both trend and pairwise, of combined hepatocellular tumors in female rats. The pairwise increase for combined tumors was significant at p=0.03, which is not a strong indication of a positive effect. Further, statistical significance was only found when liver adenomas were combined with liver carcinomas. Finally, the increase in these tumors was within, but at the high end, of the historical controls. Fludioxonil was not mutagenic in the tests for gene mutations. However, based on the induction of polyploidy in the *in vitro* Chinese hamster ovary cell cytogenetic assay and the suggestive evidence of micronuclei induction in rat hepatocytes *in vivo*, additional mutagenicity testing was performed in three studies specifically designed to address the concerns regarding aneuploidy. The results of these assays were negative for aneuploidy activity.

Specific information on the studies received and the nature of the adverse effects caused by fludioxonil as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document Fludioxonil. Human Health Risk Assessment for Section 3 Tolerances on Avocado.....and Brassica Vegetables, dated July 10, 2008 at page 20 in docket ID number EPA–HQ–OPP–2007–0940-003.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological point of departure (POD) is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-, intermediate-, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect greater than that expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for fludioxonil used for human risk assessment can be found at *http://www.regulations.gov* in document Fludioxonil. Human Health Risk Assessment for Section 3 Tolerances on Avocado.....and Brassica Vegetables, dated July 10, at page 20 in docket ID number EPA–HQ–OPP–2007–0940-0003.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to fludioxonil, EPA considered exposure under the petitioned-for tolerances as well as all existing fludioxonil tolerances in 40 CFR 180.516. EPA assessed dietary exposures from fludioxonil in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

In estimating acute dietary exposure, EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM-FCID™, Version 2.03), which incorporates food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intakes by Individuals (CSFII). As to residue levels in food, acute dietary exposure analysis is based on tolerance-level residues. EPA assumed that 100% of the crops with fludioxonil tolerances are treated. The only population subgroup that is relevant for this acute assessment is females of child-bearing age (i.e., females 13 to 49 years old).

ii. *Chronic exposure.* In conducting the chronic dietary (food + water) exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 Nationwide CSFII. As to residue levels in food, the chronic dietary exposure analyses assumed tolerance-level residues for most commodities with existing and proposed tolerances. Anticipated residues (AR) values were determined for apple, grapefruit, lemon, lime, pear, orange and orange juices using average residues from field trials and processing factors from processing studies. Processing factors were set to 1X for all relevant processed commodities. DEEM-FCID default processing factors were used for all other processed commodities. The population subgroup of highest exposure is children 1to 2 years old. The Agency assumed 100% of crops with fludioxonil tolerances are treated.

iii. *Cancer.* As explained above, EPA determined that fludioxonil was not classifiable as to human carcinogenicity. Therefore, no assessment of exposure for the purpose of estimating cancer risk is necessary.

iv. *Anticipated residue.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Anticipated residue data were used in the chronic (non-cancer) dietary risk analyses but not in the acute dietary risk analysis. For certain proposed tolerance crops, the anticipated residues values were determined from the field trial studies. Additionally, results of processed commodities studies show that fludioxinil residues do not concentrate to the extent that the existing crop tolerance would be exceeded.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for fludioxonil in drinking water. These

simulation models take into account data on the physical, chemical, and fate/transport characteristics of fludioxonil. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

The maximum application rates for the new uses are less than the application rate for turfgrass. Therefore, the values for turfgrass (worst case) were used in the human health risk assessment. Tier 1 drinking water assessment for fludioxonil on turfgrass is based on the label application rate for turfgrass, which is used in this current assessment, and is three applications of 0.67 lb active ingredient/Acre (ai/A) applied using 14-day intervals, for a total application rate of 2 lb ai/A/year.

Based on the First Index Reservoir Screening Tool (FIRST and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of fludioxonil for acute and chronic (non-cancer) exposures. EDWCs were modeled based on the use site with the highest application rate; i.e., spray/foliar applications to turfgrass of 2.0 lbs ai/A/yr. For acute exposure, EDWCs are estimated to be 81.3 parts per billion (ppb) for surface water and 0.20 ppb for ground water. The EDWCs for chronic exposures for non-cancer assessments are estimated to be 37.4 ppb for surface water and 0.20 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 81.3 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 37.4 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Fludioxonil is currently registered for the following uses that could result in residential exposures: turfgrass and ornamentals. EPA assessed residential exposure using the following assumptions: The current petition for fludioxonil results in no residential/non-occupational exposures. Since the product registered for residential uses, Medallion® (EPA Reg. No. 100–769), is restricted for residential uses to commercial applicators-only, and since the Agency did not identify short- or intermediate-term dermal endpoints, only a toddler post-application assessment for incidental ingestion exposures to treated lawns was included.

The combined short-term oral exposure risk estimate, which includes hand-to-mouth, object-to-mouth and soil ingestion pathways, was previously determined to be 0.013 milligrams/kilogram of bodyweight/day (mg/kg bw/day), while the intermediate-term was determined to be 0.0074 mg/kg bw/day. It should be noted that each of the incidental oral assessments (i.e., hand-to-mouth, object-to-mouth and soil ingestion) are considered conservative. Therefore, combining all the assessments is expected to provide a highly conservative assessment of children's incidental oral exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found fludioxonil to share a common mechanism of toxicity with any other substances, and fludioxonil does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that fludioxonil does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408(b)(2)(c) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. There was no quantitative or qualitative evidence of increased susceptibility following *in utero* exposure to rats and rabbits or following prenatal/postnatal exposure to rats. In the rat developmental study, there was an increase in the number of fetuses and litters with dilated renal pelvis and dilated ureter. This finding was considered to be related to maternal toxicity rather than an indication of increased susceptibility. Therefore, it is concluded that there is no evidence of increased susceptibility in the developmental toxicity study in the rat. In the rabbit developmental study, no developmental toxicity was seen up to the highest dose tested. Materal toxicity was demonstrated at that dose. In the 2-generation rat reproduction study, offspring toxicity was seen at the dose that produced parental toxicity. The parental toxicity was manifested as increased clinical signs, decreased body weight, body weight gain and food consumption. Offspring toxicity was manifested as decreased weight gain in pups. Since parental and offspring toxicity were comparable, it was concluded that there is no increased susceptibility in the 2-generation reproduction study.

3. *Conclusion*. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for fludioxonil is complete.

ii. There is no indication that fludioxonil is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that fludioxonil results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100% CT and tolerance-level residues or residues from crop field trials. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to fludioxonil in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by fludioxonil.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. No adverse effect resulting from a single-oral exposure was identified and no acute dietary endpoint was selected for the general population including infants and children. Therefore, fludioxonil is not expected to pose an acute risk.

Using the exposure assumptions discussed in this unit for acute exposure for females 13 to 49 years old, the acute dietary exposure from food and water to fludioxonil will occupy 14% of the aPAD for (females 13 to 49 years old) the population group receiving the greatest exposure.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to fludioxonil from food and water will utilize 89% of the cPAD for (children 1 to 2 years old) the population group receiving the greatest exposure.

Based on the discussions above regarding residential use patterns, chronic residential exposure to residues of fludioxonil is not expected. The chronic aggregate risk does not exceed the Agency's level of concern.

3. *Short-term risk*. In aggregating short-term risk, EPA considers background chronic dietary exposure (food + water) and short-term, residential non-dietary oral and dermal exposures. Fludioxonil is restricted to commercial handlers. Therefore, the only non-occupational exposure expected to result from the residential uses of fludioxonil is post-application exposure. For adults, post-application exposures may result from dermal contact with treated turf. For toddlers, dermal and non-dietary oral post-application exposures may result from dermal contact with treated turf as well as hand-to-mouth transfer of residues from turfgrass. However, the Agency did not identify short-term dermal endpoints for fludioxonil. Therefore, the short-term aggregate risk for fludioxonil considers food, water, and residential non-dietary oral exposures (for toddlers).

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures aggregated result in aggregate MOEs of 250 for children (1 to 2 years old) and 280 for children (3 to 5 years old) for short-term scenario. These values are well above the Agency's level of concern of an aggregate MOE level of below 100.

4. *Intermediate-term risk*. In aggregating intermediate-term risk, the Agency considers background chronic dietary exposure (food + water) and intermediate-term, residential non-dietary oral and dermal exposures. Based on the residential use pattern, there is a possibility, although unlikely, that a toddler may experience intermediate-term exposures to fludioxonil residues on treated lawns. As with the short-term aggregate assessment, only non-dietary exposures are included. Therefore, the intermediate-term aggregate risk for fludioxonil considers food, water, and residential non-dietary oral exposures (for toddlers).

All intermediate-term aggregate risk estimates result in MOEs greater than 100, with the exception that the MOE for children 1 to 2 years old is 98, just below 100. Due to the conservative nature of the dietary exposure assessment (assumes 100% of crops with tolerances are treated and most crops have residues at the tolerance-level and the fact that dietary exposure is 78 percent of the aggregate exposure), EPA does not have any concern for the purposes of this action. Intermediate-term aggregate exposure to fludioxonil, as a result of all registered and proposed uses, is below EPA's level of concern.

5. *Aggregate cancer risk for U.S. population*. Fludioxonil poses a negligible cancer risk. Cancer studies with fludioxonil only showed marginal evidence of cancer in one sex of one species. There was no evidence of carcinogenicity in mice when tested up to the limited dose 7,000 ppm. There was no evidence of carcinogenicity in male rats, but there was a statistically significant increase, both trend and pairwise, of combined hepatocellular tumors in female rats. The pairwise increase for combined tumors was significant at p=0.03, which is not a strong indication of a positive effect. Further, statistical significance was only found when liver adenomas were combined with liver carcinomas. Finally, the increase in these tumors was within, but at the high end, of the historical controls.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to fludioxonil residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology, High Performance Liquid Chromatography is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no Canadian or Mexican Maximum Residue Limits (MRLs) for residues of fludioxonil. There are Codex limits on tomato (higher than the U.S. limit; 0.5 ppm vs 0.40 ppm, proposed), herbs (equal to or lower than the U.S. limit), cucurbits (lower than the U.S. limit), and carrot (lower than the U.S. limit). Except for tomato, the Codex MRLs are not a restriction on items for which there is a significant import trade. Since having the U.S. tolerance lower than the Codex MRL would cause a barrier to tomato imports, the tomato and tomatillo tolerances were raised from 0.40 ppm to 0.50 ppm.

C. Revisions to Petitioned-For Tolerances

The Agency modified/amended certain tolerances as proposed by the registrant and/or indicated by available supporting data, as follows:

i. Proposed new tolerances for herb subgroup 19A, fresh at 13 ppm and herb subgroup 19A, dried at 55 ppm were rejected by EPA and existing tolerances at 10 ppm and 60 ppm, respectively, were retained. The petitioner requested that the existing data for fresh and dry basil and chive be combined with the submitted parsley data and used in support of the requested tolerances on the herb subgroup 19A, fresh and dried at 13 ppm and 55 ppm, respectively. There are adequate residue field trials to support a tolerance on parsley, fresh and dried. The analytical results show

that fludioxonil residues were 3.87 ppm in fresh parsley and 22.29 ppm in dried parsley. It is EPA policy to analyze each crop in a group separately and establish the group tolerance using the highest of the individual analyses. Since there are existing tolerances for herb subgroup 19A, fresh and dried at 10 ppm and 65 ppm, respectively, and the data from the parsley residue field trials do not exceed those established tolerances using the same treatment pattern, no change in the group tolerance is required.

ii. Proposed tolerances for lime at 0.25 ppm; and lemon at 0.25 ppm were determined to be unnecessary due to the existing tolerance on fruit, citrus, group 10 at 10 ppm and the citrus, oil tolerance at 500 ppm established by this regulation.

iii. Proposed tolerances for tomato at 0.40 and tomatillo at 0.40 were both raised to 0.50 ppm to address international harmonization issues. Proposed tolerances for tomato paste at 1.0 ppm is not needed. Results of processed commodities studies show that fludioxonil residues do not appreciably concentrate, and

iv. Certain commodity definitions in the petition were corrected or revised to comply with EPA's Pesticide Tolerance Crop Grouping Program outlined in the **Federal Register** of December 7, 2007, 72 FR 69150

V. Conclusion

Therefore, tolerances are established for residues of the fungicide fludioxonil, 4-(2,2-difluoro-1,3-benzodioxol-4-yl)-1*H*-pyrrole-3-carbonitrile, in or on avocado at 0.45 ppm, canistel at 0.45 ppm, citrus, oil at 500 ppm, mango at 0.45 ppm, papaya at 0.45 ppm, sapodilla at 0.45 ppm, sapote, black at 0.45 ppm, sapote, mamey at 0.45 ppm, star apple at 0.45 ppm, tomatillo at 0.50 ppm, tomato at 0.50 ppm, vegetable, cucurbit, crop group 9 at 0.45 ppm, vegetable, leaves of root and tuber, crop group 2 at 30 ppm, vegetable, root, except sugar beet, subgroup 1B at 0.75 ppm, and vegetable, tuberous and corm, except potato, subgroup 1D at 3.5 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 25, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.516 the table to paragraph (a) is amended by removing the entries for ''carrot;'' ''grapefruit oil'' and ''leaves and roots of tuber vegetables,'' and by alphabetically adding the following commodities, except for ''vegetable, cucurbit, group 9,'' which is revised. The added and revised entries read as follows:

§ 180.516 Fludioxonil; tolerance for residues.

(a) * * *

Commodity	Parts per million
* * * *	*
Avocado	0.45
* * * *	*
Canistel	0.45
* * * *	*
Citrus, oil	500
* * * *	*
Mango	0.45
* * * *	*
Papaya	0.45
* * * *	*
Sapodilla	0.45
Sapote, black	0.45
Sapote, mamey	0.45
* * * *	*
Star apple	0.45
* * * *	*
Tomatillo	0.50
Tomato	0.50
* * * *	*
Vegetable, cucurbit, crop group 9	0.45

Commodity	Parts per million
* * * *	*
Vegetable, leaves of root and tuber, crop group 2	30
Vegetable, root, except sugar beet, subgroup 1B	0.75
* * * *	*
Vegetable, tuberous and corn, except potato, subgroup 1D	3.5
* * * *	*

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[FR Doc. E8–20547 Filed 9–9–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0262; FRL–8379–8]

Spiromesifen; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation revises the tolerances for combined residues of spiromesifen and its enol metabolite in or on corn. Bayer CropScience requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective September 10, 2008. Objections and requests for hearings must be received on or before November 10, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0262. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Amer Al-Mudallal, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0566; e-mail address: *al-mudallal.amer@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of This Document?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0262 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before November 10, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2008–0262, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of May 16, 2008 (73 FR 28461) (FRL–8361–6), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7F7274) by Bayer CropScience, P. O. Box 12014, 2 T. W. Alexander Drive, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.607 be amended by increasing tolerances for combined residues of the insecticide/miticide spiromesifen in or on corn, field, forage from 3.0 ppm to 6.0 ppm. That notice referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised

the tolerances for combined residues of spiromesifen in or on corn, field, forage and in/on corn, field, stover. For more details, see Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to amend a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for combined residues of spiromesifen and its enol metabolite on corn, field, forage at 5.0 ppm and corn, field, stover at 8.0 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by spiromesifen as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document *Spiromesifen HED Risk Assessment for Use on Field Corn and Tomatoes*, pages 13-20 in docket ID number EPA–HQ–OPP–2008–0262.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological point of departure (POD) is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-, intermediate-, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect greater than that expected in a lifetime. For more information on the general principles, EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for spiromesifen used for human risk assessment can be found at *http://www.regulations.gov* in document *Spiromesifen HED Risk Assessment for Use on Field Corn and Tomatoes*, page 21 in docket ID number EPA–HQ–OPP–2008–0262.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to spiromesifen, EPA considered exposure under the petitioned-for tolerances as well as all existing spiromesifen tolerances in (40 CFR 180.607). EPA assessed dietary exposures from spiromesifen in food as follows:

i. *Acute exposure*. Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure.

No such effects were identified in the toxicological studies for spiromesifen; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment, EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM-FCID™), which incorporates food consumption data as reported by respondents in the USDA 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII), and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments:

a. Established/recommended tolerances for all plant and livestock except the leafy-green and leafy-Brassica vegetable subgroups;

b. EPA calculated residues of concern (parent and metabolites) for the leafy-green and leafy-Brassica vegetable subgroup;

c. 100 Percent Crop Treated (PCT) information for all proposed and existing uses; and

d. DEEM™ Version 7.81 default processing factors for all commodities. The metabolism studies show that the hydroxymethyl metabolite is formed along with the enol metabolite only in the leafy-green and leafy-Brassica vegetable subgroups. EPA determined that these two metabolites along with spiromesifen should be included in the chronic dietary risk assessment for these crops. Residue data are unavailable for the 4-hydroxymethyl metabolite; to account for this metabolite in the risk assessment, the recommended tolerance levels for these crops was multiplied by a correction factor of 1.3X, where 1.3 = metabolites in risk assessment (ppm)/metabolites in tolerance expression (ppm).

iii. *Cancer*. A cancer exposure assessment was not performed because spiromesifen is classified as ''not likely to be carcinogenic to humans.''

iv. *Anticipated residue and PCT information*. EPA did not use anticipated residue and/or PCT

information in the dietary assessment for spiromesifen. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water*. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for spiromesifen in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of spiromesifen. Further information regarding EPA's drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of spiromesifen for chronic exposures for non-cancer assessments are estimated to be 11 ppb for surface water and 28 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model.

For chronic dietary risk assessment, the water concentration of value 28 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Spiromesifen is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found spiromesifen to share a common mechanism of toxicity with any other substances, and spiromesifen does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that spiromesifen does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408(b)(2)(c) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. There is no evidence of increased susceptibility of rats or rabbits to *in utero* prenatal or postpostnatal exposure to spiromesifen In a rat developmental toxicity study, no developmental toxicity was observed at doses up to 500 milligrams/kilograms/day (mg/kg/day) (the highest dose tested (HDT)) in the presence of maternal toxicity. The rat maternal LOAEL was determined to be 70 mg/kg/day based on decreased body-weight gain and reduced food consumption. In the rabbit developmental toxicity study, there was no developmental toxicity observed at doses up to 250 mg/kg/day (the HDT), but the maternal LOAEL was determined to be 35 mg/kg/day based on body weight loss and reduced food consumption. There is no qualitative and/or quantitative evidence of increased susceptibility to spiromesifen following prenatal/postnatal exposure in a 2–generation reproduction study in rats. There is no concern for developmental neurotoxicity resulting from exposure to spiromesifen. Neurotoxic effects such as reduced motility, spastic gait, increased reactivity, tremors, clonic-tonic convulsions, reduced activity, labored breathing, vocalization, avoidance reaction, piloerection, limp, cyanosis, squatted posture, and salivation were observed in two studies (5–day inhalation and subchronic oral rat). However, these effects were considered as secondary, not neurotoxic, effects due to the high dosage. There was no evidence of neurotoxicity in the acute or subchronic neurotoxicity or any other studies.

3. *Conclusion*. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

- There is a complete toxicity database for spiromesifen.
- There is no evidence of increased susceptibility of rat or rabbit fetuses to *in utero* exposure in developmental studies, nor following prenatal or postnatal exposure by rats in the 2–generation reproduction study.
- There are no neurotoxicity concerns based on acute and sub-chronic neurotoxicity studies.
- The dietary food exposure assessment uses proposed tolerance levels or higher residues for most commodities and assumed 100% crop-treated information for all commodities. By using these screening-level assessment, chronic exposures and risks will not be underestimated. The ''higher residues'' are those that were calculated using a modifying factor to account for the lack of spiromesifen-4-hydroxymethyl residue data.
- The dietary drinking water assessment (Tier 2 estimates) uses values generated by model and associated modeling parameters which are designed to provide conservative, health protective, and high-end estimates of water concentrations.
- Residential exposure is not expected as spiromesifen is registered for agricultural and greenhouse/ornamental uses only.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. No adverse effect resulting from a single-oral exposure was identified and no acute dietary endpoint was selected. Therefore, spiromesifen is not expected to pose an acute risk.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to spiromesifen from food and water will utilize 43% of the cPAD for children 1-2 years old and children 3-5 years old, the population group receiving the greatest exposure. There are no residential uses for spiromesifen.

3. *Short-term risk*. Spiromesifen is not registered for any use patterns that would result in residential exposure. Therefore, the short-term aggregate risk is the sum of the risk from exposure to spiromesifen through food and water and will not be greater than the chronic aggregate risk.

4. *Intermediate-term risk*. Spiromesifen is not registered for any use patterns that would result in intermediate-term residential exposure. Therefore, the intermediate-term aggregate risk is the sum of the risk from exposure to spiromesifen through food and water, which has already been addressed, and will not be greater than the chronic aggregate risk.

5. *Aggregate cancer risk for U.S. population*. There is no evidence that spiromesifen is carcinogenic to humans; therefore, a dietary cancer assessment is not required.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to spiromesifen residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology, high-performance liquid chromatography (HPLC)/triple stage quadruple mass spectrometry (MS/MS) method, is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no established Codex Maximum Residue Levels for the proposed use of spiromesifen on corn, field.

C. Revisions to Petitioned-For Tolerances

Based upon review of the data supporting the petition, EPA has revised the tolerance levels for residues of spiromesifen on corn, field, forage and corn, field, stover. EPA determined that the appropriate tolerance level for residues of spiromesifen in or on corn, field, forage is 5.0 ppm. EPA also determined that it is appropriate to increase the tolerance level in or on corn, field, stover from 5.0 ppm to 8.0 ppm. EPA revised these tolerance levels based on analyses of the residue field trial data using the Agency's Tolerance Spreadsheet in accordance with the Agency's Guidance for Setting Pesticide Tolerances Based on Field Trial Data.

V. Conclusion

Therefore, tolerances are established for combined residues of spiromesifen, in or on corn, field, at 5.0 ppm for forage and 8.0 ppm for stover.

VI. Statutory and Executive Order Reviews

This final rule revises tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 29, 2008.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.607 is amended by revising the following entries in the

table in paragraph (a)(1) to read as follows:

§ 180.607 Spiromesifen; tolerances for residues.

(a) *General.* (1) * * *

Commodity	Parts per million
* * *	* *
Corn, field, forage	5.0
* * *	* *
Corn, field, stover	8.0
* * *	* *

* * * * *

[FR Doc. E8–20873 Filed 9–9–08; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–1170; FRL–8379–3]

Benfluralin, Carbaryl, Diazinon, Dicrotophos, Fluometuron, Formetanate Hydrochloride, Glyphosate, Metolachlor, Napropamide, Norflurazon, Pyrazon, and Tau-Fluvalinate; Tolerance Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is revoking certain tolerances for the herbicides benfluralin and napropamide and the insecticides carbaryl and diazinon. Also, EPA is modifying certain tolerances for the herbicides fluometuron, glyphosate, norflurazon, and pyrazon and the insecticides carbaryl, diazinon, dicrotophos, formetanate hydrochloride, and tau-fluvalinate. In addition, EPA is establishing new tolerances for the herbicides fluometuron, glyphosate, metolachlor, and pyrazon and the insecticides carbaryl and formetanate hydrochloride. The regulatory actions finalized in this document are in follow-up to the Agency's reregistration program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and tolerance reassessment program under the Federal Food, Drug, and Cosmetic Act (FFDCA), section 408(q).

DATES: This regulation is effective September 10, 2008. Objections and requests for hearings must be received on or before November 10, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–1170. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Jane Smith, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0048; e-mail address: *smith.jane-scott@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of This Document?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 436a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–1170 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before November 10, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2007–1170, by one of the following methods.

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made

for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background

A. What Action Is the Agency Taking?

In the **Federal Register** of May 21, 2008 (73 FR 29456) (FRL–8362–1), EPA issued a proposal to revoke, modify, and establish specific tolerances for residues of the herbicides benfluralin, fluometuron, glyphosate, metolachlor, napropamide, norflurazon, and pyrazon; and the insecticides carbaryl, diazinon, dicrotophos, formetanate hydrochloride, and tau-fluvalinate. Also, the proposal of May 21 provided a 60–day comment period which invited public comment for consideration and for support of tolerance retention under FFDCA standards.

In this final rule, EPA is revoking, modifying, and establishing specific tolerances for residues of benfluralin, carbaryl, diazinon, dicrotophos, fluometuron, formetanate hydrochloride, glyphosate, metolachlor, napropamide, norflurazon, pyrazon, and tau-fluvalinate in or on commodities listed in the regulatory text of this document.

EPA is finalizing these tolerance actions in order to implement the tolerance recommendations made during the reregistration and tolerance reassessment processes (including follow-up on canceled or additional uses of pesticides). As part of these processes, EPA is required to determine whether each of the amended tolerances meets the safety standard of FFDCA. The safety finding determination of ''reasonable certainty of no harm'' is discussed in detail in each Reregistration Eligibility Decision (RED) and Report on FQPA Tolerance Reassessment Progress and Interim Risk Management Decision (TRED) for the active ingredient. REDs and TREDs recommend the implementation of certain tolerance actions, including modifications, to reflect current use patterns, to meet safety findings and change commodity names and groupings in accordance with new EPA policy. Printed copies of many REDs and TREDs may be obtained from EPA's National Service Center for Environmental Publications (EPA/NSCEP), P.O. Box 42419, Cincinnati, OH 45242–2419; telephone number: 1–800–490–9198; fax number: 1–513–489–8695; Internet at *http://www.epa.gov/ncepihom* and from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161; telephone number: 1–800–553–6847 or (703) 605–6000; Internet at *http://www.ntis.gov.* Electronic copies of REDs and TREDs are available on the Internet at *http://www.regulations.gov* and *http:// www.epa.gov/pesticides/reregistration/status.htm.*

In this final rule, EPA is revoking certain tolerances and/or tolerance exemptions because either they are no longer needed or are associated with food uses that are no longer registered under FIFRA in the United States. Those instances where registrations were canceled were because the registrant failed to pay the required maintenance fee and/or the registrant voluntarily requested cancellation of one or more registered uses of the pesticide active ingredient. The tolerances revoked by this final rule are no longer necessary to cover residues of the relevant pesticides in or on domestically treated commodities or commodities treated outside but imported into the United States. It is EPA's general practice to issue a final rule revoking those tolerances and tolerance exemptions for residues of pesticide active ingredients on crop uses for which there are no active registrations under FIFRA, unless any person in comments on the proposal indicates a need for the tolerance or tolerance exemption to cover residues in or on imported commodities or legally treated domestic commodities.

EPA has historically been concerned that retention of tolerances that are not necessary to cover residues in or on legally treated foods may encourage misuse of pesticides within the United States.

Generally, EPA will proceed with the revocation of these tolerances on the grounds discussed in Unit II.A. if one of the following conditions applies:

- Prior to EPA's issuance of a FFDCA section 408(f) order requesting additional data or issuance of a FFDCA section 408(d) or (e) order revoking the tolerances on other grounds, commenters retract the comment identifying a need for the tolerance to be retained.
- EPA independently verifies that the tolerance is no longer needed.
- The tolerance is not supported by data that demonstrate that the tolerance meets the requirements under the Federal Quality Protection Act (FQPA).

In response to the proposal published in the **Federal Register** of May 21, 2008, EPA received three general comments and one specific comment on diazinon during the 60–day public comment period, as follows:

1. *General*—i. *Comment by private citizens.* Three private citizens expressed concerns about pesticides on food and that only zero tolerance levels should be acceptable. In addition, those commenting expressed concern for pesticide use in general and their possible toxic effects on wildlife and humans.

ii. *Agency response.* The private citizen's comments did not take issue with any of the Agency's specific conclusions to modify, revoke, or establish certain tolerances. Also, the commenters did not refer to any specific studies which pertained to those conclusions. EPA believes that the tolerance actions finalized herein meet the safety standard of FFDCA section 408, 21 U.S.C. 346a. In developing REDs and TREDs, EPA works with stakeholders, pesticide registrants, growers, and other pesticide users, environmental and public health interests, the States, the United States of Department of Agriculture (USDA), other Federal agencies, and others to develop voluntary measures or regulatory controls needed to effectively reduce risks of concern. Such options include voluntary cancellation of pesticide products or deletion of uses, declaring certain uses ineligible or not yet eligible, restricting use of products to certified applicators, limiting the amount or frequency of use, improving use directions and precautions, adding more protective clothing and equipment requirements requiring special packaging or engineering controls, requiring no-treatment buffer zones, employing environmental and ecological safeguards, and other measures.

2. *Diazinon*—i. *Comment by the American Mushroom Institute.* The commenter expressed a need for the retention of the tolerance for diazinon in 40 CFR 180.153 on mushrooms and mentioned working with EPA's Registration Division to reinstate the mushroom use. Diazinon is considered a unique tool to control adult fly populations in mushroom production facilities (when the crop is not present). According to the commenter, these fly populations (and subsequent mechanically transmitted diseases to mushrooms) have increased dramatically on some farms since use of diazinon ceased.

ii. *Agency response.* The Agency published a cancellation order in the **Federal Register** of July 25, 2007 (72 FR 40874) (FRL–8139–6) which resulted in the immediate cancellation of certain uses of diazinon including all uses in mushroom houses. The cancellation of the uses of diazinon in mushroom houses and the subsequent proposed revocation of the diazinon tolerance on mushrooms were not due to a lack of data to support the tolerance or due to

dietary risk, but rather to an exposure risk to workers during application of diazinon in mushroom houses. Since there are no current or pending uses of diazinon in mushroom houses and no resolution of the exposure risk to workers during application at this time, EPA will not retain the tolerance for diazinon in 40 CFR 180.153 on mushrooms, consistent with the Agency's policy on tolerances for canceled uses discussed earlier in this unit.

The Agency did not receive any specific comments, during the 60–day comment period, on the following pesticide active ingredients: Benfluralin, carbaryl, dicrotophos, fluometuron, formetanate hydrochloride, glyphosate, metolachlor, napropamide, norflurazon, pyrazon, and tau-fluvalinate. Therefore, the Agency is finalizing the amendments proposed in the **Federal Register** of May 21, 2008. For the detailed discussion of the Agency's rationale for the establishments, revocations, and modifications to the tolerances, refer to the proposed rule of May 21, 2008.

The regulatory text contained in the May 21, 2008 proposal regarding 40 CFR 180.153(a) inadvertently omitted an existing tolerance for use of diazinon on beet, garden tops at 0.7 parts per million (ppm), This was a clerical error; EPA did not intend to revoke this tolerance (and did not discuss any such revocation in the May 21, 2008 proposal). The regulatory text in this final rule corrects that error, including the existing tolerance in 40 CFR 180.153(a). The Agency also identified and corrected commodity terminology for consistency that was inadvertantly omitted in the proposal. These corrections in terminology do not affect or change which commodities are regulated; in 40 CFR 180.153 from escarole to endive in 40 CFR 180.169 from ''vegetable, foliage legume, group 7'' to ''vegetable, foliage of legume, subgroup 7A, except soybean;'' in 40 CFR 180.229(d) from ''grain, cereal, forage group 16'' to ''grain, cereal, forage, fodder, and straw, group 16, forage'' and ''grain, cereal, fodder, and straw group 16'' to ''grain, cereal, forage, fodder, and straw, group 16, stover'' and in 40 CFR 180.276 from ''orange, sweet'' to ''orange.''

B. What is the Agency's Authority for Taking this Action?

EPA may issue a regulation establishing, modifying, or revoking a tolerance under FFDCA section 408(e). In this final rule, EPA is establishing, modifying, and revoking tolerances to implement the tolerance recommendations made during the reregistration and tolerance reassessment processes, and as follow-up on canceled uses of pesticides. As part of these processes, EPA is required to determine whether each of the amended tolerances meets the safety standards under FFDCA. The safety finding determination is found in detail in each post-FQPA RED and TRED for the active ingredient. REDs and TREDs recommend the implementation of certain tolerance actions, including modifications to reflect current use patterns, to meet safety findings, and change commodity names and groupings in accordance with new EPA policy. Printed and electronic copies of the REDs and TREDs are available as provided in Unit II.A.

EPA has issued post-FQPA REDs and TREDs for benfluralin, carbaryl, diazinon, dicrotophos, fluometuron, formetanate-hydrochloride, metolachlor, napropamide, norflurazon, pyrazon and tau-fluvalinate. Also, EPA issued a RED prior to FQPA for glyphosate and made a safety finding which reassessed its tolerances according to FFDCA standard, maintaining them when new tolerances were established as noted in Unit II.A. REDs and TREDs contain the Agency's evaluation of the database for these pesticides, including statements regarding additional data on the active ingredients that may be needed to confirm the potential human health and environmental risk assessments associated with current product uses, and REDs state conditions under which these uses and products will be eligible for reregistration. The REDs and TREDs recommended the establishment, modification, and/or revocation of specific tolerances. RED and TRED recommendations such as establishing or modifying tolerances, and in some cases revoking tolerances, are the result of assessment under the FFDCA standard of ''reasonable certainty of no harm.'' However, tolerance revocations recommended in REDs and TREDs that are made final in this document do not need such assessment when the tolerances are no longer necessary.

EPA's general practice is to revoke tolerances for residues of pesticide active ingredients on crops for which FIFRA registrations no longer exist and on which the pesticide may therefore no longer be used in the United States. EPA has historically been concerned that retention of tolerances that are not necessary to cover residues in or on legally treated foods may encourage misuse of pesticides within the United States. Nonetheless, EPA will establish and maintain tolerances even when corresponding domestic uses are canceled if the tolerances, which EPA refers to as ''import tolerances,'' are necessary to allow importation into the United States of food containing such pesticide residues. However, where there are no imported commodities that require these import tolerances, the Agency believes it is appropriate to revoke tolerances for unregistered pesticides in order to prevent potential misuse.

When EPA establishes tolerances for pesticide residues in or on raw agricultural commodities, the Agency gives consideration to possible pesticide residues in meat, milk, poultry, and/or eggs produced by animals that are fed agricultural products (for example, grain or hay) containing pesticides residues (40 CFR 180.6). If there is no reasonable expectation of finite pesticide residues in or on meat, milk, poultry, or eggs, then tolerances do not need to be established for these commodities (40 CFR 180.6(b) and 180.6 (c)).

C. When Do These Actions Become Effective?

With the exception of certain tolerances for carbaryl and napropamide, for which EPA added specific expiration/revocation dates, the Agency is revoking, modifying, and establishing specific tolerances, and revising specific commodity terminologies effective on the date of publication of this final rule in the **Federal Register**. With the exception of tolerances for carbaryl and napropamide with specific expiration/revocation dates provided herein, the Agency believes that existing stocks of pesticide products labeled for the uses associated with the revoked tolerances have been completely exhausted and that treated commodities have had sufficient time for passage through the channels of trade. The Agency believes that these expiration dates allow users to exhaust stocks and allows sufficient time for passage of treated commodities through the channels of trade.

Any commodities listed in the regulatory text of this document that are treated with the pesticides subject to this final rule, and that are in the channels of trade following the tolerance revocations, shall be subject to FFDCA section 408(1)(5), as established by FQPA. Under this unit, any residues of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of the Food and Drug Administration (FDA) that:

1. The residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA.

2. The residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from tolerance. Evidence to show that food was lawfully treated may include records that verify the dates that the pesticide was applied to such food.

III. Are There Any International Trade Issues Raised by This Final Action?

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international Maximum Residue Limits (MRLs) established by the Codex Alimentarius Commission, as required by section 408(b)(4) of FFDCA. The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level in a document published for public comment. EPA's effort to harmonize with Codex MRLs is summarized in the tolerance reassessment section of individual REDs and TREDs, and in the Residue Chemistry document which supports the RED and TRED, as mentioned in the proposed rule cited in Unit II.A. Specific tolerance actions in this rule and how they compare to Codex MRLs (if any) is discussed in Unit II.A.

IV. Statutory and Executive Order Reviews

In this final rule, EPA establishes tolerances under FFDCA section 408(e), and also modifies and revokes specific tolerances established under FFDCA section 408. The Office of Management and Budget (OMB) has these types of actions (i.e., establishment and modification of a tolerance and tolerance revocation for which extraordinary circumstances do not exist) from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866 due to its lack of significance, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any other Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–13, section 12(d) (15 U.S.C. 272 note). Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency previously assessed whether establishment of tolerances, exemptions from tolerances, raising of tolerance levels, expansion of exemptions, or revocations might significantly impact a substantial number of small entities and concluded that, as a general matter, these actions do not impose a significant economic impact on a substantial number of small entities. These analyses for tolerance establishments and modifications, and for tolerance revocations were published on May 4, 1981 (46 FR 24950) and on December 17, 1997 (62 FR 66020) (FRL–5753–1), respectively, and were provided to the Chief Counsel for Advocacy of the Small Business Administration. Taking into account this analysis, and available information concerning the pesticides listed in this final rule, the Agency hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. In a memorandum dated May 25, 2001, EPA determined that eight conditions must all be satisfied in order for an import tolerance or tolerance exemption revocation to adversely affect a significant number of small entity importers, and that there is a negligible joint probability of all eight conditions holding simultaneously with respect to any particular revocation. (This Agency document is available in the docket for this rule, as mentioned in Unit II.A.). Furthermore, for the pesticides named in this final rule, the Agency knows of no extraordinary circumstances that exist as to the present revocations that would change EPA's previous analysis. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers, and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this final rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This final rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this final rule.

V. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: September 3, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.153 is amended by revising paragraphs (a) and (c) to read as follows:

§ 180.153 Diazinon; tolerances for residues.

(a) *General*. Tolerances are established for residues of the insecticide diazinon, *O*,*O*-diethyl *O*-[6-methyl-2-(1-methylethyl)-4-pyrimidinyl]phosphorothioate (CAS No. 333–41–5), in or on the following food commodities:

Commodity	Parts per million
Almond, hulls	3.0
Apple	0.50
Apricot	0.20
Bean, lima	0.50
Bean, snap, succulent	0.50
Beet, garden, roots	0.75
Beet, garden, tops	0.70
Blueberry	0.50
Caneberry subgroup 13-07A	0.75
Carrot, roots	0.75
Cattle, fat	0.50
Cherry, sweet	0.20
Cherry, tart	0.20
Cranberry	0.50
Endive	0.70
Fig	0.50
Ginseng	0.75
Hazelnut	0.50
Kiwifruit[1]	0.75
Lettuce	0.70
Melon	0.75
Nectarine	0.20
Onion, bulb	0.75
Onion, green	0.75
Pea, succulent	0.50
Peach	0.20
Pear	0.50
Pineapple	0.50
Plum, prune, fresh	0.20
Radish	0.50
Rutabaga	0.75
Spinach	0.70
Strawberry	0.50
Tomato	0.75
Vegetable, brassica, leafy, group 5	0.70
Watercress	0.05

[1]There are no domestic registrations for kiwifruit as of March 6, 2002.

* * * * *

(c) *Tolerances with regional registrations*. Tolerances with regional registration, as defined in §180.1(m), are established for residues of the insecticide diazinon, *O*, *O*-diethyl *O*-[6-methyl-2-(1-methylethyl)-4-pyrimidinyl]-phosphorothioate (CAS No. 333–41–5), in or on the following food commodities:

Commodity	Parts per million
Almond	0.50
Banana	0.20
Celery	0.70
Cucumber	0.75
Parsley, leaves	0.75
Parsnip	0.50
Pepper	0.5
Potato	0.10
Potato, sweet	0.10
Squash, summer	0.50
Squash, winter	0.75
Swiss chard	0.70
Turnip, roots	0.50
Turnip, tops	0.75

* * * * *

■ 3. Section 180.169 is amended by revising paragraphs (a)(1), (a)(2), and (c) read as follows:

§ 180.169 Carbaryl; tolerances for residues.

(a) * * * (1) Tolerances are established for residues of the insecticide carbaryl, 1-naphthyl *N*-methylcarbamate *per se*, in or on the following food commodities:

Commodity	Parts per million	Expiration/revocation date
Alfalfa, forage	50	None
Alfalfa, hay	75	None
Almond, hulls	50	None
Apple, wet pomace	15	None
Asparagus	15	None
Banana	5.0	None
Beet, sugar, roots	0.5	None
Beet, sugar, tops	25	None
Bushberry subgroup 13-07B	3.0	None
Cabbage	21	None
Cactus, fruit	5.0	None
Cactus, pads	12	None
Caneberry subgroup 13-07A	12.0	None
Citrus, oil	20	None
Clover, forage	50	None
Clover, hay	70	None
Corn, field, forage	30	None
Corn, field, grain	0.02	None
Corn, field, stover	20	None
Corn, pop, grain	0.02	None
Corn, pop, stover	20	None
Corn, sweet, forage	185	None
Corn, sweet, kernel plus cob with husks removed	0.1	None
Corn, sweet, stover	215	None

Commodity	Parts per million	Expiration/revocation date
Cotton, undelinted seed	5.0	10/31/09
Cranberry	3.0	None
Dandelion, leaves	22	None
Endive	10	None
Flax, seed	0.5	None
Fruit, citrus, group 10	10	None
Fruit, pome, group 11	12	None
Fruit, stone, group 12	10	None
Grain, aspirated fractions	70	None
Grape	10	None
Grape, raisin	12	None
Grass, forage	100	None
Grass, hay	15	None
Leaf petiole subgroup 4B	3.0	None
Lettuce	10	None
Millet, proso, grain	1.0	None
Millet, proso, straw	20	None
Nut, tree group 14, except walnut	0.1	None
Okra	4.0	None
Olive	10	None
Oyster	0.25	None
Parsley, leaves	22	None
Pea and bean, dried shelled, except soybean, subgroup 6C	1.0	None
Peanut	0.05	None
Peanut, hay	20	None
Pineapple	2.0	None
Pistachio	0.1	None
Rice, grain	15	None
Rice, hulls	30	None
Rice, straw	60	None
Sorghum grain, forage	30	None
Sorghum grain, grain	10	None
Sorghum grain, stover	30	None
Soybean, forage	15	None
Soybean, hay	15	None
Soybean, seed	0.5	None
Spinach	22	None
Strawberry	4.0	None
Sunflower, seed	0.5	None
Sweet potato, roots	0.2	None
Trefoil, forage	15	None
Trefoil, hay	25	None
Vegetable, brassica, leafy, group 5, except cabbage	10	None
Vegetable, cucurbit, group 9	3.0	None
Vegetable, foliage of legume, subgroup 7A, except soybean	60	None
Vegetable, fruiting, group 8	5.0	None
Vegetable, leaves of root and tuber, group 2, except sugar beet tops	75	None
Vegetable, legume, edible podded, subgroup 6A	10	None
Vegetable, root and tuber, group 1, except sugar beet and sweet potato	2.0	None
Walnut	1.0	None
Wheat, forage	30	None
Wheat, grain	1.0	None
Wheat, hay	30	None
Wheat, straw	20	None

(2) Tolerances are established for residues of the insecticide carbaryl, 1-naphthyl *N*-methylcarbamate, including its metabolites: 1-naphthol (naphthyl-sulfate); 5,6-dihydrodihydroxycarbaryl; and 5,6-dihydrodihydroxy naphthol, calculated as 1-naphthyl *N*-methylcarbamate and the free and conjugated residues of carbaryl: 5,6-dihydro-5,6-dihydroxy carbaryl and 5-methoxy-6-hydroxy carbaryl, in or on the following food commodities:

Commodity	Parts per million	Expiration/revocation date
Cattle, fat	0.5	None
Cattle, meat	1.0	None
Cattle, meat byproducts	3.0	None
Egg	0.5	10/31/09
Goat, fat	0.5	None
Goat, meat	1.0	None
Goat, meat byproducts	3.0	None

Commodity	Parts per million	Expiration/revocation date
Hog, fat	0.5	None
Hog, meat	1.0	None
Hog, meat byproducts	3.0	None
Horse, fat	0.5	None
Horse, meat	1.0	None
Horse, meat byproducts	3.0	None
Milk	1.0	None
Poultry, fat	5.0	10/31/09
Poultry, meat	5.0	10/31/09
Sheep, fat	0.5	None
Sheep, meat	1.0	None
Sheep, meat byproducts	3.0	None

* * * * *

(c) *Tolerances with regional registrations.* Tolerances with regional registrations, as defined in § 180.1(m), are established for residues of the insecticide carbaryl, 1-naphthyl *N*-methylcarbamate *per se*, in or on the following food commodities:

Commodity	Parts per million
Dillweed, fresh leaves	0.2

* * * * *

■ 4. Section 180.208 is amended by revising the section heading and paragraph (a) to read as follows:

§ 180.208 Benfluralin; tolerances for residues.

(a) *General.* Tolerances are established for residues of the herbicide benfluralin, *N*-butyl-*N*-ethyl-ααα-trifluoro-2,6-dinitro-*p*-toluidine, in or on the following food commodities:

Commodity	Parts per million
Alfalfa, forage	0.05
Alfalfa, hay	0.05
Clover, forage	0.05
Clover, hay	0.05
Lettuce	0.05
Trefoil, forage	0.05
Trefoil, hay	0.05

* * * * *

■ 5. Section 180.229 is revised to read as follows:

§ 180.229 Fluometuron; tolerances for residues.

(a) *General.* (1) Tolerances are established for the combined residues of the herbicide fluometuron, *N*, *N*-dimethyl-*N'*-[3-(trifluoromethyl)phenyl]urea, and its metabolite, trifluoromethylaniline (TFMA) determined as TFMA, in or on the following food commodities:

Commodity	Parts per million
Cotton, gin byproducts	3.5
Cotton, undelinted seed	1.0

(2) Tolerances are established for the combined residues of the herbicide fluometuron, *N*,*N*-dimethyl-*N'*-[3-(trifluoromethyl)phenyl]urea, and its metabolites determined as TFMA and the hydroxylated metabolites: CGA-236431, 1-(4-hydroxy-3-trifluoromethylphenyl)urea; CGA-236432, 1-methyl-3-(4-hydroxy-3-trifluoromethylphenyl)urea; and CGA-13211, 1,1-dimethyl-3-(4-hydroxy-3-trifluoromethylphenyl)urea, in or on the following food commodities:

Commodity	Parts per million
Cattle, meat byproducts	0.1
Egg	0.1
Goat, meat byproducts	0.1
Hog, meat byproducts	0.1
Horse, meat byproducts	0.1
Milk	0.02
Poultry, fat	0.1
Poultry, meat	0.1
Poultry, meat byproducts	0.1
Sheep, meat byproducts	0.1

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* Tolerances are established for the combined residues of the herbicide fluometuron, *N*, *N*-dimethyl-*N'*-[3-(trifluoromethyl)phenyl]urea, and its metabolite, trifluoromethylaniline (TFMA) determined as TFMA, in or on the following food commodities.

Commodity	Parts per million
Grain, cereal, forage, fodder, and straw group 16, forage	3.0
Grain, cereal, forage, fodder, and straw, group 16, stover	6.0
Grain, cereal, group 15	0.5
Peanut	0.1
Peanut, hay	4.0
Peanut, meal	0.2
Soybean, forage	3.0
Soybean, hay	3.0
Soybean, seed	2.0
Rice, hulls	1.0
Wheat, milled byproducts	1.0

■ 6. Section 180.276 is amended by revising the table in paragraph (a) to read as follows:

§ 180.276 Formetanate hydrochloride; tolerances for residues.

(a) * * *

Commodity	Parts per million
Apple	0.50
Apple, wet pomace	1.5
Grapefruit	1.5
Lemon	0.60
Lime	0.03
Nectarine	0.40
Orange	1.5
Peach	0.40
Pear	0.50
Tangelo	0.03
Tangerine	0.03

* * * * *

■ 7. Section 180.299 is revised to read as follows:

§ 180.299 Dicrotophos; tolerances for residues.

(a) *General.* Tolerances are established for residues of the insecticide dicrotophos, dimethyl phosphate of 3-hydroxy-*N*,*N*-dimethyl-cis-crotonamide, in or on the following food commodities:

Commodity	Parts per million
Cotton, gin byproducts	2.0
Cotton, undelinted seed	0.2

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

■ 8. Section 180.316 is amended by revising the table in paragraph (a) and paragraph (d) to read as follows:

§ 180.316 Pyrazon; tolerances for residues.

(a) * * *

Commodity	Parts per million
Beet, garden, roots	0.9
Beet, garden, tops	7.0
Beet, sugar, molasses	1.5
Beet, sugar, roots	0.2
Beet, sugar, tops	3.0
Cattle, fat	0.10
Cattle, liver	0.15
Cattle, meat	0.10
Cattle, meat byproducts, except liver	0.10
Goat, fat	0.10
Goat, liver	0.15
Goat, meat	0.10
Goat, meat byproducts, except liver	0.10
Horse, fat	0.10
Horse, liver	0.15
Horse, meat	0.10
Horse, meat byproducts, except liver	0.10
Milk	0.02
Sheep, fat	0.10
Sheep, liver	0.15
Sheep, meat	0.10
Sheep, meat byproducts, except liver	0.10

* * * * *

(d) *Indirect or inadvertent residues.* Tolerances are established for combined residues of the herbicide pyrazon, 5-amino-4-chloro-2-phenyl-3(2*H*)-pyridazinone, and its metabolites (calculated as pyrazon), in or on the following food commodities:

Commodity	Parts per million
Corn, field, forage	0.5
Corn, field, stover	0.5
Soybean, forage	0.5
Soybean, hay	0.5
Wheat, forage	0.3
Wheat, hay	0.2
Wheat, straw	0.1

§ 180.319 [Amended]

■ 9. Section 180.319 is amended by removing the entry ''Carbaryl (1-naphthyl N-methylcarbamate and its metabolite 1-naphthol, calculated as carbaryl'' from the table.

■ 10. Section 180.328 is revised to read as follows:

§ 180.328 Napropamide; tolerances for residues.

(a) *General.* Tolerances are established for residues of the herbicide napropamide, *N*,*N*-diethyl-2-(1-napthalenyloxy) propionamide, in or on the following food commodities:

Commodity	Parts per million	Expiration/revocation date
Almond, hulls	0.1	None
Artichoke, globe	0.1	4/26/09
Asparagus	0.1	None
Avocado	0.1	4/26/09
Basil	0.1	None
Berry group 13	0.1	None
Coffee, green bean	0.1	None
Cranberry	0.1	None
Fig	0.1	4/26/09
Fruit, citrus	0.1	4/26/09
Fruit, pome	0.1	4/26/09
Fruit, stone	0.1	4/26/09
Grape	0.1	None
Kiwifruit	0.1	None
Marjoram	0.1	None
Nut, tree, group 14	0.1	None
Olive	0.1	4/26/09
Peppermint, tops	0.1	None
Persimmon	0.1	None
Pistachio	0.1	04/26/09
Rhubarb	0.1	None
Rosemary	0.1	None
Savory, summer	0.1	None
Savory, winter	0.1	None
Spearmint, tops	0.1	None
Strawberry	0.1	None
Sweet potato, roots	0.1	None
Vegetable, brassica, leafy, group 5	0.1	None
Vegetable, fruiting, group 8	0.1	None

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* Tolerances are established for residues of the herbicide napropamide, *N*,*N*-diethyl-2-(1-napthalenyloxy) propionamide, in or on the following food commodities:

Commodity	Parts per million	Expiration/revocation date
Pomegranate	0.1	4/26/09

(d) *Indirect or inadvertent residues.* [Reserved]

■ 11. Section 180.356 is amended by revising the following commodities in the table in paragraph (a) to read as follows:

§ 180.356 Norflurazon; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * *	*
Cattle, liver	0.50
* * * *	*
Goat, liver	0.50
* * * *	*
Hog, liver	0.50
* * * *	*
Horse, liver	0.50
* * * *	*
Sheep, liver	0.50
* * * *	*

* * * * *

■ 12. Section 180.364 is amended by revising the table in paragraph (a) to read as follows:

§ 180.364 Glyphosate; tolerances for residues.

(a) * * *

Commodity	Parts per million
Acerola	0.2
Alfalfa, seed	0.5
Almond, hulls	25
Aloe vera	0.5
Ambarella	0.2
Animal feed, nongrass, group 18	400
Artichoke, globe	0.2
Asparagus	0.5
Atemoya	0.2
Avocado	0.2
Bamboo, shoots	0.2
Banana	0.2
Barley, bran	30
Beet, sugar, dried pulp	25
Beet, sugar, roots	10
Beet, sugar, tops	10
Berry group 13	0.2
Betelnut	1.0
Biriba	0.2
Blimbe	0.2
Borage, seed	0.1
Breadfruit	0.2
Cacao bean	0.2
Cactus, fruit	0.5
Cactus, pads	0.5
Canistel	0.2
Canola, seed	20
Cattle, meat byproducts	5.0
Chaya	1.0
Cherimoya	0.2
Citrus, dried pulp	1.5
Coconut	0.1
Coffee, bean	1.0
Corn, field, forage	6.0
Corn, field, grain	5.0
Corn, pop, grain	0.1
Corn, sweet, grain	0.1
Cotton, gin byproducts	175
Cotton, undelinted seed	40
Cranberry	0.2
Crambe, seed	0.1
Custard apple	0.2
Date	0.2
Dokudami	2.0
Durian	0.2
Egg	0.05
Epazote	1.3
Feijoa	0.2
Fig	0.2
Fish	0.25
Flax, meal	8.0
Flax, seed	4.0
Fruit, citrus, group 10	0.5
Fruit, pome, group 11	0.2
Fruit, stone, group 12	0.2
Galangal, roots	0.2
Ginger, white, flower	0.2
Goat, meat byproducts	5.0
Gourd, buffalo, seed	0.1
Governor's plum	0.2
Gow kee, leaves	0.2
Grain, aspirated fractions	100
Grain, cereal, forage, fodder and straw, group 16, except field corn, forage	100
Grain, cereal, group 15 except field corn, popcorn, rice, sweet corn, and wild rice	30
Grape	0.2
Grass, forage, fodder and hay, group 17	300
Guava	0.2
Herbs subgroup 19A	0.2
Hog, meat byproducts	5.0
Hop, dried cones	7.0
Horse, meat byproducts	5.0
Ilama	0.2
Imbe	0.2
Imbu	0.2
Jaboticaba	0.2
Jackfruit	0.2
Jojoba, seed	0.1
Juneberry	0.2
Kava, roots	0.2
Kenaf, forage	200
Kiwifruit	0.2
Lesquerella, seed	0.1
Leucaena, forage	200
Lingonberry	0.2
Longan	0.2
Lychee	0.2
Mamey apple	0.2
Mango	0.2
Mangosteen	0.2
Marmaladebox	0.2
Meadowfoam, seed	0.1
Mioga, flower	0.2
Mustard, seed	0.1
Noni	0.20
Nut, pine	1.0
Nut, tree, group 14	1.0
Okra	0.5
Olive	0.2
Oregano, Mexican, leaves	2.0
Palm heart	0.2
Palm heart, leaves	0.2
Palm, oil	0.1
Papaya	0.2
Papaya, mountain	0.2
Passionfruit	0.2
Pawpaw	0.2
Pea, dry	8.0
Peanut	0.1
Peanut, hay	0.5
Pepper leaf, fresh leaves	0.2
Peppermint, tops	200
Perilla, tops	1.8
Persimmon	0.2
Pineapple	0.1
Pistachio	1.0
Pomegranate	0.2
Poultry, meat	0.1
Poultry, meat byproducts	1.0
Pulasan	0.2
Quinoa, grain	5.0
Rambutan	0.2
Rapeseed, seed	20
Rice, grain	0.1
Rice, wild, grain	0.1
Rose apple	0.2
Safflower, seed	85
Salal	0.2
Sapodilla	0.2
Sapote, black	0.2
Sapote, mamey	0.2
Sapote, white	0.2
Sesame, seed	0.1
Sheep, meat byproducts	5.0
Shellfish	3.0
Soursop	0.2
Soybean, forage	100
Soybean, hay	200
Soybean, hulls	100
Soybean, seed	20
Spanish lime	0.2
Spearmint, tops	200
Spice subgroup 19B	7.0
Star apple	0.2
Starfruit	0.2
Stevia, dried leaves	1.0
Strawberry	0.2
Sugar apple	0.2
Sugarcane, cane	2.0
Sugarcane, molasses	30
Sunflower, seed	85
Surinam cherry	0.2
Tamarind	0.2
Tea, dried	1.0
Tea, instant	7.0
Teff, grain	5.0
Ti, leaves	0.2
Ti, roots	0.2
Ugli fruit	0.5
Vegetable, bulb, group 3	0.2
Vegetable, cucurbit, group 9	0.5
Vegetable, foliage of legume, subgroup 7A, except soybean	0.2
Vegetable, fruiting, group 8	0.1
Vegetable, leafy, brassica, group 5	0.2
Vegetable, leafy, except brassica, group 4	0.2
Vegetable, leaves of root and tuber, group 2, except sugar beet tops	0.2
Vegetable, legume, group 6 except soybean and dry pea	5.0
Vegetable, root and tuber, group 1, except sugar beet	0.2
Wasabi, roots	0.2
Water spinach, tops	0.2

Commodity	Parts per million
Watercress, upland	0.2
Wax jambu	0.2
Yacon, tuber	0.2

* * * * *

■ 13. Section 180.368 is amended by alphabetically adding the following commodities to the table in paragraph (a)(1) to read as follows:

§ 180.368 Metolachlor; tolerances for residues.

(a) * * * (1) * * *

Commodity	Parts per million
* * * *	*
Dill	0.50
* * * *	*
Grass, forage	10
Grass, hay	0.20
* * * *	*
Okra	0.50
* * * *	*
Spinach	0.50
Tomato	0.10
* * * *	*

* * * * *

■ 14. Section 180.427 is amended by revising the section heading and paragraph (a) to read as follows:

§ 180.427 Tau-Fluvalinate; tolerances for residues.

(a) *General*. Tolerances are established for residues of the insecticide tau-fluvalinate, cyano-(3-phenoxyphenyl)methyl *N*-[2-chloro-4-(trifluoromethyl)phenyl]-*D*-valinate, in or on the following food commodities:

Commodity	Parts per million
Honey	0.02

* * * * *

[FR Doc. E8–20993 Filed 9–9–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0475; FRL–8380–1]

Acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed (CAS No. 924892–37–5); when used as an inert ingredient in a pesticide chemical formulation. Celanese Ltd. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of acetic acid ethenyl ester, polymer with sodium 2–methyl–2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed on food or feed commodities.

DATES: This regulation is effective September 10, 2008. Objections and requests for hearings must be received on or before November 10, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0475. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Karen Samek, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–8825; e-mail address: *samek.karen@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0475 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before November 10, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2008–0475, by one of the following methods.

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background and Statutory Findings

In the **Federal Register** of July 9, 2008 (73 FR 39289) (FRL–8371–2), EPA issued a notice pursuant to section 408 of FFDCA, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (PP 8E7364) filed by Celanese Ltd., 1601 West LBJ Freeway, Dallas, TX 75234. The petition requested that 40 CFR 180.960 be amended by establishing an exemption from the requirement of a tolerance for residues of acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed; CAS No. 924892–37–5. That notice included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency did not receive any comments.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and use in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemption from the requirement of a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue,'' and specifies factors EPA is to consider in establishing an exemption.

III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability, and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). Acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.
2. The polymer does contain as an integral part of its composition the atomic elements carbon, hydrogen, and oxygen.
3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).
4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize.
5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the TSCA Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.
6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 daltons.

Additionally, the polymer also meets as required the following exemption criteria specified in 40 CFR 723.250(e).

7. The polymer's number average MW of 61,000 daltons is greater than or equal to 10,000 daltons. The polymer contains less than 2% oligomeric material below MW 500 and less than 5% oligomeric material below MW 1,000.

Thus, acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed.

IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The number average MW of acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed is 61,000 daltons. Generally, a polymer of this size would be poorly

absorbed through the intact gastrointestinal tract or through intact human skin. Since acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed conform to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

V. Cumulative Effects

Section 408 (b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance or tolerance exemption, the Agency consider ''available information'' concerning the cumulative effects of a particular chemical's residues and ''other substances that have a common mechanism of toxicity.'' For the purposes of this tolerance action, EPA has not assumed that acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed has a common mechanism of toxicity with other substances, based on the anticipated absence of mammalian toxicity. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www.epa.gov/pesticides/cumulative*.

VI. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database unless EPA concludes that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed, EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed.

VIII. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. International Tolerances

The Agency is not aware of any country requiring a tolerance for acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed nor have any CODEX Maximum Residue Levels (MRLs) been established for any food crops at this time.

IX. Conclusion

Accordingly, EPA finds that exempting residues of acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed from the requirement of a tolerance will be safe.

X. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these rules from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes, or otherwise have any unique impacts on local governments. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

Although this action does not require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994), EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. As such, to the extent that information is publicly available or was submitted in comments to EPA, the Agency considered whether groups or segments of the population, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this

document, compared to the general population.

XI. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 29, 2008.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In §180.960, the table is amended by adding alphabetically the following polymer to read as follows:

§ 180.960 Polymers; exemptions from the requirement of a tolerance.

* * * * *

Polymer	CAS No.
* * *	* *
Acetic acid ethenyl ester, polymer with sodium 2-methyl-2-[(1-oxo-2-propen-1-yl)amino]-1-propanesulfonate (1:1), hydrolyzed, minimum number average molecular weight (in amu), 61,000	924892–37–5
* * *	* *

[FR Doc. E8–20984 Filed 9–9–08; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket No. FEMA–B–1001]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Maps (FIRMs) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Mitigation Assistant Administrator of FEMA reconsider the changes. The modified BFEs may be changed during the 90-day period.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151.

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by the other Federal, State, or regional entities. The changed BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This interim rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This interim rule involves no policies that have federalism implications under Executive Order 13132, Federalism.

Executive Order 12988, Civil Justice Reform. This interim rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
California:					
San Diego	City of Escondido (07–09–1345P).	July 24, 2008; July 31, 2008; *San Diego Transcript*.	The Honorable Lori Holt Pfeiler, Mayor, City of Escondido, 201 North Broadway, Escondido, CA 92025.	November 28, 2008	060290
San Diego	City of San Diego (08–09–1015P).	July 10, 2008; July 17, 2008; *San Diego Transcript*.	The Honorable Jerry Sanders, Mayor, City of San Diego, 202 C Street, 11th Floor, San Diego, CA 92101.	June 30, 2008	060295
Colorado:					
Arapahoe	Unincorporated areas of Arapahoe County (08–08–0536P).	July 17, 2008; July 24, 2008; *Aurora Sentinel*.	The Honorable Susan Beckman, Chair, Arapahoe County Board of Commissioners, 5334 South Prince Street, Littleton, CO 80166–0001.	November 21, 2008	080011
Arapahoe	City of Aurora (08–08–0536P).	July 17, 2008; July 24, 2008; *Aurora Sentinel*.	The Honorable Ed Tauer, Mayor, City of Aurora, 15151 East Alameda Parkway, Aurora, CO 80012.	November 21, 2008	080002
Arapahoe	City of Centennial (08–08–0536P).	July 17, 2008; July 24, 2008; *Aurora Sentinel*.	The Honorable Randy Pye, Mayor, City of Centennial, City of Centennial Office, 12503 East Euclid Drive, Suite 200, Centennial, CO 80111.	November 21, 2008	080315
Arapahoe	City of Cherry Hills Village (08–08–0414P).	July 4, 2008; July 11, 2008; The Englewood Herald.	The Honorable Mike Wozniak, Mayor, City of Cherry Hills Village, 2450 East Quincy Avenue, Cherry Hills Village, CO 80113.	November 11, 2008	080013
Florida:					
Charlotte	City of Punta Gorda (08–04–4040P).	July 17, 2008; July 24, 2008; *Charlotte Sun*.	The Honorable Larry Friedman, Mayor, City of Punta Gorda, 326 West Marion Avenue, Punta Gorda, FL 33950.	June 30, 2008	120062
Monroe	Unincorporated areas of Monroe County (08–04–0421P).	July 10, 2008; July 17, 2008; *Key West Citizen*.	The Honorable Mario DiGennaro, Mayor, Monroe County, Florida Keys Marathon Airport, 9400 Overseas Highway, Suite 210, Marathon, FL 33050.	June 30, 2008	125129
Monroe	Unincorporated areas of Monroe County (08–04–3795P).	July 10, 2008; July 17, 2008; *Key West Citizen*.	The Honorable Mario DiGennaro, Mayor, Monroe County, Florida Keys Marathon Airport, 9400 Overseas Highway, Suite 210, Marathon, FL 33050.	June 30, 2008	125129
Polk	City of Winter Haven, (08–04–2591P).	July 17, 2008; July 24, 2008; *Winter Haven News Chief*.	The Honorable Nathaniel Birdsong, Jr., Mayor, City of Winter Haven, 451 Third Street, Northwest, Winter Haven, FL 33881.	November 21, 2008	120271
Sumter	City of Wildwood (08–04–0921P).	July 17, 2008; July 24, 2008; *Sumter County Times*.	The Honorable Ed Wolf, Mayor, City of Wildwood, 100 North Main Street, Wildwood, FL 34785.	June 30, 2008	120299
Georgia: Columbia	Unincorporated areas of Columbia County (08–04–0423P).	July 27, 2008; August 3, 2008; *Columbia County News-Times*.	The Honorable Ron C. Cross, Chairman, Columbia County, Board of Commissioners, P.O. Box 498, Evans, GA 30809.	December 2, 2008	130059
Indiana: Marion	City of Indianapolis (08–05–2727P).	July 8, 2008; July 15, 2008; *Indianapolis Star*.	The Honorable Gregory A. Ballard, Mayor, City of Indianapolis, 200 East Washington Street, Indianapolis, IN 46204.	June 25, 2008	180159
Kansas: Johnson	City of Overland Park (08–07–0908P).	July 9, 2008; July 16, 2008; *The Overland Park Sun*.	The Honorable Carl R. Gerlach, Mayor, City of Overland Park, 10084 Hemlock Drive, Overland Park, KS 66212.	June 30, 2008	200174
Maryland:					
Carroll	Unincorporated areas of Carroll County (08–03–0973P).	July 31, 2008; August 7, 2008; *Carroll County Times*.	The Honorable Julia Gouge, Commissioner, Carroll County, 225 North Center Street, Westminster, MD 21157.	December 5, 2008	240015
Carroll	City of Westminster (08–03–0973P).	July 31, 2008; August 7, 2008; *Carroll County Times*.	The Honorable Thomas K. Ferguson, Mayor, City of Westminster, 1838 Emerald Hill Lane, Westminster, MD 21158.	December 5, 2008	240018
Washington	Unincorporated areas of Washington County (08–03–0660P).	June 4, 2008; June 11, 2008; *The Herald-Mail*.	The Honorable John Barr, President, Washington County Commissioners, 100 West Washington Street, Room 226, Hagerstown, MD 21740.	October 9, 2008	240070
Massachusetts: Suffolk.	City of Boston (08–01–1020P).	July 24, 2008; July 31, 2008; *Boston Herald*.	The Honorable Thomas Menino, Mayor, City of Boston, One City Hall Square, Boston, MA 02201.	December 5, 2008	250286
Michigan: Macomb	Township of Macomb (08–05–1867P).	July 16, 2008; July 23, 2008; *The Macomb Daily* and *Daily Tribune*.	The Honorable John D. Brennan, Township Supervisor, Township of Macomb, 54111 Broughton Road, Macomb, MI 48042.	July 2, 2008	260445
Mississippi: DeSoto	City of Olive Branch (08–04–2647P).	July 31, 2008; August 7, 2008; *DeSoto Times Today*.	The Honorable Samuel P. Rikard, Mayor, City of Olive Branch, 9200 Pigeon Roost Road, Olive Branch, MS 38654.	July 18, 2008	280286

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
New Mexico:					
Sandoval	Town of Bernalillo (08–06–0693P).	July 17, 2008; July 24, 2008; *Santa Fe New Mexican*.	The Honorable Patricia A. Chavez, Mayor, Town of Bernalillo, P.O. Box 638, Bernalillo, NM 87004.	November 21, 2008	350056
Sandoval	City of Rio Rancho (08–06–0693P).	July 17, 2008; July 24, 2008; *Santa Fe New Mexican*.	The Honorable Thomas E. Swisstack, Mayor, City of Rio Rancho, 3200 Civic Center Circle, Northeast, Rio Rancho, NM 87144.	November 21, 2008	350146
Sandoval	Unincorporated areas of Sandoval County (08–06–0693P).	July 17, 2008; July 24, 2008; *Santa Fe New Mexican*.	The Honorable Joshua Madalena, Chairman, Sandoval County Commission, Sandoval County Courthouse, 711 Camino Del Pueblo, Bernalillo, NM 87004.	November 21, 2008	350055
New York: New York	City of New York (08–02–0948P).	July 17, 2008; July 24, 2008; *New York Times*.	The Honorable Michael R. Bloomberg, Mayor, City of New York, One Centre Street, New York, NY 10007.	September 29, 2008	360497
Oklahoma:					
Oklahoma	City of Edmond (08–06–0227P).	July 16, 2008; July 23, 2008; *The Edmond Sun*.	The Honorable Daniel R. O'Neil, Mayor, City of Edmond, P.O. Box 2970, Edmond, OK 73083.	July 30, 2008	400252
Tulsa	City of Tulsa (08–06–1820P).	June 26, 2008; July 3, 2008; *Tulsa World*.	The Honorable Kathryn L. Taylor, Mayor, City of Tulsa, 200 Civic Center, Tulsa, OK 74103.	October 31, 2008	405381
South Dakota: Pennington.	City of Rapid City (08–08–0211P).	June 25, 2008; July 2, 2008; *Hill City Prevailer-News*.	The Honorable Alan Hanks, Mayor, City of Rapid City, 300 Sixth Street, Rapid City, SD 57701.	October 30, 2008	465420
Texas:					
Harris	Unincorporated areas of Harris County (08–06–0795P).	July 2, 2008; July 9, 2008; *Houston Chronicle*.	The Honorable Ed Emmett, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	June 25, 2008	480287
Tarrant	City of Grapevine (07–06–0439P).	May 30, 2008; June 6, 2008; *Grapevine Courier*.	The Honorable William D. Tate, Mayor, City of Grapevine, P.O. Box 95104, Grapevine, TX 76099.	September 4, 2008	480598
Utah: Uintah	Unincorporated areas of Uintah County (08–08–0264P).	July 22, 2008; July 29, 2008; *Uintah Basin Standard*.	The Honorable Mike McKee, Chairman, Uintah County, Board of Commissioners, 152 East 100 North, Vernal, UT 84078.	November 26, 2008	490147
Virginia:					
Frederick	Unincorporated areas of Frederick County (08–03–1051P).	July 28, 2008; August 4, 2008; *The Winchester Star*.	The Honorable Richard C. Shickle, Chairman At-Large, Frederick County, Board of Supervisors, 292 Green Spring Road, Winchester, VA 22603.	December 2, 2008	510063
Frederick	City of Winchester (08–03–1051P).	July 28, 2008; August 4, 2008; *The Winchester Star*.	The Honorable Elizabeth Minor, Mayor, City of Winchester, 231 East Piccadilly Street, Suite 310, Winchester, VA 22601.	December 2, 2008	510173
Independent City.	City of Winchester (08–03–0972P).	July 3, 2008; July 10, 2008; *The Winchester Star*.	The Honorable Elizabeth Minor, Mayor, City of Winchester, 231 East Piccadilly Street, Suite 310, Winchester, VA 22601.	October 31, 2008	510173

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: August 26, 2008.

Michael K. Buckley,

Deputy Assistant Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–20825 Filed 9–9–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Assistant Administrator of the Mitigation Directorate has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community. The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

State	City/town/county	Source of flooding	Location	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified
City of Jackson, Missouri FEMA Docket No.: B–7759				
Missouri	City of Jackson	Goose Creek	Confluence with Hubble Creek	+401
			Approximately 2.44 miles upstream of East Main Street.	+476
Missouri	City of Jackson	Hubble Creek	Confluence with Goose Creek	+400
			Missouri State Route Y	+474
Missouri	City of Jackson	Neal Creek	Confluence with Goose Creek	+428
			Approximately 0.60 mile upstream of Woodland Drive.	+472
Missouri	City of Jackson	Ramsey Branch	Approximately 1.51 miles upstream of Hoppers Road.	+474
			Approximately 1.62 miles upstream of Hoppers Road.	+477
Missouri	City of Jackson	Rocky Branch	0.21 miles upstream of confluence with Hubble Creek at South Farmington Road.	+406
			Approximately 130 feet upstream of North Farmington Road.	+470
Missouri	City of Jackson	Rocky Branch West Fork	Confluence with Rocky Branch	+410
			Approximately 260 feet upstream of Old Toll Road.	+446
Missouri	City of Jackson	West Fork of Williams Creek.	Confluence with Williams Creek	+419
			Approximately 230 feet upstream of Old Cape Road.	+437
Missouri	City of Jackson	Williams Creek	Approximately 0.39 miles downstream of Highway 61.	+414
			Approximately 0.19 miles upstream of Bainbridge Road.	+441

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

City of Jackson
Maps are available for inspection at 101 Court Street, Jackson, MO 63755.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Graham County, North Carolina and Incorporated Areas Docket Nos.: FEMA–B–7734 and FEMA–D–7818			
Anderson Creek	At the confluence with Tulula Creek	+2,255	Graham County (Unincorporated Areas).
	Approximately 0.4 mile upstream of State Road 1103	+2,643	
Atoah Creek	At the confluence with Long Creek	+2,045	Graham County (Unincorporated Areas).
	Approximately 230 feet upstream of Lewis Nelson Road	+2,329	
Bear Creek (near Dentons)	At the confluence with Little Snowbird Creek	+2,510	Graham County (Unincorporated Areas).
	Approximately 1.5 miles upstream of the confluence with Little Snowbird Creek.	+3,093	
Beech Creek	At the confluence with Sweetwater Creek	+2,196	Graham County (Unincorporated Areas).
	Approximately 1,920 feet upstream of the confluence of South Fork Beech Creek.	+2,363	
Bert Creek	At the confluence with Tulula Creek	+2,185	Graham County (Unincorporated Areas).
	Approximately 1,100 feet upstream of Berts Creek Road	+2,344	
Buffalo Creek	At the confluence with Cheoah River	+1,942	Graham County (Unincorporated Areas).
	At the confluence of West Buffalo Creek	+1,942	
Cheoah River	At the confluence with Little Tennessee River	+1,088	Graham County (Unincorporated Areas), Town of Robbinsville.
	At the confluence of Tulula Creek and Sweetwater Creek	+1,982	
Cochran Creek	At the confluence with Cheoah River	+1,693	Graham County (Unincorporated Areas).
	Approximately 0.4 mile upstream of Cochrans Creek Road (State Road 1250).	+1,930	
Cooloska Branch	At the confluence with Snowbird Creek	+1,942	Graham County (Unincorporated Areas).
	Approximately 900 feet upstream of Massey Branch Road (State Road 1116).	+1,965	
Dry Creek	At the confluence with Stecoah Creek	+2,050	Graham County (Unincorporated Areas).
	Approximately 1,630 feet upstream of Collins Cove	+2,629	
East Buffalo Creek	At the confluence with Cheoah River	+1,942	Graham County (Unincorporated Areas), Town of Lake Santeetlah.
	Approximately 0.4 mile upstream of Buffalo Lane	+2,066	
Eller Mill Creek	At the confluence with Little Snowbird Creek	+2,317	Graham County (Unincorporated Areas).
	Approximately 0.5 mile upstream of the confluence with Little Snowbird Creek.	+2,540	
Fontana Lake	Entire shoreline within Graham County	+1,710	Graham County (Unincorporated Areas).
Franks Creek	At the confluence with Tulula Creek	+2,126	Graham County (Unincorporated Areas).
	Approximately 1,000 feet upstream of Franks Creek Road (State Road 1207).	+2,315	
Gladdens Creek	At the confluence with Cheoah River	+1,722	Graham County (Unincorporated Areas).
	Approximately 0.5 mile upstream of Gladdens Creek Road (State Road 1135).	+1,917	
Hares Creek	At the confluence with Tulula Creek	+2,278	Graham County (Unincorporated Areas).
	Approximately 700 feet downstream of Carpenter Drive	+2,602	
Hooper Mill Creek	At the confluence with West Buffalo Creek	+2,114	Graham County (Unincorporated Areas).
	Approximately 20 feet downstream of the confluence of Seven Springs Branch.	+2,672	
Hyde Mill Creek	At the confluence with Tulula Creek	+2,084	Graham County (Unincorporated Areas).
	Approximately 1,870 feet upstream of Floyd Carpenter Road (State Road 1132).	+2,433	
Juanita Branch	At the confluence with Little Snowbird Creek	+2,985	Graham County (Unincorporated Areas).

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 0.7 mile upstream of the confluence with Little Snowbird Creek.	+3,255	
Juts Creek	At the confluence with Tulula Creek	+2,425	Graham County (Unincorporated Areas).
	Approximately 0.5 mile upstream of U.S. Highway 129	+2,580	
Little Buffalo Creek	At the confluence with West Buffalo Creek and Squally Creek.	+2,361	Graham County (Unincorporated Areas).
	Approximately 1.5 miles upstream of the confluence with West Buffalo Creek and Squally Creek.	+2,928	
Little Snowbird Creek	At the confluence with Snowbird Creek	+2,108	Graham County (Unincorporated Areas).
	Approximately 800 feet upstream of the confluence of Hornet Nest Branch.	+3,288	
Little Tennessee River	Approximately 1.7 miles downstream of the confluence of Cheoah River.	+1,088	Graham County (Unincorporated Areas).
	At the downstream side of the Fontana Dam	+1,277	
Long Creek	At the confluence with Cheoah River	+1,968	Graham County (Unincorporated Areas), Town of Robbinsville.
	Approximately 1.4 miles upstream of Springwood Lake Road.	+2,393	
Mountain Creek	At the confluence with Cheoah River	+1,945	Graham County (Unincorporated Areas).
	Approximately 50 feet downstream of Mountain Creek Road (State Road 1214).	+2,397	
Mouse Branch	At the confluence with Panther Creek	+1,710	Graham County (Unincorporated Areas).
	Approximately 2.0 miles upstream of the confluence with Panther Creek.	+1,713	
North Fork Tuskeegee Creek	At the confluence with Tuskeegee Creek	+1,953	Graham County (Unincorporated Areas).
	Approximately 1,420 feet upstream of Upper Tuskeegee NP (State Road 1242).	+2,031	
Ollie Branch	At the confluence with East Buffalo Creek	+1,943	Graham County (Unincorporated Areas).
	Approximately 180 feet upstream of Ollies Creek Road (State Road 1253).	+2,246	
Panther Creek	At the confluence with Little Tennessee River	+1,710	Graham County (Unincorporated Areas).
	Approximately 0.4 mile upstream of Shell Stand Road (State Road 1268).	+1,886	
Santeetlah Creek	At the confluence with Cheoah River	+1,942	Graham County (Unincorporated Areas).
	Approximately 1.8 miles upstream of the confluence with Cheoah River.	+1,942	
Sawyer Creek	At the confluence with Stecoah Creek	+1,710	Graham County (Unincorporated Areas).
	Approximately 0.4 mile upstream of Upper Sawyers Creek NP (State Road 1240).	+2,284	
Snowbird Creek	At the confluence with Cheoah River	+1,942	Graham County (Unincorporated Areas).
	Approximately 0.6 mile downstream of the confluence of Chestnut Flat Branch.	+2,207	
South Fork Beech Creek	At the confluence with Beech Creek	+2,283	Graham County (Unincorporated Areas).
	Approximately 1.6 miles upstream of Beech Creek Road (State Road 1223).	+2,845	
Squally Creek	At the confluence with West Buffalo Creek and Little Buffalo Creek.	+2,361	Graham County (Unincorporated Areas).
	Approximately 0.9 mile upstream of the confluence of South Fork Squally Creek.	+3,922	
Stecoah Creek	At the confluence with Little Tennessee River	+1,710	Graham County (Unincorporated Areas).
	Approximately 0.7 mile upstream of the confluence of Cody Branch.	+2,328	
Sweetwater Creek	At the confluence with Cheoah River and Tulula Creek	+1,982	Graham County (Unincorporated Areas), Town of Robbinsville.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 80 feet downstream of NC Highway 143	+2,356	
Town Branch	At the confluence with Panther Creek	+1,710	Graham County (Unincorporated Areas).
	Approximately 0.5 mile upstream of the confluence of Town Branch Tributary 1.	+1,729	
Town Branch Tributary 1	At the confluence with Town Branch	+1,710	Graham County (Unincorporated Areas).
	Approximately 0.5 mile upstream of the confluence with Town Branch.	+1,712	
Tulula Creek	At the confluence with Cheoah River and Sweetwater Creek.	+1,982	Graham County (Unincorporated Areas), Town of Robbinsville.
	Approximately 0.8 mile upstream of the confluence of Juts Creek.	+2,506	
Tuskeegee Creek	At the confluence with Little Tennessee River	+1,710	Graham County (Unincorporated Areas).
	At the confluence of North Fork Tuskeegee Creek	+1,953	
West Buffalo Creek	At the confluence with Buffalo Creek	+1,942	Graham County (Unincorporated Areas).
	At the confluence of Squally Creek and Little Buffalo Creek.	+2,361	
Wolf Creek	At the confluence with Panther Creek	+1,710	Graham County (Unincorporated Areas).
	Approximately 0.5 mile upstream of Little Bear Lane	+1,855	
Yellow Creek	At the confluence with Cheoah River	+1,447	Graham County (Unincorporated Areas).
	Approximately 0.9 mile upstream of Yellow Creek Road (State Road 1242).	+2,338	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

Graham County
Maps are available for inspection at Graham County Mapping Department, 12 North Main Street, Robbinsville, North Carolina.

Town of Lake Santeetlah
Maps are available for inspection at Lake Santeetlah Town Hall, 4 Marina Drive, Lake Santeetlah, North Carolina.

Town of Robbinsville
Maps are available for inspection at Robbinsville Town Hall, 4 Court Street, Robbinsville, North Carolina.

Mitchell County, North Carolina and Incorporated Areas
Docket No.: FEMA–B–7755

Bear Creek	At the confluence with North Toe River	+2,459	Unincorporated Areas of Mitchell County.
	Approximately 0.4 mile upstream of State Road 1197	+2,689	
Beaver Creek	At the confluence with North Toe River	+2,515	Unincorporated Areas of Mitchell County, Town of Spruce Pine.
	Approximately 1.9 miles upstream of Beaver Creek Road (State Road 1143).	+3,350	
Big Crabtree Creek	At the confluence with North Toe River	+2,411	Unincorporated Areas of Mitchell County.
	Approximately 1.2 miles upstream of Seven Mile Ridge Road (State Road 1167).	+3,129	
Big Rock Creek	At the confluence with North Toe River	+2,124	Unincorporated Areas of Mitchell County.
	Approximately 0.6 mile upstream of NC Highway 226	+2,841	
Brushy Creek	At the confluence with Big Crabtree Creek	+2,508	Unincorporated Areas of Mitchell County.
	Approximately 500 feet upstream of Road B	+2,692	
Cane Creek	At the confluence with North Toe River	+2,243	Unincorporated Areas of Mitchell County, Town of Bakersville.
	Approximately 800 feet upstream of State Road 1206	+2,894	
Cane Creek Tributary 6	At the confluence with Cane Creek	+2,449	Town of Bakersville.
	Approximately 620 feet upstream of Ridgeview Drive	+2,477	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Cane Creek Tributary 7	At the confluence with Cane Creek	+2,450	Unincorporated Areas of Mitchell County, Town of Bakersville.
	Approximately 0.6 mile upstream of the confluence with Tributary of Cane Creek Tributary 7.	+2,575	
East Fork Grassy Creek	At the confluence with Grassy Creek	+2,617	Unincorporated Areas of Mitchell County.
	Approximately 300 feet upstream of NC Highway 226	+2,677	
English Creek	At the confluence with North Toe River	+2,510	Town of Spruce Pine.
	Approximately 0.3 mile upstream of Greenwood Road	+2,526	
Grassy Creek	At the confluence with North Toe River	+2,525	Unincorporated Areas of Mitchell County, Town of Spruce Pine.
	Approximately 300 feet upstream of Dula Road (State Road 1106).	+2,656	
Greene Cove Creek	At the confluence with Cane Creek	+2,600	Unincorporated Areas of Mitchell County.
	Approximately 800 feet upstream of Green Cove Road (State Road 1205).	+2,671	
Greene Creek	At the confluence with Little Rock Creek	+3,148	Unincorporated Areas of Mitchell County.
	Approximately 0.5 mile upstream of Green Cove Road (State Road 1223).	+3,514	
Little Rock Creek	At the confluence with Big Rock Creek	+2,323	Unincorporated Areas of Mitchell County.
	Approximately 2.0 miles upstream of Greene Creek Road (State Road 1223).	+3,731	
Little Rose Creek	At the confluence with North Toe River	+2,560	Unincorporated Areas of Mitchell County.
	Approximately 0.4 mile upstream of the confluence with North Toe River.	+2,592	
Nolichucky River	Approximately 5.4 miles upstream of North Carolina/Tennessee State boundary.	+1,981	Unincorporated Areas of Mitchell County.
	At the confluence of North Toe River	+2,044	
North Toe River	At the confluence with Nolichucky River	+2,044	Unincorporated Areas of Mitchell County, Town of Spruce Pine.
	Approximately 3.5 miles upstream of U.S. Highway 19	+2,681	
North Toe River Tributary 67	At the confluence with North Toe River	+2,453	Unincorporated Areas of Mitchell County.
	Approximately 0.9 mile upstream of the confluence with North Toe River.	+2,577	
Tributary of Cane Creek Tributary 7.	At the confluence with Cane Creek Tributary 7	+2,529	Unincorporated Areas of Mitchell County, Town of Bakersville.
	Approximately 0.4 mile upstream of the confluence with Cane Creek Tributary 7.	+2,569	
White Oak Creek	At the confluence with Cane Creek	+2,461	Unincorporated Areas of Mitchell County, Town of Bakersville.
	Approximately 0.3 mile upstream of Crimson Laurel Way	+2,489	
White Oak Creek Tributary 1	At the confluence with White Oak Creek	+2,472	Unincorporated Areas of Mitchell County, Town of Bakersville.
	Approximately 770 feet upstream of Crimson Laurel Way	+2,502	
Young Cove Creek	At the confluence with Cane Creek	+2,550	Unincorporated Areas of Mitchell County.
	Approximately 940 feet upstream of the confluence with Cane Creek.	+2,563	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

Town of Bakersville
Maps are available for inspection at Bakersville Town Hall, 26 South Mitchell Street, Bakersville, North Carolina.

Town of Spruce Pine
Maps are available for inspection at Spruce Pine Town Hall, 138 Highlands Avenue, Spruce Pine, North Carolina.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Unincorporated Areas of Mitchell County			
Maps are available for inspection at Mitchell County Administration Building, 26 Crimson Laurel Circle, Suite 5, Bakersville, North Carolina.			
Northampton County, North Carolina and Incorporated Areas Docket Nos.: FEMA–D–7668 and FEMA–B–7759			
Ahoskie Creek	Approximately 500 feet downstream of the Northampton/Hertford County boundary.	+58	Unincorporated Areas of Northampton County.
	Approximately 50 feet downstream of Tyler Road (State Road 1100).	+66	
Ahoskie Creek Tributary 8	At the confluence with Ahoskie Creek	+60	Unincorporated Areas of Northampton County.
	Approximately 0.5 mile upstream of the confluence with Ahoskie Creek.	+62	
Bear Swamp	At the confluence with Urahaw Swamp	+51	Unincorporated Areas of Northampton County.
	Approximately 0.9 mile upstream of NC 305 Highway	+78	
Beaverpond Creek	At the confluence of Beaverpond Creek Tributary 1	+98	Unincorporated Areas of Northampton County.
	Approximately 0.8 mile upstream of the North Carolina/Virginia State boundary.	+216	
Beaverpond Creek Tributary 1	At the confluence with Beaverpond Creek	+98	Unincorporated Areas of Northampton County.
	Approximately 0.5 mile upstream of the confluence with Beaverpond Creek.	+111	
Beaverpond Creek Tributary 2	At the confluence with Beaverpond Creek	+127	Unincorporated Areas of Northampton County.
	Approximately 0.6 mile upstream of Old Emporia Road (State Road 1209).	+150	
Black Duck Creek	At the confluence with Lees Creek	+66	Unincorporated Areas of Northampton County, Town of Gaston.
	Approximately 0.7 mile upstream of Cal Floyd Road (State Route 1210).	+193	
Bridges Creek Tributary 2	At the confluence with Bridges Creek	+42	Unincorporated Areas of Northampton County.
	Approximately 250 feet downstream of Chapel Hill Church Road.	+60	
Chockoyotte Creek	At the confluence with Roanoke River	+57	Unincorporated Areas of Northampton County.
	At the confluence with Roanoke River (the Northampton/Halifax County boundary).	+59	
Corduroy Swamp	At the confluence with Kirby Creek	+55	Unincorporated Areas of Northampton County.
	Approximately 2.1 miles upstream of Mount Carmel Road (State Road 1333).	+128	
Corduroy Swamp Tributary 1	At the confluence with Corduroy Swamp	+66	Unincorporated Areas of Northampton County.
	Approximately 0.6 mile upstream of the confluence with Corduroy Swamp.	+70	
Corduroy Swamp Tributary 2	At the confluence with Corduroy Swamp	+71	Unincorporated Areas of Northampton County.
	Approximately 0.6 mile upstream of the confluence with Corduroy Swamp.	+78	
Corduroy Swamp Tributary 3	At the confluence with Corduroy Swamp	+78	Unincorporated Areas of Northampton County.
	Approximately 0.9 mile upstream of the confluence with Corduroy Swamp.	+84	
Corduroy Swamp Tributary 4	At the confluence with Corduroy Swamp	+87	Unincorporated Areas of Northampton County.
	Approximately 0.8 mile upstream of the confluence with Corduroy Swamp.	+93	
Corduroy Swamp Tributary 5	At the confluence with Corduroy Swamp	+89	Unincorporated Areas of Northampton County.
	Approximately 1.2 miles upstream of the confluence with Corduroy Swamp.	+98	
Corduroy Swamp Tributary 6	At the confluence with Corduroy Swamp	+104	Unincorporated Areas of Northampton County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 0.4 mile upstream of the confluence with Corduroy Swamp.	+106	
Corwells Millpond	At the confluence with Jacks Swamp	+72	Unincorporated Areas of Northampton County.
	Approximately 1,570 feet upstream of Big Johns Store Road (State Road 1300).	+89	
Cutawhiskie Creek	At the downstream side of Fennell Road (State Road 1155).	+52	Unincorporated Areas of Northampton County.
	Approximately 1.1 miles upstream of Eagletown Road (State Road 1522).	+65	
Cutawhiskie Creek Tributary 3	Approximately 50 feet downstream of the Northampton/Hertford County boundary.	+51	Unincorporated Areas of Northampton County.
	Approximately 0.4 mile upstream of the Northampton/Hertford County boundary.	+53	
Cutawhiskie Creek Tributary 4	At the confluence with Cutawhiskie Creek	+57	Unincorporated Areas of Northampton County.
	Approximately 0.7 mile upstream of the confluence with Cutawhiskie Creek.	+62	
Cypress Creek	At the confluence with Meherrin River	+45	Unincorporated Areas of Northampton County.
	Approximately 1.7 miles upstream of Julian Morgan Road	+99	
Cypress Creek Tributary 1	At the confluence with Cypress Creek	+52	Unincorporated Areas of Northampton County.
	Approximately 1.6 miles upstream of the confluence with Cypress Creek.	+63	
Cypress Creek Tributary 2	At the confluence with Cypress Creek	+68	Unincorporated Areas of Northampton County.
	Approximately 600 feet upstream of NC 186 Highway	+87	
Cypress Creek Tributary 3	At the confluence with Cypress Creek	+70	Unincorporated Areas of Northampton County.
	Approximately 0.5 mile upstream of the confluence with Cypress Creek.	+79	
Cypress Creek Tributary 4	At the confluence with Cypress Creek	+86	Unincorporated Areas of Northampton County.
	Approximately 1,480 feet upstream of Julian Morgan Road.	+97	
Devils Branch	At the confluence with Roanoke River	+135	Unincorporated Areas of Northampton County.
	Approximately 3.1 miles upstream of the confluence with Roanoke River.	+196	
Fountains Creek	At the confluence with Meherrin River	+46	Unincorporated Areas of Northampton County.
	Approximately 4.3 miles upstream of the confluence with Meherrin River.	+51	
Grant Branch	At the confluence with Urahaw Swamp	+49	Unincorporated Areas of Northampton County, Town of Lasker.
	Approximately 1.4 miles upstream of Collier Road (State Road 1515).	+74	
Gumberry Swamp	At the downstream side of Barrows Mill Road (State Route 1126).	+47	Unincorporated Areas of Northampton County.
	Approximately 300 feet upstream of railroad	+124	
Hunting Branch	At the confluence with Corduroy Swamp	+58	Unincorporated Areas of Northampton County.
	Approximately 20 feet downstream of Frank Harris Road (State Road 1343).	+70	
Ivy Creek	At the confluence with Cypress Creek	+84	Unincorporated Areas of Northampton County.
	Approximately 1.2 miles upstream of the confluence with Cypress Creek.	+89	
Jacks Swamp	At the North Carolina/Virginia State boundary	+68	Unincorporated Areas of Northampton County.
	Approximately 710 feet upstream of Interstate 95 (Southbound).	+135	
Jacks Swamp Tributary 1	At the confluence with Jacks Swamp	+69	Unincorporated Areas of Northampton County.
	Approximately 0.7 mile upstream of the confluence with Jacks Swamp.	+84	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Jacks Swamp Tributary 2	At the confluence with Jacks Swamp	+94	Unincorporated Areas of Northampton County.
	Approximately 2.0 miles upstream of the confluence with Jacks Swamp.	+121	
Jacks Swamp Tributary 3	At the confluence with Jacks Swamp	+100	Unincorporated Areas of Northampton County.
	Approximately 0.9 mile upstream of the confluence with Jacks Swamp.	+122	
Jacks Swamp Tributary 4	At the confluence with Jacks Swamp	+123	Unincorporated Areas of Northampton County.
	Approximately 870 feet upstream of Interstate 95 (Southbound).	+136	
Kirby Creek	At the confluence with Meherrin River	+17	Unincorporated Areas of Northampton County.
	At the confluence of Corduroy Swamp and Rogers Swamp.	+55	
Kirby Creek Tributary 1	At the confluence with Kirby Creek	+19	Unincorporated Areas of Northampton County, Town of Severn.
	Approximately 0.9 mile upstream of NC Highway 35	+60	
Kirby Creek Tributary 1A	At the confluence with Kirby Creek Tributary 1	+43	Unincorporated Areas of Northampton County.
	Approximately 0.6 mile upstream of the confluence with Kirby Creek Tributary 1.	+51	
Kirby Creek Tributary 2	At the confluence with Kirby Creek	+44	Unincorporated Areas of Northampton County, Town of Conway.
	Approximately 1,280 feet upstream of Phillips Hill Road (State Road 1365).	+72	
Kirby Creek Tributary 3	At the confluence with Kirby Creek	+50	Unincorporated Areas of Northampton County.
	Approximately 80 feet downstream of Barnes Loop Road (State Road 1342).	+57	
Kirby Creek Tributary 4	At the confluence with Kirby Creek	+51	Unincorporated Areas of Northampton County.
	Approximately 0.5 mile upstream of Barnes Loop Road (State Road 1342).	+70	
Lees Creek	At the confluence with Roanoke River	+66	Unincorporated Areas of Northampton County, Town of Gaston.
	Approximately 450 feet downstream of Graysburg Road	+85	
Lees Creek Tributary 1	At the confluence with Lees Creek	+69	Unincorporated Areas of Northampton County, Town of Gaston.
	Approximately 250 feet downstream of Graysburg Road	+136	
Lilly Pond Creek	Approximately 1.1 miles upstream of the confluence with Gumberry Swamp.	+47	Unincorporated Areas of Northampton County, Town of Jackson.
	Approximately 1,500 feet upstream of Depot Street	+92	
Meherrin River	At the confluence of Kirby Creek	+17	Unincorporated Areas of Northampton County.
	At the confluence of Fountains Creek	+46	
Occoneechee Creek	Approximately 4.5 miles upstream of the confluence with Roanoke River.	+47	Unincorporated Areas of Northampton County.
	Approximately 1.1 miles upstream of Jackson By-Pass Road (State Route 1311).	+109	
Occoneechee Creek Tributary 1	At the confluence with Occoneechee Creek	+49	Unincorporated Areas of Northampton County.
	Approximately 0.9 mile upstream of the confluence with Occoneechee Creek.	+51	
Occoneechee Creek Tributary 2	At the confluence with Occoneechee Creek	+81	Unincorporated Areas of Northampton County.
	Approximately 2.7 miles upstream of the confluence with Occoneechee Creek.	+97	
Paddys Delight Creek	At the confluence with Potecasi Creek	+50	Unincorporated Areas of Northampton County.
	Approximately 1.1 miles upstream of the confluence of Paddys Delight Creek Tributary 1.	+77	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Paddys Delight Creek Tributary 1.	At the confluence with Paddys Delight Creek	+66	Unincorporated Areas of Northampton County, Town of Conway.
	Approximately 140 feet downstream of Vann Street	+93	
Panther Swamp	At the Northampton/Hertford County boundary	+49	Unincorporated Areas of Northampton County.
	Approximately 1.1 miles upstream of Gilmer Ricks Road (State Road 1543).	+88	
Potecasi Creek	At the Northampton/Hertford County boundary	+36	Unincorporated Areas of Northampton County.
	At the confluences of Ramsey Creek and Wiccacanee Swamp.	+65	
Potecasi Creek Tributary 13	At the confluence with Potecasi Creek	+55	Unincorporated Areas of Northampton County.
	Approximately 0.7 mile upstream of the confluence with Potecasi Creek.	+61	
Potecasi Creek Tributary 14	At the confluence with Potecasi Creek	+57	Unincorporated Areas of Northampton County.
	Approximately 1,360 feet upstream of Lasker Road (State Road 1503).	+71	
Potecasi Creek Tributary 15	At the confluence with Potecasi Creek	+61	Unincorporated Areas of Northampton County.
	Approximately 100 feet downstream of Fire Tower Road (State Road 1500).	+69	
Potecasi Creek Tributary 15A	At the confluence with Potecasi Creek Tributary 15	+63	Unincorporated Areas of Northampton County.
	Approximately 0.5 mile upstream of the confluence with Potecasi Creek Tributary 15.	+73	
Potecasi Creek Tributary 16	At the confluence with Potecasi Creek	+62	Unincorporated Areas of Northampton County.
	Approximately 0.7 mile upstream of the confluence with Potecasi Creek.	+71	
Potecasi Creek Tributary 17	At the confluence with Potecasi Creek	+64	Unincorporated Areas of Northampton County.
	Approximately 0.8 mile upstream of the confluence with Potecasi Creek.	+74	
Potecasi Creek Tributary 9	At the confluence with Potecasi Creek	+44	Unincorporated Areas of Northampton County.
	Approximately 1.9 miles upstream of Ashley Grove Road (State Road 1536).	+68	
Quarter Swamp	At the confluence with Urahaw Swamp	+60	Unincorporated Areas of Northampton County.
	Approximately 1.7 miles upstream of W.J. Duke Service Road (State Road 1121).	+81	
Ramsey Creek	At the confluence with Potecasi Creek	+65	Unincorporated Areas of Northampton County, Town of Jackson.
	Approximately 580 feet downstream of Buck Howell Road (State Road 1316).	+124	
Ramsey Creek Tributary 1	At the confluence with Ramsey Creek	+69	Unincorporated Areas of Northampton County.
	Approximately 40 feet downstream of NC Highway 305	+79	
Reedy Creek	At the confluence with Kirby Creek	+34	Unincorporated Areas of Northampton County.
	Approximately 1,210 feet upstream of U.S. 158 Highway	+55	
Roanoke River	At the Northampton/Bertie/Halifax County boundary	+34	Unincorporated Areas of Northampton County, Town of Gaston.
	At the Northampton/Warren County boundary	+203	
Roanoke River Tributary 12	At the confluence with Roanoke River	+133	Unincorporated Areas of Northampton County.
	Approximately 0.5 mile upstream of NC–46	+196	
Roanoke River Tributary 12A	At the confluence with Roanoke River Tributary 12	+150	Unincorporated Areas of Northampton County.
	Approximately 0.4 mile upstream of Dr. Hall Road (State Route 1218).	+184	
Roanoke River Tributary 14	At the confluence with Roanoke River	+133	Unincorporated Areas of Northampton County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 50 feet downstream of NC–46	+185	
Roanoke River Tributary 14A	At the confluence with Roanoke River Tributary 14	+164	Unincorporated Areas of Northampton County.
	Approximately 0.8 mile upstream of NC–46	+233	
Roanoke River Tributary 7	Approximately 1,500 feet upstream of the confluence with Roanoke River.	+45	Unincorporated Areas of Northampton County.
	Approximately 1.7 mile upstream of the confluence with Roanoke River.	+70	
Roanoke River Tributary 8	At the confluence with Roanoke River	+46	Unincorporated Areas of Northampton County.
	Approximately 1.2 miles upstream of the confluence with Roanoke River.	+69	
Rogers Swamp	At the confluence with Corduroy Swamp and Kirby Creek	+55	Unincorporated Areas of Northampton County.
	Approximately 840 feet upstream of Tower Road (State Road 1341).	+88	
Rogers Swamp Tributary 1	At the confluence with Rogers Swamp	+55	Unincorporated Areas of Northampton County.
	Approximately 0.9 mile upstream of Britton Road (State Road 1337).	+67	
Rogers Swamp Tributary 2	At the confluence with Rogers Swamp	+61	Unincorporated Areas of Northampton County.
	Approximately 0.5 mile upstream of the confluence with Rogers Swamp.	+66	
Rogers Swamp Tributary 3	At the confluence with Rogers Swamp	+67	Unincorporated Areas of Northampton County.
	Approximately 0.7 mile upstream of the confluence with Rogers Swamp.	+80	
Rogers Swamp Tributary 4	At the confluence with Rogers Swamp	+69	Unincorporated Areas of Northampton County.
	Approximately 0.6 mile upstream of the confluence with Rogers Swamp.	+74	
Rogers Swamp Tributary 5	At the confluence with Rogers Swamp	+77	Unincorporated Areas of Northampton County.
	Approximately 0.7 mile upstream of the confluence with Rogers Swamp.	+89	
Sandy Run	At the confluence with Roanoke River	+34	Unincorporated Areas of Northampton County.
	Approximately 0.6 mile upstream of State Highway 308	+60	
Sandy Run Tributary 1	At the confluence with Sandy Run	+37	Unincorporated Areas of Northampton County.
	Approximately 0.7 mile upstream of the confluence with Sandy Run.	+60	
Sandy Run Tributary 3	At the confluence with Sandy Run	+37	Unincorporated Areas of Northampton County.
	Approximately 0.5 mile upstream of the confluence with Sandy Run.	+46	
Trouble Field Creek	At the confluence with Roanoke River	+55	Unincorporated Areas of Northampton County.
	Approximately 1.8 miles upstream of the confluence with Roanoke River.	+61	
Turkey Creek	At the confluence with Kirby Creek	+17	Unincorporated Areas of Northampton County.
	Approximately 1,060 feet upstream of U.S. 158 Highway	+51	
Urahaw Swamp	At the confluence with Potecasi Creek	+43	Unincorporated Areas of Northampton County, Town of Woodland.
	Approximately 1.3 miles upstream of Bryantown Road (State Road 1108).	+66	
Urahaw Swamp Tributary 4	At the confluence with Urahaw Swamp	+57	Unincorporated Areas of Northampton County.
	Approximately 1,300 feet upstream of Dick Harmony Road (State Road 1115).	+63	
Urahaw Swamp Tributary 5	At the confluence with Urahaw Swamp	+64	Unincorporated Areas of Northampton County.
	Approximately 1.0 mile upstream of W.J. Duke Service Road (State Road 1121).	+71	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Wiccacanee Swamp	At the confluence with Potecasi Creek	+65	Unincorporated Areas of Northampton County.
	Approximately 1.2 miles upstream of U.S. Highway 158	+107	
Wiccacanee Swamp Tributary	At the confluence with Wiccacanee Swamp	+69	Unincorporated Areas of Northampton County.
	Approximately 0.6 mile upstream of the confluence with Wiccacanee Swamp.	+75	
Wildcat Swamp	At the confluence with Potecasi Creek	+54	Unincorporated Areas of Northampton County.
	Approximately 160 feet downstream of U.S. Highway 158	+118	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

Town of Conway
Maps are available for inspection at Conway Town Hall, 221 West Main Street, Conway, North Carolina.

Town of Gaston
Maps available for inspection at the Gaston Town Hall, 223 Craig Street, Gaston, North Carolina.

Town of Jackson
Maps are available for inspection at Jackson Town Hall, 100 East Jefferson Street, Jackson, North Carolina.

Town of Lasker
Maps are available for inspection at Lasker Town Hall, 203A West Church Street, Lasker, North Carolina.

Town of Severn
Maps are available for inspection at Severn Town Hall, 314 Main Street, Severn, North Carolina.

Town of Woodland
Maps are available for inspection at Woodland Town Hall, 300 Spruce Street, Woodland, North Carolina.

Unincorporated Areas of Northampton County
Maps are available for inspection at Northampton County Office, 108 West Jefferson Street, Jackson, North Carolina.

Adams County, Pennsylvania, and Incorporated Areas
FEMA Docket No.: B–7755

Bermudian Creek	At approximately 1,600 feet downstream of Oxford Road LR–01004.	+612	Township of Tyrone.
	At approximately 175 feet upstream of Cranberry Road LR–010011.	+640	
Little Marsh Creek	At approximately 735 feet downstream of Berry Patch Lane.	+644	Township of Franklin.
	At approximately 935 feet upstream of Hickory Bridge Road TR–315.	+702	
Marsh Creek	At approximately 700 feet upstream of Pumping Station Road.	+467	Township of Cumberland.
	At approximately 1,725 feet downstream of the confluence with Little Marsh Creek.	+498	
Toms Creek	At approximately 3,200 feet upstream of Jacks Mountain Road.	+630	Township of Hamiltonban.
	At approximately 3,500 feet upstream of Jacks Mountain Road.	+635	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

Township of Cumberland
Maps are available for inspection at 1370 Fairfield Road, Gettysburg, PA 17325.

Township of Franklin
Maps are available for inspection at 55 Scott School Road, Cashtown, PA 17353.

Township of Hamiltonban
Maps are available for inspection at 23 Carroll's Tract Road, Fairfield, PA 17320.

Township of Tyrone
Maps are available for inspection at 5280 Old Harrisburg Road, York Springs, PA 17372.

Waller County, Texas, and Incorporated Areas
FEMA Docket No.: B–7724

Cane Island Branch	Intersection with U.S. 190	+137	City of Katy.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
	Approximately 535 feet upstream of Clay Road intersection.	+158	
Cypress Creek	Intersection with private road contiguous with county line	+170	Waller County (Unincorporated Areas).
	Confluence with Mound Creek	+185	
East Fork Mound Creek	Confluence with Mound Creek	+221	City of Waller.
	200 feet upstream of Taylor intersection	+249	Waller County (Unincorporated Areas).
Mound Creek	Approximately 1,800 feet downstream from confluence with Tributary 7.62 of Mound Creek.	+217	City of Waller.
	Approximately 1,000 feet upstream of confluence with Tributary 7.62 of Mound Creek.	+219	
Spring Creek	3,800 feet downstream of intersection with Nichols Rd	+202	City of Waller.
	850 feet upstream of 1736 intersection	+291	
Tributary 7.62 of Mound Creek	Confluence with Mound Creek	+218	Waller County (Unincorporated Areas).
	Approximately 4,000 feet upstream of confluence with Mound Creek.	+224	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

City of Katy
Maps are available for inspection at 910 Avenue C, Katy, TX 77493.

City of Waller
Maps are available for inspection at PO Box 239, Waller, TX 77484.

Waller County (Unincorporated Areas)
Maps are available for inspection at 775 Business 290 East, Hempstead, TX 77445.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Effective Modified	Communities affected
Grant County, Washington, and Incorporated Areas FEMA Docket No.: B–7755			
Crab Creek	Just above BNSF Railroad Bridge 338	+1277	Town of Wilson Creek, Unincorporated Areas of Grant County.
	Approximately 1,300 feet upstream of Kappel Road Bridge.	+1283	
Wilson Creek	At confluence with Crab Creek	+1283	Town of Wilson Creek, Unincorporated Areas of Grant County.
	At eastern corporate limits of the Town of Wilson Creek.	+1301	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

Town of Wilson Creek
Maps are available for inspection at 254 Railroad Street, Wilson Creek, WA 98860.

Unincorporated Areas of Grant County
Maps are available for inspection at 124 Enterprise Street SE, Ephrata, WA 98823.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground Modified	Communities affected
Eau Claire County, Wisconsin, and Incorporated Areas FEMA Docket No.: B–7726			
Chippewa River	Approximately 1,800 feet upstream of county boundary	+762	Eau Claire County (Unincorporated Areas).
	Approximately 800 feet downstream of Interstate Highway 94.	+772	
Sherman Creek	Approximately 1,500 feet upstream of the confluence with the Chippewa River.	+777	City of Eau Claire, Eau Claire County (Unincorporated Areas).
	Approximately 1,800 feet downstream of U.S. Highway 12	+888	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

ADDRESSES

City of Eau Claire
Maps are available for inspection at City of Eau Claire, City Hall, 203 South Farwell Street, Eau Claire, WI 54702–5148.

Eau Claire County (Unincorporated Areas)
Maps are available for inspection at Eau Claire County Courthouse, 721 Oxford Avenue, Eau Claire, WI 54703–5481.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: August 26, 2008.

Michael K. Buckley,

Deputy Assistant Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E8–20824 Filed 9–9–08; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 071212833–8179–02]

RIN 0648–XK04

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Commercial Quota Harvested for Massachusetts

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

ACTION: Closure of commercial fishery.

SUMMARY: NMFS announces that the Atlantic bluefish commercial quota available to Massachusetts has been harvested. Vessels issued a commercial Federal fisheries permit for the Atlantic bluefish fishery may not land bluefish in Massachusetts for the remainder of calendar year 2008, unless additional quota becomes available through a transfer. Regulations governing the Atlantic bluefish fishery require publication of this notification to advise Massachusetts that the quota has been harvested and to advise vessel permit holders and dealer permit holders that no commercial quota is available for landing bluefish in Massachusetts.

DATES: Effective 0001 hours, September 10, 2008, through 2400 hours, December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Emily Bryant, Fishery Management Specialist, (978) 281–9244.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic bluefish fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned on a percentage basis among the coastal states from Florida through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.160.

The initial Federal coastwide commercial quota for Atlantic bluefish for the 2008 calendar year was set equal to 4,787,000 lb (2,171 mt) (73 FR 9958, February 25, 2008). The initial commercial quota was adjusted by transferring 2,918,693 lb (1,324 mt) from the initial recreational allocation, resulting in a total commercial quota of 7,705,244 lb (3,495 mt). The percent allocated to vessels landing bluefish in Massachusetts is 6.7167 percent, resulting in an initial commercial quota of 517,538 lb (235 mt). The 2008 allocation was reduced to 516,619 lb (234 mt) (73 FR 9958, February 25, 2008) due to 2008 research set-aside quota allocation.

The regulations at § 648.161(b) require the Administrator, Northeast Region, NMFS (Regional Administrator), to monitor state commercial quotas and to determine when a state's commercial quota has been harvested. NMFS then publishes a notification in the **Federal Register** to advise the state and to notify Federal vessel and dealer permit holders that, effective upon a specific date, the state's commercial quota has been harvested and no commercial quota is available for landing bluefish in that state. The Regional Administrator has determined, based upon dealer reports and other available information, that Massachusetts has harvested its quota for calendar year 2008.

The regulations at § 648.4(b) provide that Federal permit holders agree, as a condition of the permit, not to land bluefish in any state that the Regional Administrator has determined no longer has commercial quota available. Therefore, effective 0001 hours, September 10, 2008, further landings of bluefish in Massachusetts by vessels holding Atlantic bluefish commercial Federal fisheries permits are prohibited for the remainder of the 2008 calendar year, unless additional quota becomes available through a transfer and is announced in the **Federal Register**. Effective 0001 hours, September 10, 2008, federally permitted dealers are also notified that they may not purchase bluefish from federally permitted

vessels that land in Massachusetts for the remainder of the calendar year, or until additional quota becomes available through a transfer.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 4, 2008.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–20996 Filed 9–5–08; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 080627793–81063–02]

RIN 0648–AW81

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Monkfish Fishery; Framework Adjustment 6 to the Monkfish Fishery Management Plan

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

ACTION: Final rule.

SUMMARY: NMFS approves and implements new management measures for the monkfish fishery recommended in Framework Adjustment 6 (Framework 6) to the Monkfish Fishery Management Plan (FMP), which has been submitted jointly by the New England (NEFMC) and Mid-Atlantic Fishery Management Councils (Councils). This action eliminates the backstop provision adopted in Framework Adjustment 4 (Framework 4) to the FMP, which was implemented in October 2007. This provision would have adjusted, and possibly closed, the directed monkfish fishery in fishing year (FY) 2009 if the landings in FY 2007 exceeded the target total allowable catch (TTAC) by more than 30 percent. Given that both stocks are rebuilt according to the most recent assessment, the backstop provision is no longer deemed necessary.

DATES: This rule is effective October 10, 2008.

ADDRESSES: Copies of the Environmental Assessment (EA), including the Regulatory Impact Review (RIR) and Initial Regulatory Flexibility Analysis (IRFA), prepared for Framework 6 are available upon request from Paul Howard, Executive Director, NEFMC, 50 Water Street, Newburyport, MA, 01950. The document is also available online at *www.nefmc.org*. NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), which is contained in the Classification section of this rule. The FRFA consists of the IRFA, public comments and responses contained in this final rule, and a summary of impacts and alternatives contained in this final rule. The small entity compliance guide is available from Patricia A. Kurkul, Regional Administrator, Northeast Regional Office, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930 2298, and on the Northeast Regional Office's website at *http://www.nero.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Emily Bryant, Fishery Management Specialist, phone (978) 281–9244, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

The monkfish fishery is jointly managed by the Councils, with the NEFMC having the administrative lead. The fishery extends from Maine to North Carolina, and is divided into two management units: The Northern Fishery Management Area (NFMA) and the Southern Fishery Management Area (SFMA).

Framework 6 eliminates the backstop provision adopted in Framework 4. This backstop provision would have adjusted, and possibly closed, the directed monkfish fishery in 2009 if the landings in FY 2007 exceeded the TTAC by more than 30 percent. When Framework 4 was implemented, the biological reference points indicated that monkfish stocks were overfished and overfishing was occurring. In July 2007, the Northeast Data Poor Stocks Working Group (DPWG) completed and accepted a new stock assessment that indicated neither stock is overfished, overfishing is no longer occurring, and both stocks are rebuilt based on a new modeling approach and newly recommended biomass reference points. Framework Adjustment 5, implemented in May 2008, adopted the revised reference points recommended by the DPWG and implemented other measures that will reduce the likelihood of TTAC overages in FY 2008 and beyond. Therefore, a stock rebuilding program for the monkfish fishery is no longer necessary, nor is the backstop provision. For a complete discussion of Framework 6, refer to the preamble of the proposed rule for this action (73 FR 39643; July 10, 2008).

Technical Change to Monkfish FMP Regulations

This rule would have corrected the regulations implementing the FMP, but the regulatory text for the backstop provision has already been removed from the regulations. The final rule implementing the Standardized Bycatch Recording Methodology (SBRM) Omnibus Amendment (73 FR 4736, January 28, 2008) inadvertently revised § 648.96(b)(5) by deleting the majority of regulations pertaining to the backstop provision introduced by Framework 4. In addition, the SBRM adjustment to the monkfish regulations added text referencing the annual review process at § 648.96(b)(5), which is now redundant with the existing text under § 648.96(a). Therefore, this action codifies the prior inadvertent removal of the backstop regulations and removes the redundant text under § 648.96(b)(5) referencing the annual review process. This action also adjusts § 648.96(b)(6) for the purpose of removing the only remaining reference to the TTAC overage backstop provision that was added through the final rule implementing Framework 4.

Comments and Responses

The public comment period on the proposed rule ended on August 11, 2008, with three comments received from private individuals and one comment from the State of Maine Department of Marine Resources.

Comment 1: One commenter generally opposed the removal of the backstop provision but did not provide any specific comments that are relevant to this action.

Response: There is no scientific or legal basis for the commenter's statements as monkfish are not currently subject to overfishing, nor in an overfished condition, based on the best scientific information available. Additionally, since both stocks are rebuilt, there is no longer a stock rebuilding program for monkfish. As such, the backstop provision is no longer necessary.

Comment 2: One commenter supported the removal of the backstop provision, mentioning the economic impact on monkfish fishermen if the provision were retained.

Response: NMFS acknowledges the commenter's support of this measure and is aware of the economic impacts that would occur if the backstop provision had been implemented.

Comment 3: Two commenters supported the removal of the backstop provision because of the new stock assessment model results.

Response: NMFS acknowledges the commenters' support of this measure and agrees that this measure is no longer necessary, given current monkfish stock status.

Classification

The Administrator, Northeast Region, NMFS, determined that Framework 6 is necessary for the conservation and management of the monkfish fishery and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The FRFA prepared pursuant to 5 U.S.C. 604(a) is included in this final rule. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS's responses to those comments, and a summary of the analyses completed to support the action. The preamble to the proposed rule included a detailed summary of the analyses contained in the IRFA, and that discussion is not repeated here. A copy of the EA/RIR/IRFA is available from the Council (see **ADDRESSES**).

Final Regulatory Flexibility Analysis

Statement of Objective and Need

A description of the reasons why this action is being taken, and the objectives of and legal basis for this final rule are contained in the preambles to the proposed rule and this final rule and are not repeated here.

Summary of Significant Issues Raised in Public Comments

Four comments were submitted on the proposed rule, but none were specific to the IRFA. However, one commenter mentioned the economic effects of the rule. NMFS has responded to this comment in the Comments and Responses section of the preamble to this final rule. No changes were made to the final rule as a result of that comment, which supported the rule.

Description and Estimate of Number of Small Entities to Which the Rule will Apply

The Small Business Administration (SBA) defines small businesses in the commercial fishing and recreational fishing sectors as firms with receipts (gross revenues) of up to $4.0 million and $6.5 million, respectively. No large entities participate in this fishery, as defined in section 601 of the RFA. Therefore, there are no disproportionate impacts between large and small entities. This action would only affect limited access monkfish vessels that fish in the SFMA. As of March 14, 2008, there were 765 limited access monkfish permits. Based on FY 2006 Vessel Trip Report records, 462 limited access permit holders fished in the SFMA.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

No additional reporting, recordkeeping, or other compliance requirements are included in this final rule. This rule does not duplicate, overlap, or conflict with other Federal rules.

Description of the Steps Taken to Minimize Economic Impact on Small Entities

The backstop provision was implemented when there were concerns regarding potential overfishing of monkfish as the FMP neared the end of its rebuilding period. Changes in the biological reference points under Framework 5 showed that monkfish are no longer overfished, and overfishing is not occurring. In addition, current population modeling indicates that TTAC overage levels of 30 percent would not change the monkfish stock status. In the absence of this action, the directed monkfish fishery would close in the SFMA in FY 2009, based upon landings in FY 2007 indicating that the TTAC for this area was exceeded by 41 percent. Retaining the existing effort reduction measures for FY 2009, under the no action alternative, would have a negative economic impact on small entities, without materially aiding in the rebuilding of the stock. Conversely, under this action, restrictions on effort will not be required in FY 2009, thus avoiding a negative economic impact on small entities participating in the fishery. No other alternatives were considered because the purpose of the action is to remove a measure deemed unnecessary based upon best scientific information available. Using a trip model, it wasestimated that the proposed measure would result in positive or neutral changes in vessel net revenues, crew payments, and monkfish revenues in FY 2009, compared to taking no action, depending on whether or not a vessel fished in the SFMA. An approximate increase of 380 percent in monkfish net revenues was estimated for vessels that fish exclusively in the SFMA. Thus, the proposed action minimizes the economic impacts to small entities by implementing a measure that would avoid any unneccessary economic effects.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of Federal limited access permits issued for the monkfish fishery. In addition, copies of this final rule and guide (i.e., permit holder letter) are available from NMFS (see **ADDRESSES**) and at the following website: *http://www.nero.noaa.gov*.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: September 4, 2008.

Samuel D. Rauch III,

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

■ For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 648.96, paragraph (b)(5) is removed and reserved, and paragraph (b)(6) is revised to read as follows:

§ 648.96 Monkfish annual adjustment process and framework specifications.

* * * * *

(b) * * *

(6) *Management measures for FY 2010 and beyond.* If a regulatory action is not implemented to establish management measures for the monkfish fishery for FY 2010 or subsequent years, the management measures in effect during FY 2009 (i.e., trip limits and DAS allocations) shall remain in effect.

* * * * *

[FR Doc. E8–21019 Filed 9–9–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106671–8010–02]

RIN 0648–XK32

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 620 in the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in Statistical Area 620 in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the C season allowance of the 2008 total allowable catch (TAC) of pollock for Statistical Area 620 in the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 6, 2008, through 1200 hrs, A.l.t., October 1, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The C season allowance of the 2008 TAC of pollock in Statistical Area 620 of the GOA is 2,695 metric tons (mt) as established by the 2008 and 2009 harvest specifications for groundfish of the GOA (73 FR 10562, February 27, 2008). In accordance with § 679.20(a)(5)(iv)(B) the Administrator, Alaska Region, NMFS (Regional Administrator), hereby decreases the C season pollock allowance by 1,998 mt, the amount of the B season allowance of the pollock TAC that was exceeded in Statistical Area 620. Therefore, the revised C season allowance of the pollock TAC in Statistical Area 620 is 697 mt (2,695 mt minus 1,998 mt).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the C season allowance of the 2008 TAC of pollock in Statistical Area 620 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 637 mt, and is setting aside the remaining 60 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 620 of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of pollock in Statistical Area 620 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 4, 2008.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 5, 2008.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–20994 Filed 9–5–08; 4:15 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 73, No. 176
Wednesday, September 10, 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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0137]

Airspace Docket No. 08–AWP–2 Proposed Establishment of Class E Airspace; Death Valley, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to establish Class E airspace at Death Valley, CA. Controlled airspace is necessary to facilitate vectoring of Instrument Flight Rules (IFR) traffic from en route airspace to Las Vegas, NV. The FAA is proposing this action to enhance the safety and management of IFR aircraft operations near Las Vegas, NV.

DATES: Comments must be received on or before October 27, 2008.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone (202) 366–9826. You must identify FAA Docket No. FAA–2008–0137; Airspace Docket No. 08–AWP–2, at the beginning of your comments. You may also submit comments through the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Richard Roberts, Federal Aviation Administration, Western Service Area, Operations Support Group, 1601 Lind Avenue, SW., Renton, WA 98057; telephone (425) 203–4517.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2008–0137 and Airspace Docket No. 08–AWP–2) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://dms.dot.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2008–0137 and Airspace Docket No. 08–AWP–2''. The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the **Federal Register's** Web page at *http://www.gpoaccess.gov/fr/index.html.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Area, Operations Support Group, 1601 Lind Avenue, SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to establish controlled airspace at Death Valley, CA. This action would enhance the safety and management of IFR aircraft operations by vectoring IFR aircraft from en route airspace to Las Vegas, NV.

Class E airspace designations are published in paragraph 6006 of FAA Order 7400.9R, signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

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

The FAAs authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for 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 I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use

of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish controlled airspace at Death Valley, CA.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

1. The authority citation for 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 the FAA Order 7400.9R, Airspace Designations and Reporting Points, signed August 15, 2007, and effective September 15, 2007 is amended as follows:

Paragraph 6006 En route domestic airspace areas.

* * * * *

AWP CA E6 Death Valley, CA [New]

Clarr Intersection

(Lat. 35°40′08″ N., long. 115°40′19″ W.)

That area extending upward from 1,200 feet above the surface within an area beginning at lat. 36°51′00″ N., long. 116°33′33″ W; thence northwest to lat. 36°56′33″ N., long. 117°11′21″ W; thence southeast to lat. 35°15′25″ N., long. 116°13′00″ W; thence northeast along VOR Federal Airway V–394 to the Clarr Intersection; thence northwest along VOR Federal Airway V–135 to lat. 36°27′39″ N., long. 116°26′33″ W; thence north to lat. 36°46′00″ N., long. 116°26′33″ W.; thence to the point of origin.

* * * * *

Issued in Seattle, Washington, on August 26, 2008.

Kevin Nolan,

Acting Manager, Operations Support Group, Western Service Area.

[FR Doc. E8–20985 Filed 9–9–08; 8:45 am]

BILLING CODE 4910–13–P

Notices

Federal Register
Vol. 73, No. 176
Wednesday, September 10, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Privacy Act of 1974, System of Records

AGENCY: United States Agency for International Development.

ACTION: Notice of new system of records.

SUMMARY: The United States Agency for International Development (USAID) is issuing public notice of its intent to establish a new system of records maintained in accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended, entitled ''USAID–028, Personnel Locator Systems.'' This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of record systems maintained by the agency (5 U.S.C. 522a(e)(4)).

DATES: Public comments must be received on or before October 10, 2008. Unless comments are received that would require a revision, this update to the system of records will become effective on October 20, 2008.

ADDRESSES: You may submit comments:

Paper Comments

- *Fax:* (703) 666–1466.
- *Mail:* Chief Privacy Officer, United States Agency for International Development, 1300 Pennsylvania Avenue, NW., Suite 2.12–003, Washington, DC 20523–2120.

Electronic Comments

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions on the Web site for submitting comments.
- *E-mail: privacy@usaid.gov*.

FOR FURTHER INFORMATION CONTACT: For general questions please contact, Rhonda Turnbow, Deputy Chief Privacy Officer (202) 712–0106.

SUPPLEMENTARY INFORMATION: The Personnel Locator System is being established as an Agency-wide system of record to cover all USAID locator systems. USAID Offices, Bureaus, Missions, or Teams, that desire to collect, maintain or store personnel data under the scope of this system of record will be required to undergo a compliance review and register their system with the USAID Privacy Office.

The system is being established to collect and maintain USAID organizational information, emergency contact information and professional biographical information. The Personnel Locator System will enable USAID to quickly access information required to reach individuals in the event of an urgent situation, conduct continuity of operations planning exercises, and identify individuals with specialized areas of expertise to facilitate professional contacts.

Dated: August 21, 2008.

W. Philip Gordon, Jr.,

Acting Chief Privacy Officer.

USAID–028

SYSTEM NAME:

USAID Personnel Locator System.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION(S):

Records are maintained at USAID, 1300 Pennsylvania Avenue, NW., Ronald Reagan Building Suite 2.12, Washington, DC 20523.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records of current employees, contractors, consultants, and partners.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains USAID organizational information, emergency contact information and professional biographical information. Categories of records include: full name, title, USAID organizational address, building name, room number, bureau, region, mission, country, office telephone numbers, office fax numbers, office e-mail address, employment mechanism, home address, home phone number, alternate phone number, emergency contact name, emergency contact phone number, emergency contact alternate number, program areas of expertise, foreign language skills, professional affiliations, professional certifications, photograph, regional or country-based experience, operational experience and educational experience.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301.

PURPOSE(S):

Records in this system will be used:

(1) To develop and maintain current agency personnel locator and professional directory listings,

(2) To identify and notify individuals employed by USAID when an emergency which occurs after hours requires that he/she report or not report for duty,

(3) To maintain and implement emergency plans, including continuity of operations and facility evacuation plans,

(4) To notify, locate and mobilize individuals as necessary during emergency or other threatening situations,

(5) To notify the designated emergency contact in case of a medical or other emergency event involving an individual,

(6) To identify colleagues by areas of expertise to facilitate mentoring activities with new Foreign Service Officers, and

(7) To identify colleagues with specialized knowledge and/or expertise to participate in collaborative efforts.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

These records are not disclosed to consumer reporting agencies.

ROUTINE USE OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to USAID's Statement of Routine uses, records in this system may be disclosed to any Federal Agency, Foreign Government or other entity participating in emergency response activities or providing assistance to USAID with an evacuation, medical emergency, or any other crisis situation.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored in electronic and paper format.

RETRIEVABILITY:

Records are retrievable by name, location or any other identifier listed in the categories of records cited above.

SAFEGUARDS:

Access to paper records will be provided to those individuals who require hard copy documents in the performance of their duties. Access to electronic records will be restricted to those individuals with a need to know.

RETENTION AND DISPOSAL:

Records will be updated periodically to reflect changes and deleted or destroyed when their use is no longer required.

SYSTEM MANAGER AND ADDRESS:

USAID, Chief Information Officer, 1300 Pennsylvania Ave., NW., RRB Suite 2.12, Washington, DC 20253.

NOTIFICATION PROCEDURES:

Individuals requesting notification of the existence of records on them must send the request in writing to the USAID Chief Privacy Officer, 1300 Pennsylvania Ave., NW., RRB. Suite 2.12–003, Washington, DC 20253. The request must include the requestor's full name, his/her current address and a return address for transmitting the information. The request shall be signed by either notarized signature or by signature under penalty of perjury and reasonably specify the record contents being sought.

RECORD ACCESS PROCEDURES:

Individuals requesting access to a record maintained on them must address the request to the USAID Chief Privacy Officer as described in ''Notification Procedures'' above.

CONTESTING RECORD PROCEDURES:

Individuals requesting amendment of a record maintained on them must identify the information to be changed and the corrective action sought. Requests must be sent to the USAID Chief Privacy Officer as described in ''Notification Procedures'' above.

RECORD SOURCE CATEGORIES:

Whenever possible, the records contained in this system will be provided by and updated by the individual who is the subject of the record. Additional sources may include the supervisor of the individual, human resources personnel, or other designated agency personnel.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–20988 Filed 9–9–08; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Privacy Act of 1974; Abolish Obsolete System of Records

AGENCY: Office of the Secretary, Department of Agriculture (USDA).

ACTION: Notice of abolishment for USDA/FS–51 Electronic Corpsmember Information System (ELCID).

SUMMARY: A review of this Privacy Act System of Records has concluded that this system is no longer in effect and obsolete. This system is being abolished from the Forest Service System of Records in accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This notice is effective on September 10, 2008.

ADDRESSES: For additional information contact the Director of Recreation and Heritage Resources, 1400 Independence Avenue, SW., Mailstop 1136, Washington, DC 20250–1136.

FOR FURTHER INFORMATION CONTACT: Bob Gonzales, *telephone:* (303) 236–9914.

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974 (5 U.S.C. 552a), as amended, requires that each agency publish a notice of the existence and character of each new or altered ''system of records.'' 5 U.S.C. 552a(a)(5). This notice identifies and abolishes a Forest Service discontinued and obsolete system of records. The Forest Service is abolishing the following system of records which, upon review, is no longer used and is obsolete: USDA/FS–51 ELCID. The records have been transferred to the Federal Records Center and destroyed according to the Federal Records Disposal Act of 1943 (44 U.S.C. 366–380) and the Federal Records Act of 1950, and as designated in the Forest Service Records Management Handbook (FSH) 6209.11.

Dated: August 27, 2008.

Edward T. Schafer,

Secretary.

[FR Doc. E8–21003 Filed 9–9–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Meeting; Federal Lands Recreation Enhancement Act, (Title VIII, Pub. L. 108–447)

AGENCY: USDA Forest Service.

ACTION: Notice of Meeting.

SUMMARY: The Eastern Region Recreation Resource Advisory Committee will hold its fourth meeting at the Crowne Plaza, 5700 E. 28th St. SE., Grand Rapids, MI, on October 8, 2008. The purpose of the meeting is to receive recommendations concerning recreation fee proposals on areas managed by the Forest Service in Maine, New Hampshire, Vermont, New York, Pennsylvania, West Virginia, Ohio, Indiana, Illinois, Missouri, Minnesota, Michigan and Wisconsin; and to discuss other items of interest related to the Federal Lands Recreation Enhancement Act of 2004.

A final detailed agenda, with any additions/corrections to agenda topics, location, field trips and meeting times, will be sent to regional media sources at least 14 days before the meeting, and hard copies can also be mailed or sent via FAX. Individuals who need special assistance such as sign language interpretation or other reasonable accommodations, or who wish a hard copy of the agenda, should contact Marcia Heymen at 414–297–3662 (voice) or 414–944–3969 (TTY/TDD) two weeks prior to the meeting.

DATES: The meeting will be held October 8, 2008.

ADDRESSES: Crowne Plaza, 5700 E. 28th St. SE., Grand Rapids, MI

FOR FURTHER INFORMATION, CONTACT: Cheryl Chatham, Designated Federal Official, U.S. Forest Service, P.O. Box 1270, Hot Springs, AR 71902.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members. However, persons who wish to bring recreation fee matters to the attention of the Committee may file written statements with the Committee staff before the meeting. A public input session will be provided and individuals who make written requests by October 1, 2008, will have the opportunity to address the Committee at the meeting. Send written comments to Cheryl Chatham, Designated Federal Official for the Southern Recreation RAC, U.S. Forest Service, P.O. Box 1270, Hot Springs, AR 71902.

The Recreation RAC is authorized by the Federal Land Recreation Enhancement Act, which was signed into law by President Bush in December 2004.

Dated: September 3, 2008.

Cheryl G. Chatham,

Designated Federal Officer, Southern Region.

[FR Doc. E8–20885 Filed 9–9–08; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and Opportunity for Public Comment.

Pursuant to Section 251 of the Trade Act of 1974 (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. EDA has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION OF ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE, 8/1/2008 THROUGH 8/31/2008

Firm	Address	Date accepted for filing	Products
Design Plastics, Inc	3550 Keystone Drive, Omaha, NE 68134.	8/27/2008	Parts for transportation industry.
Oak Canyon Manufacturing, Inc	3021 N. 29th Dr., Phoenix, AZ 85017–5504.	8/28/2008	Wood bookcases, entertainment centers, home office furniture, and some wood non-home office furniture.
Rehab Plus Therapeutic Products dba: RPS.	726 Donald Preston Dr., Wolfforth, TX 79382.	8/27/2008	Fire and chemical protective apparel and safety head gear.
DRW Machines, Inc	835 Monty, Shreveport, LA 71107	8/28/2008	Safety and relief valves and casing heads.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Office of Performance Evaluation, Room 7009, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice. Please follow the procedures set forth in Section 315.9 of EDA's final rule (71 FR 56704) for procedures for requesting a public hearing. The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance.

Dated: September 4, 2008.

William P. Kittredge,

Program Officer for TAA.

[FR Doc. E8–20976 Filed 9–9–08; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–821–819]

Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On May 5, 2008, the Department of Commerce published the preliminary results of the administrative review of the antidumping duty order on magnesium metal from the Russian Federation. The review covers two manufacturers/exporters, PSC VSMPO–AVISMA Corporation (AVISMA) and Solikamsk Magnesium Works (SMW). The period of review is April 1, 2006, through March 31, 2007.

Based on our analysis of the comments received we have made changes in the margin calculations for AVISMA. Therefore, the final results differ from the preliminary results. The final weighted–average dumping margins for the reviewed firms are listed below in the section entitled ''Final Results of the Review.''

EFFECTIVE DATE: September 10, 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 May 5, 2008, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on magnesium metal from the Russian Federation. See *Magnesium Metal from the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 24541 (May 5, 2008) (Preliminary Results).

We invited interested parties to comment on the preliminary results. At the request of certain parties, we held a hearing on July 23, 2008. The Department has conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of Order

The merchandise covered by the order is magnesium metal (also referred to as magnesium), which includes primary and secondary pure and alloy magnesium metal, regardless of chemistry, raw material source, form, shape, or size. Magnesium is a metal or alloy containing by weight primarily the element magnesium. Primary magnesium is produced by decomposing raw materials into magnesium metal. Secondary magnesium is produced by recycling magnesium–based scrap into magnesium metal. The magnesium covered by the order includes blends of primary and secondary magnesium.

The subject merchandise includes the following pure and alloy magnesium metal products made from primary and/or secondary magnesium, including, without limitation, magnesium cast into ingots, slabs, rounds, billets, and other shapes, and magnesium ground, chipped, crushed, or machined into raspings, granules, turnings, chips, powder, briquettes, and other shapes: (1) products that contain at least 99.95 percent magnesium, by weight

(generally referred to as ''ultra–pure'' magnesium); (2) products that contain less than 99.95 percent but not less than 99.8 percent magnesium, by weight (generally referred to as ''pure'' magnesium); and (3) chemical combinations of magnesium and other material(s) in which the magnesium content is 50 percent or greater, but less that 99.8 percent, by weight, whether or not conforming to an ''ASTM Specification for Magnesium Alloy''.

The scope of the order excludes: (1) magnesium that is in liquid or molten form; and (2) mixtures containing 90 percent or less magnesium in granular or powder form by weight and one or more of certain non–magnesium granular materials to make magnesium–based reagent mixtures, including lime, calcium metal, calcium silicon, calcium carbide, calcium carbonate, carbon, slag coagulants, fluorspar, nephaline syenite, feldspar, alumina (Al203), calcium aluminate, soda ash, hydrocarbons, graphite, coke, silicon, rare earth metals/mischmetal, cryolite, silica/fly ash, magnesium oxide, periclase, ferroalloys, dolomite lime, and colemanite.[1]

The merchandise subject to the order is currently classifiable under items 8104.11.00, 8104.19.00, 8104.30.00, and 8104.90.00 of the *Harmonized Tariff Schedule of the United States (HTSUS)*. Although the HTSUS item numbers are provided for convenience and customs purposes, the written description of the merchandise covered by the order is dispositive.

On November 9, 2006, in response to U.S. Magnesium Corporation LLC's request for scope rulings, the Department issued final scope rulings in which it determined that the processing of pure magnesium ingots imported from Russia by Timminco, a Canadian company, into pure magnesium extrusion billets constitutes substantial transformation. Therefore, such alloy magnesium extrusion billets produced and exported by Timminco are a product of Canada and thus are not within the scope of the order. *See* November 9, 2006, Memorandum for Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, from Barbara E. Tillman, Director, Office 6, and Wendy Frankel, Director, Office 8, China/NME Group, AD/CVD Operations: Pure Magnesium from the People's Republic of China (A–570–832), Magnesium Metal from the People's Republic of China (A–570–896), and Magnesium Metal from Russia (A–821–819): Final Ruling in the Scope Inquiry on Russian and Chinese Magnesium Processed in Canada.

[1] This second exclusion for magnesium–based reagent mixtures is based on the exclusion for reagent mixtures in the 2000–2001 investigations of magnesium from China, Israel, and Russia. See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular Form From the People's Republic of China, 66 FR 49345 (September 27, 2001); Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Israel, 66 FR 49349 (September 27, 2001); Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation, 66 FR 49347 (September 27, 2001). These mixtures are not magnesium alloys, because they are not chemically combined in liquid form and cast into the same ingot.

Analysis of the Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review of the order on magnesium metal from the Russian Federation are addressed in the ''Issues and Decision Memorandum'' from Stephen J. Claeys, Deputy Assistant Secretary, to David M. Spooner, Assistant Secretary, dated September 2, 2008 (Decision Memo), which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded is in the Decision Memo and attached to this notice as an Appendix. The Decision Memo, which is a public document, is on file in the Central Records Unit, main Department of Commerce building, Room 1117, and is accessible on the Web at http://ia.ita.doc.gov/frn/index.html. The paper copy and electronic version of the Decision Memo are identical in content.

Use of Adverse Facts Available

For the final results, we continue to find that, by failing to provide information we requested, SMW did not act to the best of its ability in responding to our questionnaire. Thus, the Department continues to find that the use of adverse facts available is warranted for SMW under sections 776 (a)(2) and (b) of the Act. See *Preliminary Results*, 73 FR at 24542. As we explained in the *Preliminary Results*, the rate of 21.71 percent selected as the adverse facts–available rate for SMW is the highest rate on the record of the proceeding that we are able to corroborate in accordance with section 776 (c) of the Act. *Id*; see also the accompanying Decision Memo at Comment 8.

Sales Below Cost in the Home Market

As discussed in the *Preliminary Results*, we conducted an investigation to determine whether AVISMA made home–market sales of the foreign like product during the POR at prices below their costs of production (COP) within the meaning of section 773(b) of the Act. See *Preliminary Results*, 73 FR at 24544. For these final results, we performed the cost test following the same methodology as in the *Preliminary Results*.

We found that 20 percent or more of AVISMA's sales of a given product during the POR were at prices less than the weighted–average COP for this period. Thus, we determined that these below–cost sales were made in ''substantial quantities'' within an extended period of time and at prices which did not permit the recovery of all costs within a reasonable period of time in the normal course of trade. See sections 773(b)(1) and (2) of the Act.

Therefore, for purposes of these final results, we found that AVISMA made below–cost sales not in the ordinary course of trade. Consequently, we disregarded these sales for AVISMA and used the remaining sales as the basis for determining normal value pursuant to section 773(b)(1) of the Act.

Changes Since the Preliminary Results

Based on our analysis of comments received and based on our own analysis of the preliminary results, we have made revisions that have changed the results for AVISMA. These changes are discussed in the Decision Memo.

Final Results of the Review

We determine that the following percentage weighted–average margins on magnesium metal exist for the period April 1, 2006, through March 31, 2007:

Manufacturer/Exporter	Margin (percent)
PSC VSMPO–AVISMA Corporation	15.77
Solikamsk Magnesium Works	21.71

Assessment Rates

The Department will determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries. We intend to issue appropriate assessment instructions directly to CBP 15 days after publication of these final results of review. In accordance with 19 CFR 351.212(b)(1), we have calculated an importer–specific assessment rate for subject merchandise produced and exported by AVISMA by dividing the total dumping duties due by the entered value of sales we analyzed.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003) (*Assessment of Antidumping Duties*). This clarification will apply to entries of subject

merchandise during the period of review produced by AVISMA and for which AVISMA did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate un–reviewed entries at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see Assessment of Antidumping Duties.

Because we are relying on total adverse facts available to establish the dumping margin for SMW, we will instruct CBP to apply a dumping margin of 21.71 percent to all entries of subject merchandise during the POR that were produced and/or exported by SMW.

Cash–Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication, consistent with section 751(a)(2)(C) of the Act: (1) the cash–deposit rates for the reviewed companies will be the rates shown above; (2) for previously reviewed or investigated companies not listed above, the cash–deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original less–than-fair–value (LTFV) investigation but the manufacturer is, the cash–deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; (4) the cash–deposit rate for all other manufacturers or exporters will continue to be the all–others rate established in the LTFV investigation, which is 21.01 percent. See *Notice of Antidumping Duty Order: Magnesium Metal from the Russian Federation*, 70 FR 19930 (April 15, 2005). These deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: September 2, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

Appendix

1. Calculation of Cost of Production and Constructed Value

A. Joint–Cost Allocation - Overview
B. Magnesium as a Byproduct
C. Magnesium as a Main Product
D. Valuation of Chlorine at the Split–off Point
E. The Use of an Appropriate Cost Database
F. Chlorine–Disposal Costs
G. Constructed–Value Profit

2. Constructed Export–Price Offset

3. Selection of an Adverse Facts–Available Rate

[FR Doc. E8–21001 Filed 9–9–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Application for Duty–Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651; as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States. Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be filed within 20 days with the Statutory Import Programs Staff, U.S. Department of Commerce 14th and Constitution Ave., NW, Room 2104 Washington, D.C. 20230. Applications may be examined between 8:30 A.M. and 5:00 P.M. in Room 2104, U.S. Department of Commerce.

Docket Number: 08–040. Applicant: New Mexico Institute of Mining and Technology; Magdalena Ridge Observatory, 801 Leroy Place, Socorro, New Mexico 87801. Instrument: Unit Telescope. Manufacturer: Advanced Mechanical and Optical Systems SA (AMOS), Belgium. Intended Use: The instrument is intended to be used to study star formation and the earliest stages of planet formation, fundamental astrophysical phenomena like mass accretion, mass transfer and convection in single and binary star systems, and the surroundings of the centers of nearby galaxies. These phenomena will be studied at optical and near infrared wavelengths from about 0.5 to 2.5 microns. The instrument must be able to be relocated and the functions of the instrument must be controlled and monitored over a network connection. Another unique feature of this instrument is that it must have an aperture greater than one–meter. Application accepted by Commissioner of Customs: July 25, 2008.

Docket Number: 08–042. Applicant: University of Alabama at Birmingham, 701 South 20th St., Birmingham, AL 35294. Instrument: FIE Vitrobot. Manufacturer: FEI Company, the Netherlands. Intended Use: The instrument is intended to be used to prepare a range of biological samples for imaging by cryo–electron microscopy. Samples to be studied include viruses and virus–related particles, protein complexes, protein–nucleic acid, lipid–containing samples, filamentous structures, subcellular organelles, and entire prokaryotic and eukaryotic cells. A unique feature of this instrument is that it must have a controlled environmental chamber and have the capability of fully automated operation. Application accepted by Commissioner of Customs: August 12, 2008.

Dated: September 4, 2008.

Faye Robinson,

Director, Statutory Import Programs Staff, Import Administration.

[FR Doc. E8–21000 Filed 9–9–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–898]

Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: September 10, 2008.

SUMMARY: The Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on chlorinated isocyanurates from the People's Republic of China (''PRC'') covering the period June 1, 2006, through May 31, 2007. We invited interested parties to comment on our preliminary results. Based on our analysis of the comments received, we have made changes to our margin calculations. Therefore, the final results differ from the preliminary results.

FOR FURTHER INFORMATION CONTACT: Jennifer Moats or Charles Riggle, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5047 or (202) 482–0650, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 6, 2008, the Department published its preliminary results of review of the antidumping order on chlorinated isocyanurates from the PRC. *See Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 24943 (May 6, 2008) (''*Preliminary Results*''). On May 27, 2008, Clearon Corporation (''Clearon'') and Occidental Chemical Corporation (''Petitioners''), Petitioners in the underlying investigation, and Hebei Jiheng Chemical Corporation, Ltd. (''Jiheng'') provided additional information on the appropriate surrogate values to use as a means of valuing the factors of production. On June 5, 2008, the Department received a request for a hearing from Petitioners. On June 12, 2008, the Department received case briefs from Petitioners and from respondents Jiheng and Nanning Chemical Industry Co. Ltd. (''Nanning''). On June 17, 2008, the Department received rebuttal briefs from Petitioners and Jiheng. On July 22, 2008, the Department held a public hearing. We have conducted this administrative review in accordance with section 751 of the Tariff act of 1930, as amended (''the Act''), and 19 CFR 351.213.

Scope of the Order

The products covered by this order are chlorinated isocyanurates, as described below: Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s–triazine triones. There are three primary chemical compositions of chlorinated isocyanurates: (1) trichloroisocyanuric acid ($Cl_3(NCO)_3$), (2) sodium dichloroisocyanurate (dihydrate) ($NaCl_2(NCO)_3 \bullet 2H_2O$), and (3) sodium dichloroisocyanurate (anhydrous) ($NaCl_2(NCO)_3$). Chlorinated isocyanurates are available in powder, granular, and tableted forms. This order covers all chlorinated isocyanurates.

Chlorinated isocyanurates are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.40.50, 3808.50.40 and 3808.94.50.00 of the Harmonized Tariff Schedule of the United States (''HTSUS''). The tariff classification 2933.69.6015 covers sodium dichloroisocyanurates (anhydrous and dehydrate forms) and trichloroisocyanuric acid. The tariff classifications 2933.69.6021 and 2933.69.6050 represent basket categories that include chlorinated isocyanurates and other compounds including an unfused triazine ring. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Analysis of Comments Received

All issues raised in the post–preliminary comments by parties in this review are addressed in the memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, ''Issues and Decision Memorandum for the 2006–2007 Administrative Review of Chlorinated Isocyanurates from the People's Republic of China,'' dated concurrently with this notice (''Issues and Decision Memorandum''), which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum is attached to this notice as an appendix. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit (''CRU'') in room 1117 in the main Commerce Department building, and is also accessible on the Web at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of comments received, we have made changes in the margin calculations for Jiheng and Nanning. *See* Issues and Decision Memorandum at Comments 1–8.

We have revised the surrogate value for electricity. For the final results, we find that the best available information with which to value electricity is the electricity price data for small, medium, and large industries, as published by the Central Electricity Authority of the Government of India in its publication titled *Electricity Tariff & Duty and Average Rates of Electricity Supply in India*, dated July 2006. *See* Issues and Decision Memorandum at Comment 3 and the Memorandum to the File titled ''Surrogate Value Memorandum,'' dated concurrently with this notice (''Final Surrogate Value Memorandum'').

We revised the financial ratio calculations to include rates and taxes, to exclude income relating to a prior year adjustment, and to include income items within miscellaneous income that have identifiable expenses. *See* Issues and Decision Memorandum at Comments 5A through 5D and the Final Surrogate Value Memorandum, dated concurrently with this notice.

We corrected certain clerical errors in the calculations for the *Preliminary Results. See* Issues and Decision Memorandum at Comments 7A through 7D, the Final Surrogate Value Memorandum, and Memorandum to the File titled ''Analysis Memorandum for the Final Results: Hebei Jiheng Chemical Company, Ltd.,'' dated concurrently with this notice.

Final Results of Review

We determined that the following dumping margins exist for the period June 1, 2006, through May 31, 2007.

Exporter/Manufacturer	Weighted–Average Margin Percentage
Jiheng	0.80
Nanning	53.67

Assessment Rates

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (''CBP'') 15 days after the date of publication of these final results of review. In accordance with 19 CFR 351.212(b)(1), we have calculated importer–specific assessment rates for merchandise subject to this review.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) for subject merchandise exported by Jiheng, the cash deposit rate will be 0.80 percent and for subject merchandise exported by Nanning, the cash deposit rate will be 53.67 percent; (2) for previously reviewed or investigated exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter–specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise, which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC–wide rate of 285.63 percent; and (4) for all non–PRC exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non–PRC exporter. These deposit requirements shall remain in effect until further notice.

Notification of Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties. This notice also serves as a reminder to parties subject to administrative protective orders (''APOs'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation that is subject to sanction.

We are issuing and publishing these final results of review and notice in accordance with sections 751(a) and 777(i) of the Act.

Dated: September 3, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

APPENDIX

List of Comments and Issues in the Issues and Decision Memorandum

Surrogate Values

Comment 1: Surrogate Value for Urea
Comment 2: Surrogate Value for Sodium Chloride (Salt)
Comment 3: Surrogate Value for Electricity

Comment 4: Surrogate Value for Steam Coal
Comment 5: Financial Ratios
A. Rates and Taxes
B. Other Income Related to Prior Year Adjustment
C. Income Items within Miscellaneous Receipts
D. Cost of Traded Goods and Increase in Stocks

Company Specific Issues

Jiheng

Comment 6: By–Product Offsets
A. Ammonia Gas
B. Hydrogen
Comment 7: Clerical Errors
A. Supersacks
B. Rail Freight
C. Free of Charge Packaging Materials
D. Reimbursed Materials

Nanning

Comment 8: Cyanuric Acid.

[FR Doc. E8–20916 Filed 9–9–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

INTERNATIONAL TRADE ADMINISTRATION

[A–428–602]

Brass Sheet and Strip from Germany: Amended Notice of Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: September 10, 2008.

FOR FURTHER INFORMATION CONTACT: Joy Zhang or James Terpstra, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1168 and (202) 482–3965, respectively.

SUPPLEMENTARY INFORMATION: On August 20, 2008, the Department of Commerce published *Brass Sheet and Strip from Germany: Notice of Rescission of Antidumping Duty Administrative Review*, 71 FR 49170 (August 20, 2008), in the **Federal Register**. We are amending this notice to correct a typographical error in identifying the period of review. The correct period of review is March 1, 2007 through February 29, 2008.

This notice is issued and published in accordance with section 777(i) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: September 4, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–21027 Filed 9–9–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Notice: Request for Applications, Commerce Spectrum Management Advisory Committee

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Reopening of Application Period.

SUMMARY: The National Telecommunications and Information Administration (NTIA) is seeking applications from persons interested in serving on the Commerce Spectrum Management Advisory Committee (CSMAC) for new two year terms to commence in December 2008. This Notice reopens the application period in order to provide the public with an additional opportunity to submit applications. The evaluation criteria for selecting members contained in the August 1, 2008 notice shall continue to apply.

DATES: Applications must be postmarked or electronically transmitted on or before October 17, 2008.

ADDRESSES: Persons wishing to submit applications should send their resume or *curriculum vita* and a statement summarizing the qualifications of the nominee and identifying any particular expertise or area of interest relevant to the CSMAC's work to the attention of Eric Stark, Designated Federal Officer, by mail to Office of Policy Analysis and Development, National Telecommunications and Information Administration, 1401 Constitution Avenue N.W., Room 4725, Washington,

DC 20230; by facsimile transmission to (202) 482–6173; or by electronic mail to spectrumadvisory@ntia.doc.gov.

FOR FURTHER INFORMATION CONTACT: Eric Stark at (202) 482–1880 or estark@ntia.doc.gov; or Joe Gattuso at (202) 482–0977 or jgattuso@ntia.doc.gov.

SUPPLEMENTARY INFORMATION: On August 1, 2008 NTIA published a notice in the **Federal Register** seeking persons interested in serving on the CSMAC for new two year terms to commence in December 2008, with applications due no later than September 2, 2008. (73 Fed. Reg. 44972 (Aug. 1, 2008), available at http://edocket.access.gpo.gov/2008/pdf/E8–17693.pdf.). The CSMAC provides advice to the Assistant Secretary for Communications and Information and NTIA Administrator on spectrum management matters.

This notice reopens the application period in order to provide the public with an additional opportunity to submit applications. Any applicant who provided NTIA with the requested materials prior to this current notice and before the new due date will be considered for membership and need not resubmit materials. As before, current members of the CSMAC are not required to submit applications in order to be reappointed; however, reappointments are not automatic.

Members of the CSMAC are experts in radio spectrum policy and do not represent any organization or interest. They serve on the CSMAC in the capacity of Special Government Employees. They do not receive compensation or reimbursement for travel or for per diem expenses.

The CSMAC's charter allows it to have up to 20 members. Appointments are for two-year terms, subject to continuation of the CSMAC under its charter. NTIA intends to seek renewal of the current charter, which expires March 27, 2009.

The evaluation criteria for selecting members contained in the August 1, 2008 notice shall continue to apply. The Secretary of Commerce will appoint members with a broad cross-section of points of views from the private and non-federal government sectors. The Department of Commerce seeks high level individuals with expertise in those sectors and interests on spectrum policy issues relevant to the CSMAC.

Applications should include a resume or *curriculum vita* and should also include a statement summarizing the qualifications of the applicant and identifying any particular expertise or area of interest relevant to the CSMAC's work.

Dated: September 5, 2008.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. E8–21025 Filed 9–9–08; 8:45 am]

BILLING CODE 3510–60–S

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, September 19, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

FOR MORE INFORMATION CONTACT: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Staff Assistant.

[FR Doc. E8–21107 Filed 9–8–08; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, September 26, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

FOR MORE INFORMATION CONTACT: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Staff Assistant.

[FR Doc. E8–21109 Filed 9–8–08; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11 a.m., Friday, September 12, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Staff Assistant.

[FR Doc. E8–21110 Filed 9–8–08; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 2 p.m., Wednesday, September 17, 2008.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

FOR FURTHER INFORMATION CONTACT: Sauntia S. Warfield, 202–418–5084.

Sauntia S. Warfield,

Staff Assistant.

[FR Doc. E8–21111 Filed 9–8–08; 4:15 pm]

BILLING CODE 6351–01–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Senior Executive Service Performance Review Board

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice.

SUMMARY: This notice announces the membership of the Defense Nuclear Facilities Safety Board (DNFSB) Senior Executive Service (SES) Performance Review Board (PRB).

DATES: *Effective Date:* September 10, 2008.

ADDRESSES: Send comments concerning this notice to: Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2001.

FOR FURTHER INFORMATION CONTACT: Deborah Biscieglia by telephone at (202) 694–7041 or by e-mail at *debbieb@dnfsb.gov*.

SUPPLEMENTARY INFORMATION: 5 U.S.C. 4314(c)(1) through (5) requires each

agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more performance review boards. The PRB shall review and evaluate the initial summary rating of the senior executive's performance, the executive's response, and the higher level official's comments on the initial summary rating. In addition, the PRB will review and recommend executive performance bonuses and pay increases.

The DNFSB is a small, independent Federal agency; therefore, the members of the DNFSB SES Performance Review Board listed in this notice are drawn from the SES ranks of other agencies. The following persons comprise a standing roster to serve as members of the Defense Nuclear Facilities Safety Board SES Performance Review Board: Christopher E. Aiello, Director of Human Resources, Federal Deposit Insurance Corporation David M. Capozzi, Director of Technical and Information Services, United States Access Board DeDe Greene, Executive Officer, Civil Rights Division, Department of Justice Raymond Limon, Chief Human Capital Officer, Corporation for National & Community Service Christopher W. Warner, General Counsel, U.S. Chemical Safety and Hazard Investigation Board.

Dated: September 3, 2008.

Brian Grosner,

Chairman, Executive Resources Board.

[FR Doc. E8–21029 Filed 9–9–08; 8:45 am]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before November 10, 2008.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: September 4, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Extension.

Title: Annual Report on Appeals Process (RSA–722).

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs (primary).

Reporting and Recordkeeping Hour Burden:

Responses: 80.

Burden Hours: 160.

Abstract: The RSA–722 is needed to meet specific data collection requirements in Subsections 102(c)(8)(A) and (B) of the Rehab Act of 1973, as amended on the number of requests for mediation, hearings and reviews filed. The information collected is used to evaluate the types of complaints made by applicants for and eligible individuals of the vocational rehabilitation program and the final resolution of appeals filed. Respondents are State agencies that administer the Federal/State Program for Vocational Rehabilitation.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3815. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* 202–260–9404. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–20966 Filed 9–9–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before October 10, 2008.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, *Attention:* Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']. '' Persons submitting comments electronically should not submit paper copies.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested

Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: September 4, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Service, Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Extension.

Title: Protection and Advocacy of Individual Rights (PAIR) Program Assurances.

Frequency: Other: Submitted once prior to FY 2007, and therefore only upon the redesignation of the P&A.

Affected Public: Not-for-profit institutions (primary). State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 57.

Burden Hours: 9.

Abstract: Section 509 of the Rehabilitation Act of 1973 as amended (Act), and its implementing Federal Regulations at 34 CFR Part 381, require the PAIR grantees to submit an application to the RSA Commissioner in order to receive assistance under Section 509 of the Act. The Act requires that the application contain Assurances to which the grantee must comply. Section 509(f) of the Act specifies the Assurances. There are 57 PAIR grantees. All 57 grantees are required to be part of the protection and advocacy system in each State established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 6041 *et seq.*)

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3752. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* 202–401–1097. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–20968 Filed 9–9–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 08–77–LNG]

Cheniere Marketing, Inc.; Application for Blanket Authorization To Export Liquefied Natural Gas

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of Application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application, filed on August 15, 2008 by Cheniere Marketing, Inc. (CMI), as modified on August 28, 2008, requesting blanket authorization to export liquefied natural gas (LNG) that previously had been imported from foreign sources in an amount up to the equivalent of 64 Billion cubic feet (Bcf) of natural gas on its own behalf or as agent for others on a short-term or spot market basis from the Sabine Pass LNG terminal owned by CMI's affiliate, Sabine Pass LNG, L.P., in Cameron Parish, Louisiana to the United Kingdom, Belgium, Spain, France, Italy, Portugal, Turkey, Brazil, Argentina, Chile, Mexico, Dominican Republic, Japan, South Korea, India, China, Taiwan and/or the Commonwealth of Puerto Rico over a two-year period commencing on the date of the authorization.

The application was filed under section 3 of the Natural Gas Act (15 U.S.C. 717b), as amended by section 201 of the Energy Policy Act of 1992 (Pub. L. 102–486). Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed at the address listed below no later than 4:30 p.m., eastern time, October 10, 2008.

ADDRESSES: U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Beverly Howard, U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9478; (202) 586–9387.

Edward Myers, U.S. Department of Energy, Office of General Counsel, Fossil Energy and Energy Efficiency, Forrestal Building, Room 6B–159, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586–3397.

SUPPLEMENTARY INFORMATION:

Background

CMI is a Delaware corporation with its principal place of business in Houston, Texas. CMI is a wholly-owned subsidiary of Cheniere Energy, Inc. (Cheniere Energy), which is also a Delaware corporation with its primary place of business in Houston, Texas. Cheniere Energy is a developer of LNG import terminals and natural gas pipelines on the U.S. Gulf Coast.

The Federal Energy Regulatory Commission (FERC) has authorized Sabine Pass LNG, L.P. to site, construct, and operate a new LNG import, storage, and vaporization terminal in Cameron Parish, Louisiana with a total send-out capacity of 4 Bcf/day to be completed in two phases.[1] CMI states that Phase I consists of 2.6 Bcf/day of send-out capacity that is due to be placed into service in the near term; however, 2.0 Bcf/day of the Phase I capacity is subscribed under long-term contracts for service that is not expected to commence until April 2009, at the earliest. Phase II, consisting of 1.4 Bcf/day of capacity, is currently under construction and is anticipated to be

[1] Sabine Pass LNG, L.P., Order Granting Authority Under Section 3 of the Natural Gas Act and Issuing Certificates, 109 FERC ¶ 61,324 (2004) (Phase I); and Sabine Pass LNG, L.P., Order Granting Authority Under Section 3 of the Natural Gas Act, 115 FERC ¶ 61,330 (2006) (Phase II).

placed into service during the second quarter of 2009.

On January 29, 2007, FE granted CMI blanket authorization to import LNG from various international sources for a two-year term beginning on January 29, 2007.[2]

Current Application

In the instant application, CMI is seeking blanket authorization to export LNG that has been imported into the United States over a two-year period, on a short-term or spot market basis, in an amount up to the equivalent of 64 Bcf of natural gas.

Public Interest Considerations

In support of its application, CMI states that there is no domestic reliance on the LNG that it seeks to export. It indicates that the gas which it seeks to export is restricted to foreign sourced LNG. CMI adds that, due to global LNG market conditions, U.S. natural gas demand and prices do not currently support the importation of LNG into the U.S., and the export authorization sought herein would provide U.S. gas consumers two principal benefits: (1) It would foster the continuing operation of U.S. energy infrastructure by enabling the applicant to economically import LNG for the maintenance and continual operation of the Sabine Pass facilities during periods when market conditions may not otherwise favor deliveries of LNG into the U.S.; and (2) to the extent imported LNG may be needed to meet U.S. gas demand, the authorization would help to ensure that such supply is available and ready for delivery to U.S. markets. CMI, therefore, asserts in its application that a grant of the proposed authorization would not reduce U.S. natural gas supplies but would actually increase domestic supplies because it would encourage CMI to obtain and store spot-market LNG cargoes, making it available to supply domestic markets when conditions support it, thereby also serving to moderate U.S. natural gas prices.

DOE/FE Evaluation

This export application will be reviewed pursuant to section 3 of the Natural Gas Act, as amended, and the authority contained in DOE Delegation Order No. 00–002.00G (Jan. 29, 2007) and DOE Redelegation Order No. 00–002.04C (Jan. 30, 2007). In reviewing this LNG export application, DOE will consider domestic need for the gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this application should comment in their responses on these issues.

CMI asserts the proposed authorization is in the public interest. Under section 3 of the Natural Gas Act, as amended, an LNG export from the United States to a foreign country must be authorized unless ''the proposed exportation will not be consistent with the public interest.'' Section 3 thus creates a statutory presumption in favor of approval of this application, and parties opposing the authorization bear the burden of overcoming this presumption.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notice of intervention and written comments, as provided in DOE's regulations at 10 CFR section 590.301, *et seq.* Any person wishing to become a party to the proceeding and to have their written comments considered as a basis for any decision on the application must file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to the application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements specified by the regulations in 10 CFR part 590. Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Oil and Gas Global Security and Supply at the address listed above.

A decisional record on the application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The application filed by Cheniere Marketing, Inc. is available for inspection and copying in the Office of Oil and Gas Global Security and Supply docket room, 3E–042, at the above address. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The application is also available electronically by going to the following Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html*.

Issued in Washington, DC, on September 4, 2008.

Robert F. Corbin,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

[FR Doc. E8–21059 Filed 9–9–08; 8:45 am]

BILLING CODE 6450–01–P

[2] *Cheniere Marketing, Inc.*, DOE/FE Order No. 2327, issued January 29, 2007.

DEPARTMENT OF ENERGY

[FE Docket No. 08–70–LNG]

Freeport LNG Development, L.P.; Application for Blanket Authorization To Export Liquefied Natural Gas

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of Application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application filed on August 1, 2008 by Freeport LNG Development, L.P. (Freeport LNG), requesting blanket authorization to

export liquefied natural gas (LNG) that previously had been imported from foreign sources on their own behalf or as agent for others on a short-term or spot market basis from existing facilities on Quintana Island, Texas in an amount up to the equivalent of 24 Billion cubic feet (Bcf) of natural gas to the United Kingdom, Belgium, Spain, France, Italy, Japan, South Korea, India, China, and/or Taiwan over a two-year period commencing on the date of the authorization.

The application is filed under section 3 of the Natural Gas Act (15 U.S.C. 717b), as amended by section 201 of the Energy Policy Act of 1992 (Pub. L. 102–486), and DOE Delegation Order No. 00–002.00G (Jan. 29, 2007) and DOE Redelegation Order No. 00–002.04C (Jan. 30, 2007). Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed at the address listed below no later than 4:30 p.m., eastern time, October 10, 2008.

ADDRESSES: U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Beverly Howard, U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9478; (202) 586–9387.

Edward Myers, U.S. Department of Energy, Office of the Assistant General Counsel for Fossil Energy and Energy Efficiency, Forrestal Building, Room 6B–159, 1000 Independence Ave. SW., Washington, DC 20585, (202) 586–3397.

SUPPLEMENTARY INFORMATION:

Background

Freeport LNG is a Delaware limited partnership with one general partner, Freeport LNG–GP, Inc., a Delaware corporation, which is owned 50% by an individual, Michael S. Smith, and 50% by ConocoPhillips Company. Freeport LNG's limited partners are: (1) Freeport LNG Investments, LLLP, a Delaware limited liability limited partnership, which owns a 45% limited partnership interest in Freeport LNG; (2) Cheniere FLNG, L.P., a Delaware limited partnership, which owns a 30% limited partnership interest in Freeport LNG; (3) Texas LNG Holdings LLC, a Delaware limited liability company and wholly-owned subsidiary of The Dow Chemical Company, which owns a 15% limited partnership interest in Freeport LNG; and (4) Turbo LNG LLC, a Delaware limited liability company and wholly-owned subsidiary of Osaka Gas Co., Ltd., which owns a 10% limited partnership interest in Freeport LNG.

The Federal Energy Regulatory Commission (FERC) has authorized Freeport LNG to site, construct and operate a new LNG import, storage, and vaporization terminal on Quintana Island, Texas and an associated 9.6-mile long send-out pipeline which will be utilized to import up to 1.55 Bcf per day of LNG.[1] On July 1, 2008, FERC issued a letter Order granting Freeport LNG's request to commence service at its Quintana Island import terminal.

On January 15, 2008, FE granted Freeport LNG blanket authorization to import up to 30 Bcf of LNG from various international sources for a two-year term beginning March 1, 2008.[2]

Current Application

In the instant application, Freeport LNG is seeking blanket authorization to export LNG over a two-year period, on a short-term or spot market basis, in an amount up to the equivalent of 24 Bcf of natural gas, that has been imported into the United States. Freeport LNG is seeking this authorization so that it may sell in non-U.S. markets any imported LNG that is not required for the operation of its facilities should U.S. market prices not support the sale of such imported LNG domestically.

Public Interest Considerations

In support of its application, Freeport LNG states that there is no domestic reliance on the LNG that it seeks to export. Due to global LNG market conditions, U.S. natural gas demand and prices do not currently support the importation of LNG into the U.S., and export authorization is needed in order to enable the applicant to economically import LNG for the maintenance and continual operation of the Freeport LNG facilities.

Freeport LNG also states in its application that local natural gas supplies will not be reduced. The applicant states that it intends to export only foreign sourced LNG, and does not intend to export domestically produced natural gas. Further, the applicant states that U.S. natural gas supplies would actually increase if the requested authorization were granted, since the boil-off gas from any LNG cargoes delivered to the Freeport LNG terminal would be sold into U.S. markets. Additionally, granting of the requested authorization would encourage Freeport LNG to obtain and store spot-market LNG cargoes, making it available to supply local markets when conditions support it, thereby serving to moderate U.S. natural gas price volatility.

DOE/FE Evaluation

This export application will be reviewed pursuant to section 3 of the Natural Gas Act, as amended, and the authority contained in DOE Delegation Order No. 00–002.00G (Jan. 29, 2007) and DOE Redelegation Order No. 00–002.04C (Jan. 30, 2007). In reviewing this LNG export application, DOE will consider domestic need for the gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this application should comment in their responses on these issues.

Freeport LNG asserts the proposed authorization is in the public interest. Under section 3 of the Natural Gas Act, as amended, an LNG export from the United States to a foreign country must be authorized unless ''the proposed exportation will not be consistent with the public interest.'' Section 3 thus creates a statutory presumption in favor of approval of this application, and parties opposing the authorization bear the burden of overcoming this presumption.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable, and written comments. Any person wishing to become a party to the proceeding and to have their written comments considered as a basis for any decision on the application must file a motion to intervene or notice of intervention, as applicable. The filing of

[1] Freeport LNG Development, L.P., Order Granting Authorization Under Section 3 of the Natural Gas Act, 107 FERC ¶ 61,278 (2004), Order Granting Rehearing and Clarification, 108 FERC ¶ 61,253 (2004); Order Amending Section 3 Authorization, 112 FERC ¶ 61,194 (2005).

[2] *Freeport LNG Development L.P.*, DOE/FE Order No. 2457, issued January 15, 2008.

a protest with respect to the application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements specified by the regulations in 10 CFR part 590. Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Oil and Gas Global Security and Supply at the address listed above.

A decisional record on the application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The application filed by Freeport LNG Development, L.P. is available for inspection and copying in the Office of Oil and Gas Global Security and Supply docket room, 3E–042, at the above address. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The application is also available electronically by going to the following Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html*.

Issued in Washington, DC, on September 4, 2008.

Robert F. Corbin,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

[FR Doc. E8–20991 Filed 9–9–08; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2003–0215, 2004–0196, 2004–0453, 2001–0005, 2004–0233, 2002–0089 FRL–8712–6]

Agency Information Collection Activities: Proposed Collection; Comment Request; Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills; National Emission Standards for Inorganic Arsenic Emissions From Primary Copper Smelters; National Emission Standards for Hazardous Air Pollutant Emissions: Group I Polymers and Resins; National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins; National Emission Standards for Hazardous Air Pollutants: Manufacturing of Nutritional Yeast; National Emission Standards for Hazardous Air Pollutants: Rubber Tire Manufacturing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*), this document announces that EPA is planning to submit a request to reinstate two previously approved Information Collection Requests (ICR) and four new ICR to the Office of Management and Budget (OMB). Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before November 10, 2008.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier service. Follow the detailed instructions as provided under **SUPPLEMENTARY INFORMATION**, section A.

FOR FURTHER INFORMATION CONTACT: The contact individuals for each ICR are listed under **SUPPLEMENTARY INFORMATION**, section II.C.

SUPPLEMENTARY INFORMATION:

I. Docket and Comment Information/Instructions

A. How Can I Access the Docket and/or Submit Comments?

1. Docket Access Instructions

EPA has established a public docket for the ICR listed in the **SUPPLEMENTARY INFORMATION**, section II.B. The docket is available for online viewing at *http://www.regulations.gov*, or in-person viewing at the Enforcement and Compliance Docket and Information Center (ECDIC), in the EPA Docket Center, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the ECDIC docket is (202) 566–1752.

Use *www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. When in the system, select ''search,'' then key in the docket ID number identified in this document.

2. Instructions for submitting comments

Submit your comments by one of the following methods:

(a) *Electronic Submission:* Access *www.regulations.gov* and follow the on-line instructions for submitting comments.

(b) *E-mail: a-and-r-Docket@epa.gov*.

(c) *Fax:* (202) 566–9744.

(d) *Mail:* Information Collection Request, Environmental Protection Agency, *Mailcode:* 2822, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

(e) *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Direct your comments to the specific docket listed in **SUPPLEMENTARY INFORMATION**, section II.B, and reference the OMB Control Number for the ICR. It is EPA's policy that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be confidential business

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

B. What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the Paperwork Reduction Act (PRA), EPA is soliciting comments and information to enable it to:

1. Evaluate whether the proposed collections of information are 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 estimates of the burdens of the proposed collections of information.

3. Enhance the quality, utility, and clarity of the information to be collected.

4. Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated or electronic collection technologies or other forms of information technology, e.g., permitting electronic submission of responses.

C. What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under **DATES**.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. ICR To Be Renewed

A. For All ICR

The Agency computed the burden for each of the recordkeeping and reporting requirements applicable to the industry for the currently approved ICR listed in this notice. Where applicable, the Agency identified specific tasks and made assumptions, while being consistent with the concept of the PRA.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions to: Develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The listed ICR address Clean Air Act (CAA) information collection requirements in standards (i.e., regulations) which have mandatory recordkeeping and reporting requirements. Records collected under the national emission standards for hazardous air pollutants (NESHAP) must be retained by the owner or operator for at least 5 years. In general, the required collections consist of emissions data and other information deemed not to be private.

In the absence of such information collection requirements, enforcement personnel would be unable to determine whether the standards are being met on a continuous basis as required by the CAA.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the Agency displays a currently valid OMB control number. The OMB control numbers for EPA's regulations under Title 40 of the Code of Federal Regulations are published in the **Federal Register**, or on the related collection instrument or form. The display of OMB control numbers for certain EPA regulations is consolidated at 40 CFR part 9.

B. What Information Collection Activity or ICR Does This Apply to?

In compliance with the PRA (44 U.S.C. 3501, *et seq.*), this notice announces that EPA is planning to submit the following ICR to OMB:

1. *Docket ID Number:* EPA–HQ–OAR–2003–0215.

Title: Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills (40 CFR part 60, subpart Cc).

ICR Numbers: ICR Number 1893.05, OMB Control Number 2060–0430.

ICR Status: New.

2. *Docket ID Number:* EPA–HQ–OAR–2004–0196.

Title: National Emission Standards for Inorganic Arsenic Emissions From Primary Copper Smelters (40 CFR part 61, subpart O).

ICR Numbers: EPA ICR Number 1089.04, OMB Control Number 2060–New.

ICR Status: New.

3. *Docket ID Number:* EPA–HQ–OAR–2004–0453.

Title: National Emission Standards for Hazardous Air Pollutant Emissions: Group I Polymers and Resins (40 CFR part 63, subpart U).

ICR Numbers: EPA ICR Number 1746.01, OMB Control Number 2060–0356.

ICR Status: Discontinued.

4. *Docket ID Number:* EPA–HQ–OAR–2001–0005.

Title: National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins (40 CFR part 63, subpart JJJ).

ICR Numbers: EPA ICR Number 1737.01, OMB Control Number 2060–0351.

ICR Status: Discontinued.

5. *Docket ID Number:* EPA–HQ–OAR–2004–0233.

Title: National Emission Standards for Hazardous Air Pollutants: Manufacturing of Nutritional Yeast (40 CFR part 63, subpart CCCC).

ICR Numbers: EPA ICR Number 1886.02, OMB Control Number 2060–New.

ICR Status: New.

6. *Docket ID Number:* EPA–HQ–OAR–2002–0089.

Title: National Emission Standards for Hazardous Air Pollutants: Rubber Tire Manufacturing (40 CFR part 63, subpart XXXX).

ICR Numbers: EPA ICR Number 1982.01, OMB Control Number 2060–New.

ICR Status: New.

C. Contact Individuals for ICR

1. *Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills* (40 CFR Part 60, subpart Cc); Hillary Ward, Office of Air Quality Planning and Standards at (919) 541–3154 or via E-mail to: *ward.hillary@epa.gov;* EPA ICR Number 1893.05; OMB Control Number 2060–0430.

2. *National Emission Standards for Inorganic Arsenic Emissions From Primary Copper Smelters* (40 CFR part 61, subpart O); Jeff Telander, Office of Air Quality Planning and Standards at (919) 541–5427 or via E-mail to: *telander.jeff@epa.gov;* EPA ICR Number 1089.04; OMB Control Number 2060–New.

3. *National Emission Standards for Hazardous Air Pollutant Emissions:* Group I Polymers and Resins (40 CFR part 63, subpart U); David Markwordt, Office of Air Quality Planning and Standards at (919) 541–0837 or via E-mail to: *markwordt.david@epa.gov;* EPA ICR Number 1746.01; OMB Control Number 2060–0356; Discontinued.

4. *National Emission Standards for Hazardous Air Pollutant Emissions:* Group IV Polymers and Resins (40 CFR part 63, Subpart JJJ); David Markwordt, Office of Air Quality Planning and Standards at (919) 541–0837 or via E-mail to: markwordt.david@epa.gov; EPA ICR Number 1737.01; OMB Control Number 2060–0351.

5. *National Emission Standards for Hazardous Air Pollutants:* Manufacturing of Nutritional Yeast (40 CFR part 63, subpart CCCC); Bill Shrock, Office of Air Quality Planning and Standards at (919) 541–5032 or via E-mail to: *schrock.bill@epa.gov;* EPA ICR Number 1886.02; OMB Control Number 2060–New.

6. *National Emission Standards for Hazardous Air Pollutants:* Rubber Tire Manufacturing (40 CFR part 63, subpart XXXX); David Salman, Office of Air Quality Planning and Standards at (919) 541–0859 or via E-mail to: *salman.dave@epa.gov;* EPA ICR Number 1982.01; OMB Control Number 2060–New.

D. Information for Individual ICR

1. *Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills* (40 CFR part 60, subpart Cc); Docket ID Number EPA–HQ–OAR–2003–0215, EPA ICR Number 1893.05, OMB Control Number 2060–0430.

Affected Entities: Entities potentially affected by this action are each existing municipal solid waste (MSW) landfill for which construction, reconstruction, or modification commenced before May 30, 1991.

The affected entities are subject to the emission guidelines at 40 CFR part 60, subpart Cc.

Abstract: The information collection includes initial reports and periodic recordkeeping necessary for EPA to ensure compliance with emission guidelines and compliance times for the control of certain designated pollutants from certain designated MSW landfills in accordance with section 111(d) of the CAA and subpart B of 40 CFR part 60. Responses to the collection are mandatory under 40 CFR part 60, subpart Cc—Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills. All information submitted to EPA for which a claim of confidentiality is made will be safeguarded according to the Agency policies set forth in 40 CFR part 2, subpart B—Confidentiality of Business Information.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average approximately 72 hours per response.

Respondents/Affected Entities: Each existing MSW landfill for which construction, reconstruction, or modification commenced before May 30, 1991.

Estimated Number of Respondents: 173.

Frequency of Response: Quarterly, annual.

Estimated Total Annual Hour Burden: 12,456.

Estimated Total Annual Cost: $242,200. This includes an estimated burden cost of $242,200.

2. *National Emission Standards for Inorganic Arsenic Emissions From Primary Copper Smelters* (40 CFR part 61, Subpart O); Docket ID Number EPA–HQ–OAR–2004–0196, EPA ICR Number 1089.04, OMB Control Number 2060–New.

Affected Entities: Entities potentially affected by this action are primary copper smelters in the United States, including the District of Columbia, and all United States territories.

The affected entities are subject to the General Provisions of NESHAP at 40 CFR part 61, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 61, subpart O.

Abstract: Owners or operators of new or the 4 existing primary copper smelters are subject to the current rule (40 CFR part 61, subpart O) and no new smelters are projected. The existing rule establishes design, equipment, work practice, and operational standards for primary copper smelters where the total arsenic charging rate for the copper converter department averaged over a 1-year period is less than 75 kilograms/hour (hr) (165 pounds/hr), as determined under 40 CFR 61.174(f). Arsenic emissions from all four of these smelters are below the regulatory threshold and are not required to operate air emission controls or monitoring systems. The existing rule requires that these smelters perform monthly sampling and analyses to determine the converter charging rate, keep a daily log, and submit annual reports to demonstrate that inorganic arsenic emissions remain under the regulatory threshold. Respondents are owners or operators of new or existing primary copper smelters. Responses to the collection are mandatory under 40 CFR part 61, subpart O, National Emission Standards for Inorganic Arsenic Emissions From Primary Copper Smelters.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average approximately 792 hours per response.

Respondents/Affected Entities: Primary Copper Smelters.

Estimated Number of Respondents: 4.

Frequency of Response: Annually, quarterly.

Estimated Total Annual Hour Burden: 3,167.

Estimated Total Annual Cost: The estimated total annual cost for the monitoring, recordkeeping, and reporting requirements for the four existing facilities subject to the Inorganic Arsenic Emissions from Primary Copper Smelters NESHAP is 3,167 person-hours, with an annual average cost of $297,703, an operation and maintenance (O&M) cost of $2,000, and no capital costs.

3. *National Emission Standards for Hazardous Air Pollutant Emissions:* Group I Polymers and Resins (40 CFR part 63, subpart U); Docket ID Number EPA–HQ–OAR–2004–0453, EPA ICR Number 1746.01, OMB Control Number 2060–0356.

Affected Entities: Entities potentially affected by this action are those which produce elastomers and thermoplastics.

The affected entities are subject to the General Provisions of NESHAP at 40 CFR part 63, subpart A, and any changes or additions to the General Provisions specified at 40 CFR part 63, subpart U.

Abstract: The information collection includes initial reports and periodic recordkeeping necessary for EPA to ensure compliance with Federal standards for hazardous air pollutants from the production of elastomers and thermoplastics. Responses to the collection are mandatory under 40 CFR part 63, subpart U—National Emission Standards for Hazardous Air Pollutant Emissions: Group I Polymers and Resins. All information submitted to EPA for which a claim of confidentiality is made will be safeguarded according to the Agency policies set forth in 40 CFR part 2, subpart B—Confidentiality of Business Information.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average approximately 2,935 hours per response.

Respondents/Affected Entities: Producers of elastomers and thermoplastics.

Estimated Number of Respondents: 43.

Frequency of Response: Semiannually, quarterly.

Estimated Total Annual Hour Burden: 126,227.

Estimated Total Annual Cost: $4,060,000. This includes an estimated burden cost of $4,060,000.

4. *National Emission Standards for Hazardous Air Pollutant Emissions:* Group IV Polymers and Resins (40 CFR part 63, subpart JJJ); Docket ID Number EPA–HQ–OAR–2001–0005, EPA ICR Number 1737.01, OMB Control Number 2060–0351.

Affected Entities: Entities potentially affected by this action are those which manufacturer acrylonitrile butadiene styrene resin, styrene acrylonitrile resin, methyl methacrylate acrylonitrile butadiene styrene resin, methyl methacrylate butadiene styrene resin, polystyrene resin, polyethylene terephthalate resin, and nitrile resin.

The affected entities are subject to the General Provisions of NESHAP at 40 CFR part 63, subpart A, and any changes or additions to the General Provisions specified at 40 CFR part 63, subpart JJJ.

Abstract: The information collection includes initial reports and periodic recordkeeping necessary for EPA to ensure compliance with Federal standards for hazardous air pollutants from the manufacture of acrylonitrile butadiene styrene resin, styrene acrylonitrile resin, methyl methacrylate acrylonitrile butadiene styrene resin, methyl methacrylate butadiene styrene resin, polystyrene resin, and nitrile resin. Responses to the collection are mandatory under 40 CFR part 63, subpart JJJ—National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins. All information submitted to the EPA for which a claim of confidentiality is made will be safeguarded according to the Agency policies set forth in 40 CFR part 2, subpart B—Confidentiality of Business Information.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average approximately 3,980 hours per response.

Respondents/Affected Entities: Manufacturers of acrylonitrile butadiene styrene resin, styrene acrylonitrile resin, methyl methacrylate acrylonitrile butadiene styrene resin, methyl methacrylate butadiene styrene resin, polystyrene resin, and nitrile resin.

Estimated Number of Respondents: 91.

Frequency of Response: Semiannually, quarterly.

Estimated Total Annual Hour Burden: 362,500.

Estimated Total Annual Cost: $11,647,000. This includes an estimated burden cost of $11,647,000.

5. *National Emission Standards for Hazardous Air Pollutants:* Manufacturing of Nutritional Yeast (40 CFR part 63); Docket ID Number EPA–HQ–OAR–2004–0233, EPA ICR Number 1886.02, OMB Control Number 2060-New.

Affected Entities: Entities potentially affected by this action are those which manufacturer varieties of saccharomyces cerevisiae nutritional yeast made for the purpose of becoming an ingredient in dough for bread or other yeast-raised baked product, and for becoming a nutritional food additive in the United States, including the District of Columbia, and all United States territories.

The affected entities are subject to the General Provisions of NESHAP at 40 CFR part 63, subpart A, and any changes or additions to the General Provisions specified at 40 CFR part 63, subpart CCCC.

Abstract: The information collection includes initial reports and periodic recordkeeping necessary for EPA to ensure compliance with Federal standards for hazardous air pollutants from the manufacture of nutritional yeast. Respondents are manufacturers of nutritional yeast. Responses to the collection are mandatory under 40 CFR part 63, subpart CCCC—National Emission Standards for Hazardous Air Pollutants: Manufacturing of Nutritional Yeast. All information submitted to the EPA for which a claim of confidentiality is made will be safeguarded according to the Agency policies set forth in 40 CFR part 2, subpart B—Confidentiality of Business Information.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average approximately 350 hours per response.

Respondents/Affected Entities: Manufacturers of saccharomyces cerevisiae nutritional yeast.

Estimated Number of Respondents: 10.

Frequency of Response: Semiannually, quarterly.

Estimated Total Annual Hour Burden: 3,459.

Estimated Total Annual Cost: $295,436. This includes an estimated burden cost of $146,972 and an estimated cost of $148,463 for capital investment or O&M costs.

6. *National Emission Standards for Hazardous Air Pollutants:* Rubber Tire Manufacturing (40 CFR part 63, subpart XXXX); Docket ID Number EPA–HQ–OAR–2002–0089, EPA ICR Number 1982.01, OMB Control Number 2060–New.

Affected Entities: Entities potentially affected by this action are those which manufacturer rubber tires.

The affected entities are subject to the General Provisions of NESHAP at 40 CFR part 63, subpart A, and any changes or additions to the General Provisions specified at 40 CFR part 63, subpart XXXX.

Abstract: The information collection includes initial reports and periodic recordkeeping necessary for EPA to ensure compliance with Federal standards for hazardous air pollutants from the manufacture of rubber tires. Responses to the collection are mandatory under 40 CFR part 63, subpart XXXX—National Emission Standards for Hazardous Air Pollutants: Rubber Tire Manufacturing. All information submitted to the EPA for which a claim of confidentiality is made will be safeguarded according to the Agency policies set forth in 40 CFR part 2, subpart B—Confidentiality of Business Information.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average approximately 355 hours per response.

Respondents/Affected Entities: Manufacturers of rubber tires.

Estimated Number of Respondents: 38.

Frequency of Response: Semiannually, quarterly.

Estimated Total Annual Hour Burden: 12,800.

Estimated Total Annual Cost: $2,055,000. This includes an estimated burden cost of $701,000 and an estimated cost of $1,354,000 for capital investment or O&M costs.

EPA will consider any comments received and may amend any of the above ICR, as appropriate. Then the final ICR packages will be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue one or more **Federal Register** notices pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about any of the above ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: August 28, 2008.

Jenny Noonan Edmonds,

Acting Director, Office of Air Planning and Standards.

[FR Doc. E8–21044 Filed 9–9–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0669; FRL–8381–9]

Pesticide Program Dialogue Committee Work Group on Web-Distributed Labeling; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act, EPA gives notice of a public meeting of the Pesticide Program Dialogue Committee (PPDC) Work Group on Web-Distributed Labeling on October 2, 2008. An agenda is under development and will be posted on our website by September 26, 2008.

DATES: The PPDC meeting will be held on Thursday, October 2, 2008, from 1:30 p.m. to 4:30 p.m.

To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held in room S–12100 on the 12th floor at One Potomac Yard (South Bldg.), 2777 S. Crystal Drive, Arlington, VA. This location is approximately a half mile from the Crystal City Metro Station.

FOR FURTHER INFORMATION CONTACT: Michelle DeVaux, Office of Pesticide Programs (7501P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–5891; fax number:(703) 308–4776; e-mail address:*devaux.michelle@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of particular interest to persons who work in agricultural settings or persons who are concerned about implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Federal Food, Drug, and Cosmetic Act (FFDCA); and the amendments to both of these major pesticide laws by the Food Quality Protection Act (FQPA) of 1996. Potentially affected entities may include, but are not limited to: Agricultural workers and farmers; pesticide industry and trade associations; environmental, consumer, and farmworker groups; pesticide users and growers; pest consultants; State, local and Tribal governments; academia; public health organizations; food processors; and the public. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0669. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Drive, Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is(703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

A draft agenda is under development and will be posted by September 26, 2008, on EPA's website at:*http://www.epa.gov/pesticides/ppdc/*.

II. Background

EPA's Office of Pesticide Programs (OPP) is entrusted with the responsibility to help ensure the safety of the American food supply, the education and protection from unreasonable risk of those who apply or are exposed to pesticides occupationally or through use of products, and general protection of the environment and special ecosystems from potential risks posed by pesticides. The Charter for EPA's Pesticide Program Dialogue Committee (PPDC) was established under the Federal Advisory Committee Act (FACA), Public Law 92–463, in September 1995, and was renewed November 2, 2007, for another 2–year period. The purpose of PPDC is to provide advice and recommendations to the EPA Administrator on issues associated with pesticide regulatory development and reform initiatives, evolving public policy and program implementation issues, and science issues associated with evaluating and reducing risks from use of pesticides. It is determined that PPDC is in the public interest in connection with the performance of duties imposed on the Agency by law. The following sectors are represented on the PPDC: Pesticide industry and trade associations; environmental/public interest, consumer, and animal rights groups; farm worker organizations; pesticide user, grower, and commodity groups; Federal and State/local/Tribal governments; the general public; academia; and public health organizations. The objective of the PPDC Work Group on Web-Distributed Labeling is to provide advice regarding a process to ensure that the most current version of pesticide labeling is available to purchasers and users electronically. Copies of the PPDC Charter are filed with appropriate committees of Congress and the Library of Congress and are available upon request.

III. How Can I Request to Participate in this Meeting?

PPDC meetings are open to the public and seating is available on a first-come basis. Persons interested in attending do not need to register in advance of the meeting.

List of Subjects

Environmental protection, Agricultural workers, Agriculture,

Chemicals, Foods, Pesticides and pests, Public health.

Dated: September 3, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

[FR Doc. E8–20875 Filed 9–9–08; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

[MB Docket No. 08–172; FCC 08–196]

Development of Devices Capable of Supporting Multiple Audio Entertainment Services

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Commission adopted a *Memorandum Opinion and Order and Report and Order*, FCC 08–178 (''*Merger Order*''), approving the transfer of various licenses and authorizations from XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc., both licensees of Satellite Digital Audio Radio Service (''SDARS'') systems in the United States. In the *Merger Order*, the Commission committed to initiate a Notice of Inquiry (''NOI'') within 30 days of adoption of the *Merger Order* on the issues of requiring devices capable of receiving SDARS to include digital audio broadcast (''DAB''), or HD Radio™, or any other technologies capable of providing audio entertainment services; and requiring devices capable of receiving HD Radio to include SDARS or any other technologies capable of providing audio entertainment services. With this proceeding, we initiate this NOI.

DATES: Comments for this proceeding are due on or before November 10, 2008; reply comments are due on or before December 9, 2008.

ADDRESSES: You may submit comments, identified by MB Docket No. 08–172, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/*. Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by *e-mail: FCC504@fcc.gov* or *phone:* 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, please contact Rosalee Chiara, *Rosalee.Chiara@fcc.gov*, or Brendan Murray, *Brendan.Murray@fcc.gov*, both of the Policy Division, Media Bureau, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Notice of Inquiry in MB Docket No. 08–172, FCC 08–196, adopted August 22, 2008, and released August 25, 2008. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Summary of the Notice of Inquiry

I. Introduction

1. On July 25, 2008, the Commission adopted a *Memorandum Opinion and Order and Report and Order, FCC 08–178* (''*Merger Order*''), approving the transfer of various licenses and authorizations from XM Satellite Radio Holdings Inc. (''XM'') to Sirius Satellite Radio Inc. (''Sirius''), both licensees of Satellite Digital Audio Radio Service (''SDARS'') systems in the United States. In the *Merger Order*, the Commission committed to initiate a Notice of Inquiry (''NOI'') within 30 days of adoption of the *Merger Order* on the issues of (i) requiring devices capable of receiving SDARS to include digital audio broadcast (''DAB''), or HD Radio™, or any other technologies capable of providing audio entertainment services; and (ii) requiring devices capable of receiving HD Radio to include SDARS or any other technologies capable of providing audio entertainment services. With this proceeding, we initiate this NOI.

II. Background

2. *HD Radio*. The Commission first considered the feasibility of terrestrial and satellite digital radio services in 1990. With respect to terrestrial digital radio, the Commission concluded that the available systems were undeveloped and that it was premature to engage in discussions regarding standards, testing, licensing, and other policy issues. In 1999, the Commission recognized new technological developments and innovations and commenced the DAB proceeding to begin the process of adopting a DAB system. In the *DAB NPRM*, the Commission proposed criteria for the evaluation of DAB models and systems and considered certain DAB system testing, evaluation, and standard selection issues. In October 2002, the Commission selected iBiquity's IBOC HD Radio technology as the sole digital technology for the terrestrial radio broadcast service. IBOC technology makes use of the existing AM and FM bands (in-band) by adding digital carriers to a radio station's analog signal, thereby allowing broadcasters to transmit digitally on their existing channel assignments (on-channel) while simultaneously maintaining their analog service. The Commission concluded that adoption of a single IBOC transmission standard would benefit the radio broadcast industry, and solicited industry assistance in developing a formal standard. In 2007, the Commission released the *Second DAB Report and Order*, adopting service rules, programming and operational rules, and technical rules. In the *Second DAB Report and Order*, the Commission refrained from imposing a mandatory conversion schedule for radio stations to commence digital broadcast operations, but many radio stations have begun digital transmissions on a voluntarily basis.

3. *SDARS*. SDARS was established by the Commission in 1997 and, after an auction, licenses were granted to two entities, Sirius and XM. In establishing SDARS, the Commission explained that the new service would provide ''continuous nationwide radio programming with compact disc (CD) quality sound'' and would ''increase the variety of programming available to the listening public.'' XM commenced service in September 2001, and Sirius began service in February 2002. In 2007, Sirius and XM requested Commission approval to merge. The Commission adopted a decision on July 25, 2008 approving the merger subject to conditions. The companies publicly reported on July 29, 2008 that they completed the transaction and the

newly combined company now operates under the name Sirius XM Radio, Inc. (''Sirius XM'').

4. *Equipment Open Access Commitment*. In the Sirius-XM merger proceeding, some commenters urged the Commission to require the combined SDARS company to provide open access to the technical specifications of its devices and network to enable any receiver manufacturer to develop SDARS receivers. Some commenters also urged the Commission to require the combined SDARS company to direct manufacturers to include HD Radio technology in all SDARS receivers containing analog AM or FM radio technology. To address these issues, the Commission approved the merger subject to conditions, based on voluntary commitments made by Sirius XM, that require the merged entity to (i) permit any device manufacturer to develop equipment that can deliver the combined company's satellite radio service; (ii) not prevent such devices from reaching consumers through exclusive contracts or otherwise; and (iii) provide, on commercially reasonable terms, the intellectual property to permit any device manufacturer to develop equipment that can deliver the merged entity's satellite radio service. Moreover, in response to issues raised regarding the incorporation of other audio technologies in SDARS receivers, Sirius XM committed to allowing device manufacturers to incorporate in SDARS receivers any other technology that would not result in harmful interference with the merged entity's network, including HD Radio, iPod ports, Internet connectivity, and other technology. Based on these commitments, the Commission declined to adopt a merger condition that would mandate the incorporation of HD Radio technology in SDARS receivers. The Commission determined, however, that ''important issues have been raised that warrant further examination.'' Accordingly, the Commission committed to initiate this NOI within 30 days of adoption of the *Merger Order*.

III. Discussion

5. Consistent with our commitment made in the *Merger Order*, we initiate this NOI regarding whether to require HD Radio or any other audio technologies to be incorporated into all SDARS receivers and/or whether to require SDARS or any other audio technologies to be incorporated into all HD Radio receivers. As an initial matter, we seek comment on the extent to which the market is already making multi-functional radio receivers available to the public that include two or more of the following capabilities: SDARS, HD Radio, iPod/MP3, Internet, or any other technologies capable of providing audio entertainment services. How many of each type of multi-functional radio receivers are available today, including factory-installed receivers in automobiles and receivers later installed in vehicles in the so-called ''aftermarket''? How many multi-functional radio receivers are expected to be available in the near future without a Commission requirement? To the extent that multi-functional radio receivers are not available today and are not expected to be available in the near term, is this because of a lack of consumer demand for such receivers or some other reason? How does any lack of multi-functional radio receivers impact competition among SDARS, HD Radio, iPod/MP3, Internet, or any other technologies capable of providing audio entertainment services?

A. Including HD Radio or Other Audio Technologies in SDARS Receivers

6. We seek comment on whether we should require all receivers and other devices capable of receiving SDARS signals to also contain chips and other technology necessary to support HD Radio or any other technologies capable of providing audio entertainment services. Would such a requirement promote competition among Sirius XM, HD Radio stations, and other audio technologies, thereby leading to lower prices for audio entertainment services and/or broader programming options for listeners? As discussed above, Sirius XM has committed in connection with its merger to allow any manufacturer to develop SDARS receivers that can deliver the combined entity's satellite radio service and to allow manufactures to incorporate any technology that would not result in harmful interference with the SDARS network, including HD Radio technology. As a result of this commitment, can we expect a sufficient number of multi-functional radio receivers that include both HD Radio and SDARS reception capabilities to become available in the near term without a Commission requirement? In addition to increased competition, what other public interest benefits might result from the incorporation of HD Radio or other audio technologies in SDARS receivers? We note that the Commission's rules do not require SDARS operators to transmit state-level Emergency Alert System (''EAS'') alerts. Would including HD Radio technology in SDARS receivers facilitate the dissemination of state-level and other geographically targeted EAS alerts to SDARS subscribers?

7. We seek comment on the effect of any receiver requirements, or lack thereof, on the development of HD Radio. We also seek comment on the extent of consumer demand for HD Radio. What amount and type of programming is available on HD Radio today? What amount and type of programming is expected to be available on HD Radio in the next three years? To what extent are automobile manufacturers already incorporating HD Radios into new model vehicles? Does the HD Radio industry currently provide automobile manufacturers with incentives to include HD Radios in new model vehicles? What incentives would further facilitate the deployment of HD Radios in new model vehicles? Would a Commission rule requiring HD Radio technology to be incorporated into all SDARS receivers facilitate the development of HD Radio? We note that in establishing rules for SDARS in 1997, the Commission refrained from requiring SDARS receivers to be capable of receiving terrestrial broadcasting formats. We seek comment on whether we should reconsider this conclusion based on marketplace developments.

8. We seek comment on the impact of including HD Radio chips and technology in SDARS receivers on the cost of SDARS receivers. We seek comment on the cost impact on radio manufacturers, auto manufacturers and, ultimately, consumers. If the Commission were to require all SDARS receivers to also contain HD Radio chips and technology, would such a requirement result in higher volume purchases of HD Radio chips and technology and thereby lead to lower per-unit costs? To what extent is the cost of HD Radio chips and technology attributable to licensing fees for intellectual property (IP)? Would higher volume purchases of HD Radio chips and technology lead to lower IP licensing costs? Should the Commission require reduced royalty fees to iBiquity if we mandate the inclusion of an HD Radio chip? If so, does the Commission have the authority to do so? Would a mandate requiring the inclusion of HD Radio chips and technology in SDARS receivers reduce the incentive to improve the quality, develop innovations, and/or reduce the cost of HD Radio technology? We also seek comment on the impact on the cost of an SDARS receiver from including other technologies capable of providing audio entertainment services, such as iPod/MP3 and Internet capability.

9. We seek comment on what impact including an HD Radio chip and

technology in an SDARS receiver would have on the size, weight, battery life, and other parameters of an SDARS receiver. Would including HD Radio technology have a particularly significant impact on the size, weight, and battery life of any class of SDARS receivers, such as handheld receivers? Conversely, would including HD Radio technology have a relatively insignificant impact on the size, weight, and battery life of any class of SDARS receivers, such as receivers in automobiles? We also seek comment on the impact on the size, weight, battery life, and other parameters of an SDARS receiver from including other technologies capable of providing audio entertainment services, such as iPod/MP3 and Internet capability.

10. We seek comment on whether including HD Radio technology or other audio technologies in SDARS receivers would have any impact on the performance of the SDARS receivers. Would inclusion of HD Radio or other audio technologies have any adverse impact on the receiver's ability to receive SDARS signals?

11. If the Commission were to require SDARS receivers to include HD Radio or other audio technologies, what timeframe would be appropriate for compliance with this requirement? Should we establish a different timeframe for Original Equipment Manufactured (''OEM'') automobile receivers to account for procurement cycles for the automobile industry? Should we require Sirius XM to certify compliance with any rules we adopt? Should we adopt any additional requirements to aid the Commission in enforcing any rules we adopt?

12. Would a Commission rule requiring the incorporation of HD Radio or other audio technologies into SDARS receivers limit consumer choice in the selection of SDARS receivers? Should we allow some SDARS-only receivers? If we were to establish a class of permissible SDARS-only receivers, how would this impact competition among SDARS, HD Radio, iPod/MP3, Internet, or any other technologies capable of providing audio entertainment services? As suggested by iBiquity, should we require HD Radio chips and technology to be included only in SDARS receivers that include the ability to receive terrestrial analog AM/FM signals and which provide the user with the same tuning apparatus or display for both satellite and analog AM/FM radio? Would inclusion of HD Radio technology in these receivers impact the ability of a receiver to receive analog AM/FM reception?

13. We seek comment on whether the open access merger commitment affects the need for Commission action. We also seek comment on any other issues appropriate to our inquiry regarding whether to require HD Radio or any other technologies capable of providing audio entertainment services to be incorporated into SDARS receivers.

B. Including SDARS or Other Audio Technologies in HD Radio Receivers

14. We seek comment on whether we should require all receivers and other devices capable of receiving HD Radio signals to also contain chips and other technology necessary to support SDARS or any other technologies capable of providing audio entertainment services. Would such a requirement promote competition among HD Radio stations, Sirius XM, and other audio technologies, thereby leading to lower prices for audio entertainment services and/or broader programming options for listeners? In addition to increased competition, what other public interest benefits might result from the incorporation of SDARS or other audio technologies in HD Radio receivers? We note, for example, that there may be areas where there is no terrestrial communications infrastructure, including during times of disaster. Would including SDARS technology in HD Radio receivers promote the dissemination of emergency information in these areas?

15. We seek comment on the impact of including SDARS chips and technology in HD Radio receivers on the cost of HD Radio receivers. We seek comment on the cost impact on radio manufacturers, auto manufacturers and, ultimately, consumers. Does the SDARS technology afford adequate controls to enable Sirius XM to control access to its subscription services if SDARS chips and technology are included in all HD Radio receivers? If the Commission were to require all HD Radio receivers to also contain SDARS chips and technology, to what extent would this result in higher volume purchases of SDARS chips and technology and thereby lead to lower per-unit costs? To what extent is the cost of SDARS chips and technology attributable to IP licensing fees? Would higher volume purchases of SDARS chips and technology lead to lower IP licensing costs? Would a mandate requiring the inclusion of SDARS chips and technology in HD Radio receivers reduce the incentive to improve the quality, develop innovations, and/or reduce the cost of SDARS technology? We also seek comment on the impact on the cost of an HD Radio receiver from including other technologies capable of providing audio entertainment services, such as iPod/MP3 and Internet capability.

16. We seek comment on what impact including an SDARS chip and technology in an HD Radio receiver would have on the size, weight, battery life, and other parameters of an HD Radio receiver. Would including SDARS technology have a particularly significant impact on the size, weight, and battery life of any class of HD Radio receivers, such as handheld receivers? In particular, we seek comment on the size of the antenna needed to receive SDARS satellite signals. How would this antenna size impact the size of an HD Radio? To what extent has HD Radio technology been incorporated into mobile phones? If all devices capable of receiving HD Radio signals must also include SDARS technology, how would that impact the incentives of equipment manufacturers to include HD Radio technology in mobile phones? Would including SDARS technology have a relatively insignificant impact on the size, weight, and battery life of any class of HD Radio receivers, such as receivers in automobiles? We also seek comment on the impact on the size, weight, battery life, and other parameters of an HD Radio receiver from including other technologies capable of providing audio entertainment services, such as iPod/MP3 and Internet capability.

17. We seek comment on whether including SDARS technology or other audio technologies in HD Radio receivers would have any impact on the performance of the HD Radio receiver. Would inclusion of SDARS or other audio technologies have any adverse impact on the receiver's ability to receive HD Radio signals?

18. If the Commission were to require HD Radio receivers to include SDARS or other audio technologies, what timeframe would be appropriate for compliance with this requirement? Should we establish a different timeframe for OEM automobile receivers to account for procurement cycles for the automobile industry? What steps could we take to certify compliance with any rules? Should we adopt additional requirements to aid in enforcing any rules we adopt?

19. Would a Commission rule requiring SDARS or other audio technologies to be incorporated into HD Radio receivers limit consumer choice in the selection of HD Radio receivers? Should we allow some receivers to be capable of receiving HD Radio but not SDARS or other audio technologies? If we were to establish a class of such receivers, how would that impact competition among HD Radio, SDARS,

iPod/MP3, Internet, or any other technologies capable of providing audio entertainment services?

20. We seek comment on any other issues appropriate to our inquiry regarding whether to require SDARS or any other technologies capable of providing audio entertainment services to be incorporated into HD Radio receivers.

IV. Statutory Authority

21. We seek comment on whether the Commission has the jurisdiction to mandate the inclusion of HD Radio, SDARS, or any other audio technology in receivers. Do we have express or ancillary statutory authority to require receiver manufacturers to include certain technology in receivers? To the extent that the Commission does not have the authority to require receiver manufacturers to include certain technology in receivers, do we have authority to require iBiquity, licensees of HD Radio stations, Sirius XM, and/or other entities to certify that receivers authorized to receive content include certain mandated technology? Would such a requirement be technologically feasible, particularly in the case of a non-subscription service such as HD Radio?

V. Procedural Matters

A. Ex Parte Presentations

22. This is an exempt proceeding in which ex parte presentations are permitted (except during the Sunshine Agenda period) and need not be disclosed.

B. Comment Filing Procedures

23. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.

• *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov*. Filers should follow the instructions provided on the Web site for submitting comments.

• For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov*, and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.

• *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington DC 20554.

24. *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

25. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC, 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

26. *Additional Information*. For additional information on this proceeding, contact Rosalee Chiara, *Rosalee.Chiara@fcc.gov*, or Brendan Murray, *Brendan.Murray@fcc.gov*, of the Media Bureau, Policy Division, (202) 418–2120.

VI. Ordering Clauses

Accordingly, *it is ordered*, pursuant to the authority contained in sections 1, 4(i) & (j), 303(r), and 403 of the Communications Act of 1934, 47 U.S.C sections 151, 154(i) & (j), 303(r), and 403, that this *Notice of Inquiry is adopted*.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–20992 Filed 9–9–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

[Notice 2008–10]

Filing Dates for the Ohio Special Election in the 11th Congressional District

AGENCY: Federal Election Commission.

ACTION: Notice of filing dates for special election.

SUMMARY: Ohio has scheduled elections on October 14, 2008, and November 18, 2008, to fill the U.S. House of Representatives seat in the Eleventh Congressional District held by the late Representative Stephanie Tubbs Jones.

Committees required to file reports in connection with the Special Primary Election on October 14, 2008, shall file a 12-day Pre-Primary Report. Committees required to file reports in connection with both the Special Primary and Special General Election on November 18, 2008, shall file a 12-day Pre-Primary Report, a 12-day Pre-General Report, and a 30-day Post-General Report.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin R. Salley, Information Division, 999 E Street, NW., Washington, DC 20463; *Telephone:* (202) 694–1100; Toll Free (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Principal Campaign Committees

All principal campaign committees of candidates who participate in the Ohio Special Primary and Special General Elections shall file a 12-day Pre-Primary Report on October 2, 2008; a 12-day Pre-General Report on November 6, 2008; and a 30-day Post-General Report on December 18, 2008. (See chart below for the closing date for each report).

All principal campaign committees of candidates participating only in the Special Primary Election shall file a 12-day Pre-Primary Report on October 2, 2008. (See chart below for the closing date for each report).

Unauthorized Committees (PACs and Party Committees)

Political committees filing on a quarterly basis in 2008 are subject to special election reporting if they make previously undisclosed contributions or expenditures in connection with the Ohio Special Primary or Special General Elections by the close of books for the applicable report(s). (See chart below for the closing date for each report).

Committees filing monthly that support candidates in the Ohio Special Primary or Special General Elections should continue to file according to the monthly reporting schedule.

Additional disclosure information in connection with the Ohio Special Election may be found on the FEC Web site at *http://www.fec.gov/info/report_dates.shtml*.

CALENDAR OF REPORTING DATES FOR OHIO SPECIAL ELECTION

Report	Close of books [1]	Reg./cert. and overnight mailing deadline	Filing deadline
Committees Involved in Only the Special Primary (10/14/08) Must File:			
Pre-Primary	09/24/08	09/29/08	10/02/08
October Quarterly	09/30/08	10/15/08	10/15/08
Committees Invovled in Both the Special Primary (10/14/08) and Special General (11/18/08) Must File:			
Pre-Primary	09/24/08	09/29/08	10/02/08
October Quarterly	09/30/08	10/15/08	10/15/08
Pre-General	10/29/08	11/03/08	11/06/08
Post-General	12/08/08	12/18/08	12/18/08
Year-End	12/31/08	01/31/09	[2] 01/31/09
Committees Involved in Only the Special General (11/18/08) Must FIle:			
Pre-General	10/29/08	11/03/08	11/06/08
Post-General	12/08/08	12/18/08	12/18/08
Year-End	12/31/08	01/31/09	[2] 01/31/09

[1] The reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered up through the close of books for the first report due.

[2] Notice that this filing deadline falls on a weekend. Filing deadlines are not extended when they fall on nonworking days. Accordingly, reports filed by methods other than Registered, Certified or Overnight Mail, or electronically, must be received before the Commission's close of business on the last business day before the deadline.

On behalf of the Commission,

Dated: September 4, 2008.

Ellen L. Weintraub,

Commissioner, Federal Election Commission.

[FR Doc. E8–20936 Filed 9–9–08; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

AGENCY: Federal Election Commission.

DATE AND TIME: Thursday, September 11, 2008 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (ninth floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED: Correction and Approval of Minutes.

ADVISORY OPINION 2008–08: Mr. Jonathan Zucker. Management and Administrative Matters.

PERSON TO CONTACT FOR INFORMATION: Robert Biersack, Press Officer, *Telephone:* (202) 694–1220.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Mary Dove, Commission Secretary, at (202) 694–1040, at least 72 hours prior to the hearing date.

Darlene Harris,

Deputy Secretary of the Commission.

[FR Doc. E8–20911 Filed 9–9–08; 8:45 am]

BILLING CODE 6715–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Web site (*www.fmc.gov*) or contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 011733–026.

Title: Common Ocean Carrier Platform Agreement.

Parties: A.P. Moller-Maersk A/S; CMA CGM; Hamburg-Süd; Hapag-Lloyd AG; Mediterranean Shipping Company S.A.; and United Arab Shipping Company (S.A.G.) as shareholder parties, and Alianca Navegacao e Logistica Ltda.; Compania Sud Americana de Vapores, S.A.; Companhia Libra de Navegacao; COSCO Container Lines Co., Ltd.; Emirates Shipping Lines; Gold Star Line, Ltd.; Hanjin Shipping Co., Ltd.; Hyundai Merchant Marine Co. Ltd; Kawasaki Kisen Kaisha, Ltd.; MISC Berhad; Mitsui O.S.K. Lines Ltd.; Nippon Yusen Kaisha; Safmarine Container Lines N.V.; Senator Lines GmbH; Norasia Container Lines Limited; Tasman Orient Line C.V. and Zim Integrated Shipping as non-shareholder parties.

Filing Party: Wayne R. Rohde, Esq., Sher & Blackwell LLP, 1850 M Street, NW., Suite 900, Washington, DC 20036.

Synopsis: The amendment would add Evergreen Line Joint Service Agreement as a non-shareholder party to the agreement.

Agreement No.: 012048.

Title: The Container Trades Statistics Agreement.

Parties: A.P. Moeller-Maersk A/S; China Shipping Container Lines Co., Ltd.; COSCO Container Lines Company Ltd.; CMA CGM S.A.; Compania Sudamericana de Vapores S.A.; Evergreen Line Joint Service Agreement; Hamburg Sud KG; Hanjin Shipping Co., Ltd.; Hapag-Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Independent Container Line Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mediterranean Shipping Co. S.A.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Orient Overseas Container Line Ltd.; Pacific International Lines (PTE) Ltd.; United Arab Shipping Co. (SAG); Yangming Marine Transport Corp.; and Zim Integrated Shipping Services, Ltd.

Filing Party: Wayne R. Rohde, Esq., Sher & Blackwell LLP, 1850 M Street, NW., Suite 900, Washington, DC 20036.

Synopsis: The agreement authorizes the parties to gather, compile, aggregate, exchange, and disseminate demand and supply forecasts, a volume database, and a price index relating to the trade between the United States and the European Union. It also authorizes the parties to meet and discuss such data.

By Order of the Federal Maritime Commission.

Dated: September 5, 2008.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–21034 Filed 9–9–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/.*

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 3, 2008.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. Heritage Bancorp, Inc., Mason, Tennessee; to directly acquire 2.12 percent, for total direct and indirect ownership of 51.77 percent, of Mason Bancorp, Inc., Mason, Tennessee, and thereby indirectly acquire The Bank of Mason, Mason Tennessee.

Board of Governors of the Federal Reserve System, September 5, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–20958 Filed 9–9–08; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–08–0494]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Exposure to Aerosolized Brevetoxins during Red Tide Events (OMB No. 0920–0494)—Revision—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC.)

Background and Brief Description

Karenia brevis (formerly *Gymnodinium breve*) is the marine dinoflagellate responsible for extensive blooms (called Florida red tides) that forms in the Gulf of Mexico. *K. brevis* produces potent toxins, called brevetoxins, which have been responsible for killing millions of fish and other marine organisms. The biochemical activity of brevetoxins is not completely understood and there is still little information regarding human health effects from environmental exposures, such as inhaling brevetoxin that has been aerosolized and swept onto the coast by offshore winds. The National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC) has recruited people who work along the coast of Florida and who are periodically occupationally exposed to aerosolized red tide toxins.

NCEH administered a baseline respiratory health survey and conducted pre- and post-shift pulmonary function tests (PFTs) during a time when there is no red tide reported near the area. When a red tide developed, NCEH administered a symptom survey and conducted PFTs. NCEH compared symptoms reported before the shift with symptoms reported after the shift. NCEH also examined changes in PFT test results (post-shift values compared to pre-shift values). NCEH did these comparisons during a time when there was no red tide and during a time when

there was a red tide and then examined the data to see if red tide exposure had an effect on symptom reports or PFT results.

NCEH requests a revision of data collection procedures for the currently approved project and an additional three year extension. Unfortunately, the exposures experienced by the study cohort have been minimal, and NCEH plans to conduct another study (using the same symptom surveys and PFTs) during a more severe red tide event. First, NCEH wants to quantify the levels of cytokines in nasal exudates to assess whether they can be used to verify exposure and to demonstrate a biological effect (i.e., allergic response) following inhalation of aerosolized brevetoxins. NCEH will collect nasal exudates at the same time the PFTs are done.

NCEH plans to include the study subjects who have been involved in the earlier studies and any new individuals (n=25) who have been hired to work at the relevant beaches.

There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Instrument type	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Pulmonary History Survey	10	1	20/60	3
Symptom survey	25	6	5/60	13
Total				16

Catina Conner,

Assistant Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–20913 Filed 9–9–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Ethics Subcommittee, Advisory Committee to the Director, Centers for Disease Control and Prevention (CDC); Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention announce the following Subcommittee meeting.

Name: Ethics Subcommittee, Advisory Committee to the Director.

Time and Date: 12 p.m.–1:30 p.m., EDT, Thursday, September 25, 2008.

Place: This meeting will be held by conference call. The call in number is (866) 919–3560 and entering code 4168828.

Status: Open to the public. The public is welcome to comment during the public comment period which is tentatively scheduled from 1 p.m.–1:15 p.m.

Purpose: The Ethics Subcommittee will provide counsel to the ACD, CDC regarding a broad range of public health ethics questions and issues arising from programs, scientists and practitioners.

Matters To Be Discussed: Agenda items will include review of ethics guidance for public health emergency preparedness and response.

For Further Information Contact: For more information about this meeting contact Drue Barrett, PhD., Designated Federal Official, Ethics Subcommittee, CDC, 1600 Clifton Road, NE., M/S D–50, Atlanta, Georgia 30333, Telephone (404)639–4690, *e-mail: dbarrett@cdc.gov*.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: September 4, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–20967 Filed 9–9–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0239]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Regulations for In Vivo Radiopharmaceuticals Used for Diagnosis and Monitoring

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by October 10, 2008.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *baguilar@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0409. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3792.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Regulations for In Vivo Radiopharmaceuticals Used for Diagnosis and Monitoring (OMB Control Number 0910–0409)—Extension

FDA is requesting OMB approval of the information collection requirements contained in 21 CFR 315.4, 315.5, and 315.6. These regulations require manufacturers of diagnostic radiopharmaceuticals to submit information that demonstrates the safety and effectiveness of a new diagnostic radiopharmaceutical or of a new indication for use of an approved diagnostic radiopharmaceutical.

In response to the requirements of section 122 of the Food and Drug Administration Modernization Act of 1997 (Public Law 105–115), FDA published a final rule in the **Federal**

Register of May 17, 1999 (64 FR 26657) amending its regulations by adding provisions that clarify the agency's evaluation and approval of in vivo radiopharmaceuticals used in the diagnosis or monitoring of diseases. The regulation describes the kinds of indications of diagnostic radiopharmaceuticals and some of the criteria that the agency would use to evaluate the safety and effectiveness of a diagnostic radiopharmaceutical under section 505 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355) and section 351 of the Public Health Service Act (the PHS Act) (42 U.S.C. 262). Information about the safety or effectiveness of a diagnostic radiopharmaceutical enables FDA to properly evaluate the safety and effectiveness profiles of a new diagnostic radiopharmaceutical or a new indication for use of an approved diagnostic radiopharmaceutical.

The rule clarifies existing FDA requirements for approval and evaluation of drug and biological products already in place under the authorities of the act and the PHS Act. The information, which is usually submitted as part of a new drug application or biologics license application or as a supplement to an approved application, typically includes, but is not limited to, nonclinical and clinical data on the pharmacology, toxicology, adverse events, radiation safety assessments, and chemistry, manufacturing, and controls. The content and format of an application for approval of a new drug are set forth in § 314.50 (21 CFR 314.50). Under 21 CFR part 315, information required under the act and needed by FDA to evaluate the safety and effectiveness of in vivo radiopharmaceuticals still needs to be reported.

Based on the number of submissions (that is, human drug applications and/or new indication supplements for diagnostic radiopharmaceuticals) that FDA receives, the agency estimates that it will receive approximately two submissions annually from two applicants. The hours per response refers to the estimated number of hours that an applicant would spend preparing the information required by the regulations. Based on FDA's experience, the agency estimates the time needed to prepare a complete application for a diagnostic radiopharmaceutical to be approximately 10,000 hours, roughly one-fifth of which, or 2,000 hours, is estimated to be spent preparing the portions of the application that would be affected by these regulations. The regulation does not impose any additional reporting burden for safety and effectiveness information on diagnostic radiopharmaceuticals beyond the estimated burden of 2,000 hours because safety and effectiveness information is already required by § 314.50 (collection of information approved by OMB under OMB control number 0910–0001). In fact, clarification in these regulations of FDA's standards for evaluation of diagnostic radiopharmaceuticals is intended to streamline overall information collection burdens, particularly for diagnostic radiopharmaceuticals that may have well established, low risk safety profiles, by enabling manufacturers to tailor information submissions and avoid unnecessary clinical studies. Table 1 of this document contains estimates of the annual reporting burden for the preparation of the safety and effectiveness sections of an application that are imposed by existing regulations. This estimate does not include the actual time needed to conduct studies and trials or other research from which the reported information is obtained.

In the **Federal Register** of April 28, 2008 (73 FR 22955), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.— ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours Per Response	Total Hours
315.4, 315.5, and 315.6	2	1	2	2,000	4,000
Total					

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: August 29, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–20933 Filed 9–9–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Statutorily Mandated Single Source Award; Quentin N. Burdick American Indians Into Nursing Program

AGENCY: Indian Health Service, HHS.

ACTION: Notice of intent to fund a statutorily mandated single source grant award to the University of North Dakota, Quentin N. Burdick American Indians into Nursing Program, also known as the Recruit American Indians Into Nursing (RAIN) Program.

Project Period: August 1, 2008–July 31, 2013.

Amount of Award: $350,000.

Authority: This program is authorized under 25 U.S.C. 1616e(e) as amended, and requires the IETS to provide one grant to establish and maintain a program at the University of North Dakota (UND) to be known as the ''Quentin N. Burdick American Indians into Nursing Program.''

Single Source Justification: The single source award is statutorily mandated under 25 U.S.C. 1616e(e), as amended and shall to the maximum extent feasible, coordinate with the Quentin N. Burdick Indians Into Psychology Program.

Description of the Project: While Indian health programs have need for advance practice nurses who are nurse midwives and nurse practitioners, its greatest need in the field of advance practice nursing is nurse anesthesia. Additional high-need areas are nurse administrators trained at the graduate level and clinical nurses at the bachelor's level. Therefore, UND will maintain or incorporate the following:

A. Provide a preference to Indians,

B. Train nurse anesthetists, nurse midwives, nurse practitioners, nurse administrators and Bachelor's of Science in Nursing (BSN) nurses,

C. Teach curriculum in an interdisciplinary manner with other

health professionals such as pharmacy, medicine, or behavioral health students,

D. Integrate and emphasize an Evidence Based Practice (EBP) curriculum,

E. Have student clinical rotations established with Indian health programs,

F. Provide access to the nursing curriculum using distance learning,

G. Have formal bridge program agreements between Tribal colleges or universities to accommodate License Practical Nurse (LPN) to Associate Degree in Nursing (ADN)/BSN or BSN to Master's of Science in Nursing (MSN)/ Doctorate in Nursing Practice (DNP) students,

H. Have a faculty exchange program between a Tribal college and UND School of Nursing to enhance cultural relevance, competency, and faculty strength,

I. Have an emphasis on transcultural nursing and cultural competency, and

J. Have a rural health focus.

Continuation awards are subject to the availability of funds and satisfactory performance.

To obtain application instructions please click on the following link and go to the funding opportunities: *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm?rnodule=gogp_funding.*

Criteria

A. Methodology (40 Points)

Applicants must train nurses at the graduate level in nurse anesthesia, nurse midwifery, nurse practitioners, nursing healthcare administration, or undergraduate level at the BSN degree level and should provide this training in an interdisciplinary manner. The applicant's curriculum should be available via a distance learning model and emphasize and integrate EBP, transcultural nursing, and include a rural health focus. Applicants must define how they will locate and recruit American Indian and Alaska Native (AI/AN) students and provide support services to AI/AN students who are recruited to facilitate their success in the nursing program and to track their progress. Applicants must define how they will assist the graduate nurse with job placement and track their payback status to ensure that the obligees comply with the terms of their service obligation. Applicants should have a mechanism in place to provide their students with clinical rotations in AI/AN health programs, have a bridge program agreement between Tribal colleges or universities so as to accommodate LPN to ADN/BSN or BSN to MSN/DNP and have a faculty exchange program with a Tribal college or university and a university school of nursing.

B. Capacity (20 Points)

Applicants must provide verification of accreditation and show that they are capable of conducting the project from a technical and business standpoint by providing the qualifications and credentials of key personnel and a sound fiscal plan using the grant funds. Applicants for the Graduate or Bachelor's level grants must submit verifying documentation of National League of Nursing Accreditation Commission or American Association of Colleges of Nursing Commission on Collegiate Nursing Education accreditation. All programs must submit verifying documentation of State approval.

C. Need (15 Points)

Applicants must justify the need for their project and provide a plan for the methodology they will use for recruiting AI/AN students nationwide as well as how they will actively assist nursing graduates with job placement. Applicants must recruit and train AI/AN individuals to be nurses at the graduate and undergraduate level and provide scholarships to those AI/AN individuals enrolled in the school of nursing to pay tuition, books, fees, and stipends for living expenses; provide a program that encourages AI/AN nurses at the graduate and undergraduate level to provide or continue to provide, health care services in AI/AN health care programs; and provide a program that increases the skills of, and provides continuing education, to AI/AN nurses at the graduate and undergraduate level.

D. Evaluation (15 Points)

Applicants must present a plan for evaluating their success in carrying out the project and on an annual basis conduct a quantitative and qualitative evaluation of their year's activities, identifying what areas of the project need to be improved and how they will make those improvements. Applicants must identify how they will meet on an annual basis with the other project directors and staff under this grant program to share successes and challenges and to receive Federal grant training.

E. Prior Experience (10 Points)

The UND must identify their experience with other similar projects, including the results of those projects and provide evidence of their past or potential cooperation and experience with AI/AN communities and Tribes and how UND Works with the Center for Gifted and Talented Indian Students established under section 5324(a) of the Indian Education Act of 1988.

Agency Contacts(s):

For program-related information, contact Ms. Sandra L. Haldane, BSN, RN, MS, Director, Division of Nursing Services, Office of Clinical and Prevention Services, Indian Health Service, 801 Thompson Avenue, Reyes Building, Suite 300, Rockville, MD 20852, (301) 443–1840.

For grants-related information, contact Ms. Norma Jean Dunne, Grants Management Specialist, Division of Grants Operations, Indian Health Service, 801 Thompson Avenue, TMP 360, Rockville, MD 20852, (301) 443–5204. (The telephone numbers are not toll-free numbers).

Dated: September 2, 2008.

Robert G. McSwain,

Director, Indian Health Service.

[FR Doc. E8–20907 Filed 9–9–08; 8:45 am]

BILLING CODE 4165–16–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Molecular and Integrative Signal Transduction Study Section, October 2, 2008, 8 a.m. to October 3, 2008, 5:30 p.m., Sheraton Delfina Santa Monica Hotel, 530 West Pico Boulevard, Santa Monica, CA 90405 which was published in the **Federal Register** on August 18, 2008, 73 FR 48219–48220.

The meeting will be held one day only October 2, 2008. The meeting time and location remain the same. The meeting is closed to the public.

Dated: September 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–20908 Filed 9–9–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice

is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel Nursing Homes.

Date: October 2, 2008.

Time: 5:30 p.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suite Hotel, 4300 Military Road, Washington, DC 20015 (Telephone Conference Call).

Contact Person: Alicja L. Markowska, PhD, DSC, National Institute on Aging, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *markowsania@nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel Biomarkers.

Date: October 3, 2008.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Bldg., 7201 Wisconsin Avenue, RM 20212, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Ramesh Vemuri, PhD, Chief, Scientific Review Office, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 20–212, Bethesda, MD 20892, 301–402–7700, *rv23r@nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel Posterior Association Cortex in Aging, MCI, and AD.

Date: October 7, 2008.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health Gateway, 7201 Wisconsin Avenue, Suite 20212, Bethesda, MD 20814 (Telephone Conference Call).

Contact Person: Alicja L. Markowska, PhD, DSC, National Institute on Aging, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *markowsania@nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel Long Term Consequences of Delirium.

Date: October 29, 2008.

Time: 1:30 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, 2C212, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Jeannette L. Johnson, PhD, Scientific Review Officer, National Institutes on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2c212, Bethesda, MD 20892, 301–402–7705, *JOHNSONJ9@NIA.NIH.GOV*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: September 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–20909 Filed 9–9–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5194–N–14]

Notice of Proposed Information Collection: Comment Request; Study of Capital Needs in the Public Housing Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* November 10, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name or OMB Control Number and should be sent to: Lillian L. Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Room 4178, Washington, DC 20410–5000; telephone 202–402–8048 (this is not a toll-free number) or e-mail Ms. Deitzer at *Lillian.L.Deitzer@hud.gov* for a copy of the proposed interview guides, survey instruments, or other available information.

FOR FURTHER INFORMATION CONTACT: Mary Schulhof, Office of Policy, Program and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street, SW., Room 4116, Washington, DC 20410; telephone 202–708–0713 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (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; (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 collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Study of Capital Needs in the Public Housing Program.

OMB Control Number: 2577-pending.

Description of the need for the information and proposed use: In response to a congressional request, the Department is conducting a study of the existing and accrual capital needs of the public housing stock. Through a combination of on-site inspections and Public Housing Authority (PHA) interviews, capital needs will be estimated at the national level for subcategories such as housing authority size (measured by number of ACC units) and region. The findings will be compared to those from an earlier study, *Capital Needs of the Public Housing Stock in 1998: Formula Capital Study (January 30, 2000),* to illustrate how existing and accrual needs have changed over time. The study is also required to investigate the feasibility of using Real Estate Assessment Center (REAC) inspections to facilitate ongoing estimates of public housing capital needs. The collected information will support budgeting, planning, and evaluation efforts by Congress and HUD.

Agency form number, if applicable: Not applicable.

Members of affected public: Staff from Public Housing Authorities included in the sample.

Estimation of the total number of hours needed to prepare the information collection including number of respondents: The total burden for data collection is estimated at 4,820 hours (4,400 hours for physical inspections of units and 420 hours for a PHA survey). Since the entire data collection period is

roughly six months within the same calendar year, the total burden hours are the same as the average annual burden hours. Each of the 550 properties selected for inspection will need to provide a knowledgeable staff member to accompany the inspector during the 8 hour inspection. At each of the 140 PHAs selected, an average of three staff members (such as the executive director, director of modernization, engineer, or asset manager) will need to spend a combined total of approximately 180 minutes responding to our information requests and follow-up questions.

Data collected	Number of respondents	Burden per respondent (minutes)	Total respondent burden (minutes)	Total respondent burden (hours)
Physical Inspections [1]	550	480	264,000	4,400
PHA Survey	420	60	25,200	420
Total	970	n.a.	289,200	4,820

[1] The physical inspection process is estimated to take about 8 hours per property. A building or property manager is expected to accompany the inspector during the inspection.

Status of the proposed information collection: New collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: August 28, 2008.

Merrie Nichols-Dixon,

Director, Trouble Agency Recovery Operations.

[FR Doc. E8–21022 Filed 9–9–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5187–N–53]

Management Review of Multifamily Housing Projects

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

HUD staff, Mortgagees, and Contract Administrators complete the form HUD–9834 during on-site reviews. The information gathered from the form is used to evaluate the quality of management, determine causes of problems, and devise corrective actions to safeguard the Department's financial interest and ensure that tenants are provided with decent, safe, and sanitary housing.

DATES: *Comments Due Date:* October 10, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0178) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; *fax:* 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (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; (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 collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Management Review of Multifamily Housing Projects.

OMB Approval Number: 2502–0178.

Form Numbers: HUD–92903.

Description of the Need for the Information and Its Proposed Use: HUD staff, Mortgagees, and Contract Administrators complete the form HUD–9834 during on-site reviews. The information gathered from the form is used to evaluate the quality of management, determine causes of problems, and devise corrective actions to safeguard the Department's financial interest and ensure that tenants are provided with decent, safe, and sanitary housing.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	25,649	1		11.069		283,912

Total Estimated Burden Hours: 283,912.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: September 3, 2008.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E8–21023 Filed 9–9–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2008–N0248; 40136–1265–0000–S3]

Alligator River National Wildlife Refuge

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of the Final Comprehensive Conservation Plan and Finding of No Significant Impact for Alligator River National Wildlife Refuge in Manteo, North Carolina.

SUMMARY: The Fish and Wildlife Service announces that a Final Comprehensive Conservation Plan and Finding of No Significant Impact for Alligator River National Wildlife Refuge is available for distribution. The plan was prepared pursuant to the National Wildlife Refuge System Improvement Act of 1997, and in accordance with the National Environmental Policy Act of 1969, and describes how the refuge will be managed for the next 15 years. The compatibility determinations for hunting, fishing, wildlife observation and photography, environmental education and interpretation, and trapping of selected furbearers are also available in the plan.

ADDRESSES: A copy of the plan may be obtained by writing to the Alligator River National Wildlife Refuge, P.O. Box 1969, Manteo, North Carolina 27954. The plan may also be accessed and downloaded from the Service's Web site: *http://southeast.fws.gov/planning/*.

SUPPLEMENTARY INFORMATION: The availability of the Draft Comprehensive Conservation Plan and Environmental Assessment for a 45-day public review and comment period was announced in the **Federal Register** on May 30, 2006 (71 FR 30687). The plan and environmental assessment identified and evaluated three alternatives for managing the refuge over the next 15 years. Alternative 1, the no-action alternative, would have continued current management of the refuge. Alternative 3 would have resulted in substantial program increases.

Based on the environmental assessment and the comments received, the Service adopted Alternative 2 as its preferred alternative. Alternative 2 directs the development of programs to best achieve the refuge purpose and goals; emphasizes wildlife conservation as our highest priority in refuge management; collects habitat and wildlife data; and ensures long-term achievement of refuge and Service objectives. At the same time, these management actions provide balanced levels of compatible public use opportunities consistent with existing laws, Service policies, and sound biological principles. Alternative 2 provides the best mix of program elements to achieve desired long-term conditions.

Under this alternative, all lands under the management and direction of the refuge will be protected, maintained, and enhanced to best achieve national, ecosystem, and refuge-specific goals and objectives within anticipated funding and staffing levels. In addition, the action positively addresses significant issues and concerns expressed by the public.

Alligator River National Wildlife Refuge is located in Dare and Hyde Counties, North Carolina, about 3.5 hours east of Raleigh and 1.5 hours south of the Virginia line. The refuge covers a total of 153,017 acres within the 239,800-acre acquisition boundary and occupies the eastern-most portion of the Albemarle-Pamlico Peninsula in eastern North Carolina. The refuge is the lead refuge in the North Carolina Coastal Plain Refuge Complex and consists of a variety of habitats, including forested wetlands, shrub wetlands, agricultural lands, moist-soil areas, open waters, dirt/gravel access roads and trails, and recently reforested areas. Annually, more than 35,000 people visit the refuge.

FOR FURTHER INFORMATION CONTACT: Bonnie Strawser, Wildlife Interpretive Specialist, Alligator River National Wildlife Refuge; *telephone:* 252–473–1131; *fax:* 252–473–1668; *e-mail: bonnie_strawser@fws.gov*; or by writing to the Alligator River National Wildlife Refuge at the address in the **ADDRESSES** section.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: March 30, 2007.

Cynthia K. Dohner,

Acting Regional Director.

Editorial Note: This document was received in the Office of the Federal Register on September 5, 2008.

[FR Doc. E8–20974 Filed 9–9–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2008–N0163; 40136–1265–0000–S3]

Logan Cave National Wildlife Refuge, Benton County, AR

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: final comprehensive conservation plan and finding of no significant impact.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for Logan Cave National Wildlife Refuge. In the final CCP, we describe how we will manage this refuge for the next 15 years.

ADDRESSES: A copy of the plan may be obtained by writing to: Holla Bend National Wildlife Refuge, 10448 Holla Bend Road, Dardanelle, AR 72834. The CCP/FONSI may also be accessed and downloaded from the Service's Web site *http://southeast.fws.gov/planning/*.

FOR FURTHER INFORMATION CONTACT: Mr. Durwin Carter, Refuge Manager, Holla Bend National Wildlife Refuge; *Telephone:* (479) 229–4300; *Fax:* (479) 229–4302.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for Logan Cave National Wildlife Refuge. We started this process through a notice in the **Federal Register** on November 23, 2005 (70 FR 70878). For more about the process, see that notice.

Logan Cave National Wildlife Refuge was established in 1989 under the Endangered Species Act of 1973 to protect cave inhabitants, including the endangered gray bat (*Myotis grisescens*), Benton cave crayfish (*Cambarus aculabrum*), and the threatened Ozark cavefish (*Amblyopsis rosae*). The cave also has historically provided habitat for the endangered Indiana bat (*Myotis sodalis*). This 123-acre Ozark Mountain refuge, which includes a limestone solution cave with approximately 1.5

miles of passageways, is located 20 miles west of Fayetteville, Arkansas, and approximately 2 miles north of U.S. Highway 412. The ecology of Logan Cave has been described as the highest quality cave habitat in the entire Ozark region. There are only two known entry points for the cave: the sinkhole and spring. The sinkhole consists of a steep sided funnel shaped depression about 50 feet in diameter located on a forested hillside. The spring entrance is located on a hillside under an overhang rock bluff. Most of the refuge consists of hillsides, which support a mature climax community of oak and hickory.

Groundwater surfacing within the cave forms a stream that flows throughout the cave and at the outfall forms Logan Spring, which drains to Osage Creek just south of the refuge. Osage Creek is a major tributary of the Illinois River, which is the main drainage in southwestern Benton County, and their confluence is about 1.2 miles south of the refuge. In past years, spring water from the cave had a measured flow of approximately 5 million gallons per day and supplied the Logan community, a fish hatchery, and 49 fish ponds.

We announce our decision and the availability of the final CCP and FONSI for Logan Cave National Wildlife Refuge in accordance with the National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the draft comprehensive conservation plan and environmental assessment (Draft CCP/EA). The CCP will guide us in managing and administering Logan Cave Refuge for the next 15 years.

The compatibility determinations for environmental education and interpretation, research, and monitoring are available in the CCP.

Background

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

Comments

Approximately 120 copies of the Draft CCP/EA were made available for a 30-day public review period as announced in the **Federal Register** on January 25, 2008 (73 FR 4615). A public meeting was held on February 12, 2008, at 6 p.m., at the Logan Community Center. Fifteen individuals were in attendance at the meeting. Eight respondents consisting of the Service; the State Clearinghouse of Arkansas, Department of Finance and Administration; the Ozark Underground Laboratory, Inc.; Natural Resources Conservation Service; the Arkansas Natural Heritage Commission; and local citizens submitted written comments by mail or e-mail.

Selected Alternative

We developed three alternatives for management of the refuge and chose Alternative 3 as the preferred alternative. This alternative was considered to be the most effective for meeting the purposes of the refuge by conserving, restoring, and managing the refuge's habitats and wildlife while optimizing wildlife-dependent public uses. Alternative 3 best achieves national, ecosystem, and refuge-specific goals and objectives and positively addresses significant issues and concerns expressed by the public.

Under Alternative 3, all refuge management actions will be directed toward achieving the refuge's primary purpose to properly administer, conserve, and develop the 123-acre area for protection of a unique cave ecosystem that provides essential habitat for the endangered gray bat, endangered Benton cave crayfish, the threatened Ozark cavefish, and other significant cave dwelling wildlife species, while contributing to other national, regional, and state goals to protect and restore karst habitats and species.

The primary focus under this alternative will be to add a staff person and equipment in order to manage, maintain, restore, and protect the refuge's habitats and wildlife species. Wildlife and plant censuses and inventory activities will be initiated and maintained to obtain the biological information needed to continue current refuge management programs and implement crucial management programs on and off the refuge.

Active habitat management will be implemented to maintain and enhance water quality and quantity within the cave system, the recharge zone (groundwater recharge areas), and waterways within the bat foraging areas through best management practices, easements, and partnerships with private landowners and other federal and state agencies. Continuous groundwater quality monitoring is crucial to the existence of the aquatic species utilizing the cave stream and groundwater corridors.

The Benton cave crayfish and Ozark Cavefish populations will be maintained at a minimum of 35 and 40 individuals, respectively. A properly trained survey team (no more than 4 observers) will perform ocular surveys bi-annually in January or February. During these surveys, the occurrence of any Indiana bats will be noted. The refuge will study the micro-climate of the cave to determine suitability for Indiana bats. Gray bats will be counted annually during July by exit counts. At least two trained persons will count bats at the same time on the same evening as the bats emerge from the spring and sinkhole entrances. Bat guano will be measured each year as soon as possible after the maternity colony has left the cave. No more than three persons will conduct guano measurements and this will be done in conjunction with the crayfish/cavefish surveys when possible. The refuge will maintain all other populations of karst species, such as pseudoscorpions, isopods, amphipods, beetles, collembolans, and other blind insects, adapted to subterranean habitats. The abundance of the grotto salamander will also be monitored.

The refuge will identify and implement strategies to improve conditions on and off refuge lands for forest dwelling birds. The primary purpose of this effort will be to work with partners and private landowners to provide a forest system of sufficient size and carrying capacity to reach regional objectives associated with area-sensitive neotropical migratory birds. This will also help protect and enhance foraging area for the gray bats, especially along Osage creek and its tributaries.

Wildlife-dependent recreation activities, such as wildlife observation, wildlife photography, and environmental education and interpretation will be provided. Utilizing various partners, the refuge will develop a small environmental education program, focusing on karst

environments. Although the cave is gated and entrance is limited to biological surveys, some cave environmental education can still occur (i.e., supervised visits by small groups to observe emergence of gray bats from a safe distance during the summer). The refuge will develop a community-based volunteer program by establishing a Cave Steward or Friends program. Volunteers will be educated on management issues and utilized to help complete wildlife and plant surveys, maintenance projects, and to conduct public recreation and education programs.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: July 1, 2008.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. E8–20977 Filed 9–9–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2008–N00160; 40136–1265–0000–S3]

Upper Ouachita and Handy Brake National Wildlife Refuges, Morehouse, Union, Richland, East Carroll, West Carroll, Natchitoches, and Grant Parishes, LA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: final comprehensive conservation plan and finding of no significant impact.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for Upper Ouachita and Handy Brake National Wildlife Refuges. In the final CCP, we describe how we will manage these refuges for the next 15 years.

ADDRESSES: A copy of the CCP may be obtained by writing to: North Louisiana National Wildlife Refuge Complex, 11372 Highway 143, Farmerville, LA 71241. The CCP may also be accessed and downloaded from the Service's Web site: *http://southeast.fws.gov/planning/*.

FOR FURTHER INFORMATION CONTACT: Mr. George Chandler; *Telephone:* 318–726–4222; *Fax:* 318–726–4667; *e-mail: george_chandler@fws.gov*.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for Upper Ouachita and Handy Brake National Wildlife Refuges. We started this process through a notice in the **Federal Register** on July 13, 2005 (70 FR 40396).

The Upper Ouachita and Handy Brake National Wildlife Refuges, including 44 Farm Service Agency (FSA) lands, ranging in size from 3 acres to 1,000 acres, are units of the North Louisiana National Wildlife Refuge Complex. Upper Ouachita Refuge is in northeastern Louisiana. The northern boundary lies on the Louisiana-Arkansas state line. The refuge borders both sides of the Ouachita River, running north-south for 13.7 miles, extending 3.3 miles to the east and 16 miles to the west. The southernmost point on the refuge is approximately 20 miles north of Monroe, Louisiana. The current acquisition area encompasses 61,633 acres of which 42,594 acres have been purchased with 26,304 acres in Union Parish and 16,290 acres in Morehouse Parish.

Upper Ouachita Refuge was established in November 1978. The federally legislated purposes are ''for use as an inviolate sanctuary, or for any other management purpose, for migratory birds'' (Migratory Bird Conservation Act, 16 U.S.C. 715d); and for ''* * * the conservation of the wetlands of the nation in order to maintain the public benefits they provide and to help fulfill international obligations contained in various migratory bird treaties and conventions * * *'' (16 U.S.C. 3901(b)).

Upper Ouachita Refuge consists of 4,540 acres of pine and pine/hardwood forests, 19,767 acres of bottomland hardwood forests, 9,236 acres of reforested bottomlands, 2,000 acres of scrub/shrub, 1,182 acres of moist-soil plantings, 2,541 acres of agricultural fields, 418 acres of fallow agricultural fields, and 2,910 acres of open water.

The USDA Farm Service Agency units were established in 1990, in response to growing Fish and Wildlife Service land-based responsibilities off of traditional refuges. The Wetlands Office is responsible for the administration of wetland easements and fee title land transfers from the Farm Service Agency for conservation purposes (Consolidated Farm and Rural Development Act, 7 U.S.C. 2002) and for the benefit of endangered species, resident and migratory waterfowl, neotropical migratory birds, and other wildlife. The units also include the first fee title tract transfer from the Farm Service Agency to the Service, with the establishment of Handy Brake National Wildlife Refuge in 1988. The units consist of 36 Farm Service Agency easements, 7 fee title tracts, and 1 lease, all concentrated in northeastern Louisiana and encompassing 6 parishes. These units are spread across north Louisiana, ranging in size from 3 acres to 1,000 acres.

Handy Brake Refuge is primarily a permanent wetland of excellent habitat for wintering waterfowl, wading birds, and many other wetland-dependent species. A free lease of 35 acres of International Paper Company land provides an upland area overlooking the wetland. An observation deck in the upland area provides wildlife viewing opportunities into the wetlands. Habitat management within these units focuses primarily on reforestation of marginal agricultural areas and development and maintenance of moist-soil units. These varied habitats provide for a diverse array of wildlife. There is no hunting or fishing permitted throughout these units.

We announce our decision and the availability of the final CCP and FONSI for Upper Ouachita and Handy Brake National Wildlife Refuges in accordance with the National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the draft comprehensive conservation plan and environmental assessment (Draft CCP/EA). The CCP will guide us in managing and administering Upper Ouachita and Handy Brake Refuges for the next 15 years. Alternative B is the foundation for the CCP.

The compatibility determinations for (1) wildlife observation and photography; (2) environmental education and interpretation; (3) fishing; and (4) cooperative farming are also available within the CCP.

Background

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amended the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-

dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

Comments

Approximately 100 copies of the Draft CCP/EA were made available for a 30-day public review period as announced in the **Federal Register** on March 21, 2008 (73 FR 15186). No comments on the Draft CCP/EA were received. The Draft CCP/EA identified and evaluated three alternatives for managing the refuge over the next 15 years.

Selected Alternative

After considering the comments we received and based on the professional judgment of the planning team, we selected Alternative B for implementation.

Biological potential of historical habitats will be restored and enhanced, with most management actions emphasizing natural ecological processes to foster habitat functions and wildlife populations. The biological program will be enhanced with inventorying and monitoring so that adaptive management can be implemented not only for migratory birds, but for other species of wildlife as well. A close evaluation of migratory bird use and nesting success on the refuge will be evaluated using granting opportunities and partnerships. To determine how forest management is affecting wildlife, partnerships will be developed to establish scientifically valid protocols and to collaboratively work on research projects. Upland forest management will focus on restoring the biological integrity of a mixed hardwood/pine forest by promoting upland hardwood species and reducing pine basal area. The Red-cockaded Woodpecker Habitat Unit will be managed using a more historic fire regime while providing red-cockaded woodpecker habitat as required in the recovery guidelines. Bottomland hardwood forest management will be developed on an inventory defining current condition that could be conducted in a logical and feasible manner. Bottoms will have management increased to open canopy cover and increase understory vegetation. Water control structures and pumping capability will be improved to enhance moist-soil and cropland management for the benefit of wintering waterfowl. Invasive species will be mapped and protocols for control established with the addition of a forester. Partnerships will continue to be fostered for several biological programs, hunting regulations, law enforcement issues, and research projects.

Public use will be similar to current management with a few improvements based on additional resources. Deer hunting will be allowed while monitoring the availability, diversity, and deer use of understory woody and herbaceous plants. This will allow refuge personnel to better understand the pressure being exerted on the habitat, enabling better habitat and harvest recommendations. On Upper Ouachita Refuge, youth turkey hunting will be allowed. Fishing events and boat launch facilities will be improved. Environmental education, wildlife observation, and wildlife photography will be accommodated at present levels, with minimal disturbance to wildlife and habitat. An enhanced nature trail, interpretive panels, and ''check-out kits'' for teachers will be developed. Law enforcement will be increased to gain better compliance with refuge regulations. Staffing will increase by four positions (e.g., biological technician, forestry technician, maintenance worker, and law enforcement officer). This will enable the refuges to increase biological inventorying and monitoring, enhance forest management, increase invasives control, enhance the public use program, and provide safe and compatible wildlife-dependent recreation.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: July 2, 2008.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. E8–20978 Filed 9–9–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Proposed Renewal of Agency Information Collection Activities;

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act, this notice announces that the Bureau of Indian Affairs (BIA) is proposing to renew the information collections for OMB Control Number 1076–0114, Application for Admission to Haskell Indian Nations University (HINU) and Southwestern Indian Polytechnic Institute (SIPI); OMB Control Number 1076–0134, Student Transportation Form, Subpart H, 25 CFR 39; and OMB Control Number 1076–0122, Data Elements for Student Enrollment in Bureau-funded Schools. These collections help support the educational efforts for Native American students from elementary through post-secondary levels. These collections help fulfill the trust responsibility of the Secretary of the Department of the Interior. We are requesting comments on these information collections.

DATES: Written comments must be submitted on or before November 10, 2008.

ADDRESSES: You are requested to send any comments to Kevin Skenandore, Acting Director, Bureau of Indian Education, 1849 C Street NW., MS 3610, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Keith Neves, Bureau of Indian Education, Department of the Interior, 1849 C Street NW., MS 3609 MIB, Washington, DC 20240; Telephone 202–208–3601.

SUPPLEMENTARY INFORMATION: This notice is published in exercise of authority delegated to the Assistant Secretary–Indian Affairs under 25 U.S.C. 2 and 9 and 209 DM 8.

I. Abstract

Application for Admission to HINU & SIPI

The BIA is providing the admission forms for Haskell Indian Nations University (HINU) and the Southwestern Indian Polytechnic Institute (SIPI) for review. These admission forms are used in determining program eligibility of American Indian and Alaska Native students for educational services. These forms are utilized pursuant to Blood Quantum Act, Public Law 99–228; the Snyder Act, Chapter 115, Public Law 67–85; and, the Indian Appropriations of the 48th Congress, Chapter 180, page 91, For Support of Schools, July 4, 1884.

Student Transportation Form

The Student Transportation regulations in 25 CFR part 39, subpart H, contain the program eligibility and criteria which govern the allocation of transportation funds. Information collected from the schools will be used to determine the rate per mile. The information collection provides transportation mileage for Bureau-funded schools, which determines the allocation of transportation funds.

Data Elements for Students in Bureau-funded Schools

The information is collected by school registrars to determine the student's eligibility for enrollment in a Bureau-funded school, and if eligible, is shared with appropriate school officials to identify the student's base and supplemental educational and/or residential program needs. The information is compiled into a national database by the Bureau of Indian Education to facilitate budget requests and the allocation of Congressionally appropriated funds.

II. Request for Comments

The Department of the Interior invites comments on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agencies' estimate of the burden (including the hours and cost) of the proposed collection of information, including the validity of the methodology and assumption used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other collection techniques or other forms of information technology.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection. They also will become a matter of public record. All written comments will be available for public inspection in Room 3612 of the Main Interior Building, 1849 C Street, NW., Washington, DC, from 7:45 a.m. to 4:15 p.m. EST, Monday through Friday, excluding legal holidays. Before including your address, phone number, e-mail address or other personally identifiable information, be advised that your entire comment—including your personally identifiable information—may be made public at any time. While you may request that we withhold your personally identifiable information, we cannot guarantee that we will be able to do so. All comments from representatives of businesses or organizations will be made public in their entirety.

We will not request nor sponsor a collection of information, and you need not respond to such a request, if there is no valid Office of Management and Budget Control Number.

III. Data

Title: Applications for Admission to Haskell Indian Nations University and to Southwestern Indian Polytechnic Institute.

OMB Control Number: 1076–0114.

Type of Review: Renewal.

Description: These eligibility application forms are mandatory in determining a student's eligibility for educational services.

Total Number of Respondents: 2,281.

Total Number of Annual Responses: 3,943.

Total Annual Burden Hours: 30 minutes per application x (number of HINU applications) and 40 minutes per application x (number of SIPI applications) = total burden hours.

Filing fee: $10 per application for HINU; no fee for SIPI.

Title: Student Transportation Form, Subpart H, 25 CFR 39.100–103.

OMB Control Number: 1076–0134.

Type of Review: Renewal.

Description: This annual collection provides pertinent data concerning the schools' bus transportation mileage and related long distance travel mileage to determine funding levels for school transportation.

Total Number of Respondents: 121.

Total Number of Annual Responses: 121.

Total Annual Burden Hours: 6 hours each response = 726 hours.

Title: Data Elements for Student Enrollment in Bureau-funded Schools.

OMB Control Number: 1076–0122.

Type of Review: Renewal.

Description: This annual collection provides data about students that impacts placement, special needs assessment, and funding for individuals and assists schools in developing a plan for the school year.

Total Number of Respondents: 48,000.

Total Number of Annual Responses: 48,000.

Total Annual Burden Hours: 15 minutes for each response = 12,000.

Dated: September 2, 2008.

Sanjeev "Sonny" Bhagowalia,

Chief Information Officer—Indian Affairs.

[FR Doc. E8–20937 Filed 9–9–08; 8:45 am]

BILLING CODE 4310–6W–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Jicarilla Apache Nation Liquor Ordinance Number Correction

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice; correction.

SUMMARY: The Bureau of Indian Affairs published a document in the **Federal Register** of August 8, 2008, concerning the amended Jicarilla Apache Nation Liquor Ordinance. The document contained an incorrect ordinance number.

DATES: *Effective Date*: This correction is effective as of September 10, 2008.

FOR FURTHER INFORMATION CONTACT: Elizabeth Colliflower, Office of Tribal Services, 1849 C Street, NW., Mail Stop 4513–MIB, Washington, DC 20240; Telephone (202) 513–7640; Fax (202) 208–5113.

Correction

In the **Federal Register** of August 8, 2008, in FR Doc. E8–18287, on page 46326, in the first column, correct the number of the Ordinance to read: Ordinance No. 2007–O–525–12.

Dated: September 2, 2008.

George T. Skibine,

Acting Deputy Assistant Secretary for Policy and Economic Development.

[FR Doc. E8–20949 Filed 9–9–08; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Metlakatla Indian Community Alcohol Possession Code Correction

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice; correction.

SUMMARY: The Bureau of Indian Affairs published a document in the **Federal Register** of August 13, 2008, concerning the amended Metlakatla Indian Community Alcohol Possession Code. The document included a section deleted in the original.

DATES: *Effective Date:* This correction is effective as of September 10, 2008.

FOR FURTHER INFORMATION CONTACT: Elizabeth Colliflower, Office of Tribal

Services, 1849 C Street, NW., Mail Stop 4513–MIB, Washington, DC 20240; Telephone (202) 513–7640; Fax (202) 208–5113.

Correction

In the **Federal Register** of August 13, 2008, in FR Doc. E8–18771, on page 47211, in the second column, delete in its entirety:

Section One.1.56 Liquour Violation.

Any person who shall, within the Annette Islands Reserve sell, barter, transport, possess, consume, or have consumed, or manufacture any alcoholic beverage shall be guilty of an offense and, upon conviction thereof, shall be sentenced to labor for a period of not more than six (6) months or to pay a fine not to exceed the constitutional limit, or both, with costs.

Dated: September 2, 2008.

George T. Skibine,

Acting Deputy Assistant Secretary for Policy and Economic Development.

[FR Doc. E8–20951 Filed 9–9–08; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

The Grand Canyon West Alcohol Ordinance for the Hualapai Indian Tribe

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Grand Canyon West Alcohol Ordinance of the Hualapai Indian Tribe of Arizona (Tribe). The Ordinance regulates and controls the possession, sale and consumption of liquor within the Hualapai Reservation. This Ordinance allows for possession and sale of alcoholic beverages within the Hualapai Reservation, and increases the ability of the tribal government to control the Tribe's liquor distribution and possession. At the same time it will provide an important source of revenue for the continued operation and strengthening of the tribal government and the delivery of tribal services.

DATES: *Effective Date:* This Ordinance is effective on September 10, 2008.

FOR FURTHER INFORMATION CONTACT: Sharlot Johnson, Tribal Government Services Officer, Western Regional Office, P.O. Box 10, Phoenix, Arizona 85001, Telephone (602) 379–6786; Fax (602) 379–4100; or Elizabeth Colliflower, Office of Tribal Services, 1849 C Street NW., MS 4513–MIB, Washington, DC 20240; *Telephone:* (202) 513–7640.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner*, 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Hualapai Tribal Council of the Hualapai Indian Tribe (Tribe) adopted its Liquor Ordinance by Resolution No. 38–2006 on May 25, 2006. This is an amendment to prior Liquor Ordinances passed by the Tribe. The purpose of this Ordinance is to govern the sale, possession and distribution of alcohol within tribal lands of the Tribe.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Principal Deputy Assistant Secretary—Indian Affairs. I certify that this Liquor Ordinance of the Hualapai Indian Tribe was duly adopted by the Hualapai Tribal Council on May 25, 2006.

Dated: August 29, 2008.

George T. Skibine,

Acting Deputy Assistant Secretary for Policy and Economic Development.

The Hualapai Indian Tribe's Grand Canyon West Alcohol Ordinance reads as follows:

Hualapai Tribal Code

Grand Canyon West Alcohol Ordinance

Chapter 23, Section 23.2 Grand Canyon West Alcohol Ordinance.

(a) General Provisions.

(1) Title. This section shall be known as the Grand Canyon West Alcoholic Beverage Control Ordinance.

(2) Authority. This section is enacted pursuant to the Act of August 15, 1953 (Pub. L. 83–277, 67 Stat. 588, 18 U.S.C. Section 1161), as interpreted by the United States Supreme Court in *Rice* v. *Rehner*, 463 U.S. 713 (1983), and Article V of the Hualapai Tribe Constitution.

(3) Purpose. The purpose of this section is to allow for, regulate, and control the sale, purchase, distribution, possession, and consumption of alcoholic beverages within certain portions of the Hualapai reservation. Enactment of this section as an ordinance governing liquor possession and sale on the reservation will increase the ability of the Tribal government to control and regulate Reservation alcohol possession and consumption, and at the same time provide an important source of revenue for the continued operation and strengthening of the Tribe and the delivery of Tribal government services.

(4) Scope and Territory. This section applies to all sales, purchases, distributions, possession, and consumption of alcoholic beverages made within the exterior boundaries of the Hualapai reservation and within a 5 mile radius of the Grand Canyon West Airport Terminal. This territory is commonly referred to as Grand Canyon West, Liquor Ordinance No. 23, approved by the Tribal Council on December 7, 1968, is not applicable to the territory covered by this Ordinance. Signs describing this Ordinance will be posted at each site where Alcohol will be sold and consumed.

(5) Application of 18 U.S.C. Section 1161. All acts and transactions under this section shall be in conformity with this section and in conformity with the laws of the State of Arizona regarding alcohol to the extent required by Section 1161.

(6) Effective date. This section shall take effect on the date it is approved by the Secretary of the Interior or the Secretary's designate.

(b) Definitions.

In this section, unless the context otherwise requires:

''Alcohol'' and ''Alcoholic Beverage'' means beer, wine, or any other spirituous liquor, including alcohol, brandy, whiskey, rum, tequila, mescal, gin, porter, ale, vodka, any malt liquor or malt beverage, absinthe, a compound or mixture of any of them or of any of them with any vegetable or other substance, alcohol bitters, bitters containing alcohol, any liquid mixture or preparation, fruits preserved in ardent spirits, whether patented or otherwise, that produces intoxication.

''Beer'' means any beverage, obtained by the alcoholic fermentation, infusion or decoction of barley malt, hops, or other ingredients not drinkable, or any combination of them.

''Grand Canyon West'' means the real property that is within the exterior boundaries of the Hualapai reservation and is within a 5-mile radius of the Grand Canyon West Airport terminal. This real property is commonly referred to as Grand Canyon West. Grand Canyon West is by this Ordinance excluded from the territory covered by Liquor Ordinance No. 23, approved by the Tribal Council on December 7, 1968.

''Indian'' means a person who is either enrolled in a federally recognized Indian tribe, or who possesses one-fourth (1/4) or more degree Indian blood in a federally recognized tribe(s) and is identified in the community as being Indian.

''Reservation'' means all Indian Lands under the control and authority of the Hualapai Tribe.

''Sale of Alcohol for On-Site Consumption'' means the sale of

alcoholic beverages to be consumed only on the seller's premises and does not include package liquor.

''Sell,'' ''Sold,'' ''Buy'' means and shall include furnish, dispose of, give, receive or acquire.

''State'' means the State of Arizona.

''Tribe'' or ''Hualapai Tribe'' means the Hualapai Indian Tribe of the Hualapai Indian Reservation, a federally recognized Indian Tribe.

''Wine'' includes champagne and similar sparkling wine beverages and means the product obtained by the fermentation of grapes or other agricultural products containing natural or added sugar or any such alcoholic beverage fortified with grape brandy.

(c) Unlawful Acts. Unless specifically provided for in subsection (d) below, this section does not invalidate or alter the limitations on the use, sale, purchase, possession, or consumption of alcohol set forth in Sections 6.276, 6.277, 6.278, 6.279 or elsewhere in the Hualapai Tribal Code nor shall any provision of this section be read to invalidate the application of the laws of the State of Arizona regarding the use, sale, purchase, possession, or consumption of alcohol.

(d) Limited Sale and Consumption of Alcohol within Grand Canyon West Permitted. Notwithstanding limitations on the use, sale, purchase, possession, or consumption of alcohol set forth elsewhere in the Hualapai Tribal Code, the limited sale and consumption of alcohol within the entire area of Grand Canyon West is allowed, consistent with the following provisions:

(1) Only entities licensed pursuant to subsection (e) of this Ordinance may sell and/or serve alcohol within Grand Canyon West. This includes entities selling or serving alcohol at special events.

(2) No package liquor may be sold and/or served. Only the sale and/or service of alcohol for on-site consumption is authorized.

(3) Alcohol purchased within Grand Canyon West may only be consumed within the premises of the establishment at which it was purchased.

(4) The Hualapai Tribal Council, in its discretion, may further limit the extent to which alcohol may be sold, served, purchased, distributed, possessed, and consumed within Grand Canyon West, and may do so by resolution. Accordingly, the Hualapai Tribal Council may, by resolution:

(A) further limit the areas within Grand Canyon West in which alcohol may be sold and/or served;

(B) further limit the types of businesses within Grand Canyon West that may sell and/or serve alcohol;

(C) further limit the types of alcohol (liquor, beer, wine, etc.) sold and/or served within any portion or portions of Grand Canyon West or by any entity or groups of entities within Grand Canyon West;

(D) further limit the manner in which alcohol is sold and/or served within any portion or portions of Grand Canyon West or by any entity or groups of entities within Grand Canyon West;

(E) limit the hours in which alcohol may be sold and/or served within any portion or portions of Grand Canyon West or by any entity or groups of entities within Grand Canyon West;

(F) notwithstanding the license suspension and revocation procedures below, place a partial or full emergency moratorium on alcohol sales and/or service within any portion or portions of Grand Canyon West or by any entity or groups of entities within Grand Canyon West when such moratorium is in the best interests of the Tribe; and/or

(G) provide any other limitations on the sale and/or service of alcohol within Grand Canyon West allowed by law.

(e) Licenses.

(1) Licenses for the sale of alcohol beverages may be issued to entertainment, recreation, and tourism facilities, gaming facilities, bars, restaurant-bar operations, and entities selling or serving alcohol at special indoor or outdoor events.

(2) Any restaurant-bar operation must produce more than the specified percentage set forth in their license of its gross sales from food service in order to be licensed after the first year of operation.

(3) Licenses shall be issued by the Hualapai Tribal Council, upon the receipt by the Hualapai Tribal Council of a proper application containing the following information:

(A) The name of the entity that regulates the business at which the sale of alcohol will take place. Such entity shall be the license applicant.

(B) A copy of the organizational documents under which the applicant entity is organized.

(C) A description of the land or building regulated by the applicant entity at which the applicant entity wishes to sell alcohol beverages.

(D) A statement that the applicant entity will conform to all requirements of applicable Tribal, State, and federal law, as they relate to the purchase and sale of alcohol beverages.

(4) Upon receipt of a proper application under this Ordinance, licenses for the sale of alcohol beverages may be issued by the Hualapai Tribal Council if the Hualapai Tribal Council finds, in its sole discretion, on the basis of the facts disclosed by the application and by such additional information as the Hualapai Tribal Council may deem relevant, that such issuance is in the interest of the Tribe.

(5) Licenses for the sale of alcohol beverages issued by the Hualapai Tribal Council shall contain the following requirements:

(A) Each license shall require its holder to conform its operations to the laws of the Tribe, the State of Arizona and the United States of America as they relate to the purchase and sale of alcohol beverages.

(B) No license shall be effective for a term of more than one year from the date of its issuance, and each renewal thereof.

(C) Each license shall explicitly state that its continued validity is dependent upon the compliance of its holder with all the provisions of this Ordinance and other applicable law.

(D) No licensee may give away or sell alcohol beverages at a loss.

(6) The Hualapai Tribal Council shall have the authority to suspend or revoke any license issued under this Ordinance, under the following procedures:

(A) Upon receiving information suggesting that the holder of a license under this Ordinance may have violated the terms of the license or applicable law, the Hualapai Tribal Council shall give the license holder written notice that the Hualapai Tribal Council intends to suspend or revoke the holder's license. Such notice shall be sent by certified mail, return receipt requested, to the agent of the license holder and shall specify the grounds for the proposed suspension or revocation.

(B) Any license holder who receives a notice of a proposed suspension or revocation may request a hearing by the Hualapai Tribal Council, by sending a written request, certified mail, return receipt requested, to the Chairman of the Hualapai Tribe, at the Tribal Chairman's administrative offices, within seven (7) days of the license holder's receipt of the notice.

(C) Upon receipt of a request for a hearing under this Ordinance, the Hualapai Tribal Council shall set a date for a hearing, which shall be not later than thirty days from the date of the receipt of the hearing request.

(D) At a hearing held under this Ordinance, the holder of a license under this Ordinance shall be permitted to present evidence with respect to the holder's compliance with the terms of its license and applicable law. In

reaching its decision, the Hualapai Tribal Council may consider such evidence, together with all other evidence it deems relevant. Following a hearing, if in the judgment of the Hualapai Tribal Council the license holder has not complied with the terms of its license and applicable law, the Hualapai Tribal Council shall suspend or revoke its license; and if in the judgment of the Hualapai Tribal Council the terms of the license and applicable law have been complied with, the proceedings shall be dismissed. In either case, the decision of the Hualapai Tribal Council shall be final.

(7) The Hualapai Tribal Council may reject any application for a license, or for a renewal of a license, under this Ordinance, if the applicant previously has committed acts which have resulted in the suspension or revocation of a license under this Ordinance.

(8) Any entity licensed under this Ordinance shall appoint a statutory agent and notify the Hualapai Tribal Council of such appointment.

(9) The Hualapai Tribal Council, or any individual member thereof or any person acting with prior written authorization of the Hualapai Tribal Council may enter any premises licensed under this ordinance at any time to observe the activities taking place.

(10) Each entity licensed under this Ordinance shall be required to file a separate application and hold a separate license for each facility it operates.

(11) No license issued under this Ordinance may be transferred to any other entity or person.

(f) Violation of Section. The procedures governing the adjudication of infractions under this Ordinance shall be those set forth in the rules of the Tribal Court.

(1) Criminal Penalties.

A. Application to Indians. Any Indian who

(i) uses or purchases alcohol from an unlicensed entity or person,

(ii) possesses or consumes alcohol in any location other than within a facility licensed in accordance with this ordinance, or

(iii) sells, serves or distributes alcohol without a license or in violation of the terms and conditions of their license, shall be subject to the criminal penalties set forth in the Hualapai Tribal Code, including, but not limited to, Sections 6.276, 6.277, 6.278, 6.279 of the Hualapai Tribal Code.

B. Application to Non-Indians. Tribal Officials may notify federal, State, or county officials of any activity conducted by non-Indians within Grand Canyon West that violates federal, State, or county law. Nothing in this section shall be construed to authorize or require the criminal trial and punishment of non-Indians within the Tribal court system.

(2) Civil Fines.

A. Any customer of a licensed entity, whether Indian or non-Indian, who possesses or consumes alcohol beyond the premises of such entity or any person, whether Indian or non-Indian, who purchases alcohol, wine or beer from an unlicensed entity or person shall be subject to a civil fine not to exceed $1,000.00, plus costs, for each separate violation.

B. A Tribal employee, vendor, vendor employee, or contractor, whether Indian or non-Indian, who sells, serves, or distributes or possesses alcohol without a valid license, who fails to abide by the terms and conditions of their license or who violates any licensing requirement shall be subject to a civil fine not to exceed $4,000.00, plus costs, for each separate violation.

(3) Tribal Court.

Imposition of all criminal penalties against Indians under this section, and all civil fines against Indians and non-Indians under this section, shall be under the exclusive jurisdiction of the Tribal Court. The Tribal Court may impose a penalty or fine under this section upon a complaint or petition filed by the Tribe, represented by the Tribal prosecutor or another Hualapai Tribal Council designee. The complaint or petition must set forth specific allegations amounting to a violation of this section. Notice and hearing on such complaint or petition, as well as appellate procedures, shall be provided in accordance with the rules of the Tribal Court.

(4) Exclusion From Reservation.

In addition to other sanctions contained in this section, Tribal law enforcement officers shall be authorized to exclude persons who violate this section from the Reservation consistent with the Hualapai Tribal Code and Constitution.

(5) Tribal Police.

The Tribal law enforcement officials may enforce all violations of Tribal (including this section), State, and/or federal laws to the maximum extent allowed under Tribal, State, and federal law.

(g) Saving and Severability. In the event any section or provision of this section or its application to any particular activity is held to be invalid, the remaining sections and provisions of this section and the remaining applications of such sections and provisions shall continue in full force and effect.

(h) No Waiver of Sovereign Immunity. Nothing in this section shall serve to waive the Hualapai Tribe's sovereign immunity, which is hereby expressly affirmed.

(i) Amendments. This section may be amended by official action of the Hualapai Tribal Council.

(j) Repeal of Prior Laws. Except as provided in subsection (c) above, this section, upon becoming effective, shall operate to revise any inconsistent portion of the Hualapai Tribal Code.

[FR Doc. E8–20953 Filed 9–9–08; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–963–1410–ET; F–14988]

Notice of Proposed Withdrawal Extension and Opportunity for Public Meeting: Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Air Force (USAF) has filed an application with the Bureau of Land Management that proposes to extend the duration of Public Land Order (PLO) No. 6706 for an additional 20-year term. PLO No. 6706 withdrew 4,606.70 acres of public land from settlement, sale, location, or entry under the general land laws, including the United States mining laws (30 U.S.C. Ch. 2), and from leasing under the mineral leasing laws, to protect the United States Air Force Indian Mountain Research Site. This notice also provides an opportunity for the public to comment on the proposed action and to request a public meeting.

DATES: Comments and requests for a public meeting must be received by December 9, 2008.

ADDRESSES: Comments and meeting requests should be sent to the BLM Alaska State Director, *Attn:* Renee Fencl, Alaska State Office, 222 West 7th Avenue, No. 13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: Renee Fencl, BLM Alaska State Office, (907) 271–5067.

SUPPLEMENTARY INFORMATION: The withdrawal created by PLO No. 6706 (54 FR 979, January 11, 1989) will expire January 10, 2009, unless extended. The USAF has filed an application to extend PLO No. 6706 for an additional 20-year term to protect the integrity of the information being monitored by seismic

equipment at the USAF Indian Mountain Research Site.

This withdrawal comprises 4,606.70 acres of public land located within:

Kateel River Meridian

T. 7 N., R. 24 E.,
Secs. 13 to 16,
Secs. 21 to 27,
Secs. 34, 35, and 36; and
T. 7 N., R. 25 E.,
Secs. 18, and 19 as described in PLO No. 6706 (54 FR 979, January 11, 1989). A complete description, along with all other records pertaining to the extension application, can be examined in the BLM Alaska State Office at the address shown above.

As extended, the withdrawal would not alter the application of those public land laws governing the use of land under lease, license, or permit or governing the disposal of the mineral or vegetative resources other than under the mining and mineral leasing laws.

The use of a right-of-way or interagency or cooperative agreement would not adequately protect the Federal investment in the Indian Mountain Research Site.

There are no suitable alternative sites available since the Indian Mountain Research Site is already constructed on the above-described public land.

No water rights would be needed to fulfill the purpose of the requested withdrawal extension.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal extension may present their views in writing to the BLM Alaska State Director at the address indicated above. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Individual respondents may request confidentiality. If you wish to withhold your name or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comments. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal extension. All interested parties who desire a public meeting for the purpose of being heard on the proposed extension must submit a written request to the BLM Alaska State Director within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

The withdrawal extension proposal will be processed in accordance with the regulations set forth in 43 CFR 2310.4 and subject to Section 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3120 (2000).

Authority: 43 CFR 2310.3–1(b).

Dated: September 3, 2008.

Carolyn J. Spoon,

Chief, Branch of Lands and Realty.

[FR Doc. E8–20965 Filed 9–9–08; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent To Repatriate Cultural Items: Field Museum of Natural History, Chicago, IL

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the Field Museum of Natural History (Field Museum), Chicago, IL, that meet the definition of ''unassociated funerary objects'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

The two cultural items are a rattle and a worked walrus tusk.

The rattle (catalog number 78326) is carved wood with shell or glass bead rattlers. It is painted with blue and red mineral paints. The body of the rattle represents an oyster catcher. The handle of the rattle is wrapped with a strip of black leather, and string is wrapped around the upper neck of the oyster catcher. It measures approximately 13 inches long and 3 inches wide.

The worked walrus tusk (catalog number 78074) is comprised of four sections. Each section measures approximately 11 inches long.

According to Field Museum records, the walrus tusk sections were ''found in an old cave on a small Island in Icy Straits where a Shaman of the 'Hoonah' tribe was laid away.'' The rattle was ''believed to have come from an old grave house on the shores of Frederick Bay, near the village of 'Gan-der-kan,' of the 'Hoonah tribe'.''

At an unknown date, Lieutenant Emmons acquired the walrus tusk sections and rattle. In 1902, the Field Museum of Natural History purchased the cultural items from Lieutenant Emmons, and accessioned them into its collection that same year.

The cultural affiliation of the two cultural items is Hoonah Tlingit, as indicated through museum records and consultation with representatives of the Hoonah Indian Association.

Officials of the Field Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (3)(B), the two cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of a death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the Field Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Hoonah Indian Association.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Helen Robbins, Repatriation Director, Field Museum of Natural History, 1400 South Lake Shore Drive, Chicago, IL 60605, telephone (312) 665–7317, before October 10, 2008. Repatriation of the unassociated funerary objects to the Hoonah Indian Association may proceed after that date if no additional claimants come forward.

The Field Museum of Natural History is responsible for notifying the Central Council of the Tlingit & Haida Indian Tribes, Hoonah Indian Association,

Huna Totem Corporation, and Sealaska Heritage Foundation that this notice has been published.

Dated: August 20, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–21011 Filed 9–9–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent To Repatriate Cultural Items: U.S. Army Corps of Engineers, Portland District, Portland, OR and Museum of Anthropology, Washington State University, Pullman, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the control of the U.S. Department of Defense, Army Corps of Engineers, Portland District, Portland, OR, and in the possession of the Museum of Anthropology, Washington State University, Pullman, WA, that meet the definition of ''unassociated funerary objects'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

In 1982, human remains of one Native American individual and funerary objects were found eroding out of a streamside terrace and mixed in adjacent back dirt piles from site 35–MW–32, also known as the Willow Creek Lake Site, in Morrow County, OR. The site is located immediately west of the confluence between Willow Creek and Balm Fork, near Heppner, OR. The human remains, cultural items, and a large concentration of butchered animal bones were first observed by an employee who was working on a nearby channeling and surface grading project related to Willow Creek Dam construction at the Willow Creek Lake Project area. It is undetermined if the human remains and cultural items came from an isolated burial or if the construction activity disturbed the edge of a larger burial ground. The human remains and cultural items were assessed on-site by archeologists and personnel from the University of Idaho, Moscow, ID. The Army Corps of Engineers, Walla Walla District, then collected and transferred the human remains and cultural items for further analysis to the University of Idaho, Laboratory of Anthropology. The human remains and funerary objects were later transferred to the Museum of Anthropology, Washington State University for temporary curation until the responsible agency and repository could be identified and contacted.

In 1984, the human remains were repatriated to the Confederated Tribes of the Umatilla Indian Reservation, Oregon and reburied in Mission, OR. The funerary objects remained at the museum. The 51 unassociated funerary objects are 1 cobble pestle handle, 4 fragments of a worked bone awl, 40 pieces of chert debitage, 1 piece of basalt debitage, 2 pressed glassware fragments, and 3 square nails.

Various Native American groups were known to follow Willow Creek and Balm Fork during travels to and from the mountainous areas. Although no dates of occupation were obtained by the researchers, the burial pattern observed within 35–WS–32 is consistent with the customs of Columbia Plateau Native American groups. Ethnographic and museum records indicate that the cultural items are consistent with cultural items typically found in context with burials characteristic of the Mid-Columbia River Basin. Oral histories and published ethnographic documentation indicate that site 35–MW–32 is located within the traditional territory of the Confederated Tribes of the Umatilla Indian Reservation, Oregon. In particular, some ethnographic accounts place the site area within Umatilla and Cayuse home ranges during the equestrian period. Based on provenience, officials of the U.S. Army Corps of Engineers, Portland District reasonably believe the unassociated funerary objects are culturally affiliated with the Confederated Tribes of the Umatilla Indian Reservation, Oregon.

Officials of the U.S. Army Corps of Engineers, Portland District have determined that, pursuant to 25 U.S.C. 3001 (3)(B), the 51 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the U.S. Army Corps of Engineers, Portland District have also determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Confederated Tribes of the Umatilla Indian Reservation, Oregon.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Daniel Mulligan, NAGPRA Coordinator, Environmental Resources Branch, U.S. Army Corps of Engineers, Portland District, P.O. Box 2946, Portland, OR 97208–2946, telephone (503) 808–4768, before October 10, 2008. Repatriation of the unassociated funerary objects to the Confederated Tribes of the Umatilla Indian Reservation, Oregon may proceed after that date if no additional claimants come forward.

The U.S. Army Corps of Engineers, Portland District is responsible for notifying the Confederated Tribes of the Umatilla Indian Reservation, Oregon that this notice has been published.

Dated: August 18, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–21010 Filed 9–9–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Brigham Young University, Museum of Peoples and Cultures, Provo, UT

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in possession of the Brigham Young University, Museum of Peoples and Cultures, Provo, UT. The human remains were removed from Milliard County, UT.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Brigham Young University, Museum of Peoples and Cultures professional staff in

consultation with representatives of the Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; San Juan Southern Paiute Tribe of Arizona; Summit Lake Paiute Tribe of Nevada; Walker River Paiute Tribe of the Walker River Reservation, Nevada; and Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada.

At an unknown time, human remains representing a minimum of two individuals were removed from an unknown location (42MD) near Garrison, Milliard County, UT, by a private collector. In 1988, the human remains were donated by LaVon Rowley to the Museum of Peoples and Cultures (Catalog No. 1988.031.00001–00006; 1988.031.00008–00019). No known individuals were identified. No associated funerary objects are present.

Based on the general appearance and cultural features present on the surface at the time of the removal from the burial sites, the sites were determined to be Southern Paiute. The likely provenience of the human remains in Milliard County supports a Southern Paiute cultural affiliation. In addition, consultations with Southern Paiute representatives support the identification of the two individuals as Southern Paiute. Descendants of the Southern Paiute are members of the Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; San Juan Southern Paiute Tribe of Arizona; Summit Lake Paiute Tribe of Nevada; Walker River Paiute Tribe of the Walker River Reservation, Nevada; and Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada.

Officials of Brigham Young University, Museum of Peoples and Cultures have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of two individuals of Native American ancestry. Officials of Brigham Young University, Museum of Peoples and Cultures also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; San Juan Southern Paiute Tribe of Arizona; Summit Lake Paiute Tribe of Nevada; Walker River Paiute Tribe of the Walker River Reservation, Nevada; and Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Paul Stavast, Brigham Young University, Museum of Peoples and Cultures, 105 Allen Hall, Provo, UT 84602–3600, telephone (801) 422–0020, before October 10, 2008. Repatriation of the human remains to the Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; San Juan Southern Paiute Tribe of Arizona; Summit Lake Paiute Tribe of Nevada; Walker River Paiute Tribe of the Walker River Reservation, Nevada; and Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada may proceed after that date if no additional claimants come forward.

Brigham Young University, Museum of Peoples and Cultures is responsible for notifying the Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada; San Juan Southern Paiute Tribe of Arizona; Summit Lake Paiute Tribe of Nevada; Walker River Paiute Tribe of the Walker River Reservation, Nevada; and Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada that this notice has been published.

Dated: August 26, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–21008 Filed 9–9–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Michigan Historical Center, Lansing, MI

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of the Michigan Historical Center, Lansing, MI. The human remains were removed from Cheboygan County, MI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Michigan Historical Center professional staff in consultation with representatives of the Little Traverse Bay Bands of Odawa Indians, Michigan.

In 1992, human remains representing a minimum of one individual were removed from the Village of Mackinaw City in Cheboygan County, MI. The human remains were unearthed during a water main project on land owned by the Village of Mackinaw City, and were removed by the Mackinaw City Police. Subsequently, archeologists from the Michigan Historical Center and physical anthropologist Dr. David Barondess, of Wayne State University, Detroit, MI, were called to investigate. They identified the remaining portion of the burial pit in the trench wall, and recovered a few additional bones. After his analysis was complete, Dr. Barondess transferred the bones to the Michigan Historical Center at the request of the Village. No known individual was identified. No associated funerary objects are present.

At an unknown time, but likely in 1992, human remains representing a minimum of one individual were removed from the Village of Mackinaw City in Cheboygan County, MI, by an unidentified employee of the company constructing the water main. The construction worker gave the human remains to a student at Kirtland Community College. In early 1993, a professor at the college transferred the human remains to the Michigan Historical Center. No known individual was identified. No associated funerary objects are present.

About 30 feet away from the first individual's grave, along the water main, was a cache of artifacts of both French and Native manufacture dating to the late 17th or early 18th century. The artifacts are similar to those found at French, Odawa, and Huron/Wyandotte sites at the Straits of Mackinac during that period. As these artifacts were not in direct association with the human remains, they are not considered to be funerary objects. Other than a few modern items and one small chert flake, no artifacts from earlier or later cultural periods were found in the vicinity, despite intensive examination by trained archeologists of the utility trench spoil dirt. There were no traces of coffin hardware or coffin wood, and no shroud pins or clothing buttons. For these reasons, the human remains most likely date to the same period as the cache pit, i.e. the late 17th or early 18th century.

Both sets of human remains were identified as Native American by Dr. Barondess, who stated that their condition was consistent with being buried ''several hundred years ago.'' The ethnic identification was based on morphological attributes of the skulls and condition of the teeth. The

identification of the human remains as Native American is consistent with observed burial practices, such as a burial in a pit without evidence of a coffin, the lack of buttons or other artifacts indicative of Euro-American clothing, and morphological characteristics.

Mackinaw City is located on the south side of the Straits of Mackinac. During this period, the French had missions, traders, and a military presence at the Straits. During the late 17th and early 18th century, the Odawa were known to inhabit both sides of the Straits, as documented by French missionary and military records. At this time, Huron/Wyandotte refugees, fleeing attacks by the Iroquois, also lived on the north side of the Straits, at present day St. Ignace. The Sault Ste. Marie Tribe of Chippewa Indians resided on the north side of the Straits as well. A band of Chippewa was reported at times in the Cheboygan area. Other tribes were known to pass through the area, often stopping to trade. Although the tribal affiliation of the human remains found at Mackinaw City is not scientifically certain, the remains are likely culturally affiliated with the Odawa, as they were the tribe most commonly reported in the Mackinaw City area during the period in question. The Odawa who lived at what is now Mackinaw City moved to Little Traverse Bay in the 1740s, and their descendants are members of the Little Traverse Bay Bands of Odawa Indians, Michigan, based in what is now Emmet County.

The Village of Mackinaw City transferred the human remains found in the water main trench to the Michigan Historical Center with the understanding that the Center would arrange for reburial after studies were complete. The Center entered into consultation with the Little Traverse Bay Bands of Odawa Indians in the spring of 2008. The tribe has provided the Michigan Historical Center with documentation of their continuous presence in the Straits of Mackinac area for at least 350 years. The NAGPRA coordinators of the Sault Ste. Marie Tribe of Chippewa Indians of Michigan and Wyandotte Nation, Oklahoma have sent the Michigan Historical Center letters of support for repatriation of the human remains removed from Mackinaw City to the Little Traverse Bay Bands of Odawa Indians, Michigan.

Officials of the Michigan Historical Center have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of two individuals of Native American ancestry. Officials of the Michigan Historical Center also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Little Traverse Bay Bands of Odawa Indians, Michigan.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Barbara Mead, Michigan Historical Center, P.O. Box 30740, Lansing, MI 48909–8240, telephone (517) 373–6416, before October 10, 2008. Repatriation of the human remains to the Little Traverse Bay Band of Odawa Indians, Michigan may proceed after that date if no additional claimants come forward.

The Michigan Historical Center is responsible for notifying the Little Traverse Bay Bands of Odawa Indians, Michigan; Sault Ste. Marie Tribe of Chippewa Indians of Michigan; and Wyandotte Nation, Oklahoma that this notice has been published.

Dated: August 20, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–21009 Filed 9–9–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States of America* v. *Mark and Amanda St. Pierre,* Civil Action No. 1:08–cv–177 (D. Vt.), was lodged with the United States District Court for the District of Vermont on September 3, 2008.

This proposed Consent Decree concerns a complaint filed by the United States against Mark and Amanda St. Pierre, pursuant to sections 309(b), 309(d) and 404 of the Clean Water Act, 33 U.S.C. 1319(b), 1319(d) and 1344, to obtain injunctive relief from and impose civil penalties against the Defendants for violating the Clean Water Act by discharging pollutants without a permit into waters of the United States. The proposed Consent Decree resolves these allegations by requiring the Defendants to restore the impacted areas and perform mitigation and to pay a civil penalty. The Consent Decree also provides for the Defendants to perform a supplemental environmental project.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to Joshua M. Levin, Senior Trial Attorney, U.S. Department of Justice, Environment and Natural Resources Division, Environmental Defense Section, P.O. Box 23986, Washington, DC 20026–3986, and refer to *United States of America* v. *Mark and Amanda St. Pierre,* DJ # 90–5–1–1–17229/1.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of Vermont, Federal Bldg, 5th Floor, 11 Elmwood Avenue, Burlington, VT 05401. In addition, the proposed Consent Decree may be viewed at *http://www.usdoj.gov/enrd/Consent_Decrees.html.*

Scott A. Schachter,

Assistant Section Chief, Environmental Defense Section, Environment and Natural Resources Division.

[FR Doc. E8–20987 Filed 9–9–08; 8:45 am]

BILLING CODE 4410–CW–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Raycom Media, Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Raycom Media, Inc.*, Civil Action No. 1:08–cv–01510. On August 28, 2008, the United States filed a Complaint alleging that the acquisition by Raycom Media, Inc. of WWBT–TV, a Richmond, Virginia, broadcast television station, from Lincoln Financial Media Company violates section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed the same time as the Complaint, requires Raycom to divest its Richmond, Virginia, broadcast television station WTVR–TV, along with certain related assets.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (*telephone:* 202–514–2481), on the Department of Justice's Web site (*http://www.usdoj.gov/atr*), and at the Office of the Clerk of the United States District

Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to John R. Read, Chief, Litigation III, Antitrust Division, Department of Justice, Washington, DC 20530 (telephone: 202–307–0468).

Patricia Brink,

Deputy Director, Office of Operations.

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 450 5th Street, NW., Suite 4000, Washington, DC 20530, Plaintiff,

v.

Raycom Media, Inc., RSA Tower, 20th Floor, 201 Monroe Street, Montgomery, AL 36104, Defendant.

Civil Action No.: l:08–cv–01510

Assigned To: Urbina, Ricardo M.

Assign. Date: 08/28/2008

Description: Antitrust

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against defendant Raycom Media, Inc. (''Raycom''), and complains and alleges as follows:

1. The United States brings this suit to prevent Raycom from continuing to own two of the top four broadcast television stations in Richmond, Virginia. On April 1, 2008, Raycom consummated a transaction with Lincoln Financial Media Company (''Lincoln''), in which Raycom acquired WWBT–TV, the Richmond, Virginia, affiliate of the National Broadcasting Corporation (''NBC'') (the ''acquisition''). Raycom at that time already owned and continues to own WTVR–TV, the Richmond, Virginia, affiliate of CBS Broadcasting Inc. (''CBS''). In 2007, WWBT–TV earned approximately 32 percent and WTVR–TV earned approximately 23 percent of the broadcast television spot advertising revenues in the Richmond market.

2. The acquisition eliminated substantial head-to-head competition between WWBT–TV and WTVR–TV. Unless remedied, the loss of WWBT–TV as an independent significant competitor will substantially lessen competition for the sale of broadcast television spot advertising in the Richmond market, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

I. Jurisdiction and Venue

3. This Complaint is filed and this action is instituted under section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain Defendant from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

4. Raycom sells broadcast television spot advertising to advertisers, a commercial activity that substantially affects and is in the flow of interstate commerce. This Court has jurisdiction over the subject matter of this action pursuant to sections 15 and 16 of the Clayton Act, 15 U.S.C. 25, 26, and 28 U.S.C. 1331, 1337.

5. The Defendant has consented to personal jurisdiction and venue in this judicial district.

II. The Defendant

6. Raycom Media, Inc. is a Delaware corporation with its headquarters in Montgomery, Alabama.

7. Raycom is one of the country's largest television broadcasters. It currently owns and/or operates forty-six television stations in thirty-five markets and eighteen states. Raycom also distributes syndicated television programming and provides event management, information system support, and website design and hosting services.

III. Trade and Commerce

A. Relevant Product Market

8. Broadcast television stations attract viewers through their programming and then sell access to their viewers to businesses and others that want to advertise their products and services. Broadcast television programming is transmitted by broadcast television stations, for free, over the air to television receivers. Broadcast television programming is also simultaneously retransmitted, as aired, by cable television systems (systems that deliver programming, for a fee, through wires into homes), and satellite television systems (systems that deliver programming over the air, for a fee, to home satellite receivers). Sales of ''spot'' advertising generate the majority of a broadcast television station's revenues. Broadcast television spot advertising is purchased by advertisers that want to target potential customers in specific localized geographic markets. It differs from network and syndicated television advertising, which is sold by the major television networks and producers of syndicated programs on a nationwide basis and broadcast in every market where the network or syndicated program is aired. Spot advertising is sold either directly by the station or through its national representative on a localized, market-by-market basis.

9. Broadcast television spot advertising possesses attributes that collectively set it apart from advertising using other types of media. Television combines sight, sound, and motion, thereby creating a memorable and effective advertisement. Moreover, of all media, broadcast television spot advertising reaches the largest percentage of all potential customers in a particular desired target audience and is therefore especially effective in introducing and establishing the image of a product. A significant number of advertisers view broadcast television spot advertising as a necessary advertising medium for which there is no close substitute. Such customers would not switch to another advertising medium—such as radio, cable, internet, or newspaper—or some combination thereof, if broadcast television spot advertising prices increased by a small but significant amount.

10. In the Richmond DMA, cable television advertising is not a meaningful substitute for broadcast television spot advertising because the viewership of cable television networks, even when the networks are combined and packaged together, is significantly smaller than the viewership of broadcast television stations and is more demographically homogeneous. Additionally, unlike broadcast television advertising, it is generally difficult for advertisers to place last minute advertisements on cable television. Other media, such as radio, newspapers, internet or billboards, are even less desirable substitutes for broadcast television advertising. Satellite television advertising is not a substitute because satellite television providers cannot limit the distribution of their advertisements to a particular DMA, and therefore do not sell advertising in competition with local broadcast television stations.

11. Broadcast television stations generally can identify advertisers with strong broadcast television advertising preferences. Broadcast television stations negotiate prices individually with advertisers; consequently, broadcast television stations can charge different advertisers different prices. In the event of a price increase in broadcast television spot advertising,

some advertisers may shift some of their advertising to other media rather than absorb a price increase. However, the existence of such advertisers would not prevent broadcast television stations from profitably raising prices by a small but significant amount for a substantial number of advertisers that would not shift to other media or broadcast television stations.

12. Accordingly, the sale of broadcast television spot advertising is a relevant product market within the meaning of section 7 of the Clayton Act.

B. Relevant Geographic Market

13. A Designated Marketing Area (''DMA'') is a non-overlapping geographic area defined by A. C. Nielsen Company, a firm that surveys television viewers and furnishes television stations, advertisers, and advertising agencies with data to aid in evaluating audience size and composition. The Richmond DMA encompasses the city of Richmond. Virginia, and the surrounding counties in which stations within the Richmond DMA receive the largest share of viewers.

14. Advertisers use broadcast television stations within the Richmond DMA to reach the largest possible number of viewers within the entire DMA. Advertising on television stations outside the Richmond DMA is not an effective alternative for these advertisers because such stations are not viewed by a significant number of potential customers within the Richmond DMA. Thus, if there were a small but significant price increase in broadcast television spot advertising prices within the Richmond DMA, an insufficient number of advertisers would switch their advertising time purchases to television stations outside the Richmond DMA to render the price increase unprofitable.

15. Accordingly, the Richmond DMA is a relevant geographic market for the sale of broadcast television spot advertising within the meaning of section 7 of the Clayton Act.

C. Anticompetitive Effects

16. Broadcast television stations compete for advertisers by providing advertisers access to their viewers. A station attracts viewers by selecting shows that appeal to the greatest number of viewers, and also tries to differentiate itself from other stations by appealing to specific demographic groups. Advertisers, in turn, are interested in using broadcast television spot advertising to reach a large audience, as well as to reach a high proportion of the type of viewers that are most likely to buy their products.

17. Broadcast station ownership in the Richmond DMA is highly concentrated. Unremedied, Raycom's acquisition of WWBT–TV would give it control of two of the top four broadcast stations in the Richmond DMA and sales of over 50 percent of the total broadcast television spot advertising revenues in the Richmond DMA. Using a measure of concentration called the Herfindahl-F-lirschnian Index (''HHI''), defined and explained in Appendix A, combining the ownership of WWBT–TV and WTVR–TV substantially increases the HHI from approximately 2400 to approximately 3800, well above the 1800 threshold at which the Division normally considers a market to be highly concentrated.

18. Prior to the transaction, WWBT–TV, the local NBC affiliate, and WTVR–TV, the local CBS affiliate, competed vigorously for advertisers because the demographic makeup of their viewers makes them close substitutes for a significant number of advertisers. The two stations competed head-to-head for a substantial number of advertisers seeking a desired audience, forcing the stations to offer better terms to win an advertiser's business. These advertisers would find it difficult or impossible to obtain competitive rates with the threat to ''buy around'' WWBT–TV and WTVR–TV, because they would be unable to as effectively reach their desired audiences without purchasing advertising from Raycom's stations. Thus, without divestiture of one of its Richmond stations, Raycom's acquisition of WWBT–TV substantially reduces competition for broadcast television spot advertising in the Richmond DMA.

D. Entry

19. De novo entry into the Richmond DMA is unlikely, because the Federal Communications Commission (''FCC'') regulates entry through the issuance of licenses. These licenses are difficult to obtain because the availability of spectrum is limited, and the regulatory process associated with obtaining a license is lengthy. Even if a new signal became available, commercial success would come, at best, over a period of many years, because all major broadcast networks are already affiliated with a licensee in the Richmond DMA, the contracts last for many years, and the broadcast networks rarely switch licensees when the contracts expire. Thus, entry into the Richmond DMA broadcast television spot advertising market would not be timely, likely, or sufficient to deter Raycom from unilaterally raising prices.

IV. Violation Alleged

20. Each and every allegation in paragraphs I through 19 of this Complaint is here realleged with the same force and effect as though said paragraphs were here set forth in full.

21. The effect of Raycom's acquisition of WWBT–TV would be to substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act.

22. Raycom's acquisition of WWBT–TV will likely have the following effects, among others:

a. Competition in the sale of broadcast television spot advertising in the Richmond DMA would be substantially lessened;

b. Actual and potential competition between WWBT–TV and WTVR–TV in the sale of broadcast television spot advertising in the Richmond DMA would be eliminated; and

c. The prices for broadcast television spot advertising in the Richmond DMA would likely increase.

23. Unless restrained, the acquisition will violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

V. Requested Relief

24. Plaintiff requests:

a. That Raycom's acquisition of WWBT–TV be adjudged to violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18;

b. That Raycom be ordered to divest WTVR–TV in accord with the attached Hold Separate Stipulation and Order and proposed Final Judgment;

c. That a proposed Final Judgment giving effect to the divestiture be entered by the Court after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16;

d. That the United States be awarded the costs of this action; and

e. That the United States be granted such other and further relief as the Court may deem just and proper.

Dated: August 28, 2008.

Respectfully submitted,

For Plaintiff United States:

Deborah A. Garza,
Acting Assistant Attorney General.

Ann Marie Blaylock (D.C. Bar No. 967825),
Trial Attorney, Litigation III Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 4000, Washington, DC 20530, (202) 616–5932, Facsimile: (202) 514–7308, *ann.blaylock@usdoj.gov.*

Patricia A. Brink,
Deputy Director, Office of Operations.

John R. Read (D.C. Bar No. 419373),
Chief, Litigation III Section,

Nina B. Hale,
Assistant Chief, Litigation III Section.

Certificate of Service

I hereby certify that on August 28, 2008, I caused a copy of the foregoing Complaint to be served on the defendant in this matter in the manner set forth below:

By facsimile and U.S. mail:

Counsel for Defendant Raycom Media, Inc.,
Everett J. Bowman, Esq.,
Robinson Bradshaw & Hinson, 101 North Tryon St., Suite 1900, Charlotte, NC 28246, Telephone: (704) 377–8329, Facsimile: (704) 373–3929, E-mail: *ebowman@rbh.com.*

Ann Marie Blaylock (D.C. Bar. No. 967825), *Litigation III Section, Antitrust Division, United States Department of Justice*, 450 Fifth Street, NW., Suite 4000, Washington, DC 20530, (202) 616–5932, Facsimile: (202) 514–7308, *ann.blaylockusdoj.gov*.

Appendix A

Definition of HHI

The term HH1 means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size and distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 are considered to be moderately concentrated, and markets in which the HHI is in excess of 1800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise significant antitrust concerns under the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines.

United States District Court for the District of Columbia

United States of America, Plaintiff,

v.

Raycom Media, Inc., Defendant.

Civil Action No.: l:08–cv–01510

Assigned To: Urbina, Ricardo M.

Assign. Date: 08/28/2008

Filed: 8/28/08.

Final Judgment

Whereas, plaintiff, United States of America, filed its Complaint on August 28, 2008, the United States and defendant, Raycom Media, Inc. (''Raycom''), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And whereas, defendant agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by defendant to assure that competition is not substantially lessened;

And whereas, the United States requires defendant to make a certain divestiture for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, defendant has represented to the United States that the divestiture required below can and will be made and that it will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ordered, adjudged, and *decreed*:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendant under section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. ''Acquirer'' means the entity to which defendant divests the Divestiture Assets.

B. ''Raycom'' means defendant Raycom Media, Inc., a Delaware limited liability company with its headquarters in Montgomery, Alabama, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''DMA'' means designated market area as defined by A.C. Nielsen Company based upon viewing patterns and used by the Investing In Television BIA Market Report 2007 (2nd edition). DMAs are ranked according to the number of households therein and are used by broadcasters, advertisers and advertising agencies to aid in evaluating television audience size and composition.

D. ''Richmond market'' means the Richmond, Virginia, DMA broadcast television market.

E. ''WTVR–TV'' means the broadcast television station WTVR–TV located in the Richmond market owned by defendant.

F. ''Divestiture Assets'' means all of the assets, tangible or intangible, used in the operation of WTVR–TV, including, but not limited to, all real property (owned or leased), broadcast equipment, office equipment, office furniture, fixtures, materials, supplies, and other tangible property used in the operation of the station; all licenses, permits, authorizations, and applications therefor issued by the Federal Communications Commission (''FCC'') and other government agencies relating to the station; all contracts (including programming contracts and rights), agreements, network affiliation agreements, leases, and commitments and understandings of defendant relating to the operation of WTVR–TV; all trademarks, service marks, trade names, copyrights, patents, slogans, programming materials, and promotional materials relating to WTVR–TV; all customer lists, contracts, accounts, and credit records; and all logs and other records maintained by defendant in connection with WTVR–TV.

III. Applicability

A. This Final Judgment applies to Raycom, as defined above, and all other persons in active concert or participation with Raycom who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with section IV and V of this Final Judgment, Defendant sells or otherwise disposes of all or substantially all of its assets or of lesser business units that include the Divestiture Assets, defendant shall require the purchaser to be bound by the provisions of this Final Judgment.

Defendant need not obtain such an agreement from the acquirer of the assets divested pursuant to this Final Judgment.

IV. Divestiture

A. Defendant is ordered and directed, within thirty (30) calendar days after the filing of the Complaint in this matter or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed 60 calendar days in total, and shall notify the Court in such circumstances. With respect to divestiture of the Divestiture Assets by defendant or the trustee appointed pursuant to section V of this Final Judgment, if applications have been filed with the FCC within the period permitted for divestiture seeking approval to assign or transfer licenses to the Acquirer of the Divestiture Assets, but an order or other dispositive action by the FCC on such applications has not been issued before the end of the period permitted for divestiture, the period shall be extended with respect to divestiture of the Divestiture Assets for which FCC approval has not been issued until five (5) days after such approval is received. Defendants agree to use their best efforts to accomplish the divestitures set forth in this Final Judgment and to seek all necessary regulatory approvals as expeditiously as possible. This Final Judgment does not limit the FCC's exercise of its regulatory powers and process with respect to the Divestiture Assets. Authorization by the FCC to conduct the divestiture of a Divestiture Asset in a particular manner will not modify any of the requirements of this decree.

B. In accomplishing the divestiture ordered by this Final Judgment, defendant promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendant shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendant shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privileges or work-product doctrine. Defendant shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendant shall provide the Acquirer and the United States information relating to the personnel involved in the operation of the Divestiture Assets to enable the Acquirer to make offers of employment. Defendant will not interfere with any negotiations by the Acquirer to employ any defendant employee whose primary responsibility is the operation of the Divestiture Assets.

D. Defendant shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the business to be divested; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendant shall warrant to the Acquirer that each asset will be operational on the date of sale.

F. Defendant shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

G. Defendant shall warrant to the Acquirer that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, defendant will not undertake, directly or indirectly, any challenges to the environmental, zoning or other permits relating to the operation of the Divestiture Assets.

H. Unless the United States otherwise consents in writing, the divestiture pursuant to section IV, or by trustee appointed pursuant to section V, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing commercial broadcast television business. Divestiture of the Divestiture Assets must be made to a single Acquirer that can demonstrate to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestiture, whether pursuant to section IV or section V of this Final Judgment,

(1) Shall be made to an Acquirer that, in the United States sole judgment, has the intent and capability (including the necessary managerial, technical, operational, and financial capability) of competing effectively in the commercial broadcast television business in the Richmond market; and

(2) Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement(s) between an Acquirer and defendant gives them the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

V. Appointment of Trustee

A. If defendant has not divested the Divestiture Assets within the time period specified in section IV(A), defendant shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to section V(D) of this Final Judgment, the trustee may hire at the cost and expense of defendant any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendant shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendant must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under section VI.

D. The trustee shall serve at the cost and expense of defendant, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting. including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendant and the trust shall then be terminated. The compensation of the

trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendant shall use its best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities related to the Divestiture Assets and defendant shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendant shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court, setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth: (1) The trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment. why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such report shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, defendant or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendant. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendant, the proposed Acquirer(s), any other third party, or the trustee if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s) and any other potential Acquirer. Defendant and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendant, the proposed Acquirer(s), any third party and the trustee, whichever is later, the United States shall provide written notice to defendant and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendant's limited right to object to the sale under section V(C) of this Final Judgment. Without prior written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under section IV or section V shall not be consummated. Upon objection by defendant under section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendant shall not finance all or any part of any purchase made pursuant to section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, defendant shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendant shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under section IV or V, defendant shall deliver to the United States an affidavit as to the fact and manner of its compliance with section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendant has taken to solicit buyers for the Divestiture Assets and to provide required information to prospective Acquirers. including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendant, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendant shall deliver to the United States an affidavit that describes in reasonable detail all actions defendant has taken and all steps defendant has implemented on an ongoing basis to comply with section VIII of this Final Judgment. Defendant shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in its earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendant shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year

after such divestiture has been completed.

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant, be permitted:

(1) Access during defendant's office hours to inspect and copy, or at the option of the United States, to require defendant to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of defendant, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States or, pursuant to a customary protective order or waiver of confidentiality by defendant, the FCC, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendant to the United States, defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then the United States shall give defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. No Reacquisition

Defendant may not reacquire any part of the Divestiture Assets or enter into any local marketing agreement, joint sales agreement, or any other cooperative selling arrangement with respect to the Divestiture Assets during the term of this Final Judgment.

XII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XIV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date:

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16:

United States District Judge

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 450 5th Street, NW., Suite 4000, Washington, DC 20530, Plaintiff,

v.

Raycom Media, Inc., RSA Tower, 20th Floor, 201 Monroe Street, Montgomery, AL 36104, Defendant.

Civil Action No.: l:08–cv–01510

Assigned To: Urbina, Ricardo M.

Assign. Date: 08/28/2008

Description: Antitrust

Competitive Impact Statement

Plaintiff United States of America (''United States''), pursuant to section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

Defendant Raycom Media, Inc. (''Raycom'') and Lincoln Financial Media Company [1] (''Lincoln'') entered into a Stock Purchase Agreement, dated November 12, 2007, pursuant to which Raycom acquired three broadcast television stations from Lincoln. The transaction closed on April 1, 2008. The United States filed a cMl antitrust Complaint on August 28, 2008, alleging that Raycom's acquisition of one of the stations, WWBT–TV, the Richmond, Virginia, affiliate of the National Broadcasting Corporation, when it already owned WTVR–TV, the Richmond, Virginia, affiliate of CBS Broadcasting Inc., violates section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleges that Raycom, as a result of the acquisition, owns two of the top four broadcast television stations in the Richmond market accounting for more than half of all broadcast television spot advertising revenue in 2008. Raycom's continued ownership of both WWBT–TV and WTVR–TV would substantially lessen competition in the sale of broadcast television spot advertising in Richmond, Virginia, and the surrounding area.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (''Hold Separate'') and proposed Final Judgment, which are designed to

[1] Lincoln is not a party to this lawsuit.

eliminate the anticompetitive effects of Raycom's common ownership of WWBT–TV and WTVR–TV. Under the proposed Final Judgment, which is explained more fully below, Raycom agrees to divest WTVR–TV. Under the terms of the Hold Separate Stipulation and Order, Raycom agrees to take certain steps during the pendency of the proposed divestiture to ensure that WTVR–TV is operated as a competitively independent, economically viable and ongoing business concern, that will remain independent and uninfluenced by Raycom's other broadcast operations, and that competition is maintained between WWBT–TV and WTVR–TV.

The United States and Defendant have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendant and the Transaction

Defendant Raycom is a Delaware limited liability company with its headquarters in Montgomery, Alabama. Raycom, through its subsidiaries, owns approximately 46 television stations in the United States, including WWBT–TV and WTVR–TV in Richmond, Virginia.

B. The Transaction

On November 12, 2007, Raycom agreed to acquire three broadcast television stations in three different markets from entities controlled by Lincoln. In one of those markets—Richmond, Virginia—the acquisition would result in Raycom owning WWBT–TV and WTVR–TV, two of the top four broadcast television stations that combined account for more than 50 percent of the broadcast television spot advertising revenues in that market. Although a Federal Communications Commission (''FCC'') rule against duopolies in local markets (''the FCC duopoly rule'') prohibited Raycom from owning both stations, prior to closing Raycom planned to seek a temporary waiver of the FCC duopoly rule to allow the transaction to be completed, and then to divest WTVR–TV to cure the overlap.

On January 9, 2008, the United States, Raycom, and Lincoln entered into an agreement by which: The United States agreed to defer filing suit to enjoin the transaction for a period of ninety days following the closing of the Raycom-Lincoln transaction, during which period Raycom was to sell WTVR–TV; Raycom agreed that the United States could tile the executed Hold Separate Stipulation and Order and a proposed Final Judgment compelling the sale of WTVR–TV in the event that Raycom did not sell WTVR–TV within that period; and Raycom agreed to comply by the terms of the Hold Separate Stipulation and Order requiring Raycom to preserve and hold separate WTVR–TV, so that competition in the Richmond broadcast television advertising market would be maintained.

Raycom closed its transaction with Lincoln on April 1, 2008, but the agreed-upon divestiture has not yet taken place. Therefore, in accordance with the terms of the January 9, 2008 agreement, the United States instituted this action.

C. The Competitive Effects of the Transaction

1. The Relevant Product and Geographic Markets

The Complaint alleges that the provision of broadcast television spot advertising in the Richmond Designated Marketing Area (''Richmond DMA'') constitutes a line of commerce and section of the country, or relevant market, for antitrust purposes. Broadcast television spot advertising comprises the majority of a broadcast television station's revenues. It is purchased by advertisers who want to target potential customers in specific geographic markets and differs from network and syndicated television advertising, both of which are sold by the major television networks and producers of syndicated programs on a nationwide basis and broadcast in every market where the network or syndicated program is aired. Spot advertising is sold either directly by the station, or through its national representative, on a localized, market-by-market basis.

The Complaint alleges that broadcast television spot advertising possesses specific characteristics, such as its combination of sight, sound, and motion, and broad reach, that collectively differentiate it from other media. Broadcast television stations are able to identify advertisers with strong preferences for broadcast television advertising, and can charge different advertisers different prices. The Complaint alleges that if broadcast television stations were to raise the price of spot advertising, some advertisers might shift some of their advertising to other media rather than absorb a price increase. However, the existence of such advertisers would not prevent broadcast television stations from profitably raising prices by a small but significant amount for a substantial number of advertisers that would not shift.

The Complaint alleges that the Richmond. Virginia, DMA is the relevant geographic market. The Richmond DMA [2] encompasses the city of Richmond, Virginia, and the surrounding counties in which stations within the Richmond DMA receive the largest share of viewers. Advertisers use broadcast television stations within the Richmond DMA to reach the largest possible number of viewers within the entire DMA. Advertising on television stations outside the Richmond DMA is not an effective alternative for advertisers wishing to target viewers within the Richmond DMA, because such stations are not viewed by a significant number of potential customers within the Richmond DMA.

2. Anticompetitive Effects of the Transaction

Raycom's acquisition of WWBT–TV substantially lessens competition in the provision of broadcast television spot advertising time in the Richmond DMA. Raycom's ownership of WWBT–TV and WTVR–TV gives it control over two of the top four broadcast stations in the Richmond DMA and over 50 percent of the broadcast television spot advertising revenue in the Richmond DMA. Combining the ownership of WWBT–TV and WTVR–TV substantially increases the already high concentration in the market, which will reduce competition and lead to higher prices.

Advertisers select broadcast television stations to reach a large percentage of their target audience based upon a number of factors, including the size and demographic characteristics of the station's audience. Many advertisers seek to reach a large percentage of their target audience by selecting those broadcast television stations whose audience best correlates to their target audience. If multiple broadcast television stations efficiently reach that target audience, advertisers benefit from the competition among such stations to offer better prices or services. Today, WWBT–TV and WTVR–TV compete

[2] A Designated Marketing Area (''DMA'') is a non-overlapping geographic unit defined by A.C. Nielsen Company, a firm that surveys television viewers and furnishes television stations, advertisers, and advertising agencies in a particular area with data to aid in evaluating audience size and composition. A DMA is used to identify broadcast television stations whose broadcast signals reach a specific area and attract the most viewers.

head-to-head to reach the same audiences and, for many advertisers that buy broadcast television time in Richmond, they are close substitutes for each other based on their specific audience characteristics. Because advertisers seeking to reach a target audience would have fewer and more expensive alternatives to the merged entity as a result of the merger, the acquisition would give Raycom the ability to raise its rates.

The Complaint alleges that new entry into the Richmond broadcast television spot advertising market is highly unlikely in response to a Raycom price increase. The FCC regulates entry through the issuance of licenses. These licenses are difficult to obtain because the availability of spectrum is limited, and the regulatory process associated with obtaining a license is lengthy. Even if a new signal became available, commercial success would come, at best, over a period of many years, because all major broadcast networks are already affiliated with a station in the Richmond-DMA, the contracts last for many years, and the broadcast networks rarely switch licensees when the contracts expire. Thus, entry into the Richmond DMA broadcast television spot advertising market would not be timely, likely, or sufficient to deter Raycom from unilaterally raising prices.

For these reasons, the Division concluded that Raycoms acquisition of WWBT–TV, when it already owned WTVR–TV, would substantially lessen competition in the sale of broadcast television spot advertising time in the Richmond DMA, eliminate actual competition between WWBT–TV and WTVR–TV, and result in increased rates for broadcast television spot advertising time in the Richmond DMA, all in violation of section 7 of the Clayton Act.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment requires that Defendant divest all of the tangible and intangible assets used in the operation of WTVR–TV, defined in the Final Judgment as the ''Divestiture Assets.'' The sale of the Divestiture Assets according to the terms of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the Richmond market for broadcast television spot advertising time. The Divestiture Assets must be divested in such a way as to satisfy the United States in its sole discretion that WTVR–TV can and will be operated by the acquirer as a viable, ongoing commercial broadcast television business; and Defendant must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective acquirers. The divestiture will establish a new, independent, and economically viable competitor.

Unless the United States grants an extension of time, Raycom must divest WTVR–TV either within thirty (30) calendar days after the Complaint has been filed or within five (5) days after notice of entry of the Final Judgment, whichever is later. The United States may, in its sole discretion, grant one or more extensions of time, which in total may not exceed sixty (60) calendar days. Until the divestiture takes place, Raycom will maintain WTVR–TV as an independent competitor to the other broadcast television stations in the Richmond DMA, including WWBT–TV. WTVR–TV must be divested in such a way as to satisfy the United States in its sole discretion that it can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Raycom must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

If Raycom fails to divest WTVR–TV within the time periods specified in the Final Judgment, the Court, upon application of the United States, shall appoint a trustee nominated by the United States and approved by the Court to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Raycom will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of WTVR–TV and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished. After appointment, the trustee will file monthly reports with the United States and the Court, setting forth the trustee's efforts to accomplish the divestiture ordered under the proposed Final Judgment. If the trustee has not accomplished the divestiture within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. At the same time, the trustee will furnish such report to the United States, who will have the right to make additional recommendations consistent with the purpose of the trust. In such a situation, the Court may enter any order(s) it deems appropriate to carry out the purpose of the Final Judgment.

The proposed Final Judgment requires that Raycom maintain and operate WTVR–TV separate and apart from Raycom's other operations, pending divestiture. The Final Judgment also contains provisions to ensure that WTVR–TV will be preserved, so that after divestiture it will remain a viable, aggressive competitor.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: John Read, Chief, Litigation III Section, Antitrust Division, United States Department of Justice, 450 5th St., NW., Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendant. The United States could have continued the litigation and sought preliminary and permanent injunctions against Defendant's acquisition of WWBT–TV. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of broadcast television spot advertising in the relevant market identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest. 15 U.S.C.16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(l)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); see generally United States SBC Commc'ns, Inc., 489 F. Supp. 2d I (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[3]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See Microsoft, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also Microsoft, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''within the reaches of the public interest.'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[4] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' SBC Commc'ns, 489 F. Supp. 2d at 17; see also Microsoft, 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983); see also *United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' SBC Commc'ns, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' Microsoft, 56 F.3d at 1459. Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review

[3] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(l) (2006); see also SBC Commc'ns, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[4] Cf BNS, 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). See generally Microsoft, 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'').

the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *id.* at 1459–60. As this Court recently confirmed in SBC Communications, courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' SBC Commc'ns, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' SBC Commc'ns, 489 F. Supp. 2d at 11.[5]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: August 28, 2008.

Respectfully submitted,

Ann Marie Blaylock (D.C. Bar No. 967825),
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Certificate of Service

I hereby certify that on August 28, 2008, I caused a copy of the foregoing Competitive Impact Statement to be served on the defendant in this matter in the manner set forth below:

By facsimile and U.S. mail:

Counsel for Defendant Raycom Media, Inc.

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[5] See 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 08–33]

Novelty Distributors, Inc.; Revocation of Registration

On January 17, 2008, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration to Novelty Distributors, Inc. (Respondent), of Greenfield, Indiana. The Order immediately suspended and proposed the revocation of Respondent's DEA Certificate of Registration, 003563NSY, as a distributor of the list I chemicals ephedrine and pseudoephedrine, on the grounds that its ''continued registration is inconsistent with the public interest,'' and ''constitute[d] an imminent danger to public health and safety.'' Show Cause Order at 1 (ALJ EX. 1) (citing 21 U.S.C. 823(h), 824(a)(4), and 824(d)).

More specifically, the Show Cause Order alleged that Respondent was storing listed chemical products at, and distributing them from, over 100 unregistered locations throughout the United States, in violation of Federal law and regulations. *Id.* (citing 21 U.S.C. 822(e), 21 CFR 1309.21 and 1309.23(a)).

Next, the Show Cause Order alleged that Respondent was distributing quantities of listed chemical products ''to small retail outlets such as convenience stores'' in amounts ''far exceed[ing] what those retail outlets could be expected to sell for legitimate, therapeutic purposes.'' *Id.* at 2. The Order thus alleged that the ''listed chemical products distributed by [Respondent] in large quantities have been, and are likely to continue being, diverted to the clandestine manufacture of methamphetamine.'' *Id.* (citing cases). Relatedly, the Show Cause Order alleged that some ''[s]mall retail outlets that receive large quantities of * * * listed chemical products from [Respondent] sell such products to individuals in amounts that cannot be attributed to legitimate individual needs,'' that ''some of the retail outlets allow customers to make multiple purchases of scheduled listed chemical products within a single week, and in some cases, within a single day,'' and that ''[s]ome customers of these retail outlets purchased more than 9 grams of ephedrine or pseudoephedrine base within 30 days in violation of 21 U.S.C. 844(a).'' *Id.*[1]

The Show Cause Order further alleged that between January 1, 2007, and July 9, 2007, Respondent distributed listed chemical products ''on at least 284 occasions to 35 retail outlets,'' which had not self-certified as required under Federal law. *Id.* (citing 21 U.S.C. 830(e)(1)(A)(vii)). *Id.* Moreover, on three occasions subsequent to February 1, 2007, Respondent allegedly distributed 24-count bottles of listed chemical products to retailers in violation of Federal law, which effective April 9, 2006, required that non-liquid form products be sold only in blister packs. *Id.* at 2–3 (citing 21 U.S.C. 830(d)(2)). Relatedly, the Show Cause Order alleged that Respondent had distributed tablet-form products to retailers in Kentucky and North Carolina in violation of the laws of these States which ''prohibit the sale of non-liquid ephedrine and pseudoephedrine except in a gel-cap product.'' *Id.* at 3.

Finally, the Show Cause Order alleged that in July 2007, DEA had audited twenty listed chemical products which Respondent distributed. *Id.* at 2. The Show Cause Order alleged that Respondent ''could not account for more than 60,000 dosage units of two ephedrine products'' and that it also had ''overages for 16 different * * * listed chemical products.'' *Id.* The Order thus alleged that Respondent ''failed to maintain accurate records of its distributions and receipts of * * * listed chemical products in violation of 21 U.S.C. 830(a) and 21 CFR 1310.04.'' *Id.*

[1] The Show Cause Order also alleged that ''[i]n November 2002, 22 bottles of ephedrine products distributed by Novelty were found at an illicit methamphetamine laboratory in Connecticut.'' Show Cause Order at 2.

Based on the above allegations, I made the preliminary finding that the listed chemical products Respondent was distributing had been, and were ''likely to continue to be, diverted into the illicit manufacture of methamphetamine.'' *Id.* at 3. I also found that Respondent's ''failure to maintain effective controls against diversion, including its distribution of large amounts of * * * listed chemical products that far exceed legitimate demand, contribute to the illicit manufacture of methamphetamine.'' *Id.* I thus came to the ''preliminary conclusion that [Respondent's] continued registration during the pendency of these proceedings would constitute an imminent danger to the public health and safety,'' and immediately suspended its registration. *Id.*

On February 26, 2008, Respondent requested a hearing on the allegations. ALJ Ex. 2. The matter was assigned to Administrative Law Judge (ALJ) Gail Randall, who proceeded to conduct pre-hearing procedures. A hearing was held on March 24 through March 28, and March 31 through April 2, 2008, at which both parties put on extensive testimony and introduced numerous documents into evidence.

Moreover, on March 24, 2008, Respondent filed an interlocutory appeal in which it challenged the ALJ's denial of its motion to remove one of the Government's lawyers from participating in the hearing, on the ground that he was a necessary and indispensable witness to the events surrounding the execution of an administrative search warrant which was the subject of its motion to suppress. *See* ALJ Exs. 12 and 13. On March 25, 2008, I denied Respondent's appeal on multiple grounds.[2] ALJ Ex. 13.

Following the hearing, both parties submitted briefs containing their proposed findings, conclusions of law, and argument. On May 21, 2008, the ALJ issued her recommended decision (hereinafter, ALJ).[3]

In her decision, the ALJ found that the Government's evidence regarding the monthly expected sales of combination ephedrine products at convenience stores ($14.39) to meet legitimate demand was ''flawed and not credible.'' ALJ at 97. Relatedly, while acknowledging that ''Respondent sells an approximate monthly average of $640.00 in SLC products to its convenience store customers,'' the ALJ observed that ''there is no legitimate sales figure in the record'' by which the excessiveness of its sales (and the likelihood that the products were being diverted) could be judged. *Id.*

Regarding the allegation that Respondent failed to maintain accurate records of its receipts and distributions, the ALJ concluded that the evidence pertaining to the audit did not establish ''preponderating evidence either way to assist in analyzing the accuracy of * * * Respondent's handling'' of listed chemical products. *Id.* at 88. The ALJ concluded, however, that ''Respondent's recordkeeping is not adequate to conduct an effective audit of its SLC products.'' *Id.*

The ALJ also rejected the allegation that Respondent had made numerous distributions to uncertified retailers based on testimony and documentary evidence that one of Respondent's officials had confirmed that these ''customers were, in fact, self-certified.'' *Id.* at 91. The ALJ further found unproven the allegation that Respondent had thrice distributed listed chemical products in bottles in violation of Federal law, noting that Respondent had provided ''documentary proof that the * * * product * * * had not been illegally distributed.'' *Id.* at 86. The ALJ also found unproven the Government's allegation that Respondent had distributed tablet-form products to retailers in Kentucky and North Carolina, noting that ''Respondent produced credible testimonial evidence to support a finding that these illegal sales in fact did not happen.'' *Id.*

With respect to the allegation that Respondent was violating Federal law because it was distributing from over 100 drop-off points which were not registered, the ALJ noted that Respondent had challenged the Agency's interpretation in Federal District Court. *Id.* at 90–91. The ALJ found, however, that Respondent had been advised by a DEA Group Supervisor (GS) that its practice of shipping SLCs to numerous storage units which were not registered was illegal, that it had continued do so without even seeking clarification from the Agency, and that this conduct was ''not consistent with the requirements for a participant in a regulated industry.'' *Id.* at 91. However, because Respondent's declaratory judgment action was still ''pending in federal court,'' the ALJ ''conclude[d] that [the district court was] the proper venue for this issue'' and declined to address the statutory question.[4] *Id.* at 91 n.38.

Finally, the ALJ also found that following the suspension order, Respondent had attempted to enter into an agreement with one of its suppliers (BDI), under which its salespersons would still take orders for SLCs which would be shipped by BDI. ALJ at 92. Here again, the ALJ noted that there was no evidence that Respondent had asked the Agency if the arrangement was lawful. *Id.*

The ALJ nonetheless concluded that Respondent had ''demonstrated a willingness to comply with the laws and regulations governing the distribution of SLC products,'' specifically noting that it had developed a training program for its customers, had provided them with the logbooks required by the CMEA, and lockable display cases for its products, and had upgraded its computer system. *Id.* at 98–99. The ALJ also noted that following the implementation of the CMEA, Respondent had ''acted to remove * * * non-complying SLC products from its customers' shelves and [to] properly dispose of'' them. *Id.* at 99.

With respect to the audits, the ALJ observed that while they ''appeare[d] to reveal significant overages and shortages,'' Respondent had ''credibly and adequately minimized those figures to a more acceptable margin of inventory error after analyzing its records and making its own audit

[2] The grounds included that Respondent had not established that the Government's lawyer was a necessary and indispensable witness, and that Respondent had not cited a single case to support its contention that the conduct of the Government lawyer—even if true—was a violation of its constitutional rights. Denial of Interlocutory Appeal, at 2–3 (ALJ Ex. 13.) I also noted that the Agency had previously held that the exclusionary rule does not apply to proceedings under 21 U.S.C. 824, and that the Supreme Court had ''repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials.'' *Id.* (quoting *Pennsylvania Bd. of Probation* v. *Scott*, 524 U.S.C. 357, 363 (1998)).

[3] The decision was 165 pages in length.

[4] On August 7, 2008, the District Court granted the Government's motion for summary judgment and denied Respondent's cross-motion for summary judgment. *See* Entry on Cross Motions for Summary Judgment, *Novelty, Inc.,* v. *Tandy*, No. 1:04–cv–1502–DFH–TAB (S.D. Ind., Aug. 7, 2008). Notably, the District Court held that the instructions in the Group Supervisor's letter were interpretive and not legislative rules, and were thus not subject to notice and comment rulemaking under 5 U.S.C. 553. *Id.* at 2. Pursuant to 5 U.S.C. 556(e), I take official notice of the District Court's decision. I also take official notice of the August 13, 2008 letter submitted by Respondent's President. In his letter, Respondent's President stated that he has ordered a change to Respondent's distribution practices and ''reiterates its previously stated commitment to cooperate with [this Agency] and adhere to all conditions specified by [me] for [its] continued registration.'' Letter of Todd Green (Aug. 13, 2008).

In his letter, Respondent's CEO does not state that Respondent's will waive its right to appeal the District Court's decision. Moreover, I conclude that in light of the extensive resources that have been devoted to litigating the issue of the lawfulness of Respondent's use of unregistered locations to store and distribute SLCs, as well as the importance of the issue to the regulated industry, the issue should be decided.

findings.'' *Id.* Finally, while the ALJ noted that Respondent's continued distributions to the drop-off points ''cause[s] concern,'' she further reasoned that except for the Group Supervisor's letter, it ''had no notice from the [Agency] of any violations until the * * * Suspension Order was served'' on it, and that it ''ha[d] not been given an opportunity to remedy the flaws identified by the Agency [in] this action.'' *Id.* at 100. Based on what she characterized as its ''history of,'' and ''financial commitment to,'' compliance, the ALJ reasoned that revocation would not be an appropriate sanction. *Id.* at 100–01. Instead, the ALJ recommended that I impose compliance requirements on Respondent to ensure that it operated in the public interest. *Id.* at 101.

Thereafter, the Government filed exceptions to the ALJ's decision. Respondent likewise filed a 140 page brief which supported the ALJ's decision while also excepting to certain findings and conclusions.

Having considered the entire record in this matter and all of the issues raised in the parties' exceptions, I hereby issue this Decision and Final Order. More specifically, I reject the allegations that Respondent distributed SLC products in violation of the CMEA and the laws of Kentucky and North Carolina as unsupported by substantial evidence. With respect to the allegations that Respondent engaged in 284 distributions to uncertified retailers, I conclude that the evidence establishes only a single instance of distributing to an uncertified retailer and several instances of inaccurate recordkeeping in that Respondent's records of the addresses for several stores did not match the actual addresses of the stores, and that the Government has not proved by substantial evidence that the stores were uncertified on the date of the distributions.

With respect to the audit, I conclude that because the ALJ found credible the testimony of one of Respondent's executives that the Agency's investigators had excluded certain transactions and inventory adjustments which it had provided to them, and the Government offered no rebuttal evidence, the allegation that Respondent had shortages and overages of various products is not proved. I find, however, that the evidence shows that Respondent's recordkeeping did not comply with federal law because it failed to maintain proper records of regulated transactions as required by Federal law and DEA regulations. *See* 21 U.S.C. 830(a); 21 CFR 1310.03, *id.* 1310.04, *id.* 1310.06. Because of this, as well as evidence showing that Respondent's list of shipments included three shipments of a product with a date of July 16, 2007, even though it was then only July 9, 2007, I find that Respondent does not have adequate systems for monitoring the receipt and distribution of SLCs. 21 CFR 1309.71(b).

With respect to the allegation that Respondent's sales of SLC were excessive and consistent with diversion, I agree with the ALJ that the Government's figure as to the expected monthly sales range is not supported by substantial evidence. I nonetheless conclude that Respondent does not maintain effective controls against diversion because its own evidence shows that it distributed SLCs to numerous stores in quantities that dwarfed what its average customer purchases, and that it did so even when it had previously developed concerns that a store was purchasing excessive quantities, and that it does not even enforce its own sales limit policies.

Next, in contrast to the ALJ, I conclude that this proceeding is the appropriate forum to address the meaning of 21 U.S.C. 822(e) and the allegation that Respondent has repeatedly violated Federal law by distributing from unregistered locations. Consistent with the statutory text and purpose, I conclude that Respondent's practice of using unregistered self-storage units to store and distribute SLC products violated the Controlled Substances Act and DEA's regulation.

Finally, for reasons set forth below, I reject the ALJ's recommended sanction that Respondent's registration be continued with conditions. As explained below, because Respondent repeatedly violated Federal law notwithstanding that it was advised that its use of the unregistered self-storage facilities was unlawful, does not even enforce its own policies with respect to limiting sales, and attempted to circumvent the suspension order, I conclude that revocation is necessary to protect the public interest. I make the following findings of fact.

Findings

Respondent is a corporation which is solely owned by its President, Mr. Todd Green. Respondent is a wholesale distributor of various sundry items to between 10,000 and 12,000 convenience stores throughout the United States.

Since 1998, Respondent has held DEA Certificate of Registration, #003563NSY, which authorizes it to distribute pseudoephedrine and ephedrine from its registered location of 351 W. Muskegon Drive, Greenfield, Indiana. GX 1. Respondent's registration expires on October 31, 2008. *Id.*

Both ephedrine and pseudoephedrine have FDA approved therapeutic uses. GX 19, at 3. Ephedrine is lawfully marketed under the Food, Drug, and Cosmetic Act for OTC use as a bronchodilator to treat asthma,[5] and pseudoephedrine is lawfully marketed for OTC use as a decongestant. *Id.* at 3–4. Both substances are, however, regulated as schedule listed chemicals under the Controlled Substances Act because they are precursor chemicals which are frequently diverted into the illicit manufacture of methamphetamine, a schedule II controlled substance, a potent and highly addictive central nervous system stimulant. *See* 21 U.S.C. 802(34); *id.* 812(c); 21 CFR 1308.12(d). Moreover, in the course of investigating methamphetamine trafficking, DEA has frequently found that the listed chemicals which are used by smaller illicit labs have been sold by convenience stores, gas stations, and other small retailers. GX 51, at 56, 59, 62, 66; GX 54, at 29–30.[6] *See also TNT*

[5] The FDA has, however, issued a notice of proposed rulemaking which would remove combination ephedrine-guaifenesin products from the OTC monograph on the grounds that they are not ''safe and effective for continued OTC availability.'' 70 FR 40232 (2005).

The parties also extensively litigated the medical appropriateness of using combination ephedrine products to treat asthma. *See* ALJ 43–48. I find it unnecessary to make any findings on this issue as until the FDA issues a final rule, combination ephedrine-guaifenesin products can be lawfully marketed for this purpose.

[6] Based on the testimony of a witness whose experience was limited to the Shenandoah, Virginia valley, the ALJ found that the street price of a gram of methamphetamine is ''between $20.00 and $50.00 per gram.'' ALJ at 48–49. Based on this, as well as evidence regarding the yield and conversion rate, the ALJ found that ''it would cost a methamphetamine cook between $50.00 and $144.00 to produce 1 gram of methamphetamine.'' ALJ at 50. The ALJ thus concluded that ''using the Respondent's product to manufacture methamphetamine makes little monetary sense.'' *Id.* at 96.

I reject the ALJ's finding regarding the street price of methamphetamine and her conclusion that using Respondent's product ''makes little monetary sense.'' *Id.* As for her findings regarding the street price of methamphetamine, I note that it is based on anecdotal evidence and limited to a small region of the State of Virginia. Respondent does not, however, limit its distribution of SLCs to this region of the country. I further note that it runs counter to the data which this Agency obtains on a periodic basis, and which show that in most of the country, methamphetamine prices are substantially higher than they are in the Shenandoah Valley. *See* U.S. Dep't of Justice, *National Illicit Drug Prices—December 2007*, 32–37 (Mar. 2008). In accordance with 5 U.S.C. 556(e), and 21 CFR 1316.59(e), I take official notice of the methamphetamine street price data contained in this publication. Moreover, the ALJ's conclusion assumes that methamphetamine addicts engage in economically rational behavior. There is, however, no evidence in the record to support this assumption. I therefore reject the ALJ's conclusion.

Continued

Distributors, 70 FR 12729, 12730 (2005) (noting testimony of Special Agent that ''80 to 90 percent of ephedrine and pseudoephedrine being used [in Tennessee] to manufacture methamphetamine was being obtained from convenience stores'').

Prior to the suspension of its registration, Respondent sold combination ephedrine and pseudoephedrine products under the brand names of Double Action, Mini, and Ephedrine Plus in package sizes of two, six, twelve and twenty-four count. Tr. 561, 692–93. Respondent sold these products to approximately 3,500 to 4,000 convenience stores in approximately thirty different States. *Id.* at 80–82, 558–60. Respondent does not carry any other OTC drug products. *Id.* at 552.

Respondent employs approximately 150 sales persons, who typically visit each store every other week.[7] Tr. 2046, 1290. Using its own tractor-trailers, Respondent ships products including SLCs from its Greenfield warehouse to each sales person's ''drop-off point,'' which is a unit in a commercial self-storage facility. *Id.* at 73–75. According to the testimony of Respondent's owner and CEO, Respondent was using approximately 150 to 180 drop-off points at the time the immediate suspension was served on it. *Id.* at 76. Both the driver who delivers the product to the drop-off point and the route sales person have keys to the storage unit. *Id.* While the sales persons are notified of each arriving shipment, SLCs can sit in the storage units for several days before the sales person retrieves them for delivery to the stores.[8] *Id.* at 534, 668. Moreover, according to one of Respondent's executives, the SLCs can remain on the salesperson's truck for up to nine days depending upon the demand for the product. *Id.* at 1282, 1421.

None of the drop-off points is registered with the Agency. Tr. 1284. Moreover, the units do not have separate cages for storing SLCs, *id.* at 132, and the facilities have varying degrees of external security with some having cameras and requiring access codes while others have no additional security. *Compare id.* at 131, *with id.* at 538 (former salesperson testifying that anyone could come off the road and access the door and padlock to his route storage unit).[9] Moreover, DEA Investigators could not determine the addresses of thirty-four of the drop-off points. Tr. 1196–98.[10]

In a letter dated May 5, 2004, the Diversion Group Supervisor of the Indianapolis, Indiana DEA District Office, advised Respondent that ''any storage at, and distribution from, a location other than the registered location (including the use of delivery vehicles for overnight storage) is a violation of federal law.''[11] GX 100. Upon review of the letter, Respondent sought a declaratory judgment in Federal District Court challenging the interpretation set forth in the letter. Tr. 652–53. At no time, however, did Respondent change its practice of distributing to the drop-off points. *Id.* at 664–65. Nor did Respondent seek a review of the letter by officials at the Agency's headquarters. ALJ at 18.

The record further establishes that at the time the listed chemical products are shipped from its Greenfield, Indiana warehouse (which is its only registered location) to the drop-off points, the products have not been sold to a particular store. Tr. 2079. Indeed, the amount of SLCs to be sold to a customer is not known until the route sales person visits the store and determines how much product the store needs. *Id.* at 1282. The sales person counts the product on hand, discusses the order with the store manager, and restocks the store. *Id.* at 631; 1422.

Moreover, at the time an SLC order is placed, only the salesperson—and no one at Respondent's headquarters—knows how much the store has purchased. *Id.* at 633. The salesperson is required to enter the order information into a handheld computer which generates an invoice; this information is later transmitted back to Respondent's headquarters. *Id.* at 634. The salesperson is also required to return a paper copy of the invoice, as well as a shipping document which accompanies the delivery of the SLCs from the warehouse, to headquarters. *Id.* at 688. Under its system, while Respondent's headquarters can determine which salesperson has received product with a particular lot number, it cannot identify the specific store that obtained a particular lot number of a product. *Id.* at 1517.

Respondent's CEO testified that a store could purchase up to a case of an SLC product in each ''service cycle.''[12] *Id.* at 101. Accordingly, most stores could purchase two cases per month of each product. Moreover, Respondent sold more than ten different SLC products. *Id.* at 623.

According to one of its executives, the company monitors the sales of each SLC product at each store throughout the week to determine whether a store ''is increasing [its] inventory more than [Respondent] expects [it] to,'' and if it is, the company contacts the salesperson to

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I also find that this witness's testimony that convenience stores are not the source of precursors in the Shenandoah Valley (ALJ at 49), to be anecdotal and contrary to the Agency's experience throughout the country. I thus give it no weight.

[7] Approximately 90% of the stores are on this schedule; the remaining stores are visited either weekly or monthly. Tr. 1290.

[8] It is undisputed that the SLCs are not shipped back to Respondent's registered location prior to their being distributed.

At the hearing, an executive of Respondent insisted that ''we are not storing product in * * * unregistered locations,'' and added: ''Now your coming back into the definition of what is storage. We're not storing the product in that location,'' referring to the drop-off points. Tr. 666–67. *See also id.* at 668 (''We're not storing or keeping or whatever words you want to try and use, product in these warehouses, against the law. We're not doing it.''). The executive acknowledged, however, that products may stay in the storage units for ''a few days.'' *Id.* at 667. I therefore find that Respondent is storing products in the self-storage units.

Respondent further asserted that its distribution system provided more security than shipping the products via such common carriers as UPS or Fed Ex. *See* Tr. 644–45. Yet an executive of Respondent acknowledged that it uses temporary drivers on a contract basis. *Id.* at 693, 697. Relatedly, Respondent's CEO offered testimony as to perceived security inadequacies at UPS, asserting that ''[p]roduct delivered by UPS could easily be stolen anywhere in the system.'' *Id.* at 157.

On cross-examination, however, Respondent's CEO admitted that he had not taken a tour of a UPS facility. *Id.* at 161. When asked when he had last ''checked into the training that UPS personnel have with regard to handling [SLCs]?,'' he answered: ''I assume they don't have any training, since they're not DEA regulated facilities.'' *Id.* at 162. The ALJ did not address the credibility of the CEO's testimony. As ultimate factfinder, I reject it as lacking foundation.

[9] There is no dispute that the security at Respondent's Greenfield warehouse is adequate. It is also undisputed that following the enactment of the CMEA, Respondent prepared a training video for its customers and supplied them with logbooks and cases for storing SLC products. Tr. 1390 & 1422; RXs 34, 47, & 48.

[10] On its list of shipments, Respondent used code numbers to indicate where products were being shipped to. Tr. 1196. Moreover, Respondent initially refused to turn over information identifying the addresses of the drop-off points for the sales routes, claiming that it was outside the scope of the warrant. *Id.* at 1197.

[11] The letter also reviewed three scenarios ''in case [Respondent was] storing List I chemical products * * * and distributing them from satellite locations, such as commercial storage units, personal residences and or delivery vehicles.'' GX 100, at 1. The first two scenarios involved sales representatives who picked up listed chemicals from a registered location either to fill a pre-placed order or a ''general order,'' and could not return the products ''to the registered location at the end of the day.'' *Id.*

The third scenario was ''a company [that] ships orders containing List I chemicals to sales representatives at remote locations.'' *Id.* at 2. The letter further explained that ''DEA considers this to be freight forwarding and at this time * * * has no provisions that would permit freight forwarding for List I chemical products.'' *Id.*

[12] With respect to the 24-tablet products, the record establishes that there were 144 packages in a case. Tr. 621. The record does not, however, establish how many packages there were in a case of the smaller size packages. *Id.* at 624.

inquire further. *Id.* at 2061–62. This executive also asserted that in this event, it would send in one of the salesperson's supervisors to visit with the sales person and determine the true inventory at a store. *Id.* Moreover, another executive claimed that he ''receive[s] a computer-generated report indicating any time that more than one case has been sold to a single retail location of a single'' product and issues a warning letter to its salespersons. *Id.* at 1431. Respondent's CEO and Owner further testified that if a customer obtained more than a case of a product, he ''would cut them off, [and] stop the sale of product to them.'' [13] Tr. 159. *See also* RX 10, at 1 (asserting that stores purchasing ''unusual quantities'' would be ''monitored over the following 4 week period,'' and that ''[i]f further unusual activity is noted,'' Respondent ''will discontinue sales of all or part of the List I products sold to the store'').

According to one of Respondent's executives, between January 17, 2007 and January 17, 2008, that there had been ''approximately 35 to 45'' violations of the one case limit, and most of the violations had occurred before July 2007, when the Agency executed the administrative warrant. *Id.* at 1433. The ALJ, however, credited the testimony of a DEA DI who reviewed Respondent's sales records for the period between January and July 2007, and found that its salespersons exceeded the one case limit 85 times. Tr. 1496–1506; GX 68.

The same executive stated that Respondent had only started issuing written warnings to its salespersons after August 2007 because of a computer ''glitch'' which had resulted in the reports not being issued as scheduled. *Id.* at 1435. Moreover, while Respondent introduced into evidence a few e-mails indicating that the company had cut off supplying 100-count bottles to several stores, Respondent did not identify a single store to which it had refused to sell ephedrine.[14] Indeed, according to its own evidence, one of the stores (BPM55), which it had previously stopped selling 100-count products to because of its excessive purchases, was allowed to purchase products with a retail value of more than $7300 a month, in the three months prior to the issuance of the suspension order. *Compare* RX 56, at 1, *with* RX 27a, at 1.

According to one of its executives, Respondent's SLC customers purchased SLCs with an average retail sales value of $640 per month, with the majority of the products containing ephedrine. *Id.* at 563–64. Moreover, according to one of Respondent's exhibits, in the three months prior to the issuance of the suspension order, it distributed listed chemicals products with an average monthly retail sales value greater than $2000 to approximately 120 of its customers. RX 27A. Respondent also distributed listed chemical products with an average monthly retail sales value in excess of $3000 to thirty-four customers, and product with average monthly retail sale value greater than $4000 to nine customers. *Id.* Finally, Respondent distributed to its two largest customers, products with an average monthly retail sales value of $5056 and $7314 respectively. *Id.*

At the hearing, the Government put forward expert testimony to the effect that the expected sales range of ephedrine products at convenience stores to meet legitimate demand was $14.39 per month. GX 25, at 8. In his declaration, the Government's expert stated that U.S. Economic Census data show that only about 31.5% of all convenience stores (45,077 stores) carry non-prescription drug products. GX 99, at 7. According to his declaration, the Government's expert then applied ''these statistics'' to the National Association of Convenience Stores 2007 Survey revenue data which show that convenience stores sold a total of $292,000,000 of cough and cold remedies during 2006, to calculate the annual and monthly average sale of cough and cold products at a convenience store. *Id.* According to the Government's expert, stores carrying the HBC line had average annual sales of all cough and cold products of $4,080.18, and average monthly sales of $340.01. *Id.*; *see also id.* at Table 2.

The Government's expert did not explain, however, why he used the total number of stores carrying the HBC line [15] (71,565 stores) rather than the smaller number of stores that he had determined carried non-prescription drug products (45,077 stores). *See id.* at Table 2. Moreover, the Government did not rebut the testimony of Respondent's expert that because of legislation in twelve States, convenience stores can no longer sell ephedrine products and that the stores in these States comprise 23% of the nation's convenience stores. RX 59, at 10. This suggests that at most, 34,709 convenience stores nationwide carry ephedrine products. *Id.*[16]

Next, the Government's expert determined the percentage of cough and cold remedies comprised of ephedrine products. GX 99, at 8. According to the Government's expert, ''[t]his factor was derived from a tabulation of MRI data showing asthma remedy usage by retail channel (in this case, convenience stores).'' *Id.* Based on this data, which was included at Table 1, the Government's expert concluded that ephedrine products constitute 8.36% of cough and cold remedies sold at convenience stores. *Id.* Multiplying this figure times the average monthly total sales of cough and cold products, the Government's expert concluded that the average monthly sale of all ephedrine products at convenience stores selling the products was $28.43.[17] *Id.*

Respondent's expert stated, however, that the MRI Survey (which is a survey of 50,000 consumers) does not provide sufficient information to support the Government's expert's figure that ephedrine products constitute 8.36% of cough and cold remedies sold at convenience stores. RX 59, at 11. Respondent's expert noted that the MRI Survey (which was included as an attachment to RX 59) ''reports absolutely no information about any ephedrine products,'' and ''reports absolutely no information on whether consumers bought either an asthma remedy or a cough and cold remedy from convenience stores.'' *Id.* (emphasis deleted).

[13] While the ALJ credited the CEO's testimony, the e-mails discussed in note 14 below, show otherwise. *See, e.g.*, RX 56, at 3. Moreover, Respondent did not identify a single store which it had refused to sell SLCs to.

[14] The record contains several e-mails indicating that Respondent directed its employees to not sell 100 count ephedrine to several stores. *See* RX 56. While the e-mails expressed concerns about the excessiveness of these stores' sales of ephedrine products, notably, Respondent did not cut off all sales of the products to any of the stores. *See id.* Moreover, while it restricted its sales ''to a maximum of [one case] every 2 weeks'' and prohibited the sale of 100 count ephedrine to store number BPM55, this store was its leading SLC customer in the three months prior to the issuance of the suspension order, during which it purchased products with an average of retail value of $7317.77 per month. *Compare* RX 56, at 1, *with* RX 27A, at 1.

[15] The HBC line includes analgesics, stomach remedies, vitamins, other OTC drugs, grooming aids, feminine hygiene, family planning, baby care, skin care, cosmetics, and some other unspecified products.

[16] Respondent's expert also pointed out that some convenience stores that carry non-prescription drug products may not sell any ephedrine. RX 59, at 10.

[17] As part of its case, the Government entered into evidence a declaration prepared by its expert in another matter. *See* GX 25. In this document, the expert stated that he had also looked at data which included ''cumulated observed transactions,'' such as scanner data obtained by Information Resources, Inc. *Id.* at 7. The Government's expert also testified that in preparing GX 25, he had reviewed scanner data to determine ''the proportion of the nonprescription drug category that included preparations for the treatment of asthma containing ephedrine.'' Tr. 313 & 500. However, in his rebuttal declaration, the Government's expert made no mention of having used scanner data. *See* GX 99.

Respondent's expert further opined that the MRI Survey asks three questions which ''are inadequate to form an estimate'' of the percentage of cough and cold remedies constituting ephedrine. RX 59, at 11. The first question is: ''How many times in'' various time periods has the person used one of numerous products? *See Survey of the American Consumer* 2–106. While the survey includes a list of non-prescription cold, sinus, and allergy remedies, none of the products listed contain ephedrine. *Survey* at 12. Nor does it appear that an ephedrine product is listed anywhere in the survey.

As for the remaining two questions, the survey asks whether a person has had asthma in the last twelve months, and whether they have used a prescription drug, a non-prescription drug, an herbal remedy, or have not treated the condition at all. *Id.* at 15. The survey does not ask any further questions regarding the use of non-prescription drugs to treat asthma.

Finally, with respect to the use of convenience stores, the survey asks only whether the consumer has purchased a non-prescription/OTC drug at a convenience store in the last 30 days. *Id.* at 43. Again, the survey does not inquire further as to what type of drug the consumer may have purchased at a convenience store. The Government's expert did not explain how the data obtained in the answers to these questions supported his conclusion that ephedrine products constitute 8.36% of the cough and cold remedies purchased at convenience stores.[18]

The Government's expert further stated that he used ''[a]nother MRI tabulation showing the route of the drug (powder, tablet, liquid, mist, skin patch, etc., etc.), [which] enabled the estimate to be further adjusted to reflect tablets only * * * resulting in the final estimate of $14.78.'' *Id.* The Government's expert thus concluded that 52% of ephedrine users use tablets rather than inhalers, *id.* at Table 2; multiplying this figure times the average monthly sales of $28.43, the expert concluded that the average monthly sale of tablet-form ephedrine products at convenience stores was $14.78. *Id.* at 8.[19]

The MRI survey asks, however, only about the mode of administration with respect to cold, sinus and allergy remedies and not asthma remedies. *Survey*, at 12. Here again, it is unclear why this data provides a reliable basis for estimating the percentage of asthma sufferers who use tablets versus inhalers.

I thus agree with the ALJ that the Government has not proved by substantial evidence that the monthly expected retail sales value of ephedrine products at convenience stores to meet legitimate demand is $14.39.[20] On the other hand, it is undisputed that no ephedrine product ranks in the top 200 of over-the-counter and health-and-beauty care products which are sold in drug stores, supermarkets, and mass merchandisers. *See* GX 99, at 4. It is also undisputed that approximately 97% of the sales of non-prescription drugs occurs at pharmacies, supermarkets, warehouse clubs, department stores, electronic shopping/mail order houses, and other general merchandise stores. GX 25A, at C2. Moreover, convenience stores (both those with and without gasoline) account for approximately 1.14% of the total commerce in non-prescription drugs. *Id.* The Government, however, produced no evidence as to the annual sales of combination ephedrine products such as Primatene Tablets and Bronkaid, which are sold at pharmacies, supermarkets, and other large volume retailers of non-prescription drugs.

Evidence of Diversion

In September 2002, DMD Pharmaceuticals, a supplier to Respondent, shipped it an entire lot of sixty-count bottles of a combination ephedrine (25 mg.) product.[21] Tr. 1079. Two months later, twenty-two bottles of this lot were found at an illicit methamphetamine laboratory in Thompson, Connecticut. *Id.* at 1077. DEA subsequently issued a warning letter to DMD. *Id.* at 1077–78.

Several months later, while completing a previously-commenced inspection of Respondent, a DI discussed the matter with two of its executives. *Id.* at 1082–83. While the executives provided the DI with the names of two salespersons whose territory included or was near the part of Connecticut where the lab was found, they could not identify which specific stores had obtained the ephedrine. *Id.* at 1084.

As part of the investigation that gave rise to this proceeding, DIs based in four States visited a number of Respondent's customers. At a Roadrunner Market in Bristol, Tennessee, a DI testified that during the ''time period of July 23rd through August 23rd'' of 2007, three customers had purchased quantities that far exceeded nine grams.[22] Tr. 730–733. While 439 gel caps in 25 mg. strength is the dosage form equivalent to the nine gram limit, M.W. had bought 56 boxes totaling 1,344 gel caps or approximately 27 grams. GX 46. During the same period, C.M. purchased 23 boxes totaling 552 gel caps (approximately 11.3 grams), and E.B. purchased 52 boxes totaling 1,248 gel caps or approximately 25.6 grams. *Id.* The DI also found other evidence of repetitive purchasing patterns at the stores, but the logbooks were missing information such as the number of dosage units and/or strength of the product. *See* GX 80.

A different DI visited the Smoker Friendly No. 4 Store in Little Falls, New York, and obtained the logbooks. Tr. 785–86, 791–92. The logbooks showed that between July 27, 2007, and August

[18] Respondent's expert noted that she was informed by its executives that ephedrine products constituted 60% of its customers' SLC sales. RX 59, at 12. Even if this is an accurate figure with respect to its customers, Respondent does not allow them to purchase SLCs from other suppliers, Tr. 626–27, and it does not sell any nationally-branded OTC pseudoephedrine remedies such as Sudafed or Claritin D. The figure is thus based on a biased sample.

[19] Because the average retail price for a box of the two leading brands of ephedrine was $7.19, the Government's expert then further reduced the average monthly sales figure from $14.78 to $14.39 ''to reflect the purchase of exactly two boxes of 24 count ephedrine tablets.'' *Id.* at 9.

[20] The Government offered evidence regarding visits or telephone contacts made by various Diversion Investigators (DIs) to eighteen pharmacies which were apparently located near some of Respondent's customers. *See* ALJ Dec. at 23–33. At least half the pharmacies did not carry any ephedrine products. *See id.* As for the remaining pharmacies, the Government produced evidence as to their sales levels of ephedrine products with respect to only four of the pharmacies. This evidence showed that the pharmacies were selling minimal quantities of tablet-form ephedrine products, with the most that any store sold being 71 boxes in a four-and-a-half month period. *See, e.g.*, GXs 26, 27, 28 & 29.

The Government did not establish that it used a statistically valid sampling technique in choosing the pharmacies the DIs interviewed. The evidence thus amounts to nothing more than a collection of anecdotes. To the extent the evidence is offered to show that there is little demand at pharmacies for these products, it is of limited probative value.

[21] According to the testimony of a DI, DEA issued DMD a warning letter. Tr. 1078. Upon receipt of the letter, DMD's compliance manager told the DI that he would look into to whom the product was shipped. *Id.* Subsequently, the DI received a phone call from DMD's compliance manager and owner informing her that ''that entire lot had been sold to'' Respondent in September 2002. *Id.* at 1079. The ALJ credited this testimony, *see* ALJ at 13, as do I.

[22] It is noted that the time period which was reviewed exceeded thirty days. Even assuming that these persons did not violate Federal law in purchasing these products, given the dosing instruction for these products (one tablet every four hours and no more than six tablets every twenty-four hours), their purchases are not consistent with the use of the products to treat asthma. *See, e.g.*, RX 9, at 1. Moreover, the ''Drug Facts'' warning label for Respondent's Double Action Ephedrine (25/200 mg.) product further advises to ''Stop use and ask a doctor if * * * cough persists for more than 1 week.'' *Id.*

27, 2007, four persons had purchased more than nine grams. K.S. bought 984 tablets of ephedrine 25 mg. (more than 20 grams), and A.P. bought 768 tablets of ephedrine 25 mg. (approximately 15.7 grams). GX 45. Moreover, Richard and Robert R., who had the same last name and used the same address, respectively purchased 600 and 696 tablets of ephedrine 25 mg. *Id.* These purchases amounted to 12.3 and 14.25 grams. *Id.*

Another DI visited the Mason of New York convenience store of Jamestown, New York, and obtained the logbook. Tr. 1484. The logbook entries were frequently missing information as to the strength of the ephedrine tablets that had been purchased. Nonetheless, the logbook showed that there were five individuals who, even if they had purchased only 12.5 mg. ephedrine, had nonetheless purchased more than nine grams during the period between July 21 and August 21, 2007. More specifically, M.M. purchased 1,368 tablets (14 grams),[23] A.J. purchased 1,014 tablets (10.4 grams), J.B. purchased 1,548 tablets (15.9 grams), J.H. purchased 1,068 tablets (10.9 grams), and R.B. purchased 1,002 tablets (10.3 grams).[24] GX 49.

A Pennsylvania-based DI likewise found evidence of purchases that, while technically not in violation of the CMEA, raised a strong suspicion that the ephedrine was being diverted. For example, at the CoGo of Somerset, Pennsylvania, a DI found that S.M. had bought 384 dosage units between August 16 and 23, 2007. GX 75. At 12.5 mg. strength, this amounted to 3.9 grams. This individual had also bought three twenty-four count boxes on three consecutive days.[25] *Id.* Moreover, another DI visited a CoGos in Midland, Pennsylvania, and found evidence that a person had bought 620 dosage units of 12.5 mg. between May 1 and May 31, 2007, and an additional 636 dosage units between June 1 and June 15, 2007. Tr. 1486; GX 41.

The Allegation That Respondent Distributed Listed Chemicals to Uncertified Retailers

Effective September 30, 2006, the CMEA prohibited a retailer from selling schedule listed chemical products unless the retailer had self-certified to the Attorney General that all ''individuals who are responsible for delivering such products into the custody of purchasers or who deal directly with purchasers by obtaining payment for the products * * * have * * * undergone training provided by the seller to ensure that the individuals understand the requirements that apply'' to the sale of the products. 21 U.S.C. 830(e)(1)(VII). As stated above, the Government alleged that between January 1, 2007, and July 9, 2007, Respondent made 284 distributions of listed chemical products to thirty-five retailers who were not self-certified.

As support for the allegation, a DEA DI testified that using a document supplied by Respondent which listed the customers by code number, store name and address, she conducted a spot check to see if the stores were listed in the Agency's database of stores that had become certified. Tr. 1213–19. The DI further testified that the results of her inquiry were reported in a thirteen page document, which listed the distributions by Respondent's store code number, the date, Respondent's product code, and quantity. *Id.* at 1218, *see also* GX 40 (listing stores and transactions).

At the hearing, Respondent produced numerous documents that refuted the allegation. For example, the Government listed twenty-five Speedway stores that were located in Indiana and Kentucky which had obtained SLCs from Respondent between April 10 and July 9, 2007. GX 40, at 3, 6 & 7. Respondent, however, introduced into evidence, a letter dated April 3, 2007 from an executive of Speedway Super America to DEA's registration unit submitting a CD–Rom with the certification data for the company's stores in Indiana and Kentucky. RX 57. Respondent also submitted copies of each store's certification. *See* RX 57A. While each of the certifications was dated July 5, 2007, the Government did not rebut Respondent's evidence that the Agency considers a chain retailer who submits information on a CD–Rom to be self-certified on the date the information is received by the Agency. Tr. 1335–36.

At most, the evidence suggests that Respondent made a single distribution to a single store before it obtained its certification. *Compare* GX 40, at 14, *with* RX 57, at 18. According to these exhibits, Respondent distributed a listed chemical product on January 18, 2007, to an independent convenience store located in Centreville, Virginia, prior to the store obtaining certification on March 8, 2007.[26]

The evidence did show, however, several instances in which Respondent's records contained erroneous information. For example, Respondent's records listed the address of store XTM7480 as 1451 Dorsey Road, Hanover, Maryland. GX 39, at 100. The store's DEA Certificate states, however, that its address is 7500 Ridge Road, Hanover, MD. RX 57, at 14. Respondent's records likewise listed the address of store XTM7520 as 7300 Washington Blvd., Dorsey, MD. GX 39, at 100. According to its DEA certificate, the store's address was 7300 Washington Blvd, Elkridge, MD. RX 57, at 15. Also, Respondent's record listed the address of store MTO102 as 995 Old Airport Road, Bristol, TN. GX 39, at 33. The store's DEA certificate, however, gives its address as 1001 Airport Road, Bristol, Va. RX 57, at 16.[27]

The Allegations That Respondent Distributed Products in Forms That Could Not Be Lawfully Sold Under the CMEA and State Laws

Effective April 9, 2006, the CMEA prohibited a retailer from selling a listed chemical ''product in nonliquid form (including gel caps) at retail unless the product is packaged in blister packs * * * containing not more than 2 dosage units, or where the use of blister packs is technically infeasible, the product is packaged in unit dose packets or pouches.'' 21 U.S.C. 830(d)(2). The Government alleged that subsequent to February 1, 2007, Respondent distributed 24-count bottles of listed chemical product to retailers on three occasions.

In support of this allegation, the Government introduced a document which lists three distributions of Respondent's product # 17902, Mini 2 Way 25 mg. gel caps in 24 count bottles, to three stores (PTR3295, PTR3438, and PTR3973).[28] *See* GX 66 & 37. A DI testified that the three transactions were found in Respondent's sales records. Tr.

[23] A person named Chris M. (with the same last name and address as M.M.) purchased an additional 360 tablets. GX 49.

[24] All of these calculations assume that these persons bought 12.5 mg. tablets; if they bought 25 mg., then the amount of ephedrine was double. Moreover, the DI found that four other persons had purchased quantities which would exceed nine grams if the strength of the tablets was 25 mg.

[25] At two stores, the DI did not find any evidence of purchases in excess of the limit and was told by the managers that the products were primarily purchased by hospital workers and truck drivers who used them to stay awake on their jobs. Tr. 872–73; 886–87.

[26] The store's certification shows that it was completed online at DEA's self-certification Web page. RX 57, at 18.

[27] Likewise, Respondent's records list the address for store BGP1 as 1699 N. Dixie Hwy, Monroe Michigan. GX 39. The store's DEA certificate gives its address as 1488 N. Dixie Hwy., Monroe, Michigan. RX 57, at 21.

[28] According to Respondent's sales records, two of the distributions (to stores PTR3295 and PTR3438) occurred on February 7, 2007; the other distribution (to store PTR3973) occurred on April 23, 2007. GX 66, Tr. 1442–43.

1442–45. According to Respondent's customer list, each of the stores was owned by The Pantry chain. *See* GX 39.

Respondent's record of shipments showed, however, that the product had not been shipped after January 2006. RX 40, at 152. Moreover, Respondent presented e-mail correspondence between it and an employee of The Pantry. More specifically, Respondent requested that The Pantry check its scanner data to determine whether it had sold the bottled product at the three stores after February 1, 2007. RX 46, at 2–3. In an e-mail, a Pantry employee reported that she had checked the item number for the three stores ''from Feb. 2007-Feb. 2008 and [that] there was no movement at any of the three locations for this item.'' RX 46, at 1.[29] Based on the totality of the evidence, I find that the Government has not proved this allegation.

The Government also alleged that Respondent distributed tablet-form products to retailers in Kentucky and North Carolina, after these States prohibited the sale of non-liquid products other than in gel-cap form at establishments that are not pharmacies. In support of the allegation, the Government introduced a document which listed four distributions of Respondent's product # 017550, Ephedrine Plus Blister 24 Count. *See* GX 37 & 65. Three of the distributions were made to three stores owned by Circle K Midwest which were located in Kentucky (CKM 3212, CKM 3247, and CKM 3248); the other store was owned by The Pantry and located in North Carolina (PTR3972). *See* GX 39, at 10, 11 & 65. According to Respondent's records, the distributions occurred on March 27 and 28, and July 9, 2007.

An executive of Respondent testified that its records pertaining to the four distributions were erroneous. Tr. 1347–50. Moreover, Respondent's records did not show any shipments of this product after December 26, 2005. RX 40, at 159. Finally, in an e-mail, an employee of The Pantry reported that ''there was no movement'' of the product at store number 3972. RX 46, at 1.[30] Because the ALJ found credible Respondent's explanation and did not produce sufficient evidence to reject this finding, I find that Government has proved only that Respondent's records were erroneous and that it did not violate North Carolina or Kentucky law.

The DEA Audits

On July 9, 2007, as part of an administrative inspection of its registered location, DEA Investigators took a physical count of Respondent's listed chemical products then on hand. Tr. 1163. The DIs also obtained an initial inventory dated December 25, 2005, from Respondent's records. *Id.*; see GX 4. Both the beginning and ending inventories were certified as correct by Ryan Polk, Respondent's Chief Financial Officer. GX 4. Pursuant to an agreement with the DIs, products which were stored in the returns portion of Respondent's storage cage which included out-of-date products, broken blister packs, and single loose pills were not counted. Tr. 1494–95. The products had not, however, been logged back into Respondent's records. *Id.*

DEA Investigators audited twenty different products by adding Respondent's receipts (including returns, Tr. 1182) to the beginning inventory (GX 34)[31] and comparing this figure with the sum of the closing inventory and Respondent's shipments to its salespersons (GX 35) and returns to its suppliers. *See* GX 4, at 3. Of further note, Respondent's list of shipments indicated that it had made three separate shipments of product # 17121 (totaling more than 2300 units[32]) to three of its salespersons on July 16, 2007, notwithstanding that this date was a week into the future. GX 35, at 29.

According to the DIs' calculations, only one of the products in which there was activity balanced,[33] two of the products had sizable shortages, and the remaining had overages. *Id.* More specifically, the DI identified Respondent's product code #17902 (Mini 2-Way 25 mg. 24 count gel cap bottles) as being short nearly 28,000 bottles. Tr. 1186. Moreover, the DI concluded that Respondent was short 32,913 units of product code # 17903 (Mini 2 Way 12.5 mg. gel cap 6 ct. blister packs). *See* GX 4, at 3.

The DI further testified that ''because we got different numbers when comparing [Respondent's] receipts versus their warehouse documentation,'' Tr. 1186, she conducted an additional audit of four products by obtaining information from Respondent's suppliers in order to verify its receipts. *Id.* at 1187. According to the DI, for these four products, there were substantial differences between the quantities that were reported by the suppliers and the information provided by Respondent. *Id.* With respect to product # 17121 (Double Action 6 ct. ephedrine 25 mg. tablets), Respondent had represented that its receipts were 656,688, but according to the DI, the suppliers had claimed to have sold it only 429,024 units resulting in an overage of more than 275,000 units. Tr. 1188; GX 4, at 3. The DI also found overages in the other three products which were subject to the additional audit. GX 4, at 3. The DI further testified that she prepared an additional document which compared the receipt information provided on Respondent's printouts, the hard copy invoices of Respondent's receipts, and the quantities which the manufacturers of Respondent's products reported to the DI. Tr. 1189–90; GX 69.

According to this document, while Respondent's printout of its receipts for product #17103 (525,240 units of Double Action 12 ct. Blister 25 mg.) matched the quantity of the manufacturer's report, Respondent had no hard copy invoices. GX 69. With respect to product # 17131 (Double Action Pseudo tablets 12 mg.), Respondent's printout indicated it had received 404,184 units and the manufacturer reported that it had sold 403,248 units to Respondent. *Id.* Respondent did not, however, have any hard copy invoices for the product. *Id.* With respect to product # 17121 (Double Action 6 ct. ephedrine 25 mg.), Respondent's receipts (656,688 units) matched the number reported by the manufacturer. *Id.* Respondent, however, had hard copy invoices for only 429,024 units. *Id.*

With respect to product # 17125, Respondent's printout indicated it had received 1,011,901 units, which matched the total quantity reported by the two suppliers of this product. *Id.* Respondent, however, had invoices only

[29] Respondent's CEO attributed the data as resulting from its salesperson[s] having entered the wrong product code in their computer. Tr. 68. Another of Respondent's testified that that it had reprogrammed its computer system to prevent a salesperson from selling an item that was prohibited. *Id.* at 1404. Yet even after the reprogramming, there were several instances in which salespersons entered the codes for discontinued products. *Id.* at 1405. The same executive acknowledged that he did not know if the salespersons still had obsolete products in their storage units. *Id.*

[30] Respondent also submitted an e-mail from an employee of Circle K., which states that she checked the stores' sales going back to April 30, 2007, and that the stores had not sold the product. RX 46, at 5. The e-mail is thus not probative of whether Respondent distributed the products in violation of Kentucky law.

[31] According to the DI, the investigators ''asked to see receipts for the products audited for a time period. And we were, instead, given this three-page summary.'' Tr. 1170. Relatedly, the DI testified that while Respondent gave them a 157 page list of its shipments, the document used product codes and the Investigators had to ask several times for a document which identified the products. *Id.* at 1180–81.

[32] This product was a six-count blister pack. *See* GX 32, at 1.

[33] While two other products balanced, the computation chart indicates that there was no beginning or closing inventory of, and no activity in, these products. GX 3, at 6.

for 851,671 units. *Id.* Apparently, Respondent was also missing invoices for other products.[34] *Id.*

Respondent's CFO testified that upon being provided with a copy of the Government's audit, he proceeded to conduct his own audit. With respect to product # 17902, which the Government had concluded was short, the CFO testified that the DIs had ''excluded a transaction for 28,800 units where we sent that product back to the original manufacturer'' because in his words, it ''was an obsolete item.'' Tr. 2036; RX 36, at 4. The ALJ further found credible the CFO's testimony that he had provided this information to the DIs as part of their document request. *Id.; see also* ALJ at 42.[35] Respondent also introduced into evidence numerous documents listing inventory adjustments and data pertaining to items that had been removed to the ''obsolete inventory area'' which its CFO asserted had been excluded by the DIs in doing the audit. Tr. 2037; RX 36. As for Respondent's other product (# 17903), which the Government concluded it was short nearly 33,000 units, Respondent introduced into evidence two documents listing various inventory adjustments which it contended had not been considered by the Government and which would have greatly reduced the discrepancy. GX 36, at 2. On cross-examination, the CFO maintained that he had provided these documents no later than July 18, 2007. Tr. 2085. Notably, the Government did not rebut either the CFO's testimony that the documents had been provided or that it had failed to consider them in performing the audit.

Respondent's CFO also testified that the additional audit (performed on the four products) was flawed, asserting that with respect to two of the items (#s 17121 and 17125), the Government had ''exclude[d] a very large receipt that's on the sales record from those suppliers.'' Tr. 2038–39. With respect to product # 17121, the CFO testified that the Government had excluded ''227,664 units [that] were listed on the report as sold to'' it. *Id.* at 2039. As for product # 17125, which came from two suppliers, the CFO stated that the Government had excluded transactions totaling 160,000 units. *Id.*

While the purpose of the second audit was to obtain information from Respondent's suppliers and verify it with Respondent's reported receipts, in fact, the audit appeared to have been based on Respondent's actual invoices and not the reported figures (which appear to have been used in the first round of audits). *Compare* GX 69, *with* GX 4, at 3.[36] In his testimony, however, Respondent's CFO did not address the Government's contention that Respondent was missing various invoices of its receipts and Respondent does not cite to any specific evidence of record rebutting the allegation. *See* Tr. 2042 (CFO testified that ''I think in a couple of instances—I did not include the pages in this [exhibit RX 36], for example, Item 17121 when the Government excluded the 227,000 units.''). Accordingly, I find that Respondent was missing numerous invoices documenting its purchases from its suppliers.

Respondent's Post-Suspension Conduct

Following the issuance of the suspension order, Respondent engaged in discussions with BDI, Inc., one of its suppliers, under which Respondent proposed to have its sales persons take orders for SLCs, which would then be sent back to its headquarters and forwarded on to BDI, which would fill the orders by shipping them to its customer by UPS. GX 48; Tr. 2401–02. According to a February 8, 2008 letter which was signed by its CEO, under the scheme, Respondent's sales persons would ''still do all reordering and stocking of the merchandise as we have in the past,'' and when a shipment arrived at a customer, ''the manager [would] have the choice of stocking the OTC cabinet or holding it for our sales person.'' GX 48. The letter further stated: ''This basically keeps the business the same. The only difference is a UPS box. All invoices are from Novelty, Inc.'' *Id.*

Respondent's Vice President of Product justified the scheme, reasoning that under his ''definition of sales, we're not involved in the distribution of the product. But our sales people are in that store functioning as an agent.'' Tr. 2402.

Because BDI refused to participate, the scheme ''was never implemented.'' *Id.* at 2403. However, at the hearing, Respondent's VP testified that the scheme was ''[s]omething that we're still continuing to explore.'' *Id.*

Discussion

Section 304(a) of the Controlled Substances Act provides that a registration to distribute a list I chemical ''may be suspended or revoked * * * upon a finding that the registrant * * * has committed such acts as would render [its] registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). Moreover, under section 303(h), ''[t]he Attorney General shall register an applicant to distribute a list I chemical unless the Attorney General determines that registration of the applicant is inconsistent with the public interest.'' 21 U.S.C. 823(h). In making the public interest determination, Congress directed that the following factors be considered:

(1) Maintenance by the applicant of effective controls against diversion of listed chemicals into other than legitimate channels;

(2) Compliance by the applicant with applicable Federal, State, and local law;

(3) Any prior conviction record of the applicant under Federal or State laws relating to controlled substances or to chemicals controlled under Federal or State law;

(4) Any past experience of the applicant in the manufacture and distribution of chemicals; and

(5) Such other factors as are relevant to and consistent with the public health and safety.

Id. 823(h).

''These factors are considered in the disjunctive.'' *Joy's Ideas*, 70 FR 33195, 33197 (2005). I may rely on any one or a combination of factors, and may give each factor the weight I deem appropriate in determining whether a registration should be revoked or an application for a registration should be denied. *See, e.g., David M. Starr*, 71 FR 39367, 39368 (2006); *Energy Outlet*, 64 FR 14269 (1999). Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA*, 419 F.3d 477, 482 (6th Cir. 2005); *Morall* v. *DEA*, 412 F.3d 165, 173–74 (DC Cir. 2005).

In this matter, I have considered all of the statutory factors.[37] While I have found that several of the Government's allegations have not been proved, I nonetheless conclude that Respondent does not maintain effective controls against diversion and that its

[34] The DI also testified that there were thirty-four sales routes for which Respondent did not provide address information indicating where its products were being shipped to. Tr. 1197–98, GX 67.

[35] The ALJ noted that this document shows a return of 57,600. ALJ at 43. That figure appears, however, to be the amount of the credit Respondent was entitled to. RX 36, at 4.

[36] For example, both Respondent and the manufacturer agreed that Respondent had obtained 656,688 packets of product # 17121, but Respondent's invoices only added up to 429,024 units. GX 69. In the first audit, the Government used the 656,688 figure, and in the second audit, which was supposedly based on the information it obtained from the manufacturer, it used the 429,024 figure. *See* GX 4, at 3. It did the same thing with respect to product # 17125, using the 1,011,901 figure (which Respondent and the two manufacturers agreed with) in the first audit. *Id.* Again, in the second audit, it used the 851,671 figure, the figure that was based on the actual invoices produced by Respondent. *Id.; see also* GX 4, at 3.

[37] I note that there is no evidence that Respondent has been convicted of an offense related to controlled substances or listed chemicals.

distribution practices and recordkeeping did not comply with Federal law. Moreover, while I have carefully considered the ALJ's findings regarding Respondent's willingness to comply with Federal law and her recommendation that I continue its registration with conditions, I conclude that on balance, the ALJ did not give sufficient weight to several factors including Respondent's failure to enforce its own policies, its sustained conduct in continuing to distribute out of unregistered storage facilities even after being advised that its practice was illegal, and its attempt to circumvent the suspension order. Accordingly, Respondent's registration will be revoked.

Factor One—Maintenance of Effective Controls Against Diversion

Under agency decisions, this factor encompasses a variety of considerations. *Holloway Distributing, Inc.*, 72 FR 42118, 42123 (2007). These include the adequacy of the registrant's/applicant's security arrangements, the adequacy of its recordkeeping and reporting, its distribution practices, and the occurrence of diversion. *See id.; see also Rick's Picks*, *L.L.C.*, 72 FR 18275, 18278 (2007); *John J. Fotinopoulos*, 72 FR 24602, 24605 (2007); *D & S Sales*, 71 FR 37607, 37610 (2006); *Joy's Ideas*, 70 FR 33195, 33197–98 (2005).

In evaluating a registrant's security controls and procedures, DEA regulations direct that the Agency consider the following eight factors:

(1) The type, form, and quantity of List I chemicals handled;

(2) The location of the premises and the relationship such location bears on the security needs;

(3) The type of building construction comprising the facility and the general characteristics of the building or buildings;

(4) The availability of electronic detection and alarm systems;

(5) The extent of unsupervised public access to the facility;

(6) The adequacy of supervision over employees having access to List I chemicals;

(7) The procedures for handling business guests, visitors, maintenance personnel, and nonemployee service personnel in areas where List I chemicals are processed or stored;

(8) The adequacy of the registrant's or applicant's systems for monitoring the receipt, distribution, and disposition of List I chemicals in its operations.

21 CFR 1309.71.[38]

It is undisputed that Respondent maintains adequate physical security of the list I chemicals which it stores at its registered location. The record further establishes, however, that Respondent then ships the SLCs to between 150 to 180 self-storage units throughout the country, where the products may be kept for up to several days at a time before the route sales persons retrieve them. Tr. 534 & 667–68.

As found above, Respondent disputes that this practice constitutes storage. *See* Tr. 666 (Executive testifying that: ''That's a nonsense question. Now you're coming back into the definition of what is storage. We're not storing the product in that location.''); *id.* at 672 (''We are not storing or keeping or whatever words you want to try and use, product in these warehouses, against the law.''). Likewise, in its brief, Respondent engages in the tortured argument that it does not store products in the self-storage units because ''[t]he definition of 'store' focuses on future, not present use,'' and it uses the units only for what it terms is an ''immediate'' and not a ''future use.'' Resp. Br. 99.

This argument begs the question of why Respondent needs to rent storage units if not to store products in them. Moreover, the record is clear that the products are typically not immediately transferred from the delivery truck to the route salesperson and that products may remain in the storage unit for up to several days before the route sales person retrieves them. Respondent is therefore using the self-storage areas for storage.

Moreover, putting aside momentarily the issue of whether these storage units must be registered, it is unlikely that they could meet the security requirements of this Agency. Indeed, DEA has previously rejected applications of entities that sought to store SLCs in public storage facilities on the ground that they present an unacceptable risk of diversion. *See Stephen J. Heldman*, 72 FR 4032, 4034 (2007); *see also Sujak Distributors*, 71 FR 50102, 50104 (2006).

In these decisions, I have noted a variety of security concerns which are raised by these facilities including the inadequacy of their construction, the lack of alarm systems, the lack of 24 hour on-site monitoring, the ability of unauthorized persons to gain access to the facility and the storage units, and the fact that the tenant does not control what other tenants the landlord rents to. *See, e.g., Sujak*, 71 FR at 50104. Here, for example, a former salesperson for Respondent testified that his storage unit was in a facility which lacked a secure perimeter and that anyone could come off the road and gain access to the door of his unit. Tr. 538. It also is undisputed that the storage units did not have separate cages within them for securing the products. *Id.* at 133. Finally, to this day, the Agency does not know where thirty-four of the storage units are located. Tr. 1196–98. Respondent's use of these storage facilities thus does not provide adequate controls against diversion and provides reason alone to support the finding that its continued registration ''is inconsistent with the public interest.'' 21 U.S.C. 823(h).

The record identified a further serious deficiency in the security of Respondent's distribution practices. As found above, SLCs may remain on a salesperson's truck for up to nine days before being delivered to a store. This practice presents a serious security concern because of the risk that a thief can steal the vehicle's cargo. Indeed, by stealing the entire vehicle with its cargo—an act which takes but seconds to perform—a thief does not have to spend time offloading the SLCs. *See McBride Marketing*, 71 FR 35710, 35711 (2006). Moreover, the risk posed by Respondent's distribution practice is exacerbated by the extensive time period during which the products remain on its trucks.

Nor are these security concerns the only manner in which Respondent fails to maintain effective controls against diversion. The record also supports the conclusion that Respondent has serious recordkeeping deficiencies.

According to the manufacturer's sales journal, AAA Pharmaceuticals made three shipments of product # 17121 to Respondent: (1) 227,664 dosage units on August 11, 2006; (2) 228,264 dosage units on September 1, 2006; and (3) 200,760 dosage units on November 14, 2006. *See* GX 32 at 7, 8 & 11. Each of these shipments was also a ''regulated transaction'' as each exceeded the 1,000 gram threshold. 21 CFR 1310.04(f)(1)(ii). Respondent was thus required to keep a record of the transaction ''for 2 years after the date of the transaction.'' *Id.* 1310.04(a). Yet Respondent was missing an invoice for the August 11, 2006 shipment of 227,666 units, GX 69, and the computer-generated records which it provided to the Agency pursuant to the warrant did not comply with Federal law and Agency regulations because they were missing required information such as the form of packaging and the method of transfer. *Compare* GX 34,

[38] Under DEA regulations, ''[a]ny registrant or applicant desiring to determine whether a proposed system of security controls and procedures is adequate may submit materials and plans regarding the proposed security controls and procedures either to the Special Agent in Charge in the region in which the security controls and procedures will be used, or to the Chemical Operations Section Office of Diversion Control'' at DEA Headquarters. 21 CFR 1309.71(c).

with 21 U.S.C. 830(a)(2) and 21 CFR 1310.06(a).

With respect to product number 17103, Respondent acquired more than 525,000 units in seven different shipments between March 29, 2006, and April 19, 2006. *See* GX 3 at 2–5.[39] Here again, Respondent engaged in multiple regulated transactions and was required to keep records of them. *See* 21 U.S.C. 802(39); 21 U.S.C. 1310.04(f) (threshold for regulations transaction is based on ''the cumulative amount for multiple transactions within a calendar month''). Yet it had no invoices for any of the shipments, GX 69, and the computer-generated records it provided to the Agency likewise did not comply with the regulations.[40] Respondent was also missing invoices documenting its purchases of other products. *See id.* Respondent's failure to maintain adequate records for the regulated transactions it engaged in constitutes not only a violation of Federal law, it also demonstrates that its systems for monitoring the receipt of SLCs are inadequate.

Respondent's systems for monitoring the distribution of its products are also deficient. First, Respondent's recordkeeping is deficient in various ways. According to the shipping records which Respondent provided to the DIs on July 9, 2007, it shipped more than 2300 packages of product # 17121 to three different salespersons on July 16, 2007, even though the date listed was a week into the future.

The Government also identified several instances in which Respondent's records indicated that it had distributed products that could not be lawfully sold under either the CMEA or the laws of Kentucky and North Carolina. While I have credited Respondent's evidence that the distributions did not occur, the evidence nonetheless points to further inadequacies in Respondent's recordkeeping and systems for monitoring the distribution of SLCs.[41] Moreover, Respondent's records contained a variety of errors related to the addresses of its customers including the wrong street address, and in one case, the wrong state.

Second, Respondent's procedures for monitoring the distribution of its products are deficient. The record establishes that the placement of an order and the delivery of the products occur simultaneously, and at the time, only the salesperson knows how much the store has purchased. Tr. 633. While Respondent asserted that it monitors its sales of SLC and conducts an inquiry if a store has acquired more inventory than is expected, and that another report is prepared which lists instances in which more than one case has been sold per product during a transaction, these procedures are wholly deficient to protect against the diversion of SLCs. Moreover, as the evidence with respect to the 2002 incident in which Respondent's products were found at a meth. lab shows, under its distribution model, it can not identify which stores receive a particular product. Tr. 1517.

Fundamental to its obligation to maintain effective controls against diversion, a distributor must review every order and identify suspicious transactions. Further, it must do so prior to shipping the products. Indeed, a distributor has an affirmative duty to forgo a transaction if, upon investigation, it is unable to determine that the proposed transaction is for legitimate purposes. *See* DEA, *Chemical Handler's Manual* 21 (2002).[42] Respondent's procedure of post-transaction review is incompatible with its obligation to identify and forgo suspicious transactions.

Respondent further maintains that its imposition of its one case, per product, per service cycle limit, and its practice of issuing warning letters to salespersons who sell over the limit, demonstrates that it maintains effective controls against diversion. However, the credited testimony establishes that between January and July 2007, Respondent's sales force violated its case limit policy some 85 times. ALJ at 12. Moreover, one of Respondent's senior executives testified that it had only started issuing written warnings in August 2007, which, of course, was after the administrative inspection. Furthermore, Respondent's policy is a meaningless measure because it sells ten different products and most stores are serviced every two weeks.

The inadequacy of Respondent's control measures is further demonstrated by its own exhibit showing its sales of SLCs in the three months prior to the issuance of the suspension order. As found above, Respondent's CEO testified that its average customer sold SLCs with a retail value of $640 per month. Tr. 563–64. Yet Respondent's evidence shows that during this period, it had sold SLCs with an average monthly retail value of more than $2000 (more than three times its average monthly sale) to approximately 120 of its customers, and SLCs with an average monthly retail value of more than $3000 (4.68 times its average monthly sales) to thirty-four of its customers. RX 27A. Moreover, Respondent sold SLCs with an average monthly retail sales value greater than $4000 to nine customers. *Id.* One of these customers was purchasing SLCs with an average monthly retail sales value of $5056—approximately eight times its average customer's purchase. *Id.* Finally, its largest customer (Store # BPM55) was purchasing SLCs with an average monthly retail sale value of $7314—more than eleven times its average customer's purchase—in the three months prior to the issuance of the suspension order.

Moreover, the record establishes that Respondent had previously determined that store BPM55 was purchasing excessive quantities. RX 56. Yet notwithstanding this store's history, Respondent allowed it to purchase quantities that dwarfed that of its average customer. Furthermore, upon reviewing this store's logbook for the period July 21 through August 21, 2007, at least five individuals had purchased in excess of nine grams within this period. These customers purchased quantities which far exceeded the recommended dosing for the product's use as an asthma treatment[43] and are consistent with diversion.[44]

[39] On March 29, 2006, AAA shipped Respondent 15,984 and 114,480 units of product number 17103; a dosage unit of this product contained 25 mg. of ephedrine hcl. GX 32 at 2–3. This was followed by a shipment on April 14, 2006 of 113,856 units; a shipment on April 17, 2006 of 113, 472 units; and three shipments on April 18, 2006 which totaled 167,328 units. *See id.*

[40] Here again, there were multiple transactions that fell within the definition of a regulated transaction.

[41] I acknowledge the testimony of Respondent's executives that the errors were caused by its salespersons' erroneous entry of products codes into their computers, and that the software has since been reprogrammed.

[42] Under the Agency's policy, this manual was provided to all list I chemical distributors at various inspections. It is also available through the Agency's Web site.

[43] These five customers had purchased between 1,002 and 1,548 tablets. In contrast, Respondent's recommended dosing for its 12.5 mg product was ''2 tablets every 4 hours as needed, not to exceed 12 tablets in 24 hours,'' and to ''stop use'' and see a doctor if ''cough lasts more than 7 days.'' RX 9, at 3.

I acknowledge that Respondent cannot review the logbooks. A registrant cannot, however, ignore other evidence which is indicative of diversion.

[44] At the hearing, Respondent's Expert testified that BPM55 is an outlier and that it would not be appropriate to draw ''a conclusion about [Respondent's] customers based on relying on the . . . highest seller.'' Tr. 1722. Contrary to the understanding of Respondent's Expert, in evaluating the effectiveness of an entity's diversion controls, there are no free passes. Excessive sales to a single store are sufficient by themselves to support the conclusion that the registrant does not maintain effective controls against diversion. Moreover, as explained above, BPM55 had a history of excessive sales and had previously come to the attention of Respondent. Yet Respondent continued

Continued

Contrary to Respondent's understanding, while proof that a distributor is selling quantities in excess of the national monthly average for sales of SLCs by convenience stores would be highly probative of the distributor's lack of effective controls against diversion, it is not the sole measure for evaluating the effectiveness of those controls. More specifically, a registrant cannot ignore evidence that some of its customers are purchasing quantities that greatly exceed what its typical customer buys from it. Significantly, Respondent introduced this evidence into the record. Although in some instances there may be a plausible explanation for the disparity that does not involve diversion, Respondent offered no explanation that was specific to any store for why it was selling in such quantities.[45]

Moreover, while Respondent's CEO testified that he would cut off a customer who purchased more than a case of a product, Respondent offered no evidence that it has ever refused to sell to a customer because the customer was purchasing excessive amounts of products. Indeed, Respondent's continued sales to BPM55, at a rate that was more than eleven times what its average customer was buying, amply demonstrates that its purported written policy of monitoring those stores which purchased ''unusual quantities,'' and ''[i]f further unusual activity is noted * * *discontinu[ing] sales,'' RX 10, at 1; is a sham.

I therefore conclude that Respondent does not maintain effective controls against diversion. Given the variety of ways in which Respondent's controls are deficient, this factor strongly supports the conclusion that Respondent's continued registration ''is inconsistent with the public interest.'' 21 U.S.C. 823(h).

Factor Two—Respondent's Compliance With Applicable Laws

The Government further argues that Respondent failed to comply with Federal law and DEA regulations by distributing SLCs from the self-storage units because none of the units were registered. *See* Gov. Exceptions 1–6. The ALJ, while noting that the facts surrounding Respondent's use of the self-storage units were not in dispute, declined to address the statutory issue, reasoning that because there was then litigation pending in the U.S. District Court, the Court, and not this proceeding, is the proper forum for resolving the dispute. ALJ at 91 n.38.[46] I conclude, however, that there is no reason for the Agency to not address this issue which involves a fundamental question as to the scope of the CSA's registration requirements.[47]

Under Federal law, ''[e]very person who * * * distributes any * * * list I chemical * * * shall obtain annually a registration issued by the Attorney General.'' 21 U.S.C. 822(a)(1). ''Persons registered by the Attorney General * * * to distribute * * * list I chemicals are authorized to possess [and] distribute * * * such * * * chemicals * * * to the extent authorized by their registration and in conformity with the other provisions of'' the CSA. *Id.* § 822(b). The Act further provides that ''[a] separate registration shall be required at each principal place of business * * * where the applicant * * * distributes list I chemicals.'' *Id.* § 822(e); *see also* 21 CFR 1309.23(a) (''A separate registration is required for each principal place of business at one general physical location where List I chemicals are distributed, imported, or exported by a person.'').

With respect to SLC distributors, DEA has created by regulation two limited exceptions to the requirement that each principal place of business be registered. The first is for ''[a] warehouse where List I chemicals are stored by or on behalf of a registered person, unless such chemicals are distributed directly from such warehouse to locations other than the registered location from which the chemicals were originally delivered[.]'' 21 CFR 1309.23(b)(1).[48] This regulation is directly applicable to Respondent's use of the storage units.

Notably, at the time this regulation was promulgated, several commenters ''objected to the requirement * * * that a separate registration be obtained for each location at which List I chemical activities are carried out[,]'' and ''suggested that DEA allow companies to obtain a single registration * * * for multiple locations.'' Implementation of the Domestic Chemical Diversion Control Act of 1993, 60 FR 32447, 32448 (1995). As DEA then explained, ''[t]he law is specific on this point. The [Domestic Chemical Diversion Control Act] requires that *a separate registration be obtained at each location at which List I chemicals are distributed*.'' *Id.* (emphasis added).

Relatedly, several commenters asked ''how the requirement for separate registrations for separate locations would apply to [independently owned] warehouses?'' *Id.* DEA explained that ''[t]he person who distributes List I chemicals from independently owned warehouses *must register at each location* and ensure that the other chemical control requirements, including security, record keeping, reporting, etc., for their products are met.'' *Id.* (emphasis added).

The record here clearly establishes that the SLCs which Respondent stores in the self-storage units are not shipped back to Respondent's registered location before being distributed. Rather, the SLCs are distributed directly from the self-storage units to Respondent's customers. As DEA's regulation makes plain, Respondent's self-storage units are therefore subject to the registration requirement. *See* 21 CFR 1309.23(b)(1).

As explained above, Respondent's contention that it was not storing products at the self-storage units is

to sell to it, and sold massive quantities to it in the three months which preceded the suspension.

For similar reasons, I find unpersuasive the testimony of Respondent's Expert that it would be error to draw conclusions from the six stores identified in Government Ex. 38 and 44. *See* Tr. 1697–1705. Indeed, with the exceptions of BPM 55 and NOC 56, it is not even clear that these stores were the largest purchasers.

[45] As noted above, there was a substantial dispute between the parties over the various assumptions necessary to determine what an average convenience store would sell in legitimate commerce. Yet even indulging numerous assumptions favorable to Respondent such as: (1) That only 31,000 stores sell the products, (2) that ephedrine products constitute sixty percent of the SLC market at convenience stores, and (3) that the NACS survey has an error rate of fifty-five percent because some stores erroneously report their sales of ephedrine as general merchandise rather than as cold and cough products, ALJ Ex. 15; and concluding that the average monthly sales figure is $941 a month, more than 100 stores were selling at levels which were statistically significant according to Respondent's expert. *See* Tr. 1700 (noting that being outside of two standard deviations is statistically significant); *id.* at 1704 (use of two standard deviations is ''a very appropriate number'').

I acknowledge that because two standard deviations represents ninety-five percent of a population, by definition 2.5 % of the stores will fall outside of this point on both sides of the curve. In concluding that Respondent does not maintain effective controls against diversion, I do not rely solely on the Z scores calculated by Respondent's expert. *See* RX 27A. I also consider the disparity between the size of the purchases of Respondent's largest customers and its average customer.

[46] The ALJ did note, however, that Respondent ignored the letter of a DEA Group Supervisor which had informed it that its conduct was illegal. ALJ at 91.

[47] Ordinarily, courts defer to agencies when presented with a legal issue that lies within the agency's primary jurisdiction. II Richard J. Pierce, Jr., *Administrative Law Treatise* 917 (4th ed. 2002). The scope of the CSA's registration requirements is such an issue.

[48] The regulation also exempts from registration ''[a]n office used by agents of a registrant where sales of List I chemicals are solicited, made, or supervised but which neither contains such chemicals (other than chemicals for display purposes) nor serves as a distribution point for filling such sales orders.'' 21 CFR 1309.23(b)(2). This provision is not applicable to Respondent's use of the self-storage units.

absurd. The units are warehouses as that term is understood in common usage. *See Webster's Third New International Dictionary* 2576 (1976) (defining warehouse as ''a structure or room for the storage of merchandise or commodities'').

Respondent nonetheless argues that the drop-off points are not required to be registered because they are not its ''principal place of business.'' Resp. Br. at 97–98. Respondent acknowledges that the term ''principal place of business [is] not defined in the definition section [ ] of the CSA.'' Resp. Br. at 97. Respondent thus contends that the term should be given its ''ordinary meaning.'' *Id.* Relying on several cases interpreting the term ''principal place of business'' for the purpose of determining a corporation's citizenship for the diversity jurisdiction of the federal courts, *see* 28 U.S.C. 1332(c)(1), Respondent contends that ''[t]he principal place of business for a corporation is usually its headquarters, where day-to-day business is conducted.'' *Id.* (citing *Heritage Educ. Trust* v. *Katz,* 287 F.Supp.2d 34 (D.D.C. 2003) and *Masterson-Cook* v. *Criss Bros. Iron Works, Inc.,* 722 F. Supp. 810, 812 (D.D.C. 1989)).

According to Respondent, the Federal courts apply a '' 'nerve center of operation' test to establish the principal place of business of corporations doing business in multiple states[,]'' and that '' [w]hen no one state is clearly the center of corporate activity or accounts for a majority of the company income, the headquarters logically assumes greater importance in determination of the principal place of business.'' *Id.* at 97–98 (quoting *Masterson-Cook,* 722 F. Supp. 812) (other citations omitted). In Respondent's view, its Greenfield, Indiana headquarters ''is clearly the center of corporate activity,'' because ''[a]ll transactions with vendors and customers are handled through the Greenfield offices.'' *Id.* at 98. Relatedly, Respondent argues that ''[t]he drop off units are not the 'center of corporate activity' nor do they 'account for a majority of the company income.' '' *Id.* Respondent's arguments are not persuasive.

It is fundamental that statutory terms take their meaning from the context in which they are used and the statutory purpose. *See Mid-Con Freight Systems, Inc.,* v. *Michigan Pub. Serv. Comm'n,* 545 U.S. 440, 447 (2005); *Tyler* v. *Cain,* 533 U.S. 656, 662 (2001); *see also Pharmaceutical Res. & Mfr's of America* v. *Thompson,* 251 F.3d 219, 224 (D.C. Cir. 2001). Respondent's reliance on cases interpreting the diversity statute ignores the context in which the term ''each principal place of business'' is used in the CSA, as well as the CSA's fundamentally different purpose.

Under Respondent's interpretation, an entity would be required to obtain a registration only for a single location—its headquarters. The text of section 822 demonstrates, however, that Congress did not limit a registrant's obligation to obtain a registration to a single place of business such as its corporate headquarters. Rather, Congress imposed on a registrant the obligation to obtain a separate registration at ''*each* principal place of business * * * where the applicant * * * distributes * * * List I chemicals.'' 21 U.S.C. 822(e) (emphasis added).

Consistent with the underlying purposes of the CSA, the statutory text manifests Congress's understanding that an entity can have multiple principal places of business. A location where List I chemicals are stored and distributed from, is a principal place of business because it plays a ''consequential'' part in the registrant's activity of distributing. *See Webster's Third New Int'l Dictionary* 1802 (1976) (defining ''principal'' in part as ''consequential''). In determining whether a facility is a principal place of business within the meaning of the CSA, the Act looks to the nature of the activity that occurs at the particular location and not at the dollar volume of business that is transacted out of the facility. *See* 21 CFR 1309.23(b)(2) (exempting from registration ''[a]n office used by agents of a registrant where sales of List I chemicals are solicited, made, or supervised but which neither contains such chemicals * * * nor serves as a distribution point for filling sales orders'').

Respondent's interpretation would clearly frustrate the Congressional purpose. In enacting the CSA's registration provisions, Congress' purpose was to protect against diversion by requiring that those persons who propose to engage in the legitimate distribution of controlled substances and listed chemicals apply for a registration, notify this Agency of the proposed location of their activity, and submit the facility for inspection by the Agency to ensure that it has adequate security controls and procedures. *See, e.g.*, 21 U.S.C. 822(f) (authorizing the Attorney General ''to inspect the establishment of a registrant or applicant for registration''). Indeed, inspection by the Agency of a proposed facility is fundamental to the CSA's mandate to protect the public interest. *Id.* 823(h); *see also* 21 CFR 1309.41.

As the record here establishes, Respondent has never applied for registration for any of its storage units and has never submitted any of its storage units for inspection. Indeed, according to the record, Respondent has yet to provide information regarding the location of some 34 of its storage units. As this case demonstrates, adopting Respondent's interpretation would frustrate Congress's purpose and render the Act a nullity.

Respondent's interpretation would also create a perverse incentive. While it is unclear whether under its view an entity which has only a few warehouses would have to obtain a registration for each of them, *see* Resp. Br. at 97–98,[49] what is clear is that an interpretation which determines whether a facility must be registered by looking to the amount of business activity that occurs out of a facility rather than the nature of the activity that occurs therein, would encourage an entity to keep adding warehouses or storage facilities so that it could eventually claim that its warehouses were no longer principal places of business and were thus not subject to the registration requirement. Adopting Respondent's interpretation would thus lead to absurd results and seriously undermine the security of the Nation's controlled substances and listed chemical supplies. I therefore reject it.

As stated above, the ALJ did not address this statutory question. She did, however, conclude that Respondent's conduct in continuing to store SLCs at, and distributing them from, the self-storage units, even after receiving the Group Supervisor's letter, was ''not consistent with the requirements for a participant in a regulated industry,'' and supported the revocation of its registration. ALJ at 91. Respondent excepts to the ALJ's conclusion, contending that it was placed in the ''dilemma'' that if it complied with the letter, it would have to use common carriers and that this ''would increase the risk of diversion.'' Resp. Exceptions at 99. Respondent further argues that because it ''questioned the legal validity of the letter, and feared adherence to it would cause [it] to contribute to the risk of diversion to the illicit methamphetamine trade, it filed suit'' in federal court. *Id.* at 100.

Respondent's argument is patently self-serving and unsupported by the record. As found above, Respondent's evidence as to the perceived security inadequacies of, and increased risk of

[49] Respondent's argument that ''the principal place of business for a corporation is usually its headquarters,'' Resp. Br. 98, suggests that its view is that only one registration is required for an entity no matter the geographic scope of its distribution activities.

diversion when shipping via common carriers, lacked foundation. It presented no evidence of any diversion of SLCs when being shipped by common carriers.[50] The argument further ignores the significant risk of diversion posed by its own distribution model, both through its use of the storage units which do not provide an acceptable level of security, and its further practice under which SLCs may be stored on a salesperson's truck for up to nine days at a time.

Finally, Respondent contends that because it was not sure what the legal effect of the letter was, it felt obliged to challenge the letter by filing suit. Contrary to Respondent's view, its right to seek declaratory relief in federal court is not at issue. *Cf. id.* at 100. (arguing that ALJ's decision ''[c]ondemns the exercise of'' its right to seek relief in a federal court). Rather, what is at issue is Respondent's decision to continue to distribute SLCs—for some forty-four months—in a manner that violates Federal law, and its doing so even after being told that it was violating Federal law.

Furthermore, even if there was a legitimate question as to the legal effect of the letter, the Agency's regulation made clear that a warehouse was not exempt from registration if the SLCs being stored therein ''are distributed directly from such warehouse to locations other than the registered location from which the chemicals were originally delivered.'' 21 CFR 1309.23(a)(1). I thus conclude that the Agency's regulation and the letter provided Respondent with ample notice that its conduct was illegal.[51] Notwithstanding Respondent's assertion that it is now willing to comply with Federal law, its deliberate disregard of the warning it received and lengthy failure to comply, strongly support the revocation of its registration.[52]

Factor Four—Past Experience in the Distribution of Chemicals

In discussing this factor, the ALJ noted that Respondent has been registered since 1998 and thus had extensive experience in distributing SLCs. ALJ at 92–93. She further explained that prior to the service of the Suspension Order, ''Respondent had not been informed by the [agency] of any incidents of diversion of its SLC product,'' and that with the exception of the 2004 letter regarding its distribution practices, it was ''never informed * * * of any statutory or regulatory violations.'' *Id.* at 93. Finally, the ALJ noted that the Agency had renewed ''Respondent's registration annually between 1998 and 2007.'' *Id.* Based on what she characterized as Respondent's ''nine year history of compliance,'' the ALJ concluded that the evidence on this factor ''support[ed] a remedy less severe than revocation.'' *Id.*

The ALJ's conclusion is mistaken for several reasons. First, the ALJ's conclusion that Respondent had not been informed by the Agency of any incident of diversion is contrary to the evidence, which establishes that twenty-two sixty-count bottles of products it distributed were found at an illicit laboratory in Connecticut and that a DI discussed the matter with its executives. Tr. 1082–84. Whether the subject was first broached by the DI or Respondent is beside the point, as is whether the information was put in a formal warning letter. The fact remains that products which it distributed were diverted. Moreover, while Respondent provided the investigator with information as to which of its salespersons had received the products, it could not identify the stores to which the products were distributed. Tr. 1517.

Second, the ALJ gave insufficient weight to Respondent's continuation of its illegal practice of distributing out of unregistered storage units for more than three and a half years after having been advised of the practice's illegality. Most significantly, at no point did Respondent voluntarily cease the practice.

Moreover, as explained above under factor two, the registration requirement is one of the essential features of the CSA. Respondent's violations are not technical violations of the Act. Respondent's conduct thus precludes a finding that Respondent's experience establishes a ''history of compliance.'' ALJ at 93. Respondent's experience thus also supports the conclusion that its registration would be ''inconsistent with the public interest.'' 21 U.S.C. 823(h).[53]

Factor Five—Other Factors Relevant to and Consistent With Public Health and Safety

As found above, following the service of the Immediate Suspension, Respondent contacted one of its suppliers and attempted to enter into a scheme under which its sales force would continue to take orders for SLCs, which would be sent to its headquarters and then on to the supplier, which would ship the products. Under the scheme, Respondent's salespersons would ''still do all reordering and stocking of the merchandise as [they] have in the past.'' GX 48.

At the hearing, one of Respondent's vice presidents attempted to justify the scheme, explaining that under his ''definition of sales, we're not involved in the distribution of the product. But our sales people are in that store functioning as an agent.'' Tr. 2402. While the supplier refused to enter into the scheme, the VP testified that it was ''[s]omething that were still continuing to explore.'' *Id.* at 2403.

In its Exceptions, Respondent contends that ''[u]nder 21 CFR 1309.23, sales agents are not required to be registered and are lawful.'' Resp. Exceptions at 102. Respondent further argues that because it ''only discerned select customer's interest in it serving in this role,'' *id.* at 103, the ALJ's conclusion that it ''still does not seem to understand that it is working in a highly regulated industry when it actually handles SLC products,'' ALJ at 92, condemns it based on ''the mere expression of interest in a legal option.'' Resp. Exceptions at 103.

Respondent is correct that because it never actually entered the scheme, there is no basis for concluding that its actions related to the scheme demonstrate that it failed to comply with applicable laws. *See* 21 U.S.C. 823(h)(2). The scope of factor five is, however, considerably broader than factor two, and encompasses ''such other factors as are relevant to and consistent with the public health and safety.'' *Id.* 823(h)(5).

Respondent's assertion that it merely expressed interest in a legal option mischaracterizes the record. Respondent's actions were not limited

[50] Respondent also argues that ''the Raber letter would allow reliance on a system of distribution (FedEx and UPS unregistered locations) that present risks of diversion that exceed those of [its] system.'' Resp. Exceptions at 101. Congress however, has specifically exempted common carriers from registration, *see* 21 U.S.C. 822(c)(2), and has concluded that their use for shipping controlled substances and listed chemicals poses an acceptable risk of diversion. I further note that Respondent acknowledged in testimony that it has used common carriers in the past.

[51] Nor did Respondent seek review of the Group Supervisor's letter within the Agency.

[52] As noted under factor one, Respondent also failed to comply with Federal law because it did not maintain proper records of regulated transactions.

[53] The ALJ's further reliance on the Agency's renewal of Respondent's registration was in error. Under Federal Regulations, in the event the Agency proposes the denial of a renewal application, it must issue an Order to Show Cause. 21 CFR 1309.42(a). There are a variety of reasons why the Agency may not be prepared to go forward with a Show Cause Proceeding at a particular time including, *inter alia,* a lack of resources, the complexity of the matters under investigation, and the need to pursue other enforcement priorities. Moreover, field personnel may approve the renewal of a registration based on an erroneous understanding of the law and regulations. The decision to renew a registration is thus not probative of a registrant's record of compliance with Federal law and Agency regulations.

to merely thinking about a legal option or seeking legal advice about the scheme. Rather, it affirmatively sought out one of its suppliers and attempted to induce it to enter the scheme only to be rebuffed by the supplier.

While Respondent maintains that it was pursuing a legal option because an agent is not required to be registered, it ignores that this exception applies only if the ''agent * * * is acting in the usual course of [its] business.'' 21 U.S.C. 822(c)(1); 21 CFR 1309.24(a). The usual course of Respondent's business with respect to SLCs did not, however, involve acting as a sales agent for another registrant. Rather, the usual course of its business was distributing SLCs for its own account. More significantly, I further hold that an entity does not act in the usual course of business when it engages in distribution-related activities that it has previously been prohibited from doing pursuant to an order suspending or revoking its registration. It would fundamentally undermine the CSA's purpose of protecting against diversion to allow an entity whose registration has been suspended or revoked to subsequently engage in the same or related activities as an agent.

Respondent's attempt to circumvent the suspension order—and the admission of one its executives at the hearing that it was still exploring this option—reflects adversely on its fitness to engage in the distribution of SLCs. I thus conclude that this factor also supports the conclusion that Respondent's registration would be ''inconsistent with the public interest.'' 21 U.S.C. 823(h)(5).[54]

Sanction

Under DEA precedent, the Agency considers all of the facts and circumstances in determining the appropriate sanction. *See Martha Hernandez, M.D.*, 62 FR 61,145 (1997). While the ALJ found that factors one and two supported revocation, and that ''Respondent's actions appeared to blatantly disobey a DEA directive,'' she further reasoned that except for this letter, ''Respondent has not been given an opportunity to remedy the flaws identified * * * in this action.'' ALJ at 100. Based on what she characterized as its ''history of compliance, as evidenced by'' the Agency's continuing its registration, as well as ''its financial commitment to compliance, as evidenced by its rework of its hand-held computer system to better track inventory,'' the ALJ reasoned that revocation ''does not seem consistent with prior agency action concerning this Respondent.'' ALJ at 100–101. Based on this view of the record, the ALJ further opined ''that this is a case where teamwork between the DEA and this major distributor would facilitate the public interest.'' *Id.* at 101. The ALJ thus recommended that I continue Respondent's registration while imposing compliance conditions.

Were the evidence limited to Respondent's recordkeeping problems, imposing compliance conditions might well protect the public interest. But it is not. I acknowledge that the evidence points to some measures which Respondent voluntarily undertook such as reprogramming its computer system,[55] providing its customers with materials on the CMEA and its self-certification requirement, logbooks, and plexiglass cabinets. Its customers could not, however, legally sell its products without self-certifying and maintaining logbooks. Moreover, these measures do not address the serious problems with its distribution practices that are established by the record, and which were either ignored, or discounted by the ALJ.

First, for more than three and a half years, Respondent disregarded a DEA letter specifically warning it that its use of the 150–180 self-storage units to store and distribute SLCs violated Federal law. Moreover, Respondent continued to violate Federal law up until its registration was suspended. As explained above, these are not technical violations, but rather transgressions of one of the CSA's fundamental provisions. Respondent's disregard of the letter and continuation of its practices for some forty-four months makes its conduct especially egregious. Given the sustained nature of the violations and Respondent's failure to voluntarily cease its misconduct, its assertion that it is now willing to ''modify[] its existing system of distribution,'' Resp. Exc. 90, is not persuasive. *Cf. ALRA Laboratories, Inc.*, v. *DEA*, 54 F.3d 450, 452 (7th Cir. 1995) (''[a]n agency rationally may conclude that past performance is the best predictor of future performance''); *Southwood Pharmaceuticals, Inc.*, 72 FR 36487, 36503 (2007) (rejecting company's claims of reform in light of the scope and duration of its misconduct and failure to heed information that its activities were contributing to diversion).

Second, while Respondent asserted that it imposed sales limits on how much of each product a store could buy in a service cycle, and that it monitored the purchases of each product at each store throughout the week to determine whether a store was purchasing excessive quantities, investigated if it was, and cutoff sales to those store which were purchasing excessive amounts, it is clear that these policies were frequently ignored. Putting aside the effectiveness of the one case per product, per service cycle policy,[56] the credited testimony establishes that its sales force violated the policy some 85 times in the six months preceding the July 2007 inspection. Moreover, Respondent only started issuing warning letters to its sales force in August 2007—a month after the warrant was executed—with one of its executives offering the lame excuse that he had not received the reports until then because of a computer ''glitch.''

Notably, Respondent's CEO testified that if a customer obtained more than a case of a product in a service cycle, he ''would cut them off, [and] stop the sale of product to them.'' Tr.159. Respondent, however, produced no evidence that it had ever entirely cut off a customer.

Indeed, Respondent's own evidence with respect to store BPM55—a store at which five persons purchased quantities that are grossly inconsistent with use of the products to treat asthma and are consistent with diversion—amply demonstrates the disingenuousness of its claim that it monitors its customers' purchases and cuts off sales if a store is acquiring excessive amounts. Notwithstanding that it had previously developed concerns regarding this store's excessive purchases, in the three months prior to the suspension order, Respondent sold to it products with a monthly average retail value of more than $7300, an amount more than eleven times its average customer's purchase.[57] Respondent's sales to this store amply demonstrate that its policy of monitoring ''unusual sales activity'' and cutting off sales if such purchases

[54] As explained above at n. 5, the issue of whether there is a legitimate medical need for over-the-counter ephedrine products, *see* ALJ at 94–95, is for the FDA to decide. The issue in this proceeding is whether Respondent's registration is consistent with the public interest.

[55] It is, however, unclear whether the reprogramming has rectified the problems identified with the salespersons' entry of product codes.

[56] As explained above, the policy's limit was imposed on a per-product and per-service cycle basis. Most stores were serviced every two weeks and some were serviced weekly. Moreover, Respondent sold ten different products. Accordingly, a store being serviced weekly could buy up to forty cases every four weeks.

[57] As found above, the record also shows numerous other stores to which Respondent repeatedly sold quantities that exceeded its average customer's purchases by a wide margin.

continue, RX 10, at 1, is a sham and not a legitimate effort to control diversion.

Respondent's failure to enforce its own policies provides reason alone to conclude that it cannot be trusted to adhere to compliance conditions. This conclusion is further supported by Respondent's sustained and flagrant violations of Federal law, as well as its attempt to circumvent the suspension order. Indeed, as Respondent's history amply demonstrates, its professed commitment to ''teamwork'' and ''to become a compliance model for the entire industry,'' Resp. Ex. at 139, cannot be taken seriously.[58] I therefore conclude that imposing compliance conditions would not adequately protect the public interest, and reject the ALJ's recommendation.[59]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(h) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I order that DEA Certificate of Registration, 003563NSY, issued to Novelty Distributors, D/B/A/ Greenfield Labs, be, and it hereby is, revoked. I further order that any pending application of Novelty Distributors, D/B/A Greenfield Labs, for renewal of its registration, be, and it hereby is, denied. This order is effective immediately.

Dated: September 3, 2008.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E8–21035 Filed 9–9–08; 8:45 am]

BILLING CODE 4410–09–P

[58] For the same reasons, I find unpersuasive the August 13, 2008 letter from Respondent's President.

[59] Respondent raises a plethora of claims that the Agency or its personnel have violated its rights under the First and Fifth Amendments, as well as statutory provisions including the Administrative Procedure Act, the Data Quality Act, and 21 U.S.C. 880. *See* Resp. Br. at 114–39. For example, Respondent asserts that the DIs violated its First Amendment rights and engaged in a prior restraint because they refused to allow its executives to videotape them as they reviewed Respondent's records. *See id.* at 116. It also alleges that a DI committed an assault and battery during the inspection when he grabbed a video recorder from the hands of one of its executives who was attempting to set up the camera in order to tape the investigators while they reviewed Respondent's records.

While in my order denying Respondent's interlocutory appeal, I adhered to settled Agency precedent that the exclusionary rule does not apply in these proceedings, ALJ Ex. 13, at 3; Respondent now contends that I should discount the testimony of two DIs who participated in the inspection to deter future violations. Indeed, Respondent even contends that I should discount the testimony of these DIs based on the alleged assault and battery of the third DI, who did not testify at the hearing.

Having considered the legal and factual bases for each of Respondent's claims, I conclude that none of them presents a substantial question as to the fundamental fairness of this proceeding and none warrants further discussion.

DEPARTMENT OF LABOR

Office of the Secretary; Submission for OMB Review: Comment Request

September 5, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov*.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, *Attn:* OMB Desk Officer for the Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* 202–395–7316/Fax: 202–395–6974 (these are not toll-free numbers), *E-mail: OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension without change of a previously approved collection.

Title of Collection: Slings (29 CFR 1910.184).

OMB Control Number: 1218–0223.

Affected Public: Private Sector.

Estimated Number of Respondents: 1,000,000.

Estimated Total Annual Burden Hours: 17,760.

Estimated Total Annual Costs Burden: $0.

Description: The provisions of the standard require that the employer make a periodic inspection of alloy steel chain slings at least once a year and to make and maintain a record of the inspection. It also requires the employer to ensure that each new, repaired or reconditioned alloy steel chain sling is proof tested and a certification record maintained. In addition, the standard requires the employer to maintain a record of the proof test on wire rope slings. For additional information, see related 60-day preclearance notice published at 73 FR 35412 on June 23, 2008. PRA documentation prepared in association with the preclearance notice is available on *http://www.regulations.gov* under docket number OSHA 2008–0020.

Agency: Occupational Safety and Health Administration.

Type of Review: Extension without change of a previously approved collection.

Title of Collection: Forging Machines (29 CFR 1910.218).

OMB Control Number: 1218–0228.

Affected Public: Private Sector.

Estimated Number of Respondents: 27,700.

Estimated Total Annual Burden Hours: 187,264.

Estimated Total Annual Costs Burden: $0.

Description: The Standard requires employers to establish periodic inspections of forging machines, guards, and point-of-operation protection devices and to mark manually controlled valves and switches. These requirements reduce employees' risk of death or serious injury by ensuring that forging machines used by them are in safe operating condition, and that they are able to identify manually operated valves and switches. For additional information, see related 60-day preclearance notice published at 73 FR 35414 on June 23, 2008. PRA documentation prepared in association with the preclearance notice is available

on *http://www.regulations.gov* under docket number OSHA 2008–0018.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E8–20983 Filed 9–9–08; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

[NRC–2008–0486]

NRC Enforcement Policy: Extension of Discretion Period of Interim Enforcement Policy

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Policy statement: Revision.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is revising the NRC ''Interim Enforcement Policy Regarding Enforcement Discretion for Certain Fire Protection Issues'' (Title 10 of the *Code of Federal Regulations* (10 CFR) 50.48 ''Fire Protection''), which will allow a licensee the option to request an extended enforcement discretion period if they are pursuing transition to 10 CFR 50.48(c), ''National Fire Protection Association Standard NFPA 805.''

DATES: This revision is effective September 10, 2008. Please submit any comments on this revision to the Enforcement Policy on or before October 27, 2008.

ADDRESSES: You may submit comments by any one of the following methods. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents filed under Docket ID [NRC–2008–0486]. Address questions about NRC dockets to Carol Gallagher, 301–415–5905; e-mail *Carol.Gallagher@nrc.gov.*

Mail comments to: Michael T. Lesar, Chief, Rulemaking, Directives, and Editing Branch, Division of Administrative Services, Office of Administration, Mail Stop: T6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Hand deliver comments to: 11555 Rockville Pike, Rockville, MD 20852, between 7:30 a.m. and 4:15 p.m., on Federal workdays.

You can access publicly available documents related to this document using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents 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/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 problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

The NRC maintains the current Enforcement Policy on its Web site at *http://www.nrc.gov.* Mouse over ''Public Meetings and Involvement'' on the far right, then select ''Enforcement'' from the drop-down menu. Under the bolded ''Comments'' section select ''Enforcement Policy''.

FOR FURTHER INFORMATION CONTACT: Cynthia Carpenter, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, 301–415–2741, e-mail *Cynthia.Carpenter@nrc.gov.*

SUPPLEMENTARY INFORMATION: On June 16, 2004 (69 FR 33536), the NRC published a final rule in the **Federal Register** amending 10 CFR 50.48, ''Fire Protection.'' This rule became effective July 16, 2004 and allows licensees to adopt 10 CFR 50.48(c), a risk-informed, performance-based alternative to their current fire protection requirements in 10 CFR 50.48(b). The NRC revised its Enforcement Policy (June 16, 2004; 69 FR 33684) to provide interim enforcement discretion during a ''transition'' period. The interim enforcement discretion policy includes provisions to address the noncompliance identified during the licensee's transition process and existing identified noncompliances.

The discretion period would start when the licensee informs the NRC of a transition start date in a Letter of Intent (LOI) to transition to the National Fire Protection Association Standard 805 (NFPA 805). The discretion period would remain in effect for up to two years for the licensee to submit to the NRC a License Amendment Request (LAR) to transition to NFPA 805, and the discretion period would continue until the NRC dispositioned the LAR. Many licensees requested 3 or more years for the transition period. The basis for the extended discretion included the following: (1) The need for additional time to properly evaluate existing fire analysis; (2) a lack of resources; (3) the need for additional time to develop fire probabilistic risk assessments (PRAs); and (4) the need for additional time to use lessons learned from the pilot plants. On April 18, 2006 (71 FR 19905), the NRC revised the Interim Enforcement Policy to extend the enforcement discretion period from two to three years.

On February 2, 2007, the Nuclear Energy Institute (NEI) submitted a request for additional discretion for sites transitioning to NFPA 805 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML070460550). NEI stated that the extension of the enforcement discretion period would allow an orderly transition process.

NEI states transitioning licensees are compelled to complete portions of the transition in advance of the pilot plants due to the enforcement discretion deadline. This could result in creating substantial risk of rework and inconsistency among the transitioning licensees. The following issues formed the base for NEI's request that the staff reexamine the Interim Enforcement Policy:

(1) Timing of the pilots schedule versus the nonpilot plant discretion deadline.

(2) Delay of the industry fire PRA standard and the NEI peer review guidance.

(3) Limited fire PRA expertise available.

(4) Burden on NRC staff to conduct timely reviews of concurrent LARs.

The NRC is revising the Enforcement Policy to extend, on a case-by-case basis, the current 3-year enforcement discretion period. The NRC will grant additional time extensions depending on the progress the licensee has made in the transition effort. The additional period of discretion would end 6 months after the date of the safety evaluation approving the second pilot plant LAR review.

Nuclear safety is the first consideration in any request for additional enforcement discretion. NRC requires all transitioning licensees to fully maintain their approved fire protection program. Transitioning licensees must address all nonconforming conditions with adequate compensatory measures to

assure adequate fire safety. The NRC will continue to apply normal inspection and enforcement to all plants that are not actively transitioning to 10 CFR 50.48(c).

Paperwork Reduction Act

This policy statement does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). Existing requirements were approved by the Office of Management and Budget (OMB), approval number 3150–0136. The approved information collection requirements contained in this policy statement appear in section VII.C.

Public Protection Notification

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

Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

Accordingly, the NRC Enforcement Policy is amended to read as follows:

NRC Enforcement Policy

* * * * *

Interim Enforcement Policies

* * * * *

Interim Enforcement Policy Regarding Enforcement Discretion for Certain Fire Protection Issues (10 CFR 50.48)

This section sets forth the interim enforcement policy that the U.S. Nuclear Regulatory Commission (NRC) will follow to exercise enforcement discretion for certain noncompliances of requirements in 10 CFR 50.48, ''Fire protection,'' (or fire protection license conditions) that are identified as a result of the transition to a new risk-informed, performance-based fire protection approach included in paragraph (c) of 10 CFR 50.48 and for certain existing identified noncompliances that reasonably may be resolved by compliance with 10 CFR 50.48(c). Paragraph (c) allows reactor licensees to voluntarily comply with the risk informed, performance-based fire protection approaches in National Fire Protection Association Standard 805 (NFPA 805), ''Performance-Based Standard for Fire Protection for Light Water Reactor Electric Generating Plants,'' 2001 Edition (with limited exceptions stated in the rule language).

For those noncompliances that the NRC identifies during the licensee's transition process, this enforcement discretion policy will be in effect for up to 3 years from the date specified by the licensee in their letter of intent to adopt the requirements in 10 CFR 50.48(c). The enforcement discretion will continue to be in place, without interruption, until NRC approval of the license amendment request to transition to 10 CFR 50.48(c).

An additional period of enforcement discretion may be granted on a case-by-case basis, if a licensee has made substantial progress in its transition effort. This additional period of discretion, if granted, would end 6 months after the date of the safety evaluation approving the second pilot plant [1] LAR review.

The NRC will assess ''substantial progress'' based on accomplishment of tasks that are not resource-limited with respect to fire probabilistic risk assessment (PRA) technical expertise (e.g., classical fire protection transition, deterministic nuclear safety performance criteria transition, non-power operational transition, radioactive release transition, development of the NFPA 805 monitoring program, operator manual action transition to NFPA 805 recovery actions). In order for the NRC to adequately evaluate the transition progress, licensees that request enforcement discretion beyond the three years currently available should make their request to the NRC in writing at least 3 months before the expiration of the 3-year discretion period and compile or submit the following information:

- Compile, for on-site NRC audit/inspection, a list of all fire protection-related noncompliances and the related compensatory measures for those noncompliances.
- Document, for onsite NRC audit/inspection, that each Operator Manual Action put in place as compensatory measures are feasible and reliable, in accordance with staff provided guidance in Regulatory Issue Summary 2005–07, ''Compensatory Measures to Satisfy the Fire Protection Program Requirements.''
- Submit a description of the physical modifications performed, if any, to address existing risk-significant fire protection issues.
- Submit a status report of the transition, including a schedule of milestones for completing the fire PRA. The status report should be broken down into the following major areas:
  - Classical fire protection transition (in accordance with NFPA 805 Chapter 3).
  - Nuclear Safety Performance Criteria transition (in accordance with NFPA 805 chapters 1, 2 and 4).
  - Nonpower operational transitions.
  - NFPA 805 monitoring program.

If the NRC determines that a licensee has not made sufficient progress during the transition to NFPA 805, the NRC will deny the request for an extension of enforcement discretion.

If, after submitting the letter of intent to comply with 10 CFR 50.48(c) and before submitting the license amendment request, the licensee decides not to complete the transition to 10 CFR 50.48(c), the licensee must submit a letter stating its intent to retain its existing license basis and withdrawing its letter of intent to comply with 10 CFR 50.48(c). After the licensee's withdrawal from the transition process, the staff, as a matter of practice, will not take enforcement action against any noncompliance that the licensee corrected during the transition process and will on a case-by-case basis, consider refraining from taking action if reasonable and timely corrective actions are in progress (e.g., an exemption has been submitted for NRC review). Noncompliances that the licensee has not corrected, as well as noncompliances identified after the date of the above withdrawal letter, will be dispositioned in accordance with normal enforcement practices.

A. Noncompliances Identified During the Licensee's Transition Process

Under this interim enforcement policy, enforcement action normally will not be taken for a violation of 10 CFR 50.48(b) (or the requirements in a fire protection license condition) involving a problem such as in engineering, design, implementing procedures, or installation, if the violation is documented in an inspection report and it meets all of the following criteria:

(1) It was licensee-identified, as a result of its voluntary initiative to adopt the risk-informed, performance-based fire protection program included under 10 CFR 50.48(c) or, if the NRC identifies the violation, it was likely in the NRC staff's view that the licensee would have identified the violation in light of the defined scope, thoroughness, and schedule of the licensee's transition to 10 CFR 50.48(c) provided the schedule

[1] The NRC accepted the request from both Duke Power (ML051080005) and Progress Energy (ML052140391) to allow Oconee Nuclear Power Station and Shearon Harris Nuclear Power Station respectively, to become pilot NPFA 805 plants.

reasonably provides for completion of the transition within 3 years of the date specified by the licensee in their letter of intent to implement 10 CFR 50.48(c) or other period granted by NRC;

(2) It was corrected or will be corrected as a result of completing the transition to 10 CFR 50.48(c). Also, immediate corrective action and/or compensatory measures are taken within a reasonable time commensurate with the risk significance of the issue following identification (this action should involve expanding the initiative, as necessary, to identify other issues caused by similar root causes);

(3) It was not likely to have been previously identified by routine licensee efforts such as normal surveillance or quality assurance (QA) activities; and

(4) It was not willful.

The NRC may take enforcement action when these conditions are not met or when a violation that is associated with a finding of high safety significance is identified.

While the NRC may exercise discretion for violations meeting the required criteria where the licensee failed to make a required report to the NRC, a separate enforcement action will normally be issued for the licensee's failure to make a required report.

B. Existing Identified Noncompliances

In addition, licensees may have existing identified noncompliances that could reasonably be corrected under 10 CFR 50.48(c). For these noncompliances, the NRC is providing enforcement discretion for the implementation of corrective actions until the licensee has transitioned to 10 CFR 50.48(c) provided that the noncompliances meet all of the following criteria:

(1) The licensee has entered the noncompliance into their corrective action program and implemented appropriate compensatory measures;

(2) The noncompliance is not associated with a finding that the Reactor Oversight Process Significance Determination Process would evaluate as Red, or it would not be categorized at Severity Level I;

(3) It was not willful; and

(4) The licensee submits a letter of intent by December 31, 2005, stating its intent to transition to 10 CFR 50.48(c).

After December 31, 2005, as addressed in (4) above, this enforcement discretion for implementation of corrective actions for existing identified noncompliances will not be available and the requirements of 10 CFR 50.48(b) (and any other requirements in fire protection license conditions) will be enforced in accordance with normal enforcement practices. However, licensees that submit letters of intent to transition to 10 CFR 50.48(c) with existing noncompliances will have the option to implement corrective actions in accordance with the new performance-based regulation. All other elements of the assessment and enforcement process will be exercised even if the licensee submits its letter of intent before the NRC issues its enforcement action for existing noncompliances.

Dated at Rockville, Maryland, this 4th day of September, 2008.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E8–20972 Filed 9–9–08; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28375; 812–13526]

Phoenix Equity Trust, et al.; Notice of Application

September 3, 2008.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act.

SUMMARY OF APPLICATION: The requested order would permit certain registered open-end management investment companies to enter into and materially amend subadvisory agreements without shareholder approval.

APPLICANTS: Phoenix Equity Trust, Phoenix Insight Funds Trust, Phoenix Institutional Mutual Funds, Phoenix Opportunities Trust (the ''Companies'') and Phoenix Investment Counsel, Inc. (the ''Advisor'') (collectively, with the Companies, ''Applicants'').

FILING DATES: The application was filed on April 23, 2008, and amended on September 2, 2008.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on September 26, 2008 and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reasons for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants, One American Row, P.O. Box 5056, Hartford, CT 06102–5056.

FOR FURTHER INFORMATION CONTACT: Barbara T. Heussler, Senior Counsel at (202) 551–6990, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549–1520 (telephone (202) 551–5850).

Applicants' Representations

1. The Companies are open-end management investment companies registered under the Act. The Companies, except Phoenix Insight Funds Trust, are organized as statutory trusts under Delaware law. Phoenix Insight Funds Trust is organized as a Massachusetts business trust under Massachusetts law. The Companies presently are comprised of fifty-three separate series (each, a ''Fund'' and collectively, the ''Funds'') each of which has its own investment objectives, policies, and restrictions.[1]

2. The Advisor, a Massachusetts corporation, is registered under the Investment Advisers Act of 1940 (''Advisers Act'') and serves as investment adviser to the Funds that use

[1] Applicants also request relief with respect to current or future series of the Companies and any other registered open-end management investment companies and their series that: (a) Are advised by the Advisor or any entity controlling, controlled by or under common control with the Advisor; (b) use the management structure described in the application; and (c) comply with the terms and conditions of the application (''Future Funds,'' included in the term ''Funds''). Any existing entity that currently intends to rely on the requested relief is named as an Applicant. If a Fund has the name of any Subadvisor (as defined below) in the Fund's name, the Fund's name will be preceded by the name of the Advisor (such as ''Phoenix,'' which is the present identifying name the Advisor uses in conducting its business) or the name of the entity controlling, controlled by, or under common control with the Advisor that serves as the primary adviser to the Fund.

the management structure described in the application.[2]

3. The Companies, on behalf of the Funds, have entered into investment advisory agreements with the Advisor (the ''Advisory Agreements''). Each Advisory Agreement requires approval by shareholders of the applicable Fund and by the Fund's board of trustees (the ''Board''), including a majority of the trustees who are not ''interested persons,'' as defined in section 2(a)(19) of the Act, of the Company or the Advisor (the ''Independent Trustees''). Under the Advisory Agreements, the Advisor has primary responsibility for management of the Funds, subject to general oversight by the Board. The Advisor also evaluates, selects, and recommends to the Boards investment management organizations (''Subadvisors'') who have discretionary authority to invest all or a portion of the assets of a particular Fund pursuant to a separate subadvisory agreement with the Advisor (''Subadvisory Agreement''). Each Subadvisor is, and any future Subadvisor will be, registered under the Advisers Act. The Advisor receives management fees at annual rates based on a percentage of the applicable Fund's average daily net assets. Each Subadvisor will be paid subadvisory fees by the Advisor out of its fees from the Funds at rates negotiated with the Subadvisor by the Advisor and approved by the Boards.

4. The Advisor monitors and evaluates the Subadvisors and recommends to the Boards whether Subadvisory Agreements should be renewed, modified, or terminated. Advisor assesses the continued ability of the Subadvisor to meet the Fund's investment objective. The Advisor monitors possible replacement Subadvisors for a Fund so that any transition can be recommended to the Board and, if approved, can be effected on a timely basis should a Subadvisor change be warranted.

5. Applicants request an order to permit the Advisor, subject to Board approval, to enter into and materially amend Subadvisory Agreements without shareholder approval. The applicants will not enter into a Subadvisory Agreement with any Subadvisor that is an affiliated person, as defined in section 2(a)(3) of the Act, of the Companies or the Advisor, other than by reason of serving as Subadvisor to one or more Funds (''Affiliated Subadvisor''), unless that agreement, including the compensation to be paid thereunder, has been separately approved by the shareholders of each Fund for which the Affiliated Subadvisor will act as an investment adviser.

Applicants' Legal Analysis

1. Section 15(a) of the Act provides, in relevant part, that it is unlawful for any person to act as an investment adviser to a registered investment company except pursuant to a written contract that has been approved by the vote of a majority of the company's outstanding voting securities. Rule 18f–2 under the Act provides that each series or class of stock in a series company affected by a matter must approve such matter if the Act requires shareholder approval.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provision of the Act, or from any rule thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Applicants believe that their requested relief meets this standard.

3. Applicants state that the Funds' shareholders rely on the Advisor to select the Subadvisors best suited to achieve a Fund's investment objectives. Applicants assert that, from the perspective of the investor, the role of the Subadvisors is comparable to that of individual portfolio managers employed by traditional investment advisory firms. Applicants contend that requiring shareholder approval of Subadvisory Agreements would impose costs and unnecessary delays on the Funds and may preclude the Advisor from acting promptly in a manner considered advisable by the Board. Applicants also note that the Advisory Agreement will remain subject to the shareholder approval requirements in section 15(a) of the Act and rule 18f–2 under the Act.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. The Advisor will not enter into a Subadvisory Agreement with any Affiliated Subadvisor without that agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Fund.

2. At all times, at least a majority of the Boards will be Independent Trustees, and the nomination of new or additional Independent Trustees will be at the discretion of the then-existing Independent Trustees.

3. When a Subadvisor change is proposed for a Fund with an Affiliated Subadvisor, the Fund's Board, including a majority of the Independent Trustees, will make a separate finding, reflected in the Board minutes, that the change is in the best interests of the Fund and its shareholders and does not involve a conflict of interest from which the Advisor or the Affiliated Subadvisor derives an inappropriate advantage.

4. Before a Fund may rely on the requested order, the operation of the Fund in the manner described in the application will be approved by a majority of the Fund's outstanding voting securities, as defined in the Act, or, in the case of a Fund whose public shareholders purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 6 below, by the initial shareholder(s) before offering shares of that Fund to the public.

5. The Advisor will provide general management services to the Companies and their Funds, including overall supervisory responsibility for the general management and investment of each Fund's assets, and, subject to review and approval by the Boards, will (i) set the Fund's overall investment strategies; (ii) evaluate, select and recommend Subadvisors to manage all or part of a Fund's assets; (iii) allocate and, when appropriate, reallocate a Fund's assets among multiple Subadvisors; (iv) monitor and evaluate the performance of Subadvisors; and (v) implement procedures reasonably designed to ensure that the Subadvisors comply with the relevant Fund's investment objective, policies and restrictions.

6. Each Fund relying on the requested order will disclose in its prospectus the existence, substance, and effect of any order granted pursuant to the application. In addition, each Fund will hold itself out to the public as employing the management structure

[2] Under a prior order, the Commission granted relief to certain applicants, including Phoenix Variable Advisors, Inc. (''PVA''), from the provisions of section 15(a) of the Act and rule 18f–2 under the Act. The Phoenix Edge Series Fund and Phoenix Variable Advisors, Inc., Investment Company Act Release Nos. 25655 (July 10, 2002) (notice) and 25693 (August 6, 2002) (order) (''Prior Order''). While Applicants are not named as applicants to the Prior Order, Applicants rely on the Prior Order due to a currently existing affiliation with the applicants to the Prior Order. However, a reorganization transaction expected to close in September, 2008 will result in the Advisor no longer being controlling, controlled by, or under common control with PVA, thus making the Prior Order inapplicable to Applicants and necessitating the current request for relief.

described in the application. The prospectus will prominently disclose that the Advisor has ultimate responsibility (subject to oversight by the Boards) to oversee the Subadvisors and recommend their hiring, termination and replacement.

7. No trustee or officer of a Company or officer or director of the Advisor will own directly or indirectly (other than through a pooled investment vehicle that is not controlled by that trustee, director or officer) any interest in a Subadvisor except for (i) ownership of interests in the Advisor or any entity that controls, is controlled by, or is under common control with the Advisor; or (ii) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly-traded company that is either a Subadvisor or an entity that controls, is controlled by or is under common control with a Subadvisor.

8. Within 90 days of the hiring of any new Subadvisor, shareholders of the Fund will be furnished all information about the new Subadvisor that would be included in a proxy statement, including any change in shareholder disclosure caused by the addition of the new Subadvisor. To meet this condition, the Funds will provide shareholders with an information statement meeting the requirements of Regulation 14C, Schedule 14C, and Item 22 of Schedule 14A under the Securities Exchange Act of 1934.

9. The requested order will expire on the effective date of rule 15a–5 under the Act, if adopted.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–20960 Filed 9–9–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, September 11, 2008 at 1 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 Casey, 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 Thursday, September 11, 2008 will be:

Formal orders of investigation;
Institution and settlement of injunctive actions;
Institution and settlement of administrative proceedings of an enforcement nature;
Amicus consideration; and
Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: September 4, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–20957 Filed 9–9–08; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58455; File No. SR–CBOE–2008–94]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete Obsolete CBOE Rule 15.10

September 3, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 29, 2008, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 delete obsolete Rule 15.10, *Reporting Requirements Applicable to Short Sales in Nasdaq National Market.* The text of the rule proposal is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

CBOE Rule 15.10, *Reporting Requirements Applicable to Short Sales in Nasdaq National Market*, was adopted several years ago to coordinate CBOE's rules with the NASD's Rules of Fair Practice relating to a bid test applicable to short sales in National Market (''NM'') securities traded through Nasdaq.[5] In 2007, the Commission adopted an amendment to eliminate Rule 10a–1 and to add Rule 201 of Regulation SHO under the Act, to provide that no price test, including any price test of any self-regulatory organization (''SRO''), shall apply to short sales in any security.[6] Rule 201

[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* Securities and Exchange Act Release No. 34632 (September 2, 1994), 59 FR 46999 (September 13, 1994) (SR–CBOE–94–10).

[6] *See* Securities Exchange Act Release No. 34–55970, 72 FR 36348 (July 3, 2007) (File No. S7–21–06).

also prohibits any SRO from having a price test. As a result, the Nasdaq bid test (which was the basis for the adoption of CBOE 15.10) was superseded by Regulation SHO, thus rendering CBOE Rule 15.10 obsolete. The purpose of this filing is to delete the obsolete rule text.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements provided under Section 6(b)(5)[7] of the Act, that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–94 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–CBOE–2008–94. 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 am and 3 pm. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–94 and should be submitted on or before October 1, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–20961 Filed 9–9–08; 8:45 am]

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[7] 15 U.S.C. 78(f)(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58461; File No. SR–FINRA–2008–033]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto To Adopt FINRA Rule 4560 (Short-Interest Reporting) in the Consolidated FINRA Rulebook

September 4, 2008.

I. Introduction

On June 23, 2008 the Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') 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 adopt the short interest reporting requirements (NASD Rule 3360 and Incorporated NYSE Rules 421(1) and 421.10) as FINRA Rule 4560 in the consolidated FINRA rulebook. On July 16, 2008, FINRA submitted Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on July 31, 2008.[3] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change, as amended.

II. Description of the Proposed Rule Change

As part of the process of developing the new consolidated rulebook (''Consolidated FINRA Rulebook''),[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 58227 (July 25, 2008), 43 FR 44793 (July 31, 2008).

[4] The current FINRA rulebook consists of two sets of rules: (1) NASD Rules and (2) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together referred to as the ''Transitional Rulebook''). The Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). Dual Members also must comply with NASD Rules. For more information about the rulebook consolidation process, see FINRA Information Notice, March 12, 2008 (''Rulebook Consolidation Process'').

FINRA proposed to adopt the short interest reporting requirements in NASD Rule 3360 and Incorporated NYSE Rules 421(1) and 421.10 as FINRA Rule 4560 in the Consolidated FINRA Rulebook.

NASD Rule 3360 and Incorporated NYSE Rules 421(1) and 421.10 set forth FINRA's short interest reporting requirements.[5] NASD Rule 3360 requires members to report short positions [6] in OTC Equity Securities [7] and exchange-listed securities not otherwise reported to another self-regulatory organization (''SRO''),[8] and Incorporated NYSE Rules 421(1) and 421.10 require members to report short positions in NYSE-listed securities. Members must report total short positions in all customer and proprietary accounts as of the designated settlement dates and in the manner so prescribed.[9] Currently, the rules require such information to be reported twice a month, which in turn, is then made publicly available on an aggregate basis twice a month.[10]

As of June 30, 2008, FINRA consolidated the collection of short interest data, so that firms report short interest positions in all securities to FINRA using the Regulation Filing Applications system; consequently, firms will no longer be able to report any of their short interest positions using the NYSE's Electronic Filing Platform (''EFP'') or the Securities Industry Automation Corporation (''SIAC'').[11]

Given that the short interest requirements in each of the rules are substantially similar, FINRA proposed to adopt these requirements as part of the Consolidated FINRA Rulebook, subject only to certain non-substantive changes. Most notably, because FINRA will now be the primary collector of consolidated short interest data for its members in all securities (rather than only if such positions in exchange-listed securities are not reported to another SRO), FINRA is not retaining the text in NASD Rule 3360 that limits short interest reportable to FINRA to those positions in exchange-listed securities ''not otherwise reported to another self-regulatory organization.''

III. Discussion and Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.[12] In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[13] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission notes that it has previously approved the short interest reporting requirements of NASD Rule 3360 [14] and NYSE Rules 421(1) and 421.10 [15], and the proposed rule change moves these requirements to the Consolidated FINRA Rulebook, subject only to certain non-substantive changes. The short interest reporting requirements previously have been found to meet the statutory requirements, and the Commission believes such requirements have since proven effective in achieving the statutory mandates.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[16] that the proposed rule change (SR–FINRA–2008–033), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Acting Secretary.

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[5] Incorporated NYSE Rules 421(2) and 421.40 require members carrying margin accounts for customers to report certain aggregate debit and free credit balances.

[6] Short positions required to be reported under the rules are those resulting from ''short sales'' as the term is defined in Rule 200(a) of Regulation SHO, subject to certain limited exceptions. *See* NASD Rule 3360(b)(1).

[7] The term ''OTC Equity Securities'' refers to any equity security that is not listed on a national securities exchange. *See* NASD Rule 3360(b)(3).

[8] It is the responsibility of each member firm to ensure that it is reporting accurate short interest data, including confirming that issue symbols are active and valid as of the designated settlement date. *See Notice to Members* 06–20 (April 2006).

[9] Non-self-clearing broker-dealers generally are considered to have satisfied their reporting requirement by making appropriate arrangements with their respective clearing organizations. *See Notice to Members* 03–08 (February 2003).

[10] A schedule of FINRA's designated settlement dates can be found on its Web site at *http://www.finra.org. See also Notice to Members* 07–24 (May 2007).

[11] *See Regulatory Notice* 08–13 (March 2008). Prior to June 30, firms reported short interest positions in NYSE-listed securities through the EFP and all other securities through FINRA's Regulation Filing Applications (''RFA'') system or the SIAC.

[12] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78(c)(f).

[13] 15 U.S.C. 78o–3(b)(6).

[14] Securities Exchange Act Release No. 56279 (Aug. 17, 2007), 72 FR 48713 (Aug. 24, 2007).

[15] Securities Exchange Act Release No. 57252 (Feb. 1, 2008), 73 FR 7343 (Feb. 7, 2008).

[16] 15 U.S.C. 78s(b)(2).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58457; File No. SR–NYSEArca–2008–91]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Regarding the Listing of Fourteen Funds of the Commodities and Currency Trust

September 3, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on August 21, 2008, NYSE Arca, Inc. (''NYSE Arca'' 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 the Exchange. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, through its wholly-owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities''), proposes to list and trade shares (''Shares'') of fourteen (14) funds (''Funds'') of the Commodities and Currency Trust (''Trust'') based on several currencies, commodities and commodities indexes.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade Shares of the Funds pursuant to NYSE Arca Equities Rule 8.200, Commentary .02, which permits the trading of Trust Issued Receipts (''TIRs'') either by listing or pursuant to unlisted trading privileges (''UTP''). The Shares have been approved by the Commission for listing on the American Stock Exchange LLC (''Amex'') [3] and for trading on the Exchange pursuant to UTP.[4] The issuer of the Shares has determined to list the Shares on the Exchange. The Exchange represents that the Shares satisfy the requirements of NYSE Arca Equities Rule 8.200 and thereby qualify for listing on the Exchange.

Shares of each Fund will be generally subject to the rules that apply to TIRs. The Shares represent common units of fractional undivided beneficial interest in, and ownership of, each Fund. Each Fund will invest the proceeds of its offering of Shares in various Financial Instruments [5] that will provide exposure to the Fund's underlying currency, commodity or commodity index. In addition, the Funds will also maintain cash positions in cash or money market instruments for the purpose of collateralizing such positions taken in the Financial Instruments.

Shares of seven (7) of the Funds of the Trust will be designated as Ultra ProShares while the other seven (7) Funds of the Trust will be designated as UltraShort ProShares. Each of the Funds will have a distinct investment objective.[6] The Funds will attempt, on a daily basis, to achieve their investment objective by corresponding to a specified multiple or an inverse multiple of the performance of a particular benchmark commodities index, commodity or currency (each an ''Underlying Benchmark'' and collectively, the ''Underlying Benchmarks'').

Six (6) Funds will be based on the following benchmark commodities indexes: (i) The Dow Jones-AIG Commodity Index℠; (ii) the Dow Jones-AIG Crude Oil Sub-Index℠; and (iii) the Dow Jones-AIG Agriculture Sub-Index℠ (each, an ''Underlying Index'' and collectively, the ''Underlying Indexes''). Four (4) Funds will be based on the following commodities: (i) Gold; and (ii) silver (each, an ''Underlying Commodity'' and collectively, the ''Underlying Commodities''). Four (4) Funds will be based on the following benchmark currencies versus the U.S. dollar: (1) The Euro; and (2) the Japanese Yen (each, an ''Underlying Currency'' and collectively, the ''Underlying Currencies''). The Exchange proposes to list and trade Shares of the Funds that seek daily investment results, before fees and expenses, that correspond to twice (200%) the daily performance of the Underlying Benchmark (the ''Ultra Funds''). If a Fund is successful in meeting its investment objective, the net asset value (''NAV'') [7] of the Shares of each Fund is expected to gain on a percentage basis, approximately twice as much as each Fund's respective Underlying Benchmark when the price of the Underlying Benchmark increases on a given day, and should lose approximately twice as much when such price declines on a given day, before fees and expenses.

The Exchange also proposes to list and trade Shares of the Funds that seek daily investment results, before fees and expenses that correspond to twice the inverse (−200%) of the daily performance of the Underlying Benchmark (the ''UltraShort Funds''). If each Fund is successful in meeting its objective, the NAV of the Shares of each Fund is expected to increase approximately twice as much, on a percentage basis, as the respective Underlying Benchmark loses on a given day, or should decrease approximately twice as much as the respective Underlying Benchmark gains when the Underlying Benchmark rises on a given day, before fees and expenses. The Exchange notes that the Commission has permitted the listing and trading on the Exchange and other national securities exchanges of securities linked to the performance of underlying currencies and commodities.[8] The

[3] *See* Securities Exchange Act Release No. 58161 (July 15, 2008), 73 FR 42380 [sic] (July 21, 2008) (SR–Amex–2008–39). Notice of the Amex proposed rule change was published in Securities Exchange Act Release No. 57932 (June 5, 2008), 73 FR 33467 (June 12, 2008) (''Amex Proposal'').

[4] *See* Securities Exchange Act Release No. 58162 (July 15, 2008), 73 FR 42391 (July 21, 2008) (SR–NYSEArca–2008–73).

[5] Commentary .02(b)(4) to NYSE Arca Equities Rule 8.200 defines ''Financial Instruments'' as any combination of cash, securities, options on securities and indices, futures contracts, options on futures contracts, forward contracts, equity caps, collars and floors and swap agreements.

[6] The Funds are the Ultra DJ–AIG Commodity ProShares, UltraShort DJ–AIG Commodity ProShares, Ultra DJ–AIG Agriculture ProShares, UltraShort DJ–AIG Agriculture ProShares, Ultra DJ–AIG Crude Oil ProShares, UltraShort DJAIG Crude Oil ProShares, Ultra Gold ProShares, UltraShort Gold ProShares, Ultra Silver ProShares, UltraShort Silver ProShares, Ultra Euro ProShares, UltraShort Euro ProShares, Ultra Yen ProShares and UltraShort Yen ProShares.

[7] ''Net asset value'' means the total assets of a Fund including, but not limited to, all cash and cash equivalents or other debt securities less total liabilities of such Fund, each determined on the basis of generally accepted accounting principles in the United States, consistently applied under the accrual method of accounting. In particular, net asset value includes any unrealized profit or loss on open swaps and futures contracts, and any other credit or debit accruing to a Fund but unpaid or not received by a Fund.

[8] The Commission has previously approved issues of Commodity-Based Trust Shares, Currency Trust Shares and Commodity Index Trust Shares, which have certain characteristics similar to the proposed TIRs, for exchange listing and trading. See, *e.g.*, Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (SR–NYSE–2004–22) (order approving listing on the New York Stock Exchange (''NYSE'') of streetTRACKS Gold Trust); Securities Exchange Act Release No. 51058 (January 19, 2005), 70 FR 3749 (January 26, 2005) (SR–Amex–2004–38) (order approving listing on the American Stock Exchange (''Amex'') of the iShares COMEX Gold Trust); Securities Exchange Act Release No. 53521 (March 20, 2006), 71 FR 14967 (March 24, 2006) (SR–Amex–2005–72) (order approving listing on Amex of the iShares Silver Trust); Securities Exchange Act Release No. 56041 (July 11, 2007), 72 FR 39114 (July 17, 2007) (SR–NYSEArca–2007–43) (order granting accelerated approval to list on NYSE Arca the iShares COMEX Gold Trust); Securities Exchange Act Release No. 52843 (November 28, 2005), 70 FR 72486 (December 5, 2005) (SR–NYSE 2005–65) (order granting accelerated approval for NYSE to list and trade shares of the CurrencyShares Euro Trust); Securities Exchange Act Release No. 54020 (June 20, 2006), 71 FR 36579 (June 27, 2006) (SR–NYSE–2006–35) (order granting accelerated approval for NYSE to list and trade shares of the CurrencyShares Australian Dollar Trust, CurrencyShares British Pound Sterling Trust, CurrencyShares Canadian Dollar Trust, CurrencyShares Mexican Peso Trust, CurrencyShares Swedish Krona Trust and CurrencyShares Swiss Franc Trust); Securities Exchange Act Release No. 55268 (February 9, 2007), 72 FR 7793 (February 20, 2007) (SR–NYSE–2007–03) (order granting accelerated approval for NYSE to list and trade shares of the CurrencyShares Japanese Yen Trust); Securities Exchange Act Release No. 56131 (July 25, 2007), 72 FR 42212 (August 1, 2007) (SR–NYSEArca–2007–57) (order granting accelerated approval for listing on NYSE Arca of CurrencyShares Trusts); Securities Exchange Act Release No. 54013 (June 16, 2006), 71 FR 36372 (June 26, 2006) (SR–NYSE–2006–17) (approving listing on the NYSE of the iShares GSCI Trust); Securities Exchange Act Release No. 55585 (April 5, 2007), 72 FR 18500 (April 12, 2007) (SR–NYSE–2006–75) (approving for NYSE listing the iShares GS Commodity Light Energy Indexed Trust; iShares GS Commodity Industrial Metals Indexed Trust; iShares GS Commodity Livestock Indexed Trust and iShares GS Commodity Non-Energy Indexed Trust); Securities Exchange Act Release No. 56932 (December 7, 2007), 72 FR 71178 (December 14, 2007) (SR–NYSEArca–2007–112) (order granting accelerated approval to list iShares S&P GSCI Commodity-Indexed Trust); Securities Exchange Act Release No. 57456 (March 7, 2008), 73 FR 13599 (March 13, 2008) (SR–NYSEArca–2007–91) (order granting accelerated approval for NYSE Arca listing the iShares S&P GSCI Energy Commodity-Indexed Trust; iShares S&P GSCI Natural Gas Commodity-Indexed Trust; iShares S&P GSCI Industrial Metals Commodity-Indexed Trust; iShares S&P GSCI Light Energy Commodity-Indexed

Commission also has approved for trading on the Exchange on a UTP basis under NYSE Arca Equities Rule 5.2(j)(3) UltraFunds, Short Funds and UltraShort Funds of the ProShares Trust.[9]

A description of each of the Underlying Indexes, commodities Underlying Benchmarks and currency Underlying Benchmarks is set forth in the Amex Proposal.[10] In addition, information regarding the structure and investment objective of the Funds, the portfolio investment methodology, investment techniques, and creation and redemption of Shares is provided in the respective Registration Statements and in the Amex Proposal.

Net Asset Value (NAV). The NAV of a Fund is total assets including, but not limited to, all cash and cash equivalents or other debt securities, less total liabilities, each determined on the basis of generally accepted accounting principles. In particular, the NAV includes any unrealized profit or loss on open Financial Instruments and any other credit or debit accruing to a Fund, but unpaid or not received.

The NAV per Share of each Fund is computed by dividing the value of the net assets of such Fund (*i.e.*, the value of its total assets, less total liabilities) by its total number of Shares outstanding. Expenses and fees are accrued daily and taken into account for purposes of determining NAV. The NAV of each Fund is calculated by the Administrator and is determined each business day as described further in the Amex Proposal.

The Exchange represents that it will obtain a representation (prior to listing the Shares of the Funds) from the Trust that the NAV per Share will be calculated daily and made available to all market participants at the same time.

Availability of Information Regarding the Shares

The Web sites for the Funds and/or the Exchange, which are publicly accessible at no charge, will contain the following information: (a) The current NAV per Share daily and the prior business day's NAV per Share and the reported closing price; (b) the mid-point of the bid-ask price in relation to the NAV per Share as of the time it is calculated (the ''Bid-Asked Price''); (c) calculation of the premium or discount of such price against the NAV per Share; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV per Share, within appropriate ranges for each of the four (4) previous calendar quarters; (e) the Prospectus; and (f) other applicable quantitative information.

The NAV per Share will be calculated and disseminated daily. The Exchange will disseminate for the Funds on a daily basis by means of CTA/CQ High Speed Lines information with respect to the corresponding ''Indicative Value'' (as discussed below), recent NAV per Share and Shares outstanding. The Exchange will also make available on its Web site (*http://www.nyse.com*) daily trading volume of the Shares, closing prices of the Shares, and the NAV per Share. The closing price and settlement prices of the futures contracts held by the Funds are also readily available from the Chicago Mercantile Exchange (''CME''), New York Mercantile Exchange (''NYMEX''), Chicago Board of Trade (''CBOT''), Intercontinental Exchange/New York Board of Trade (''ICE/NYBOT''), London Metal Exchange (''LME''), automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. Real-time dissemination of spot pricing for gold, silver, euro and Japanese yen is available on a 24-hour basis worldwide from various major market data vendors.

Portfolio Disclosure

Each Fund's total portfolio composition will be disclosed on the Web site of the Trust (*http://www.proshares.com*) or another relevant Web site as determined by the Trust and/or the Exchange. The Trust will provide Web site disclosure of portfolio holdings daily and will include, as applicable, the names and number of Financial Instruments and characteristics of such instruments, cash equivalents and amount of cash held in the portfolio of each Fund. This public Web site disclosure of the portfolio composition of each Fund will occur at the same time as the disclosure by the Managing Owner of the portfolio composition to Authorized Participants, so that all market participants are provided portfolio composition information at the same time. Therefore, the same portfolio information will be provided on the public Web site as well as in electronic files provided to Authorized Participants. Accordingly, each investor will have access to the current portfolio composition of each Fund through the Trust's Web site, at *http://www.proshares.com*, and/or at the Exchange's Web site.

Availability of Information About the Underlying Benchmarks

The daily closing index value and the percentage change in the daily closing index value for each Underlying Index will be publicly available on various Web sites, *e.g.*, *http://www.ino.com* and *http://www.finance.yahoo.com*. Data regarding each Underlying Index is also available from the respective index provider to subscribers. In addition, data is available regarding the underlying component commodities of each Underlying Index from those futures exchanges that list and trade futures contracts on those commodities. Several independent data vendors also package and disseminate index data in various value-added formats (including vendors displaying both index constituents and index levels and vendors displaying index levels only).

Data regarding spot pricing of the Underlying Commodities (gold and silver) is publicly available on a 24-hour basis from various financial information service providers, such as Reuters and Bloomberg. In addition, the daily London fix for gold and silver is also disseminated by various market data vendors and is available from the London Bullion Market Association (''LBMA'') Web site at *http://www.lbma.org.uk*.

Data regarding futures contracts and options on futures contracts in connection with the Underlying Commodities is also available from the NYMEX at *http://nymex.com*. There is considerable public price and data information regarding the Underlying Currencies (euro and Japanese yen). Spot pricing related to foreign exchange is available to investors and market professionals on a 24-hour basis. A variety of public Web sites and professional and subscription services provide market and price information regarding the euro and the yen. Current spot prices are also generally available from foreign exchange dealers.

The value of each Underlying Benchmark will be updated intra-day on a real time basis as its components change in price. The daily closing index value and the percentage change in the daily closing index value for each Underlying Index will be publicly available on various Web sites, such as *http://www.ino.com* and *http://www.finance.yahoo.com*. Data regarding each Underlying Index is also available from the respective index provider to subscribers. In addition, data is also available regarding the underlying component commodities of each

Trust; iShares S&P GSCI Livestock Commodity-Indexed Trust; and iShares S&P GSCI Non-Energy Commodity-Indexed Trust).

[9] *See* Securities Exchange Act Release No. 55125 (January 18, 2007), 72 FR 3462 (January 25, 2007) (SR–NYSEArca–2006–87); Securities Exchange Act Release No. 57017 (December 20, 2007), 72 FR 73955 (December 28, 2007) (SR–NYSEArca–2007–108).

[10] *See* note 3, *supra*.

Underlying Index from those futures exchanges that list and trade futures contracts on those commodities. Several independent data vendors also package and disseminate index data in various value-added formats (including vendors displaying both index constituents and index levels and vendors displaying index levels only).

Data regarding spot pricing of the Underlying Benchmark commodities (gold and silver) is publicly available on a 24-hour basis from various financial information service providers, such as Reuters and Bloomberg. In addition, the daily London fix for gold and silver is also disseminated by various market data vendors and is available from the LBMA Web site at *http://www.lbma.org.uk*. Data regarding futures contracts and options on futures contracts in connection with the Underlying Benchmark commodities is also available from NYMEX at *http://www.nymex.com*.

There is considerable public price and data information regarding the Underlying Benchmark currencies (euro and Japanese yen). Spot pricing related to the foreign currency exchange is available to investors and market professionals on a 24-hour basis. A variety of public Web sites and professional and subscription services provide market and price information regarding the euro and the yen. Current spot prices are also generally available from foreign exchange dealers.

Dissemination of Net Asset Value and Indicative Value

The Administrator calculates and disseminates, once each trading day, the NAV per Share to market participants. The Exchange will obtain a representation (prior to listing of the Funds) from the Trust that the NAV per Share will be calculated daily and made available to all market participants at the same time. In addition, the Administrator causes to be made available on a daily basis the corresponding Cash Deposit Amounts to be deposited in connection with the issuance of the respective Shares.

In order to provide updated information relating to the Fund for use by investors, professionals and persons wishing to create or redeem the Shares, the Exchange will disseminate an updated Indicative Value. The Indicative Value will be disseminated on a per-Share basis at least every 15 seconds during Exchange Core Trading Session trading hours of 9:30 a.m. to 4 p.m. ET. The Indicative Value will be calculated based on the cash required for creations and redemptions for a Fund adjusted to reflect the price changes of the Financial Instruments.

Criteria for Initial and Continued Listing. The Funds will be subject to the criteria in NYSE Arca Equity Rule 8.200(d) and Commentary .02(d) to Rule 8.200 for initial and continued listing of the Shares. The Funds will accept subscriptions for Shares in Creation Units from Authorized Participants expected to be in a range from $20 to $70 per Share during an initial offering period, commencing with the initial effective date of the prospectus and terminating no later than the ninetieth (90) day following such date, unless (i) the subscription minimum is reached before that date and the Managing Owner determines to end the initial offering period early or (ii) that date is extended by the Managing Owner for up to an additional 90 days.

The anticipated minimum number of Shares for each Fund to be outstanding at the start of trading will be 50,000 Shares. The Exchange believes that this anticipated minimum number of Shares for each Fund to be outstanding at the start of trading is sufficient to provide adequate market liquidity and to further the objectives of the Funds. The Exchange represents that, for the initial and continued listing of the Shares, the Shares must be in compliance with NYSE Arca Equities Rule 5.3 and Rule 10A–3 under the Exchange Act.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Trading in the Shares on the Exchange will occur in accordance with NYSE Arca Equities Rule 7.34(a). The Exchange has appropriate rules to facilitate transactions in the Shares during this time. The minimum trading increment for Shares on the Exchange will be $0.01.

Further, NYSE Arca Equities Rules 8.200, Commentary .02 sets forth certain restrictions on equity trading permit holders (''ETP Holders'') acting as registered Market Makers in Trust Issued Receipts to facilitate surveillance. Rule 8.200, Commentary .02(e)(3) requires that the ETP Holder acting as a registered Market Maker in the Shares provide the Exchange with information relating to its trading in the applicable physical asset or commodity, related futures or options on futures, or any other related derivatives as may be requested. NYSE Arca Equities Rule 8.200, Commentary .02(e)(4) prohibits the ETP Holder acting as a registered Market Maker in the Shares from using any material nonpublic information received from any person associated with an ETP Holder or employee of such person regarding trading by such person or employee in the applicable underlying physical asset or commodity, related futures or options on futures, or any other related derivative (including the TIRs). In addition, NYSE Arca Equities Rule 8.200, Commentary .02(e)(1) prohibits the ETP Holder acting as a registered Market Maker in the Shares from being affiliated with a market maker in the applicable physical asset or commodity, related futures or any other related derivatives unless adequate information barriers are in place, as provided in NYSE Arca Equities Rule 7.26.

As a general matter, the Exchange has regulatory jurisdiction over its ETP Holders and any person or entity controlling an ETP Holder. The Exchange also has regulatory jurisdiction over a subsidiary or affiliate of an ETP Holder that is in the securities business. A subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts would not be subject to Exchange jurisdiction, but the Exchange could obtain certain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products, including TIRs, to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillances focus 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 is able to obtain information regarding trading in the Shares, and certain of the Financial Instruments held by TIRs including securities, options on securities and indices, commodities, futures contracts, and options on futures contracts, through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect on any relevant market. The Exchange currently has in place

comprehensive surveillance sharing agreements with ICE, LME and NYMEX for the purpose of providing information in connection with trading in or related to futures contracts traded on their respective exchanges comprising the Underlying Benchmarks. The Exchange also notes that CBOT, CME and NYBOT are members of the Intermarket Surveillance Group (''ISG'').

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares, including risks inherent with trading the Shares during the Opening and Late Trading Sessions when the updated Indicative Value is not calculated and disseminated and suitability recommendation requirements.

Specifically, the Information Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Baskets; (2) NYSE Arca Equities Rule 9.2(a),[11] which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) how information regarding the Indicative Value is disseminated; (4) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (5) trading information. For example, the Information Bulletin will advise ETP Holders, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Trust. The Exchange notes that investors purchasing Shares directly from the Funds (by delivery of the Basket Amount) will receive a prospectus. ETP Holders purchasing Shares from the Trust for resale to investors will deliver a prospectus to such investors.

In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses described in each Fund's Registration Statement. The Information Bulletin will also reference the fact that there is no regulated source of last sale information regarding physical commodities, that the Commission has no jurisdiction over the trading of physical commodities or the futures contracts on which the value of the Shares is based.

Trading Halts

The Exchange will halt trading if it becomes aware that a Fund's NAV or disclosure of the portfolio composition is not being disseminated or has not been disseminated to all market participants at the same time.[12] In addition, the Exchange will halt trading in the Shares if the value of an Underlying Benchmark is no longer calculated or available on at least a 15-second basis through one or more major market data vendors during the time the Shares trade on the Exchange or if an Indicative Fund Value [sic] per Share updated every 15 seconds is no longer calculated or available.[13]

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the underlying securities; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[14] of the Exchange Act in general and furthers the objectives of Section 6(b)(5)[15] 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 regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, and, in general to protect investors and the public interest. The Exchange believes that the proposal will facilitate the listing and trading of additional types of commodity and currency-based investments that will enhance competition among market participants, to the benefit of investors and the marketplace.

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 Exchange 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. 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 Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2008–91 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–2008–91. 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

[11] NYSE Arca Equities Rule 9.2(a) (''Diligence as to Accounts'') provides that an ETP Holder, before recommending a transaction, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to his other security holdings and as to his financial situation and needs. Further, the proposed rule amendment provides, with a limited exception, that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holder shall make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and any other information that the ETP Holder believes would be useful to make a recommendation. *See* Securities Exchange Act Release No. 54045 (June 26, 2006), 71 FR 37971 (July 3, 2006) (SR–PCX–2005–115).

[12] Pursuant to NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

[13] See NYSE Arca Equities Rule 7.12, Commentary .04. If the value of the Underlying Benchmark or the Indicative Fund Value [sic] is not being disseminated on at least a 15-second basis during the hours the Shares trade on the Exchange, the Exchange may halt trading during the day in which the interruption to the dissemination of the value of the Underlying Benchmark or the Indicative Fund Value [sic] occurs. If the interruption to the dissemination the value of the Underlying Benchmark or the Indicative Fund Value [sic] persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2008–91 and should be submitted on or before October 1, 2008.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[16] In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Exchange Act,[17] 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 notes that it has permitted the listing and trading of TIRs and other exchange-traded fund-like products linked to the performance of underlying currencies and commodities.[18] The Commission further notes that the shares of other UltraFunds and UltraShort Funds based on various securities indexes have previously been approved by the Commission.[19]

The Exchange proposes to list and trade the Shares pursuant to Commentary .02 to NYSE Arca Equities Rule 8.200.[20] NYSE Arca represents that the Shares will conform to the existing initial and continued listing criteria under such rule and must be in compliance with NYSE Arca Equities Rule 5.3 and Rule 10A–3 under the Exchange Act.

The Commission believes that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,[21] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotations and last-sale information for the Shares will be disseminated by means of CTA and Consolidated Quotation High Speed Lines.[22] In addition, the value of each Underlying Benchmark will be updated intra-day on a real time basis as its components change in price. The Indicative Value will be disseminated at least every 15 seconds during the Exchange's Core Trading Session (9:30 a.m. to 4 p.m. Eastern Time), and the NAV of each Fund will be calculated by the Administrator and made available to all market participants at the same time.

The Exchange has noted the wide availability of information regarding the Underlying Benchmarks. For example, data regarding spot pricing of the Underlying Benchmark commodities (gold and silver) is publicly available on a 24-hour basis from various financial information service providers, such as Reuters and Bloomberg. In addition, the daily London fix for gold and silver is also disseminated by various market data vendors and is available from the LBMA Web site (*http://www.lbma.org.uk*). Data regarding futures contracts and options on futures contracts in connection with the Underlying Benchmark commodities is also available from NYMEX at *http://www.nymex.com.* Spot pricing related to the foreign currency exchange is available to investors and market professionals on a 24-hour basis. A variety of public Web sites and professional and subscription services provide market and price information regarding the euro and the yen. Currency spot prices are also generally available from foreign exchange dealers.

Moreover, each Fund's total portfolio composition will be disclosed on the Web site of the Trust (*http://www.proshares.com*) or another relevant Web site as determined by the Trust and/or the Exchange. The Trust will provide Web site disclosure of portfolio holdings daily and will include, as applicable, the names and number of

[16] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 15 U.S.C. 78f(b)(5).

[18] *See, e.g.*, Securities Exchange Act Release Nos. 55268 (February 9, 2007), 72 FR 7793 (February 20, 2007) (SR–NYSE–2007–03) (approving the listing and trading of shares of the CurrencyShares Japanese Yen Trust); 54020 (June 20, 2006), 71 FR 36579 (June 27, 2006) (SR–NYSE–2006–35) (approving the listing and trading of shares of six CurrencyShares Trusts); and 52843 (November 28, 2005), 70 FR 72486 (December 5, 2005) (SR–NYSE–2005–65) (approving the listing and trading of shares of the Euro Currency Trust, n/k/a the CurrencyShares Euro Trust). *See also, e.g.*, Securities Exchange Act Release Nos. 56969 (December 14, 2007), 72 FR 72424 (December 20, 2007) (SR–Amex–2007–53) (approving the listing and trading of the GreenHaven Continuous Commodity Index Fund); 55632 (April 13, 2007), 72 FR 19987 (April 20, 2007) (SR–Amex–2006–112) (approving the listing and trading of the United States Natural Gas Fund, LP); 55292 (February 14, 2007), 72 FR 8406 (February 26, 2007) (SR–Amex 2006–86) (approving the listing and trading of the PowerShares DB U.S. Dollar Index Bullish Fund and the PowerShares DB U.S. Dollar Index Bearish Fund); 55029 (December 29, 2006), 72 FR 806 (January 8, 2007) (SR–Amex 2006–76) (approving the listing and trading of the DB Multi-Sector Commodity Trust); 54450 (September 14, 2006), 71 FR 55230 (September 21, 2006) (SR–Amex 2006–44) (approving the listing and trading of the DB Currency Index Value Fund); 53582 (March 31, 2006), 71 FR 17510 (April 6, 2006) (SR–Amex 2005–127) (approving the listing and trading of the United States Oil Fund, LP); 53521 (March 20, 2006), 71 FR 14967 (March 24, 2006) (SR–Amex 2005–072) (approving the listing and trading of the iShares Silver Trust); 53105 (January 11, 2006), 71 FR 3129 (January 19, 2006) (SR–Amex 2005–059) (approving the listing and trading of the DB Commodity Index Tracking Fund); 53059 (January 5, 2006), 71 FR 2072 (January 12, 2006) (SR–Amex 2005–128) (approving the trading of the Euro Currency Trust pursuant to UTP); 51058 (January 19, 2005), 70 FR 3749 (January 26, 2005) (SR–Amex 2004–38) (approving the listing and trading of the iShares COMEX Gold Trust); and 51446 (March 29, 2005), 70 FR 17272 (April 5, 2005) (SR–Amex–2005–032) (approving the trading of streetTRACKS Gold Shares pursuant to UTP).

[19] *See, e.g.*, Securities Exchange Act Release Nos. 56998 (December 19, 2007), 72 FR 73404 (December 27, 2007) (SR–Amex–2007–104) (approving the listing and trading of shares of the ProShares Trust); 56592 (October 1, 2007), 72 FR 57364 (October 9, 2007) (SR–Amex –2007–60) (approving the listing and trading of shares of the ProShares Trust based on international equity indexes); 54040 (June 23, 2006), 71 FR 37629 (June 30, 2006) (SR–Amex–2006–41) (approving the listing and trading of shares of the ProShares Trust); 55117 (January 17, 2007), 72 FR 3442 (January 25, 2007) (SR–Amex 2006–101) (approving the listing and trading of shares of the ProShares Trust); and 52553 (October 3, 2005), 70 FR 59100 (October 11, 2005) (SR–Amex–2004–62) (approving the listing and trading of shares of the xtraShares Trust).

[20] The Commission believes that the Exchange's existing rules and procedures are adequate with respect to the Shares. However, the Commission notes that other proposed series of TIRs may require additional Exchange rules and procedures to govern their listing and trading on the Exchange. For example, in the case of a proposed series of TIRs that are based on a portfolio, at least in part, of non-U.S. equity securities, rules relating to comprehensive surveillance sharing agreements and quantitative initial and continued listing standards may be required.

[21] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[22] E-mail from Tim Malinowski, Director, NYSE Euronext, to Edward Cho and Christopher Chow, Special Counsels, Division of Trading and Markets, Commission, dated September 3, 2008 (confirming the means of dissemination of quotations and last-sale information for the Shares).

Financial Instruments and characteristics of such instruments and cash equivalents, and amount of cash held in the portfolio of each Fund. NYSE Arca will also make available on its Web site daily trading volume of the Shares, closing prices of the Shares, and the NAV per Share. In addition, the Web sites for the Funds and/or the Exchange will publish the following information: (a) The current NAV per Share daily and the prior business day's NAV per Share and the reported closing price; (b) the Bid-Asked Price; (c) calculation of the premium or discount of such price against the NAV per Share; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters; (e) the prospectus; and (f) other applicable quantitative information.

Furthermore, the Commission believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the Trust, prior to listing, that the NAV per Share for the Funds will be calculated daily, and that the NAV will be made available to all market participants at the same time. The Exchange has represented that the disclosure of the portfolio composition for each Fund will be made available to all market participants at the same time. The Exchange may consider the suspension of trading in, or removal from listing of, the Shares if, among others: (1) The value of the underlying index or portfolio is no longer calculated or available on at least a 15-second delayed basis or the Exchange stops providing a hyperlink on its Web site to any such asset or investment value; or (2) the Indicative Value is no longer made available on at least a 15-second delayed basis.[23] Further, Commentary .02 to NYSE Arca Equities Rules 8.200 sets forth certain restrictions, described above, on ETP Holders acting as registered Market Makers in TIRs to facilitate surveillance.

The Exchange's trading halt rules are reasonably designed to prevent trading in the Shares when transparency is impaired. As discussed above, trading in the Shares will be halted: (1) If the Exchange becomes aware that a Fund's NAV or disclosure of the portfolio composition is not being disseminated or has not been disseminated to all market participants at the same time; or (2) if the value of an Underlying Benchmark is no longer calculated or available on at least a 15-second basis through one or more major market data vendors during the time the Shares trade on the Exchange or if an Indicative Value per Share updated every 15 seconds is no longer calculated or available. The Exchange also may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading may be halted because of market conditions or for reasons that make trading in the Shares inadvisable, including: (1) The extent to which trading is not occurring in the underlying securities; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

The Commission further believes that the trading rules and procedures to which the Shares will be subject pursuant to this proposal are consistent with the Exchange Act. The Exchange has represented that the Shares are equity securities subject to NYSE Arca's rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following representations:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.200(d) and Commentary .02(d) to NYSE Arca Equities Rule 8.200.

(2) The Exchange's surveillance procedures are adequate to properly monitor trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(3) The Exchange will distribute an Information Bulletin, the contents of which are more fully described above, to ETP Holders in connection with the trading of the Shares.

(4) The Exchange represents that the Trust is required to comply with NYSE Arca Equities Rule 5.3 and Rule 10A–3 under the Exchange Act.

This approval order is based on the Exchange's representations.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[24] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission notes that it has previously approved the listing and trading of the Shares on Amex[25] and believes that the Exchange's proposal to list and trade such Shares does not appear to present any novel or significant regulatory issues that should cause it to revisit that previous finding. As mentioned above, the Shares are substantially similar to the shares of other TIRs and exchange-traded products, the shares of which are currently listed and trading in the marketplace,[26] and the Commission has previously approved the listing and trading of shares of other UltraFunds and UltraShort Funds based on various securities indexes.[27] As such, the Commission believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for such products.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[28] that the proposed rule change (SR–NYSEArca–2008–91) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–20962 Filed 9–9–08; 8:45 am]

BILLING CODE 8010–01–P

[23] *See* Commentary .02(d)(2)(ii) and (iii) to NYSE Arca Equities Rule 8.200.

[24] 15 U.S.C. 78s(b)(2).

[25] *See supra* note 3. The Shares have also been approved for trading on the Exchange pursuant to UTP. *See supra* note 4.

[26] *See supra* note 18.

[27] *See supra* note 19.

[28] 15 U.S.C. 78s(b)(2).

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58458; File No. SR–NYSEArca–2008–95]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Net Asset Value Calculations for CurrencyShares Trusts

September 3, 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 August 28, 2008, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

NYSE Arca, through its wholly-owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities''), proposes to provide a description of the revised methodology for calculating net asset value (''NAV'') to be implemented by the CurrencyShares Euro Trust; CurrencyShares Australian Dollar Trust; CurrencyShares British Pound Sterling Trust; CurrencyShares Canadian Dollar Trust; CurrencyShares Japanese Yen Trust; CurrencyShares Mexican Peso Trust; CurrencyShares Swedish Krona Trust; and CurrencyShares Swiss Franc Trust. The text of the proposed rule change is available on the Exchange's Web site at *www.nyx.com*, at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to provide a description of the revised methodology for calculating net asset value (''NAV'') to be implemented by the CurrencyShares Euro Trust; CurrencyShares Australian Dollar Trust; CurrencyShares British Pound Sterling Trust; CurrencyShares Canadian Dollar Trust; CurrencyShares Japanese Yen Trust; CurrencyShares Mexican Peso Trust; CurrencyShares Swedish Krona Trust; and CurrencyShares Swiss Franc Trust (the ''Trusts'').[3] The Commission has previously approved the Trusts for listing on the Exchange pursuant to NYSE Arca Equities Rule 8.202 (''Currency Trust Shares'').[4] The Trusts were previously listed on the New York Stock Exchange LLC (''NYSE'').[5]

Each of the Trusts currently utilizes the Federal Reserve Bank of New York Noon Buying Rate in calculating the NAV for the Trusts and for shares (''Shares'') of the Trusts.[6] The NAV is posted on the Trusts' Web site (*www.currencyshares.com*) as soon as the valuation of the foreign currency held by a Trust is complete (ordinarily by 2 p.m. (New York time)). Ordinarily, it is posted no more than thirty minutes after the Noon Buying Rate is published by the Federal Reserve Bank of New York.

As of the operative date of this proposed rule change, the Trusts intend to utilize a revised methodology for calculating NAV, as follows. To calculate the NAV, the Trustee adds to the amount of foreign currency in the Trust at the end of the preceding business day accrued but unpaid interest, the foreign currency receivable under pending purchase orders and the value of other Trust assets, and subtracts the accrued but unpaid Sponsor's fee, the foreign currency payable under pending redemption orders and other Trust expenses and liabilities, if any. The result is the NAV of the Trust for that business day. The Trustee shall also divide the NAV of each Trust by the number of Shares outstanding for the date of the evaluation then being made, which figure is the ''NAV per Share.'' The NAV will be expressed in USD based on the Closing Spot Rate[7] as determined by WM/Reuters at 4 p.m. (London time). If, on a particular evaluation day, the Closing Spot Rate has not been determined and announced by 6 p.m. (London time), then the most recent Closing Spot Rate shall be used to determine the NAV of the Trust unless the Trustee, in consultation with the Sponsor, determines that such price is inappropriate to use as the basis for such valuation. In the event that the Trustee and the Sponsor determine that the most recent Closing Spot Rate is not an appropriate basis for valuation of the Trust's currency, the Trustee and the Sponsor shall determine an alternative basis for such evaluation to be employed by the Trustee. Such an alternative basis may include reference to the market price of futures contracts that reflect the value of the foreign currency relative to the USD. The use of any alternative basis to determine NAV would be disclosed on the Trust's Web site. The Trustee also determines the NAV per Share, which equals the NAV of the Trust divided by the number of outstanding Shares. The Sponsor publishes the NAV and NAV per Share for each Trust on each day that the Exchange is open for regular trading on the Trusts' Web site.[8]

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[3] *See* Post-Effective Amendment No. 1 to Form S–1 for CurrencyShares Australian Dollar Trust (Registration No. 333–132362, dated February 8, 2008); CurrencyShares British Pound Trust (Registration No. 333–132361, dated February 8, 2008); CurrencyShares Canadian Dollar Trust (Registration No. 333–132363, dated February 8, 2008); CurrencyShares Euro Trust (Registration No. 333–125581, dated February 1, 2008); CurrencyShares Japanese Yen Trust (Registration No. 333–138881, dated February 12, 2008); CurrencyShares Swiss Franc Trust (Registration No. 333–132364, dated February 1, 2008); Prospectus Supplement No. 11 for the CurrencyShares Mexican Peso Trust (Registration No. 333–132367, dated June 13, 2008); Prospectus Supplement No. 10 for the CurrencyShares Swedish Krona Trust (Registration No. 132366, dated June 13, 2008) (collectively, ''Registration Statements''). The shares of the Trusts represent units of fractional undivided beneficial interest in, and ownership of, the respective Trust. The investment objective of the Trusts is for the shares issued by the Trusts to reflect the price of the applicable foreign currency owned by the specific Trust, plus accrued interest, less the expenses and liabilities of such Trust, according to the Registration Statements. The shares are intended to provide institutional and retail investors with a simple, cost-effective means of hedging their exposure to a particular foreign currency and otherwise implement investment strategies that involve foreign currency (*e.g.*, diversify more generally against the risk that the U.S. Dollar (''USD'') would depreciate).

[4] *See* Securities Exchange Act Release No. 56131 (July 25, 2007), 72 FR 42212 (August 1, 2007) (SR–NYSEArca–2007–57) (order granting accelerated approval for listing on NYSE Arca of CurrencyShares Trusts).

[5] *See* Securities Exchange Act Release Nos. 52843 (November 28, 2005), 70 FR 72486 (December 5, 2005) (SR–NYSE–2005–65) (order granting accelerated approval for NYSE to list and trade shares of the Euro Currency Trust, now known as the CurrencyShares Euro Trust); 54020 (June 20, 2006), 71 FR 36579 (June 27, 2006) (SR–NYSE–2006–35) (order granting accelerated approval for NYSE to list and trade shares of the CurrencyShares Australian Dollar Trust, CurrencyShares British Pound Sterling Trust, CurrencyShares Canadian Dollar Trust, CurrencyShares Mexican Peso Trust, CurrencyShares Swedish Krona Trust and CurrencyShares Swiss Franc Trust); 55268 (February 9, 2007), 72 FR 7793 (February 20, 2007) (SR–NYSE–2007–03) (order granting accelerated approval for NYSE to list and trade shares of the CurrencyShares Japanese Yen Trust).

[6] As described in the above-noted previous proposed rule changes by the Exchange and the NYSE relating to the Trusts, on each day that the NYSE is open for regular trading, The Bank of New York (''Trustee'') will determine the NAV of each of the Trusts. In so doing, the Trustee values the foreign currency held by the Trusts on the basis of the Noon Buying Rate, which is the USD/applicable foreign currency exchange rate as determined by the Federal Reserve Bank of New York as of 12 p.m. (New York time) on each day that the NYSE is open for regular trading. The Sponsor (Rydex Specialized Products LLC) publishes each Trust's NAV each business day on its Web site.

[7] Closing Spot Rate will be defined in the Registration Statements as ''the [Foreign Currency]/USD exchange rate as determined by WM/Reuters at 4 p.m. (London time)''. WM/Reuters is a joint venture of The WM Company PLC and Thomson Reuters.

[8] The Exchange will obtain a representation from the Trusts that the NAV per Share will be

The Exchange understands that the Closing Spot Rate as determined by WM/Reuters is an internationally accepted currency exchange rate and is the rate generally used in currency swap transactions. The Closing Spot Rate for various currencies is published in the Financial Times. According to WM/Reuters, the majority of main equity and bond index compilers use the WM/Reuters exchange rates in their calculations.[9] The Exchange believes that the WM/Reuters Closing Spot Rate is a widely-accepted, transparent and widely-disseminated measure of currency exchange rates and does not believe that a transition to using WM/Reuters data will adversely impact investors or market transparency.

Prior to implementation of the revised NAV calculation procedures as described above, the Exchange will issue an Information Bulletin informing ETP Holders of the new procedures and that the NAV for the Trusts will be available on the Trusts' Web site. Notice to investors of changes to the NAV calculation methodology will be posted on the Trusts' Web site. In addition, the Registration Statements will be supplemented to reflect the revised methodology.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[10] of the Act, in general, and furthers the objectives of Section 6(b)(5),[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that the proposed revisions to NAV calculation methodology for the Trusts will continue to ensure transparency of the NAV calculation based upon widely-accepted information sources.

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

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[12] and subparagraph (f)(6) of Rule 19b–4 thereunder.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

NYSE Arca believes that the proposed rule change is noncontroversial in that the Trusts will continue to use an internationally-accepted, transparent and widely-disseminated measure of currency exchange rates as the basis for NAV calculation. Use of the Closing Spot Rate by the Trusts in place of the Noon Buying Rate should not adversely impact investors or market transparency.[14]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2008–95 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–2008–95. 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, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2008–95 and should be submitted on or before October 1, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–20963 Filed 9–9–08; 8:45 am]

BILLING CODE 8010–01–P

calculated daily and made available to all market participants at the same time.

[9] *See* ''Spot & Forward Rates Guide'' published by WM/Reuters, available at *www.wmcompany.com*.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 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.

[14] E-mail from Tim Malinowski, Director, NYSE Euronext, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated September 3, 2008.

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6354]

Culturally Significant Objects Imported for Exhibition Determinations: ''Beyond Babylon: Art, Trade, and Diplomacy in the Second Millennium B.C.''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Beyond Babylon: Art, Trade, and Diplomacy in the Second Millennium B.C.'', imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, New York, from on or about November 18, 2008, until on or about March 15, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Wolodymyr Sulzynsky, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* 202–453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: September 2, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–21014 Filed 9–9–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6355]

Culturally Significant Objects Imported for Exhibition Determinations: ''Raqib Shaw at the Met''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Raqib Shaw at the Met,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, NY, from on or about November 4, 2008, until on or about March 1, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* 202/453–8048). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: September 2, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–21015 Filed 9–9–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6357]

Determination and Certification Under Section 649(e)(2) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008

Pursuant to the authority vested in me as Secretary of State, including under section 649(e) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 (Div. J, Pub. L. 110–161), I hereby determine and certify that the Government of Colombia is meeting the conditions described in Section 649(e)(2) of the FY 2008 SFOAA, and that I have consulted with Congress as consistent with the latter.

This Determination shall be published in the **Federal Register** and copies shall be transmitted to the appropriate committees of Congress.

Dated: August 28, 2008.

Condoleezza Rice,

Secretary of State, Department of State.

[FR Doc. E8–21017 Filed 9–9–08; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF STATE

[Public Notice 6356]

Meetings; Advisory Committee on Private International Law Study

U.S. Department of State Advisory Committee on Private International Law Study will be holding a public meeting on the United Nations Commission on International Trade Law (UNCITRAL) Draft Legislative Guide on Secured Transactions and its treatment of security rights in intellectual property (IP).

The Department of State Advisory Committee on Private International Law (ACPIL) will be holding a public meeting to discuss the treatment of IP-secured financing practices in the UNCITRAL Draft Legislative Guide on Secured Transactions (Guide). At the 40th Session of the UNCITRAL, the Commission adopted a legislative guide on secured transactions, including recommendations dealing with the scope of the Guide as it relates to IP law and secured financing, as well as the inclusion in the commentary to the Guide of explanatory statements on the treatment of IP as secured financing. The Commission also approved a new work project on IP law matters as they relate to secured financing law. A first session for that work project was held in New York in May. A second session of that work project is scheduled for October 20–24 in Vienna. The ACPIL will use this public meeting to continue to exchange thoughts on the relationship between secured finance and IP and how this matter should be addressed in the new draft IP annex to the Guide. The report of the first session of the working group and the papers prepared by the Secretariat on this matter can be obtained at *http://www.uncitral.org/uncitral/en/*

commission/working_groups/6Security_Interests.html.

Time: The public meeting will take place at the Department of State, Office of Private International Law, 2430 E Street, NW., Washington, DC on Wednesday October 8, 2008 from 11 a.m. EST to 1 p.m. EST. *Public Participation:* Advisory Committee Study Group meetings are open to the public, subject to the capacity of the meeting room. Access to the meeting building is controlled; persons wishing to attend should contact Tricia Smeltzer or Niesha Toms of the Department of State's Legal Adviser's Office at *SmeltzerTK@state.gov* or *TomsNN@state.gov* and provide your name, e-mail address, and mailing address to get admission into the meeting or to get directions to the office. Additional meeting information can also be obtained from Rachel Wallace at *WallaceRA@state.gov* or telephone (202) 647–2324. Persons who cannot attend but who wish to comment on any of the proposals are welcome to do so by e-mail to Michael Dennis at *DennisMJ@state.gov*. If you are unable to attend the public meeting and you would like to participate by teleconferencing, please contact Tricia Smeltzer or Niesha Toms at 202–776–8420 to receive the conference call-in number and the relevant information.

Dated: September 3, 2008.

Rachel A. Wallace,

Office of IP Enforcement, Department of State.

[FR Doc. E8–21012 Filed 9–9–08; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF STATE

[Public Notice 6346]

Advisory Committee International Postal and Delivery Services

AGENCY: Department of State.

ACTION: Notice; FACA Committee meeting announcement.

SUMMARY: As required by the Federal Advisory Committee Act, Public Law 92–463, the Department of State gives notice of the third meeting of the Advisory Committee on International Postal and Delivery Services. This Committee has been formed in fulfillment of the provisions of the 2006 Postal Accountability and Enhancement Act (Pub. L. 109–435) and in accordance with the Federal Advisory Committee Act.

Public input: Any member of the public interested in providing public input to the meeting should contact Mr. Chris Wood, whose contact information is listed under **FOR FURTHER INFORMATION CONTACT** section of this notice. Each individual providing oral input is requested to limit his or her comments to five minutes. Requests to be added to the speaker list must be received in writing (letter, e-mail or fax) prior to the close of business on October 3, 2008; written comments from members of the public for distribution at this meeting must reach Mr. Wood by letter, e-mail or fax by this same date.

Meeting agenda: The agenda of the meeting will include a review of the results of the 24th UPU Congress held in Geneva from 23 July to 12 August 2008 and other subjects of interest to Advisory Committee members and the public.

Date: October 8, 2008 from 3 p.m. to about 6 p.m. (open to the public).

Location: The American Institute of Architects (Boardroom), 1735 New York Ave., NW., Washington, DC 20006.

For further information, please contact Christopher Wood, Office of Technical Specialized Agencies (IO/T), Bureau of International Organization Affairs, U.S. Department of State, at (202) 647–1044, *woodcs@state.gov*.

Dated: September 3, 2008.

Dennis M. Delehanty,

Foreign Affairs Officer, Department of State.

[FR Doc. E8–21013 Filed 9–9–08; 8:45 am]

BILLING CODE 4710–19–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending August 22, 2008

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*).

The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2007–0066.

Date Filed: August 19, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: September 9, 2008.

Description: Application of Hainan Airlines Co. Limited (''Hainan Airlines'') requesting an exemption and amended foreign air carrier permit authorizing it to engage in charter foreign air transportation of persons, property and mail between a point or points in the People's Republic of China, on the one hand, and a point or points in the United States, on the other hand, and to engage in other charters. Hainan Airlines also requests a statement of authorization under Part 212 to perform a single charter flight between October 19–21, 2008.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–21054 Filed 9–9–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[4910–RY]

Notice of Final Federal Agency Actions on State Highway 99 (Segment E) in Texas

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). The actions relate to a proposed highway project, Grand Parkway (State Highway 99) Segment E, from Interstate Highway 10 (I–10) to United States Highway 290 (U.S. 290) in Harris County, Texas. Those actions grant licenses, permits, and approvals for the project.

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 highway project will be barred unless the claim is filed on or before March 9, 2009. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Mr. Gregory Punske, P.E., District Engineer, District B (South), Federal Highway Administration, 300 East 8th Street, Room 826, Austin, Texas 78701;

telephone: (512) 536–5960; *e-mail: gregory.punske@fhwa.dot.gov*. The FHWA Texas Division Office's normal business hours are 7:45 a.m. to 4:15 p.m. (central time) Monday through Friday. You may also contact Dianna Noble, P.E., Environmental Affairs Division, Texas Department of Transportation, 118 E. Riverside Drive, Austin, Texas 78704; *telephone:* (512) 416–2734; *e-mail: dnoble@dot.state.tx.us*. The Texas Department of Transportation normal business hours are 8 a.m. to 5 p.m. (central time) Monday through Friday.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following highway project in the State of Texas: Grand Parkway (State Highway 99) Segment E from I–10 to U.S. 290 in Harris County; FHWA Project Reference Number: FHWA–TX–EIS–02–01–F. The project will be a 22.4 km (13.9 mi) long, four-lane controlled access toll road with intermittent frontage roads, grade-separated intersections with exit and entrance ramps at eight intersecting roadways, and elevated directional interchanges at State Highway 99 and U.S. 290. It will begin in western Harris County at Franz Road near I–10. It will then proceed north through Harris County and end at U.S. 290. The purpose of the project is to efficiently link the suburban communities and major roadways, enhance mobility and safety, and respond to economic growth. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Impact Statement (FEIS) for the project, approved on November 19, 2007, in the FHWA Record of Decision (ROD) issued on June 24, 2008, and in other documents in the FHWA administrative record. The FEIS, ROD, and other documents in the FHWA administrative record file are available by contacting the FHWA or the Texas Department of Transportation at the addresses provided above. The FHWA FEIS and ROD can be viewed and downloaded from the Grand Parkway Association Web site at *http://www.grandpky.com/segments/e/*.

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:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4335]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act, 42 U.S.C. 7401–7671(q).

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544] Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–(ll)]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act, 33 U.S.C. 1251–1342; Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601–4604.

8. *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. 11514 Protection and Enhancement of Environmental Quality.

(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: September 3, 2008.

Gregory S. Punske,

District Engineer, Austin.

[FR Doc. E8–20975 Filed 9–9–08; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket: PHMSA–2007–0056]

Pipeline Safety: Agency Information Collection Activities: Notice of Request for Extension of Currently Approved Information Collections

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that PHMSA is forwarding an Information Collection Request to the Office of Management and Budget (OMB) for the renewal and extension of four existing information collections. On May 22, 2008 (73 FR 29846), PHMSA published a **Federal Register** notice soliciting comments on these information collections. No comments were received. The purpose of this notice is to allow the public an additional 30 days to submit comments on the information collections described below.

DATES: Interested persons are invited to submit comments on or before October 10, 2008.

ADDRESSES: Send comments directly to the Office of Management and Budget, Office of Information and Regulatory Affairs, *Attn:* Desk Officer for the Department of Transportation, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Cameron Satterthwaite at (202) 366–1319, or by e-mail at *cameron.satterthwaite@dot.gov*.

SUPPLEMENTARY INFORMATION: Section 1320.8(d), Title 5, Code of Federal Regulations requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies information collection requests that PHMSA will be submitting to OMB for renewal and extension. These information collections are contained in the pipeline safety regulations, 49 CFR parts 190–199. PHMSA has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on changes in proposed or final rules published since the information collections were last approved. The following information is provided for each information collection: (1) Title of the information collection; (2) OMB control number; (3) type of request; (4) abstract of the information collection activity; (5) description of affected public; (6) estimate of total annual reporting and recordkeeping burden; and (7) frequency of collection. PHMSA will request a three-year term of approval for each information collection activity.

PHMSA requests comments on the following information collections:

Title: Pipeline Safety: Excess Flow Valves—Customer Notification.

OMB Control Number: 2137–0593.

Type of Request: Renewal of a currently approved information collection.

Abstract: Pipeline operators are required to provide notifications about

excess flow valves to service line customers as described in 49 CFR 192.383. Upon request, an operator must make documentation of compliance available to PHMSA or the appropriate State regulatory agency.

Estimated number of respondents: 900,000.

Estimated annual burden hours: 18,000 hours.

Frequency of collection: On occasion.

Title: Pipeline Safety: Customer-Owned Service Lines.

OMB Control Number: 2137–0594.

Type of Request: Renewal of a currently approved information collection.

Abstract: Operators of gas service lines who do not maintain certain buried piping of their customers must provide notification about maintenance to those customers (49 CFR 192.16). Upon request, an operator must make documentation of compliance available to PHMSA or the appropriate State regulatory agency.

Estimated number of respondents: 550,000.

Estimated annual burden hours: 9,167 hours.

Frequency of collection: On occasion.

Title: Pipeline Safety: Qualification of Pipeline Safety, Training.

OMB Control Number: 2137–0600.

Type of Request: Renewal of a currently approved information collection.

Abstract: Pipeline operators are required to have continuing programs for qualifying and training personnel performing safety-sensitive functions on pipelines. (49 CFR part 192, subpart N and 49 CFR part 195, subpart G). Operators must maintain records, make reports, and provide information to PHMSA and State pipeline safety agencies concerning these programs. The information aids Federal and State pipeline safety inspectors in conducting compliance inspections and investigating incidents.

Estimated number of respondents: 22,300.

Estimated annual burden hours: 466,667 hours.

Frequency of collection: On occasion.

Title: Pipeline Safety Report of Abandoned Underwater Pipelines.

OMB Control Number: 2137–0601.

Type of Request: Renewal of a currently approved information collection.

Abstract: Pipeline operators are required to report certain information about abandoned underwater pipelines to PHMSA. The information aids Federal and State pipeline safety inspectors in conducting compliance inspections and investigating incidents.

Estimated number of respondents: 10.

Estimated annual burden hours: 60 hours.

Frequency of collection: On occasion.

Issued in Washington, DC on September 4, 2008.

John A. Gale,

Director of Regulations, Office of Pipeline Safety.

[FR Doc. E8–20973 Filed 9–9–08; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Ad Hoc IRS Forms and Publications/Language Services Issue Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Ad Hoc IRS Forms and Publications/Language Services Issue Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, October 14, 2008.

FOR FURTHER INFORMATION CONTACT: Sallie Chavez at 1–888–912–1227 or 954–423–7979.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Ad Hoc IRS Forms and Publications/Language Services Issue Committee of the Taxpayer Advocacy Panel will be held Tuesday, October 14, 2008, at 2 p.m. Eastern Time via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7979, or write Sallie Chavez, TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Sallie Chavez. Ms. Chavez can be reached at 1–888–912–1227 or 954–423–7977, or you can post comments to the Web site: *http://www.improveirs.org*.

The agenda will include: *Various IRS issues*.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20944 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 1 Taxpayer Advocacy Panel (Including the States of New York, Connecticut, Massachusetts, Rhode Island, New Hampshire, Vermont and Maine)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Area 1 Taxpayer Advocacy Panel will be conducted via telephone conference call. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, October 21, 2008.

FOR FURTHER INFORMATION CONTACT: Audrey Y. Jenkins at 1–888–912–1227 or 718–488–2085.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 1 Taxpayer Advocacy Panel will be held Tuesday, October 21, 2008, at 9 a.m., Eastern Time via a telephone conference call. For more information or to confirm attendance, notification of intent to attend the meeting must be made with Audrey Y. Jenkins at 1–888–912–1227 or 718–488–2085. If you would like to have the TAP consider a written statement, please write Audrey Y. Jenkins, TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201, or you can post comments to the Web site: *http://www.improveirs.org*.

The agenda will include various IRS issues.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20948 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 2 Taxpayer Advocacy Panel (Including the States of Delaware, North Carolina, South Carolina, New Jersey, Maryland, Pennsylvania, Virginia, West Virginia and the District of Columbia)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Area 2 Taxpayer Advocacy Panel will be conducted via telephone conference call. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, October 15, 2008.

FOR FURTHER INFORMATION CONTACT: Sallie Chavez at 1–888–912–1227, or 954–423–7979.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 2 Taxpayer Advocacy Panel will be held Wednesday, October 15, 2008, at 2:30 p.m. Eastern Time via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7979, or write Sallie Chavez, TAP Office, 1000 South Pine Island Rd., Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Sallie Chavez. Ms. Chavez can be reached at 1–888–912–1227 or 954–423–7979, or post comments to the Web site: *http://www.improveirs.org*.

The agenda will include the following: Various IRS issues.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20950 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 4 Taxpayer Advocacy Panel (Including the States of Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee, and Wisconsin)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Area 4 Taxpayer Advocacy Panel will be conducted via telephone conference call. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, October 21, 2008.

FOR FURTHER INFORMATION CONTACT: Mary Ann Delzer at 1–888–912–1227, or (414) 231–2360.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 4 Taxpayer Advocacy Panel will be held Tuesday, October 21, 2008, at 1 p.m., Central Time via a telephone conference call. You can submit written comments to the panel by faxing the comments to (414) 231–2363, or by mail to Taxpayer Advocacy Panel, Stop 1006MIL, 211 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or you can contact us at *http://www.improveirs.org*. Please contact Mary Ann Delzer at 1–888–912–1227 or (414) 231–2360 for dial-in information.

The agenda will include the following: *Various IRS issues*.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20952 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 5 Taxpayer Advocacy Panel (Including the States of Iowa, Kansas, Minnesota, Missouri, Nebraska, Oklahoma, and Texas)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Area 5 Taxpayer Advocacy Panel will be conducted via a telephone conference call. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, October 14, 2008.

FOR FURTHER INFORMATION CONTACT: Mary Ann Delzer at 1–888–912–1227, or (414) 231–2360.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 5 Taxpayer Advocacy Panel will be held Tuesday, October 14, 2008, at 9:30 a.m. Central Time via a telephone conference call. You can submit written comments to the panel by faxing to (414) 231–2363, or by mail to Taxpayer Advocacy Panel, Stop 1006MIL, 211 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or you can contact us at *http://www.improveirs.org*. Please contact Mary Ann Delzer at 1–888–912–1227 or (414) 231–2360 for dial-in information.

The agenda will include the following: *Various IRS issues*.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20954 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 6 Taxpayer Advocacy Panel (Including the States of Arizona, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming).

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Area 6 committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel (TAP) is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. The TAP will use citizen input to make recommendations to the Internal Revenue Service.

DATES: The meeting will be held Tuesday, October 7, 2008.

FOR FURTHER INFORMATION CONTACT: Dave Coffman at 1–888–912–1227, or 206–220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 6 Taxpayer Advocacy Panel will be held Tuesday, October 7, 2008, from 1 p.m. Pacific Time to 2:30 p.m. Pacific Time, via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written

statement, please call 1–888–912–1227 or 206–220–6096, or write to Dave Coffman, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Dave Coffman. Mr. Coffman can be reached at 1–888–912–1227 or 206–220–6096, or you can contact us at *www.improveirs.org*.

The agenda will include the following: *Various IRS issues*.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20955 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 7 Taxpayer Advocacy Panel (Including the States of Alaska, California, Hawaii, and Nevada)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Area 7 committee of the Taxpayer Advocacy Panel will be conducted via telephone conference call. The Taxpayer Advocacy Panel (TAP) is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, October 15, 2008.

FOR FURTHER INFORMATION CONTACT: Janice Spinks at 1–888–912–1227 or 206–220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 7 Taxpayer Advocacy Panel will be held Wednesday, October 15, 2008, at 2 p.m. Pacific Time via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Janice Spinks, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA, 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Janice Spinks. Miss Spinks can be reached at 1–888–912–1227 or 206–220–6096, or you can contact us at *http://www.improveirs.org*.

The agenda will include the following: *Various IRS issues*.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20956 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Joint Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Joint Committee of the Taxpayer Advocacy Panel will be held. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, October 2, and Friday, October 3, 2008.

FOR FURTHER INFORMATION CONTACT: Patricia Robb at 1–888–912–1227 or (414) 231–2360.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Joint Committee of the Taxpayer Advocacy Panel (TAP) will be held Thursday, October 2, 2008, 8 a.m. to 5:30 p.m., and Friday, October 3, 2008, 8 a.m. to 5:30 p.m., in Atlanta, GA. If you would like to have the Joint Committee of TAP consider a written statement, please call 1–888–912–1227 or (414) 231–2360, or write Patricia Robb, TAP Office, MS–1006–MIL, 211 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or FAX to (414) 231–2363, or you can contact us at *http://www.improveirs.org*. For information to join the Joint Committee meeting, contact Patricia Robb at the above number.

The agenda will include the following: Discussion of issues and responses brought to the Joint Committee, office report, and discussion of annual meeting.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20942 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open meeting of the Small Business/Self Employed—Taxpayer Burden Reduction Issue Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Small Business/Self Employed—Taxpayer Burden Reduction Issue Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Marisa Knispel at 1-888-912-1227 or (718) 488-3557.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel Small Business/Self Employed—Taxpayer Burden Reduction Issue Committee will be held Thursday, October 9, 2008, at 2 p.m. Eastern Time via a telephone conference call. You can submit written comments to the panel by faxing to (718) 488-2062, or by mail to Taxpayer Advocacy Panel, 10 Metro Tech Center, 625 Fulton Street, Brooklyn, NY, 11201, or you can contact us at *http://www.improveirs.org*. Public comments will also be welcome during the meeting. Please contact Marisa Knispel at 1-888-912-1227 or (718) 488-3557 for additional information.

The agenda will include the following: *Various IRS Issues*.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20943 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee.

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Earned

Income Tax Credit Issue Committee will be conducted via telephone conference call. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, October 8, 2008.

FOR FURTHER INFORMATION CONTACT: Audrey Y. Jenkins at 1–888–912–1227 or 718–488–2085.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee will be held Wednesday, October 8, 2008, from 1 to 2 p.m. Eastern Time via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. For information or to confirm attendance, notification of intent to attend the meeting must be made with Audrey Y. Jenkins. Ms. Jenkins may be reached at 1–888–912–1227 or (718) 488–2085. Send written comments to Audrey Y. Jenkins, TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201 or post comments to the Web site: *http://www.improveirs.org*. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made in advance.

The agenda will include various IRS issues.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20941 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Volunteer Income Tax Assistance (VITA) Issue Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel VITA Issue Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, October 14, 2008.

FOR FURTHER INFORMATION CONTACT: Marisa Knispel at 1–888–912–1227 or (718) 488–3557.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel VITA Issue Committee will be held Tuesday, October 14, 2008, at 2 p.m. Eastern Time via a telephone conference call. You can submit written comments to the panel by faxing to (718) 488–2062, or by mail to Taxpayer Advocacy Panel, 10 Metro Tech Center, 625 Fulton Street, Brooklyn, NY, 11201, or you can contact us at *http://www.improveirs.org*. Public comments will also be welcome during the meeting. Please contact Marisa Knispel at 1–888–912–1227 or (718) 488–3557 for additional information.

The agenda will include the following: *Various VITA Issues*.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20946 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Assistance Center Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Taxpayer Assistance Center Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel (TAP) is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, October 28, 2008.

FOR FURTHER INFORMATION CONTACT: Dave Coffman at 1–888–912–1227 or 206–220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Assistance Center Committee of the Taxpayer Advocacy Panel will be held Tuesday, October 28, 2008, from 9 a.m. Pacific Time to 10:30 a.m. Pacific Time via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Dave Coffman, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Dave Coffman. Mr. Coffman can be reached at 1–888–912–1227 or 206–220–6096, or you can contact us at *http://www.improveirs.org*.

The agenda will include the following: *Various IRS issues*.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20940 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Wage & Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Wage & Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel will be conducted via telephone conference call. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, October 15, 2008.

FOR FURTHER INFORMATION CONTACT: Sallie Chavez at 1–888–912–1227, or 954–423–7979.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Wage & Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel will be held Wednesday, October 15, 2008, at 12:30 p.m. Eastern Time via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7979, or write Sallie Chavez, TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Sallie Chavez. Ms. Chavez can be reached at 1–888–912–1227 or 954–423–7979, or post

comments to the Web site: *http://www.improveirs.org*.

The agenda will include: *Various IRS issues*.

Dated: August 29, 2008.

Roy L. Block,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E8–20945 Filed 9–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Minority Veterans; Notice of Availability of Report

In compliance with section 13 of Public Law 92–463 (Federal Advisory Committee Act) notice is hereby given that the 2008 Annual Report of the Department of Veterans Affairs (VA) Advisory Committee on Minority Veterans has been issued. The report summarizes activities and recommendations of the Committee on matters relative to VA programs and policies affecting minority veterans. It is available for public inspection at two locations:

Mr. Richard Yarnall, Federal Advisory Committee Desk, Library of Congress, Anglo-American Acquisition Division, Government Documents Section, Room LM–B42, 101 Independence Avenue, SE., Washington DC 20540–4172, and

Department of Veterans Affairs, Center for Minority Veterans, Suite 435, 810 Vermont Avenue, NW., Washington DC 20420.

By Direction of the Secretary:

Dated: August 29, 2008.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. E8–20934 Filed 9–9–08; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
September 10, 2008

Part II

Nuclear Regulatory Commission

10 CFR Part 50

Industry Codes and Standards; Amended Requirements; Final Rule

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

RIN 3150–AH76

[NRC–2007–0003]

Industry Codes and Standards; Amended Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to incorporate by reference the 2004 Edition of Section III, Division 1, and Section XI, Division 1, of the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (BPV Code), and the 2004 Edition of the ASME Code for Operation and Maintenance of Nuclear Power Plants (OM Code) to provide updated rules for constructing and inspecting components and testing pumps, valves, and dynamic restraints (snubbers) in light-water nuclear power plants. The NRC also is incorporating by reference ASME Code Cases N–722, ''Additional Examinations for PWR [pressurized water reactor (PWR)] Pressure Retaining Welds in Class 1 Components Fabricated with Alloy 600/82/182 Materials, Section XI, Division 1,'' and N–729–1, ''Alternative Examination Requirements for PWR Reactor Vessel Upper Heads With Nozzles Having Pressure-Retaining Partial-Penetration Welds, Section XI, Division 1,'' both with conditions. The amendment also removes certain obsolete requirements specified in the NRC's regulations. This action is in accordance with the NRC's policy to periodically update the regulations to incorporate by reference new editions and addenda of the ASME Codes and is intended to maintain the safety of nuclear reactors and make NRC activities more effective and efficient.

DATES: *Effective Date:* October 10, 2008. The incorporation by reference of certain publications listed in the regulation is approved by the Director of the Office of the Federal Register as of October 10, 2008.

ADDRESSES: You can access publicly available documents related to this document using the following methods:

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents filed under Docket ID [NRC–2007–0003]. Address questions about NRC dockets to Carol Gallagher 301–415–5905; e-mail *Carol.Gallagher@nrc.gov.*

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 O1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents 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/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 problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: L. Mark Padovan, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–1423, e-mail *Mark.Padovan@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Analysis of Public Comments
III. Section-by-Section Analysis
IV. Generic Aging Lessons Learned Report
V. Availability of Documents
VI. Voluntary Consensus Standards
VII. Finding of No Significant Environmental Impact: Environmental Assessment
VIII. Paperwork Reduction Act Statement
IX. Regulatory Analysis
X. Regulatory Flexibility Certification
XI. Backfit Analysis
XII. Congressional Review Act

I. Background

The NRC is amending 10 CFR 50.55a to incorporate by reference the 2004 Edition of Section III, Division 1 and Section XI, Division 1 of the ASME BPV Code and the 2004 Edition of the ASME OM Code. Section 50.55a requires the use of Section III, Division 1 of the ASME BPV Code for the construction of nuclear power plant components; Section XI, Division 1 of the ASME BPV Code for the inservice inspection (ISI) of nuclear power plant components; and the ASME OM Code for the inservice testing (IST) of pumps and valves. The NRC published a proposed rulemaking on this subject in the **Federal Register** on April 5, 2007 (72 FR 16731). The 75-day public comment period for the proposed rule closed on June 19, 2007.

The introductory paragraph of § 50.55a establishes the applicability of the conditions therein to licenses and approvals issued under Part 52. Specifically, that rule states the following:

- ''Each combined license for a utilization facility is subject to the following conditions in addition to those specified in § 50.55, except that each combined license for a boiling or pressurized water-cooled nuclear power facility is subject to the conditions in paragraphs (f) and (g) of this section, but only after the Commission makes the finding under § 52.103(g) of this chapter.''
- ''Each manufacturing license, standard design approval, and standard design certification application under part 52 of this chapter is subject to the conditions in paragraphs (a), (b)(1), (b)(4), (c), (d), (e), (f)(3), and (g)(3) of this section.''

Accordingly, combined licenses, manufacturing licenses, standard design approvals, and standard design certifications are subject to these requirements.

The ASME BPV Code and OM Code are national, voluntary consensus standards, and are required by the National Technology Transfer and Advancement Act of 1995, Public Law 104–113, to be used by government agencies unless the use of such a standard is inconsistent with applicable law or is otherwise impractical. The NRC reviews new editions and addenda of the ASME BPV and OM Codes, and periodically updates § 50.55a to incorporate by reference newer editions and addenda. New editions of the subject codes are issued every 3 years; addenda to the editions are issued yearly except in years when a new edition is issued. The editions and addenda of the ASME BPV and OM Codes were last incorporated by reference into the regulations in a final rule dated October 1, 2004 (69 FR 58804). In that rule, § 50.55a was revised to incorporate by reference the 2001 Edition, and 2002 and 2003 Addenda, of Sections III and XI, Division 1, of the ASME BPV Code and the 2001 Edition, and 2002 and 2003 Addenda, of the ASME OM Code.

The NRC is now incorporating by reference Section III, Division 1, of the 2004 Edition of the ASME BPV Code; Section XI, Division 1, of the 2004 Edition of the ASME BPV Code subject to modifications and limitations; and the 2004 Edition of the ASME OM Code.

II. Analysis of Public Comments

The NRC received 23 letters and e-mails from the public that provided about 87 comments on the proposed rule. These comments were submitted by individuals, nuclear utilities, and nuclear industry organizations

consisting of the Nuclear Energy Institute (NEI), the Performance Demonstration Initiative, and the Strategic Teaming and Resource Sharing (STARS) organization. The NRC reviewed and considered the comments in its final rulemaking, as discussed in the following sections:

1. 10 CFR 50.55a(b)(1)

Public Comment:

In a letter dated June 12, 2007, G.C. Slagis Associates commented that the reversing dynamic load rules of the ASME BPV Code, Section III, should not be approved for new construction. The commenter stated that the draft rule language incorporated the 2004 Edition of the Section III piping rules (NB/NC/ND–3600) for evaluation of ''reversing dynamic loads,'' whereas the NRC had taken exception to these rules in the past. The commenter also stated that these piping rules should not be approved for new construction.

NRC Response:

The NRC has not approved the reversing dynamic load rules in the piping rules for the ASME BPV Code, Section III for new construction or existing nuclear plants. The NRC believes that the commenter's interpretation of the proposed rule was based on the wording contained in the summary of the proposed revisions to 10 CFR 50.55a (on the bottom of page 72 FR 16732 and top of page 72 FR 16733; April 5, 2007) that said ''The proposed rule would revise § 50.55a(b)(1) to incorporate by reference the 2004 Edition of Section III of the ASME Boiler and Pressure Vessel (BPV) Code. The NRC does not propose to adopt any limitations with respect to the 2004 Edition of Section III.'' The wording in the second sentence contained an editorial error. The sentence should have read ''The NRC does not propose to adopt any additional limitations with respect to the 2004 Edition of Section III.'' The proposed rule language on page 72 FR 16740 retained the previous restriction regarding the piping rules. The restriction applies to the 1994 Edition through the 2004 Edition. To clarify this, the NRC revised the subject sentences in Section III, Section-by Section Analysis, of this document as follows:

The final rule revises § 50.55a(b)(1) in the current regulation to incorporate by reference the 2004 Edition of Section III of the ASME BPV Code into 10 CFR 50.55a. The NRC is not adopting any additional limitations with respect to the 2004 Edition of Section III.

2. 10 CFR 50.55a(b)(1)(iii)—Seismic Design of Piping

Public Comment:

In a letter dated June 19, 2007, Westinghouse Electric Company requested that the NRC clarify the current limitation specified in § 50.55a(b)(1)(iii) regarding seismic design. The commenter stated that the limitations are related to the treatment of piping. However, as is stated in § 50.55a(b)(1)(iii), the rules in Article NB–3200 of Section III of the ASME BPV Code contain criteria applicable to the seismic design of components other than piping systems. The commenter recommended that the wording in § 50.55a(b)(1)(iii) be revised to clarify that the limitation only applies to the seismic design of piping.

NRC Response:

The NRC agrees with the commenter, and has revised § 50.55a(b)(1)(iii) in this final rule as follows:

Seismic design of piping. Applicants and licensees may use Articles NB–3200, NB–3600, NC–3600, and ND–3600 for seismic design of piping up to and including the 1993 Addenda, subject to the limitation specified in paragraph (b)(1)(ii) of this section. Applicants and licensees may not use these Articles for seismic design of piping in the 1994 addenda through the latest edition and addenda incorporated by reference in paragraph (b)(1) of this section.

3. 10 CFR 50.55a(b)(2)(xv)—Appendix VIII Specimen Set and Qualification Requirements

Public Comment:

Conflicts between §§ 50.55a(b)(2)(xv) and 50.55a(b)(2)(xxiv) were identified by the Performance Demonstration Initiative (letter dated May 11, 2007), Nuclear Management Company (letter dated June 19, 2007), and Mr. Michael Gothard (comment received on the NRC's public Web site on May 11, 2007). The proposed rule extends the application of § 50.55a(b)(2)(xv) from the 1995 Edition through the 2001 Edition to the 1995 Edition through the 2004 Edition. 10 CFR 50.55a(b)(2)(xxiv) prohibits the use of Appendix VIII of Section XI, 1995 Edition through the 2001 Edition, and the supplements of Appendix VIII and Article I–3000 of the 2002 Addenda through the latest edition and addenda incorporated by reference in § 50.55a(b). The proposed change in § 50.55a(b)(2)(vx) creates confusion, unnecessary burden, and conflicting requirements. The commentors proposed leaving § 50.55a(b)(2)(xv) unchanged.

NRC Response:

The NRC agrees with the commentors that the requirements in §§ 50.55a(b)(2)(xv) and 50.55a(b)(2)(xxiv) conflict. The intent of the proposed rule was to minimize the burden associated with reconciling an existing Appendix VIII of Section XI, 1995 Edition through the 2001 Edition, program with changes that occurred in the 2002 Addenda and later edition and addenda. In keeping with the NRC's intent, § 50.55a(b)(2)(xv) will reference up to, and including, the 2001 Edition of Appendix VIII as follows:

Appendix VIII specimen set and qualification requirements. The following provisions may be used to modify implementation of Appendix VIII of Section XI, 1995 Edition through the 2001 Edition. Licensees choosing to apply these provisions shall apply all of the following provisions under this paragraph except for those in § 50.55a(b)(2)(xv)(F) which are optional. Licensees who use later editions and addenda than the 2001 Edition of Section XI of the ASME Code shall use the 2001 Edition of Appendix VIII.

4. 10 CFR 50.55a(b)(2)(xx)—System Leakage Tests

Public Comment:

In a letter dated June 19, 2007, Progress Energy stated that the construction code requirement for a hydrostatic pressure test is not performed at a pressure that constitutes a challenge to the material. A hydrostatic test at this pressure does not contribute to safety any more than a pressure test at operating pressure, since both are conducted below the yield strength of the materials involved. Therefore, from a safety perspective, the hydrostatic test is not used to verify the structural integrity of the component or system being tested. It only proves leak tightness, which is also accomplished by a system leakage test. Hence, the end results of the hydrostatic test and the system leakage test are the same (leak tightness is verified). The additional nondestructive examination (NDE) being suggested by the NRC is of no value in verifying leak tightness, and thus is not related to the safety significance of not performing a hydrostatic test. The construction code NDE that is implemented by ASME Code, Section XI (IWA–4500, [''Examination and Testing'']), is all that is needed to verify any welding discontinuities that could affect the required joint efficiency for the required quality of the weld or brazed joint.

NRC Response:

Subarticle IWA–4540(a) of the 1995 Edition of the ASME BPV Code, Section XI, requires that after repair and replacement activities, a system hydrostatic pressure test be performed. The industry asserted that the hydrostatic pressure test creates a significant hardship. Subsequently, the ASME Committee developed Code Case N–416–3, ''Alternative Pressure Test Requirements for Welded Repairs or

Installation of Replacement Items by Welding Class 1, 2, and 3, Section XI, Division 1,'' to allow the use of system leakage testing and NDE to replace the hydrostatic test. Later, the technical provisions of Code Case N–416–3 were incorporated into the 2001 Edition of ASME Section XI, IWA–4540(a) and maintained through the 2002 Addenda. However, the NDE requirements of IWA–4540(a) were eliminated from the 2003 Addenda of the Code. Therefore, the NRC proposed a condition in § 50.55a(b)(2)(xx) requiring Section III NDE be performed following repair and replacement activities if a system leakage test was to be used in lieu of a hydrostatic test under the 2003 Addenda through the latest edition and addenda incorporated by reference in 10 CFR 50.55a(b)(2).

The piping systems in some vintage nuclear power plants were fabricated in accordance with American National Standards Institute (ANSI)/ASME B31.1, ''Power Piping,'' Code. ANSI/ASME B31.1 does not require a volumetric examination for those systems that would now be classified as ASME Class 2 and Class 3 piping systems during original construction. The current ASME BPV Code, Section XI (IWA–4500), allows licensees to use the NDE requirement of the original construction code as part of repair/replacement activities. Licensees of these vintage plants would not need to perform volumetric examinations after repair/replacement activities for piping classified as ASME Class 2 or Class 3 piping for which ANSI B31.1 does not require NDE. A system pressure test or hydrostatic pressure test does not verify the structural integrity of the repaired piping components. However, it is generally recognized in the industry that the volumetric examinations do provide significant information relative to the structural integrity of the repaired piping components. For those Class 2 and 3 piping systems that may not receive a volumetric examination for the life of the systems, the NRC is concerned that performance of a system leakage test without associated volumetric examinations would not adequately ensure high quality welds for the repaired or replaced component. Therefore, performance of a Section III volumetric examination in connection with a system leakage test in repair/replacement activities is necessary.

Public Comment:

In letter dated June 13, 2007, ASME stated that § 50.55a(b)(2)(xx) does not explicitly state that the NDE shall be performed after the system leakage test. As written, a licensee could comply with this requirement by performing the required NDE before the system leakage test. It is common practice to perform this NDE prior to the system leakage test.

NRC Response:

The NRC agrees with the commenter that an ASME BPV Code, Section III, 1992 Edition, volumetric examination performed as part of the repair/replacement activities prior to the system leakage test can be accepted to fulfill the NDE requirement of § 50.55a(b)(2)(xx)(B). The NRC's position has been, and continues to be, that the NDE performed as part of the repair/replacement activities satisfies the NDE provision of subarticle IWA–4540(a) of the 2002 Addenda of the ASME Code, Section XI.

Public Comment:

In letter dated June 19, 2007, Duke Energy stated that § 50.55a(b)(2)(xx) does not restrict a licensee from using the provisions of IWA–5213(a) in the 2003 Addenda of Section XI. Therefore, licensees may currently use the provisions of IWA–4540(a) in the 2003 Addenda without having to perform NDE in accordance with the requirements of IWA–4540(a)(2) of the 2002 Addenda after a system leakage test. Because the proposed change imposes additional requirements on licensees, the change should be evaluated to determine whether the change is a backfit.

NRC Response:

The NRC agrees with the commenter that the proposed requirement would result in a backfit for some licensees because this final rule would now require them to perform the required NDE in conjunction with the system leakage test in lieu of the hydrostatic test. In the October 1, 2004 (69 FR 58804), rulemaking of the 2003 Addenda of the ASME Code, the NRC neglected to incorporate the above NDE requirement in 10 CFR 50.55a(b)(2). However, the oversight needs to be corrected to ensure that during repair or replacement activities, the volumetric examination, in conjunction with a system leakage test, is performed to ensure structural integrity of the repaired or replaced piping system. The NRC discusses its backfit analysis for those licensees who may be affected by this rule in Section XI, Backfit Analysis, of this document.

5. 10 CFR 50.55a(b)(2)(xxi)(A)—Table IWB–2500–1 Examination Requirements

Public Comment:

In letter dated June 13, 2007, ASME; in letter dated June 19, 2007, Nuclear Energy Institute; and in letter dated June 19, 2007, Duke Energy disagree with modifying the limitation to require visual examination of Class 1 pressurizer and steam generator nozzle inner radius areas (ASME Code Case N–619) based on the previous reactor vessel nozzle inner radius limitation (ASME Code Case N–648–1). The commenters believe that the original limitation (to continue examination of the inner nozzle radius region) is unnecessary because of the following:

a. Inner nozzle radius regions in Class 1 systems have been examined for over 25 years without detecting cracking.

b. Structural integrity evaluations demonstrated a large tolerance for flaws.

c. Risk informed evaluations demonstrated that these nozzles have a large tolerance for flaws.

d. Risk informed evaluations demonstrated a low probability of failure under plant operating conditions.

e. There is a negligible change in risk if inspections are eliminated.

f. The term enhanced VT–1 is not defined in Code, and studies show that VT–1 character heights provide the same or better resolution than the 1 mil wire.

NRC Response:

The NRC disagrees with the commentors. The limitation on the visual examination in 10 CFR 50.55a(b)(2)(xxi)(A) did not differentiate between vessel components. The limitation is an alternative for volumetric examinations. The proposed change in the rule is to provide a visual examination criterion for determining fatigue crack flaw depth.

With respect to Item 5.a above, the commentor's information on 25 years of inservice ultrasonic examinations with no evidence of inner radius cracking on nozzles covered by the ASME Code cases is from an ASME document issued in 2001. At that time, ultrasonic examinations of pressurized-water reactors were normally performed from the inside surface, and were normally performed from the outside surface for boiling-water reactors. The NRC took issue with the effectiveness of ultrasonic examinations of the inner nozzle radius performed prior to performance-based qualification requirements. Performance-based examinations of all reactor pressure vessel (RPV) inner nozzle radii became mandatory on November 22, 2002. On July 26, 2006, the Electric Power Research Institute—Boiling Water Reactor Vessel & Internal Project (BWRVIP) provided a summary of results from inner nozzle radius performance-based examinations to support reducing RPV inner nozzle radii examination frequency by 75 percent.

By letter dated December 19, 2007, the NRC issued a safety evaluation

accepting BWRVIP–108 which reduced the inspection frequency of reactor nozzle-to-vessel shell welds and nozzle inner radius for BWRs (NRC ADAMS Accession Number ML073600374).

Operating conditions, such as fluctuating temperature, and fabricating conditions, such as work hardening can cause cracking of the inner nozzle radius. The ASME Code Cases (N–619 and N–648–1) are silent on conditions that are associated with cracking. These conditions may appear, or be affected, at various times during the operating cycle and may not be specific to vessel design. To detect degradation that appears during operations, NDE of inner nozzle radii are warranted.

Items 5b, 5c, and 5d pertained to risk-informed computations. Of the risk-informed piping programs reviewed to date, none of the programs contained risk data for Class 1 inner nozzle radius regions. The NRC did not find documentation of a review on the ASME 2001 article. Recently, the BWRVIP submitted to the NRC information on structural integrity and probability of failure and risk calculations concerning the inspection of inner nozzle radius regions to the NRC for review, which is ongoing.

With respect to Item 5f, the commentors referenced proprietary documents that were not made available to the NRC. Therefore, the NRC was unable to verify the data used to validate the adequacy of VT–1 and of character recognition for examinations of the inner radii regions. While characters are useful for distinguishing shapes, NUREG/CR 6860, ''An Assessment of Visual Testing,'' identified the crack open width dimension as a key variable for visually detecting cracks. In 10 CFR 50.55a(b)(2)(xxi)(A), the 1-mil width wire or crack is a measurable criterion for a postulated crack open width dimension. Therefore, the 1-mil width wire or crack requirement provides a minimum criteria for performance-based demonstrations of examination effectiveness.

The commentors stated that the term ''enhanced VT–1'' was not recognized by the ASME BPV Code. The term ''enhanced VT–1'' is being used by knowledgeable personnel for conversational expediency. The term ''enhanced VT–1'' is not used in the regulation. However, the use of the term ''enhanced magnification'' is used in the rule and may have been misleading. Therefore, the term ''enhanced'' will be removed from the regulation.

6. 10 CFR 50.55a(b)(2)(xxviii)—Evaluation Procedure and Acceptance Criteria for PWR Reactor Vessel Head Penetration Nozzles

Public Comment:

In a letter dated June 13, 2007, the ASME stated that this modification is being proposed because of a typographical error that the NRC says exists in ASME Section XI, Non-mandatory Appendix O, paragraph O–3220(b), equation S_R, = [l—0.82R]$^{-22}$, where the exponent -22 should be -2.2. ASME has identified this error and is publishing an ERRATA in July 2007 to correct this error retroactively to include the 2004 Edition of Section XI. As such, the proposed amendment to 10 CFR 50.55a(b)(2)(xxviii) is unnecessary.

NRC Response:

The NRC finds that ASME has published an ERRATA in July 2007 to correct the error in the S_R equation of paragraph O–3220(b) retroactively to include the 2004 Edition of ASME BPV Code, Section XI. The condition imposed in § 50.55a(b)(2)(xxviii) will not be necessary. Therefore, the NRC is not including § 50.55a(b)(2)(xxviii) in this final rule.

7. 10 CFR 50.55a(b)(3)(v)—Subsection ISTD

Public Comments:

By electronic mail dated June 11, 2007, George L. Fechter of Southern Nuclear Operating Company stated that Article IWF–5000, ''Inservice Inspection Requirements for Snubbers,'' was deleted from the 2006 Addenda of the ASME BPV Code, Section XI. With adequate verification of training provided to personnel performing visual exams, removal, testing, and reinstallation of snubbers per applicable Subsection ISTD, ''Inservice Testing of Dynamic Restraints (Snubbers) in Light-Water Reactor Power Plants,'' of the ASME OM Code and site licensing and maintenance criteria, it should be justifiable to allow performance of this type of visual examination versus a VT–3 visual examination. The knowledge obtained from such snubber-specific training and experience commonly exceeds the VT–3 visual examination criteria for snubbers. While IWA–2317 of the 2003 Addenda through 2004 Edition of the ASME BPV Code, Section XI, provides alternative VT–3 examination qualification requirements, the administrative burden incurred for the VT–3 certification may not be commensurate with any convenience provided by qualifying additional VT–3 personnel in this manner and, for reasons stated previously, does not provide higher quality examinations. The commenter requested that the permissive for allowing personnel trained specifically on snubber requirements per the applicable ISTD and site licensing and maintenance criteria be allowed to perform visual examinations for snubbers as an alternative to performing a VT–3 examination per the method described in IWA–2213 of the ASME BPV Code, Section XI.

NRC Response:

The commenter requested that the visual examination method required by § 50.55a(b)(3)(v) when performing examination and testing of snubbers be revised. The NRC declines to adopt the commenter's suggestion because the proposed rule did not suggest an amendment to the visual examination method in § 50.55a(b)(3)(v), and the NRC currently does not have a basis for supporting such a revision. There were no other public comments received on § 50.55a(b)(3)(v). Therefore, the NRC declines to adopt the commenter's suggestion. No change was made to § 50.55a(b)(3)(v) in the final rule as a result of the comment.

8. 10 CFR 50.55a(g)(6)(ii)(B)—Containment ISI Programs

Public Comments:

In a letter dated June 19, 2007, Duke Energy stated that when compliance with the requirements of the ASME BPV Code, Section XI, Subsections IWE and IWL was initially imposed by 10 CFR 50.55a, the requirements of § 50.55a(g)(6)(ii)(B) did not require licensees to submit ISI programs that were developed to comply with the Code during the expedited examination period (September 9, 1996, through September 9, 2001). However, when the initial expedited examination requirements were removed from § 50.55a after September 9, 2001, § 50.55a(g)(6)(ii)(B) was not deleted, leaving some licensees to believe that the NRC wanted to retain this provision. As a result, many licensees continue to believe that the NRC does not want updated containment ISI plans to be submitted. The NRC should take action to clarify whether it is the intent of 10 CFR 50.55a(g)(6)(ii)(B) that licensees be required to submit ISI plans for Class MC and Class CC components for all ISI plans developed after the expedited examination period.

NRC Response:

The NRC notes that the comment was not related to the proposed rule but to seek clarification on § 50.55a(g)(6)(ii)(B) in the current regulation. It is the NRC's position to retain the current § 50.55a(g)(6)(ii)(B) provision in the final rule. § 50.55a(g)(6)(ii)(B) states that

licensees do not have to submit to the NRC for approval of their containment in-service inspection (CISI) programs for Class MC and Class CC pressure retaining components that were developed to meet the requirements of the ASME BPV Code, Section XI, Subsections IWE and IWL, with specified modifications and limitations, under § 50.55a(g)(5)(i) and/or § 50.55a(g)(4). The provision requires that program elements and the required documentation of the developed plan must be maintained on site for audit. The provision applies to the CISI programs developed for each operating license for the initial 120-month inspection interval, including the CISI program revisions made by licensees of operating reactors during the September 1996 to September 2001 timeframe (i.e., expedited examination period) when the rule for ASME BPV Code, Section XI, compliance was initially imposed. Further, the provision applies to subsequent revisions to the CISI programs for successive 120-month inspection intervals under § 50.55a(g)(4)(ii). Therefore, as stated in § 50.55a(g)(6)(ii)(B), licensees do not have to submit to the NRC for approval of their CISI program that meets the ASME Code, Subsections IWE and IWL with specified modifications and limitations after the expedited examination period.

However, the NRC would like to clarify a situation which does not affect 50.55a(g)(6)(ii)(B) directly but which involves the use of Subsections IWE and IWL. If a licensee wishes to use Subsections IWE and IWL of later editions and addenda (i.e., later than the code of record for the ISI interval in question) of the ASME Code that are incorporated by reference in 10 CFR 50.55a(b) to be applied to the specific 10-year inservice inspection interval at its nuclear plant, the licensee needs to submit a request for the NRC's approval to use the later editions and addenda of the ASME Code. As stated in § 50.55a(g)(4)(iv), licensees are required to obtain NRC approval before using subsequent editions and addenda (or portions thereof) of the ASME BPV Code, Section XI, issued after their Code of Record for any 120-month inspection interval, if they choose to implement their ISI programs under § 50.55a(g)(4)(iv). The regulatory issue of using later editions and addenda of the Code has been previously clarified in NRC Regulatory Issue Summary 2004–12, ''Clarification on Use of Later Editions and Addenda to the ASME OM Code and Section XI.'' The intent of the commenter is to seek a clarification rather than a suggestion. Therefore, no change was made to § 50.55a(g)(6)(ii)(B) in the final rule as a result of this comment.

9. 10 CFR 50.55a(g)(6)(ii)(D)—Reactor Vessel Head Inspections

9a. Condition 10 CFR 50.55a(g)(6)(ii)(D)(*1*), Regarding the Implementation of Code Case N–729–1, as Amended, in Lieu of the First Revised NRC Order EA–03–009

Some commenters requested additional information on the implementation of these requirements, and asked the NRC about the process of changing the current NRC requirements for RPV closure head inspection requirements from the First Revised NRC Order EA–03–009, issued on February 20, 2004, (Order) to the requirements provided in the proposed rule language for 10 CFR 50.55a(g)(6)(ii)(D). (Comment Numbers 14, 19 and 20)

NRC Response:

To allow an orderly implementation of 10 CFR 50.55a(g)(6)(ii)(D), the NRC finds an implementation date of no later than December 31, 2008, for the requirements provided in this section is warranted. The requirements of NRC Order EA–03–009 will remain in effect until the provisions of 10 CFR 50.55a(g)(6)(ii)(D) are implemented. Once a licensee implements this requirement, the First Revised NRC Order EA–03–009 no longer applies to that licensee and under 10 CFR 50.55a(g)(6)(D)(1) shall be deemed to be withdrawn. All relaxations from the requirements of the Order will then no longer apply. If a licensee cannot meet the proposed requirements of 10 CFR 50.55a(g)(6)(ii)(D), then an alternative may be requested in accordance with 10 CFR 50.55a(a)(3)(i) or 10 CFR 50.55a(a)(3)(ii) or impracticality must be shown under 10 CFR 50.55a(g)(6)(i). To incorporate this implementation date, section 50.55a(g)(6)(ii)(D)(1) is revised to incorporate this implementation date.

9b. Condition 10 CFR 50.55a(g)(6)(ii)(D)(*2*), Regarding the Frequency of Reactor Vessel Head Inspection for ''Resistant'' Materials

Public Comment:

Some commenters disagreed with the proposed NRC position regarding the frequency of inspection of Item No. B4.40 of ASME Code Case N–729–1. The commenters made several remarks regarding previous and ongoing laboratory work with primary water stress corrosion cracking (PWSCC) ''resistant'' materials. Further, they noted operational experience with these materials had provided a sufficient basis to allow the inspection interval as stated in ASME Code Case N–729–1 without the NRC-proposed condition, as provided in proposed 10 CFR 50.55a(g)(6)(ii)(D)(*2*). One commenter, number 13, recommended extending the interval of inspection from every seven (7) years to every eight (8) years. (Comment Numbers 7, 9, 11, 13, 15, 16, 17, 19, 21, 22 and 23)

NRC Response:

During the writing of the proposed rule, the NRC disagreed with the NDE re-inspection frequency for ''resistant'' materials, in Item B4.40 of Table 1 of ASME Code Case N–729–1, of every ten (10) calendar years beyond the first 10 years. Therefore, the NRC proposed the condition 10 CFR 50.55a(g)(6)(ii)(D)(*2*) to limit the inspection frequency for ''resistant'' materials to every four refueling outages not to exceed seven (7) calendar years beyond the first 10 years. The proposed condition was based on two main factors: the availability of limited crack initiation and growth data on the Alloy 152/52 weld metal, and the accelerated susceptibility increases of replaced U.S. RPV heads versus the current operational experience data from international experience which demonstrates the resistance of Alloy 690/152/52 materials against PWSCC.

The available data on Alloy 152/52 weld metal resistance to PWSCC is an NRC concern. However, considering the comments on this issue and ongoing PWSCC research programs at Pacific Northwest National Laboratories and Argonne National Laboratory sponsored by the NRC Office of Nuclear Regulatory Research, NRC now finds that the current data is sufficient to support the re-inspection frequency of Item B4.40 of Table 1 of ASME Code Case N–729–1. NRC research on these materials is scheduled to continue through CY 2010. Accordingly, there should be enough time to address any items of concern regarding the resistance of these materials to PWSCC, if and when they develop, prior to becoming a significant safety issue.

The NRC acknowledges that current operating experience shows the resistance of Alloy 152/52 weld material to PWSCC to be superior to that of Alloy 82/182. However, RPV head temperatures at numerous international plants with replaced RPV upper heads are significantly less than U.S. upper-head temperatures. As PWSCC susceptibility in nickel based alloys like Alloy 600 has been shown to have a significant temperature dependence, NRC analysis of international head replacement data has shown that RPV heads in the U.S. will, with time, have

a greater susceptibility to PWSCC than a majority of the international plants in terms of accumulated, effective degradation years. Therefore, NRC has found that long-term operating experience is limited for components that contain Alloy 690/52/152 materials with indications and repairs of the scope and nature found in recently replaced U.S. RPV heads. Nevertheless, the NRC finds the operational experience is sufficient to support Code Case N–729–1 inspection frequencies while research on these materials continues.

The NRC agrees with the commenters and finds that there is sufficient Alloy 690/152/52 laboratory data and operational experience to allow the inspection frequency of Item B4.40 of Table 1 of ASME Code Case N–729–1 for RPV upper heads containing Alloy 690/152/52 components. Therefore, the proposed condition in 10 CFR 50.55a(g)(6)(ii)(D)(*2*) of the proposed rule will not be adopted.

9c. Condition 10 CFR 50.55a(g)(6)(ii)(D)(*3*), Regarding RPV Head Inspection Requirements and Frequencies

Public Comment:

Some commenters disagreed with the proposed NRC condition regarding the implementation of Note 6 of Table 1 of ASME Code Case N–729–1, which is stated in the 10 CFR 50.55a proposed rule language as 10 CFR 50.55a(g)(6)(ii)(D)(*3*). Several comments were concerned with the surface and volumetric examination coverage requirements and the surface examination requirement of the J-groove weld. The commenters requested to allow a UT ''leak-path'' examination in lieu of surface examination of the J-groove weld, and that a note be added to document that Appendix I of the Code Case may be used when approved as required in 10 CFR 50.55a(g)(6)(ii)(D)(6). In addition comments noted that the impact of Note 9 is not addressed in the elimination of the original Code Case N–729–1, Note 6. (Comment Numbers 7, 9, 11, 12, 13, 16, 17, 18, 19, 20, 22 and 23)

NRC Response:

In development of the proposed rule, the NRC did not find sufficient basis to allow an inspection regime of 3.0 re-inspection years (RIY) as described in Code Case N–729–1. Further, the NRC noted that due to the lack of a non-visual leak path assessment requirement in Code Case N–729–1, surface examination of all J-groove welds, commensurate with the volumetric examination of the penetration nozzle, should be required. Therefore the NRC proposed the condition in 10 CFR 50.55a(g)(6)(ii)(D)(*3*). The NRC found the inspection coverage as defined by Code Case N–729–1 using the ASME Code definition of ''essentially 100 percent'' inspection acceptable and therefore retained that language in the condition. No increase in inspection coverage is intended in the condition.

The NRC disagrees that the supporting probabilistic basis is adequate to support the 3.0 RIY option. A probabilistic fracture mechanics analysis was used as a basis for the 3.0 RIY inspection frequency option. NRC finds the supporting probabilistic model is based on an assumption of essentially no cracking in RPV head penetrations or welds with less than 4 effective years of degradation (EDY). The NRC considers this assumption to be non-conservative as used in the supporting probabilistic model. One U.S. plant at approximately 2 EDY identified cracking attributable to PWSCC. Many of the other near-cold-leg temperature RPV heads (cold-head plants) with susceptible material will not accumulate a total of 4 EDY through the next 15 to 30 years of operation. Development of flaws in these heads would cause adjustment of the probabilistic model output for all temperature ranges of RPV heads. Cracking attributed to PWSCC has been identified internationally in head penetration nozzles and associated welds at operating temperatures similar to U.S. cold-head plants. In the U.S., flaws in other components have been attributed to PWSCC in similar cold-leg temperature environments. The NRC finds that relatively few more instances of flaws attributed to PWSCC in the cold-head sub-population could significantly change the probabilistic model upon which the 3.0 RIY inspection frequency is justified. Therefore, NRC concludes that the supporting probabilistic model does not provide an adequate basis for extending the non-visual NDE inspection frequency to 3.0 RIY.

The conditional requirement for surface examinations of all J-groove welds is based on the need for a defense-in-depth method to ensure reactor coolant pressure boundary integrity through the J-groove weld. In Code Case N–729–1, the mechanism to identify a through-weld flaw in a J-groove weld is through the bare-metal visual exam using visual leak detection at the top of the RPV head. This method alone is not consistent with previous NRC inspection requirements under the Order which require a non-visual leak path assessment in conjunction with a bare-metal visual examination of the RPV head. The NRC finds that not performing a leak path assessment would limit the ability of an inspection plan to provide sufficient defense-in-depth to identify leakage through the J-groove weld. In the past, the NRC has accepted ultrasonic (UT) leak path assessments as an adequate inspection to provide this assurance. However, the UT leak path assessment was not included in Code Case N–729–1 because it had not been qualified through the ASME Code process. Surface examination of the J-groove weld was included in Code Case N–729–1, but only as an option to increase inspection frequency. Under the proposed condition, performance of a surface examination of the J-groove weld would have been the only option in terms of a leak path assessment.

The commenters stated that there are current plans to demonstrate the effectiveness of the ultrasonic leak path assessment technique for use within Code Case N–729–1. As the ultrasonic leak path assessment was a previously acceptable alternative to surface examination of the J-groove weld, due to physical constraints and radiological dose concerns in performing a surface exam in this area, the condition stated in 10 CFR 50.55a(g)(6)(ii)(D)(3) has been modified in this final rule.

As noted previously the Condition stated in 10 CFR 50.55a(g)(6)(ii)(D)(2) was removed. To address stakeholder comments about confusion between Notes 6 and 9 of Code Case N–729–1, condition in 10 CFR 50.55a(g)(6)(ii)(D)(*2*) of the proposed rule will simply state in the final rule that: ''Note 9 of ASME Code Case N–729–1 shall not be implemented.'' Note 9 of ASME Code Case N–729–1 provides the path for use of the 3.0 RIY inspection frequency interval. As previously stated, and as directed in the change to Note 6, the 3.0 RIY inspection frequency will not be included in the final rule.

9d. Condition 10 CFR 50.55a(g)(6)(ii)(D)(*4*), Regarding Qualification Requirements for Volumetric Inspection of RPV Head Penetration Nozzles

Public Comment:

Some commenters disagreed with the NRC-proposed condition regarding qualification requirements for volumetric examination as stated in Paragraph–2500 of ASME Code Case N–729–1. This proposed condition is stated in 10 CFR 50.55a(g)(6)(ii)(D)(*4*) of the proposed rule. (Comment Numbers 2, 7, 9, 11, 12, 13, 17, 19 and 22).

NRC Response:

The NRC notes that the condition stated in 10 CFR 50.55a(g)(6)(ii)(D)(*4*)

requires that reliable and effective ultrasonic examinations be performed to ensure adequate protection for public health and safety. Because of the emphasis placed on inspections of the penetrations, it is appropriate to incorporate requirements for a robust blind demonstration of the ability of personnel, procedures and equipment to reliably detect and characterize indications, consistent with the approach articulated in Appendix VIII of Section XI of the ASME BPV Code. As RPV head inspection frequencies transition to every 8 or 10 years due to replacement heads being installed, clearly defined performance demonstration requirements are necessary to ensure effective NDE. Due to the lack of current ASME BPV Code ultrasonic performance demonstration qualification requirements in Section XI, Appendix VIII, for RPV head penetrations, the NRC is adopting the conditions stated in 10 CFR 50.55a(g)(6)(ii)(D)(*4*) in the final rule.

With respect to the performance demonstration requirements of the ASME BPV Code, Section XI, Appendix VIII, have increased the effectiveness and reliability of ultrasonic examinations, most notably in the area of inspection of dissimilar metal welds. The development of a qualification program to meet the intermediate rigor requirements of ASME BPV Code, Section V, Article 14 would require an additional process beyond this rulemaking activity. As noted in paragraph 10 CFR 50.55a(g)(6)(ii)(C), implementation of performance demonstration requirements of Appendix VIII of Section XI of the ASME BPV Code is currently required by 10 CFR 50.55a for Supplements 1 through 8, 10 and 11. At this time, there is no ASME BPV Code supplement to address performance demonstration requirements for the qualification of ultrasonic inspection of Alloy 600 base material. The conditions identified in the paragraphs 10 CFR 50.55a(g)(6)(ii)(D)(4)(i) through 10 CFR 50.55a(g)(6)(ii)(D)(4)(iv) of the final rule are consistent with the performance demonstration requirements of Appendix VIII.

10 CFR 50.55a(g)(6)(ii)(D)(4), as stated in the proposed rule, is modified in the final rule to incorporate an implementation date of September 1, 2009, in order to address the comment which noted that additional time would be required to fully implement a formalized qualification program. The implementation date in the final rule addresses the time necessary for mockup production and qualification of sufficient numbers of NDE personnel. NRC determined that the implementation date of September 1, 2009, is adequate to address the current frequency of inspections and allow for enough qualified personnel resources to be available. During the interval between the effective date of the final rule and the implementation date, the NRC finds that the qualification requirements of Code Case N–729–1 will provide reasonable assurance of public health and safety.

With respect to the expansion of specimen qualification set applicability for a range of pipe diameters and thicknesses, 10 CFR 50.55a(g)(6)(ii)(D)(4)(i) was modified. The commenters noted that current demonstrations are performed on typical-sized control rod drive mechanism penetration nozzles. These demonstrations are used for a variety of similar-sized penetration nozzles (incore instrumentation, control rod drive and control element drive) and for smaller-size and thickness vent-line nozzles. The proposed draft condition specimen set applicability range was taken from Section XI, Appendix VIII, Supplement 10 requirements for dissimilar metal welds. A change to increase the range of applicability was made to 10 CFR 50.55a(g)(6)(ii)(D)(4)(i) to address stakeholder comments concerning the number of currently available mockup assemblies and the continued use of them for a slightly larger range of nozzles. The commenter noted that a small adjustment would allow the current mockups to be applicable for similar sized penetration nozzles which would fall just outside of the range stated in the proposed draft rule language. The NRC has reviewed the requested increased range of applicability and finds that the nozzles in question have enough through-wall thickness to provide similar response. As the weakness of ultrasonic examination is near field resolution, an expanded range for pipe diameters and thicknesses is allowed. The NRC finds that the range now stated in 10 CFR 50.55a(g)(6)(ii)(D)(4)(i) of the final rule is adequate to ensure representative specimen sets will be used in the qualification processes for both personnel and procedures over the entire range of penetration nozzles in the reactor vessel head, and address stakeholder concerns.

With respect to issues that recommended an adjustment for mockup specimens to include a range of blind demonstration mockups previously manufactured, 10 CFR 50.55a(g)(6)(ii)(D)(*4*)(ii) was modified for incorporation into the final rule. Specimen set flaw location requirements must meet several criteria to ensure the wide range of possible flaws identified through operational experience are captured for qualification of procedures, equipment, and personnel. The NRC has found that the commenters' flaw location range recommendations as stated in public comment viii of this section satisfactorily meet the intent of 10 CFR 50.55a(g)(6)(ii)(D)(4)(*ii*), which were established to ensure the entire range of flaws identified through operational experience are represented in the mockups. The NRC accepts the comments and, therefore, has modified the requirements of the condition stated in 10 CFR 50.55a(g)(6)(ii)(D)(4)(ii) for incorporation into the final rule.

With respect to asking for additional clarity when an essential variable may be changed outside of its demonstration range, 10 CFR 50.55a(g)(6)(ii)(D)(4)(iii) has been revised for incorporation into the final rule. The identification and definition of essential variables is necessary to ensure proper applicability of qualification standards to each particular inspection. 10 CFR 50.55a(g)(6)(ii)(D)(*4*)(*iii*) has been revised to include specific requirements if changes to essential variables occur. These requirements are the same as those required in Section XI, Appendix VIII general requirements of Subarticle VIII–2100 which are required for use under 10 CFR 50.55a(g)(6)(ii)(C) for implementation of performance demonstration requirements of Appendix VIII of Section XI of the ASME BPV Code.

With respect to the objection to the proposed generic qualification requirements for depth and length sizing qualification, noting that the requirements were currently unachievable for a generic procedure and were not necessary from a safety standpoint, 10 CFR 50.55a(g)(6)(ii)(D)(4)(*iv*) has been revised for incorporation into the final rule. Performance demonstration requirements provide depth sizing and length sizing root mean square (RMS) error tolerances to meet the acceptance standards of Table VIII–S10–1. The NRC reviewed the RMS error tolerances that the commenters recommended, and found the proposed RMS error tolerances of ⅛-inch (3 mm) in depth and ⅜-inch (10 mm) in length were adequate to ensure the validity of qualification. Therefore, for qualification of procedures, equipment, and personnel, the acceptance standard RMS error tolerance requirements were updated in 10 CFR 50.55a(g)(6)(ii)(D)(4)(iv) as incorporated into the final rule.

After review and assessment of the comments, the NRC is revising the proposed condition.

9e. Condition 10 CFR 50.55a(g)(6)(ii)(D)(5), Regarding Re-inspection Requirements Once a Plant has Identified PWSCC Flaws in Their RPV Head Penetration Nozzles or Associated Welds

Public Comment:

Some commenters disagreed with the NRC proposed condition 10 CFR 50.55a(g)(6)(ii)(D)(5). This condition requires a volumetric and/or surface re-inspection each outage once a plant identifies PWSCC in its vessel head penetration nozzles or welds. These commenters stated that flaw evaluation using the crack growth rates for PWSCC should provide an acceptable re-inspection interval for any flaws that were accepted by evaluation, and an exemption should be added to exclude the condition of ''craze cracking'' from mandating inspections at every outage. (Comment Numbers 7, 9, 11, 13, 17, and 19)

NRC Response:

The NRC disagrees with the commenters that flaw evaluation using the crack growth rates for PWSCC would provide an acceptable re-inspection interval. The proposed condition stated in 10 CFR 50.55a(g)(6)(ii)(D)(*5*) is based upon operating experience, and that several elements of PWSCC susceptibility (e.g., cold work, specific material properties, etc.) are not fully included in the susceptibility and probabilistic models of Code Case N–729–1. At least nine plants have identified flaws attributable to PWSCC in the refueling outage immediately following an inspection which identified the degradation mechanism. One plant identified at least four new flaws greater than 50 percent through-wall in one operational cycle of crack growth. The NRC finds that operational experience has shown that not all factors affecting the susceptibility of Alloy 600 materials are included within a standard flaw analysis model using the ASME BPV Code flaw analysis using the Alloy 600 crack growth rate identified in Subarticle IWB–3660 of Section XI of the ASME BPV Code.

The ASME BPV Code crack growth rate curve for Alloy 600 is a mean of the upper 50 percent of all acceptable Alloy 600 laboratory developed crack growth rate data points. It is not a bounding crack growth curve. Testing on field samples of Alloy 600 from the replaced RPV head of one plant by Argonne National Laboratories identified a crack growth rate which is at the upper bound (95th percentile) of the data used to develop the ASME curve. Additional factors may affect the initiation and growth of PWSCC in RPV upper head penetrations which were not fully analyzed in the laboratory tested material. These factors include the welding process, heats of material, and cold work applied in the field or during manufacturing conditions.

If a plant is found to have a flaw attributable to PWSCC, the flaw may have developed due to any one or a combination of the previously mentioned susceptibility factors. Therefore, the plant may not be fully bounded by the Code Case N–729–1 PWSCC model. The model provides appropriate inspection frequencies to ascertain when a plant develops PWSCC in its RPV upper head penetrations. However, to be conservative, the plant should perform volumetric and/or surface examinations for each outage to provide reasonable assurance of the integrity of the reactor coolant pressure boundary and prevent leakage once conditions for PWSCC have been verified through inspection results. As such, the NRC's proposed condition is that once a plant has identified a flaw attributable to PWSCC in a RPV head penetration or J-groove weld, that plant should perform visual and volumetric and/or surface examinations for each outage. This is consistent with NRC Order EA–03–009. Therefore, the proposed provisions in 10 CFR 50.55a(g)(6)(ii)(D)(5) are adopted without change in the final rule.

Indications of craze cracking have not previously been characterized as indications of PWSCC, and the NRC continues to find that indications of craze cracking are not PWSCC. Therefore, if a licensee determines that the indications in a vessel head penetration nozzle are a result of craze cracking alone, it would not be within the scope of proposed condition stated in 10 CFR 50.55a(g)(6)(ii)(D)(*5*).

9f. Condition 10 CFR 50.55a(g)(6)(ii)(D)(6), Regarding the Allowance of Licensee Deviation from the Requirements of ASME Code Case N–729–1 Without NRC Review and Approval Public Comments

Commenters disagreed with the NRC-proposed condition for use of Appendix I of ASME Code Case N–729–1, which is stated in 10 CFR 50.55a(g)(6)(ii)(D)(6). The comments concerned the following items:

- It is not the place of the ASME BPV Code to require utilities to get NRC approval on acceptable alternatives.
- NRC review of industry implementation of Appendix I of Code Case N–729–1 relief from the requirements of ASME Code Case N–729–1 is unnecessary.
- An exemption should be made for the need for NRC approval for use of Appendix I of Code Case N–729–1 by plants with new heads that use ''resistant'' material, until PWSCC is identified in those heads.

(Comment Numbers 7, 12, 13, 17 and 19)

NRC Response:

Appendix I of Code Case N–729–1 gives an analysis procedure that allows licensees to demonstrate the adequacy of an NDE zone of coverage less than that required by Code Case N–729–1. Implementation of this analysis procedure does not require NRC review and approval. In essence, Appendix I would allow licensees to self-approve relief from the requirements of Code Case N–729–1, essentially usurping NRC's authority under 10 CFR 50.55a to evaluate alternatives. NRC experience in processing relaxation requests to Order requirements has shown that there was significant variation in technical basis approaches between licensees in proposing alternatives to the Order. For example, probabilistic analyses were used in licensee relaxation requests from Order requirements that the NRC found to have insufficient basis and therefore did not approve as a basis for relaxation. However, under Appendix I of Code Case N–729–1, these relaxation requests could be found acceptable without NRC review. While the NRC agrees that the methods provided in Appendix I may be used as a basis to request relief from the ASME Code Case requirements, NRC review and approval shall be required for deviations from Code Case N–729–1 examination coverage requirements.

The NRC disagrees with the comment that excludes from this proposed condition new reactor vessel heads that use resistant material, until PWSCC is identified in these heads. The NRC notes that the flaw evaluation tools and susceptibility of new PWSCC resistant materials have not been established or approved by the NRC. As such, implementation of Appendix I of Code Case N–729–1 would be open to significant variation of interpretation. Therefore, the provisions in 10 CFR 50.55a(g)(6)(ii)(D)(*6*) are adopted without change in the final rule.

9g. General Public Comments on 10 CFR 50.55a(g)(6)(ii)(D)

Two commenters (comment numbers 8 and 11) stated that Public Law, PL 104–113, mandates that national consensus standards be used by Federal agencies where applicable. This

includes the use of ASME codes and standards. Because the consensus process used to develop the Code Case specifically considered the NRC comments (i.e., additional conditions being added with this rule change) and found them to be without technical merit, one commenter considered it inappropriate for NRC to impose additional conditions on the use of Code Case N–729–1. Therefore, the commenter requested that the additional conditions be removed from the rule language. Alternatively, if the additional conditions would not be removed from the rule language, the technical justifications for the need for these additional conditions should be included in the supplemental information for the final rule.

NRC Response:

NRC review of ASME Code Case N–729–1 concludes that its basis implies that leakage is acceptable as long as ejection and structural integrity due to wastage isn't likely to occur. All of the RPV head penetration and associated weld examinations required by the NRC to date, have been based on assuring an extremely low probability of leakage from these components as well as assuring their structural integrity. NRC's position for reactor pressure vessel upper head inspections is that if an active degradation mechanism is present, any long term inspection plan should be based on assuring an extremely low probability of abnormal leakage rather than allowing leakage and demonstrating the acceptability of its consequences. Consistent with this position, the NRC sets the conditions regarding the use of ASME Code Case N–729–1 in order to incorporate its use, by reference, into the Code of Federal Regulations. The technical justifications for the need for these conditions are included in the public comment section of this rulemaking activity.

10. 10 CFR 50.55a(g)(6)(ii)(E)—Reactor Coolant Pressure Boundary Visual Inspections

Public Comment:

In a letter dated June 19, 2007, Progress Energy stated that the ASME has not amended Section XI of the BPV Code to include Code Case N–722. Therefore, requiring licensees to comply with a Code Case that has not been incorporated into the ASME Code sets a precedence of mandatory implementation of a Code Case which has not been subject to ASME public review and comment during its development.

NRC Response:

The NRC recognizes that the ASME has not amended Section XI of the ASME BPV Code to include Code Case N–722 and that during development code cases may be subjected to different ASME public review and comment than Section XI. The NRC is incorporating Code Case N–722 in the rule to expedite the implementation of Code Case N–722. The NRC is requiring expedited implementation of Code Case N–722 because the NRC concluded from a safety perspective that these inspections are necessary to ensure the integrity of the Alloy 600/82/182 components. The NRC has previously incorporated code cases in 10 CFR 50.55a prior to the ASME taking action to include the code cases in the ASME Code. The NRC declines to adopt commenter's suggestion. No change was made to the final rule as a result of this comment.

Public Comment:

In a letter dated June 22, 2007, Southern Nuclear Operating Company stated that the NRC does not reference the industry efforts, especially those made through the Electric Power Research Institute's Materials and Reliability Program (MRP) to address the issue of bare-metal visual examination of Alloy 600 welds. Every PWR in the United States has agreed to the implementation of MRP–139, which requires an augmented program to perform bare-metal visual examinations on the large diameter Alloy-600 welds on a frequency that is almost identical to the schedule mandated in ASME Code Case N–722. Typically, utilities are given the option to assess each code case and determine if that code case should be adopted for use. By mandating the use of Code Case N–722, the NRC is, in effect, writing their own code and deviating from using guidance from an international consensus standard body (ASME Code Committees, of which the NRC is a participant and voting member). The NRC and the industry have been working on this issue, and industry programs are in place to cover these examinations. Additional time should be provided to allow the MRP and ASME to develop the necessary enhancements.

NRC Response:

The MRP–139 report referenced by the commenter is an industry guidance document which includes guidance on bare-metal visual examinations of Alloy 82/182 butt welds. Because MRP–139 is written as inspection guidance, MRP–139 is not suitable to be incorporated by reference in 10 CFR 50.55a. In addition, the MRP has not issued inspection guidelines for partial-penetration welded components with Alloy 600/82/182 materials. The NRC finds Code Case N–722 with conditions is suitable to be incorporated by reference in the final rule. Given the safety significance of these inspections, the NRC concluded that the reactor coolant pressure boundary visual inspections of 10 CFR 50.55a(g)(6)(ii)(E) are necessary to ensure that the appropriate safety-significant visual inspections are performed.

The NRC recognizes that the ASME is an international, consensus standard body, and that the ASME Code provides necessary requirements for the design and inspection of nuclear power plant components. Therefore, the NRC has incorporated by reference in 10 CFR 50.55a certain editions and addenda of Section III and XI of the ASME BPV Code. However, in certain cases, such as when an active degradation mechanism is affecting the integrity of pressure boundary components, the NRC needs to take regulatory actions to ensure safety and protect the public health and safety. As mandated by the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, the NRC has the statutory authority and responsibility to enact regulations through the rulemaking process as necessary to ensure safety.

The NRC declines to adopt commenter's suggestion. No change was made to the final rule as a result of this comment.

Public Comment:

In a letter dated June 20, 2007, Arizona Public Service Company stated that 10 CFR 50.55a(g)(6)(ii)(E)(1) exempts Alloy 600/82/182 materials that have been mitigated by weld overlay or stress improvement from the inspection requirements of Code Case N–722. The commenter recommended that nozzles and penetrations that have been mitigated by half-nozzle replacement or Alloy 690/52/152 weld pads should also be exempted from the requirements of Code Case N–722.

NRC Response:

Code Case N–722, as implemented by 10 CFR 50.55a(g)(6)(ii)(E), applies to examination of *pressure retaining* partial or full penetration welds in Class 1 components fabricated with Alloy 600/82/182 material in PWRs. The requirements of Code Case N–722, as implemented by 10 CFR 50.55a(g)(6)(ii)(E), applies to nozzles and penetrations that have Alloy 600/82/182 materials that form the pressure boundary. This requirement is clear from the title and wording of Code Case N–722. Note the clarification in the preceding sentences applies even though Alloy 600/82/182 materials may not be entirely removed from the component, provided that *pressure retaining* penetrations and welds no

longer contain Alloy 600, Alloy 82, or Alloy 182 materials. In addition, 10 CFR 50.55a(g)(6)(ii)(E)(1) is revised in the final rule.

Public Comment:

In a letter dated June 20, 2007, Jack Spanner of Electric Power Research Institute stated that with respect to 10 CFR 50.55a(g)(6)(ii)(E)(2), it should be sufficient to demonstrate the ability to characterize location, orientation and length of cracks with calibration blocks or mockups containing a notch in the axial and circumferential orientation.

NRC Response:

The requirements of paragraph (g)(6)(ii)(E)(2) state only that additional actions must be taken to characterize the location, orientation, and length of cracks. The comment does not provide sufficient information for the NRC to respond regarding the adequacy of calibration blocks or mockups to meet these requirements. Therefore, the NRC declines to adopt the commenter's suggestion. No change was made to the final rule as a result of this comment.

Public Comment:

In a letter dated June 20, 2007, Arizona Public Service Company recommended that the term ''Non-visual NDE'' used in paragraph (g)(6)(ii)(E)(3) be changed to ''surface'' or ''volumetric'' examination.

NRC Response:

The ASME Code, Section XI, paragraph IWA–2200 states that ''three types of examinations used during inservice inspection are defined as visual, surface, and volumetric.'' It is clear from this Code definition that non-visual examination refers to either surface or volumetric examination. The NRC declines to adopt the commenter's suggestion. No change was made to the final rule as a result of this comment.

Public Comment:

In a letter dated June 20, 2007, Arizona Public Service Company stated that paragraph (g)(6)(ii)(E)(4) imposes the rule of Appendix VIII of the ASME Code, Section XI, to components where qualification may not have been performed (possibly due to size and thickness). Therefore, the commenter recommended that because the component causing the implementation of this paragraph is leaking, the NDE method and techniques utilized to characterize the leak in paragraph (g)(6)(ii)(E)(2) should be sufficient qualification.

NRC Response:

The commentor believes that paragraph (g)(6)(ii)(E)(4) is unnecessary and suggests that the NDE method and techniques utilized to characterize the leak in (g)(6)(ii)(E)(2) be sufficient [NDE] qualification. The NRC disagrees with the commentor's suggestion. Paragraph (g)(6)(ii)(E)(2) requires that when leakage is detected in a component, additional action (e.g., non-visual examination) must be performed to characterize the location, orientation, and length of cracks that cause the leakage. Paragraph (g)(6)(ii)(E)(2) does not provide specific qualification for NDE. The intent of Paragraph (g)(6)(ii)(E)(2) is to provide a general requirement for non-visual examinations to be performed should leakage be detected. The NDE method and techniques utilized to characterize the leak in paragraph (g)(6)(ii)(E)(2) are visual examinations which cannot characterize flaw sizes.

Paragraph (g)(6)(ii)(E)(4) requires that the ultrasonic examination be performed using the appropriate supplement of Section XI, Appendix VIII of the ASME Code. The intent of paragraph (g)(6)(ii)(E)(4) is to provide specific NDE qualification requirements for ultrasonic examination for Alloy 600/82/182 butt welds so that the requirements of paragraphs (g)(6)(ii)(E)(2) or (g)(6)(ii)(E)(3) can be satisfied.

This position is consistent with other provisions of 10 CFR 50.55a in that ultrasonic examination of butt welds must be qualified in accordance with the appropriate supplement of Section XI, Appendix VIII of the ASME Code. Therefore, the NRC declines to adopt the commenter's suggestion. No change was made to the final rule as a result of this comment.

Public Comment:

After the public comment period closed, the NRC received an additional comment from Florida Power and Light Company via a phone call on July 8, 2008, regarding the schedule for implementing the initial inspections under Code Case N–722 as required by 10 CFR 50.55a(g)(6)(ii)(E), *Reactor coolant pressure boundary visual inspections.* The commenter pointed out that Code Case N–722 specifies frequency of examination for each part to be examined but does not specify when the initial inspections shall be performed. The commenter recommended that the schedule for the initial inspections be specified in the rule.

NRC Response:

The NRC agrees with the commenter that the schedule for the initial inspections is not specified in Code Case N–722 nor is it specified in a NRC-proposed condition applicable to this Code Case. Code Case N–722 contains three different inspection intervals: inspections to be conducted every other refueling outage, each refueling outage, and once per interval. The NRC has specified the following initial inspection requirements in a new footnote to the new paragraph.

For inspections to be conducted every refueling outage and inspections conducted every other refueling outage, the initial inspection shall be performed at the next refueling outage after January 1, 2009. For inspections to be conducted once per interval, the inspections shall begin in the interval in effect on January 1, 2009, and shall be prorated over the remaining periods and refueling outages in this interval. For inspections to be conducted once per interval, if the current interval ends prior to January 1, 2009, the initial inspection shall be performed at the first refueling outage after January 1, 2009. These initial inspection schedules are believed to be reasonable since, in general, the inspections are straightforward to perform and licensees have been aware for over two years of the NRC intent to incorporate Code Case N–722 in the regulations during which to plan the inspections.

III. Section-by-Section Analysis

ASME BPV Code, Section III

10 CFR 50.55a(b)(1)

The final rule revises § 50.55a(b)(1) in the current regulation to incorporate by reference the 2004 Edition of Section III, Division 1, of the ASME BPV Code into 10 CFR 50.55a. This paragraph requires new applicants for a nuclear power plant who submit an application for a construction permit under 10 CFR part 50 after the effective date of this rule use the 2004 Edition of Section III, Division 1 of the ASME BPV Code for the design and construction of the reactor coolant pressure boundary and Quality Group B and C components. This paragraph also requires that existing modifications and limitations for weld leg dimensions, independence of inspection and subsection NH in §§ 50.55a(b)(1)(ii), 50.55a(b)(1)(v), and 50.55a(b)(1)(vi), respectively, apply to the 2004 Edition of Section III, Division 1 of the ASME BPV Code. The NRC is not adopting any additional limitations with respect to the 2004 Edition of Section III.

10 CFR 50.55a(b)(1)(iii)—Seismic Design of Piping

As discussed in Section II of this document, applicants or licensees may use Articles NB–3200, NB–3600, NC–3600, and ND–3600 for seismic design of piping up to and including the 1993 Addenda, subject to the limitation specified in paragraph (b)(1)(ii) of this section. Applicants or licensees may not use these Articles for seismic design of

piping in the 1994 Addenda through the latest edition and addenda incorporated by reference in paragraph (b)(1) of this section. The final rule revises 50.55a(b)(1)(iii) in the current 10 CFR 50.55a to clarify the current limitation regarding seismic design. Current § 50.55a(b)(1)(iii) states that applicants or licensees may use Articles NB–3200, NB–3600, NC–3600, and ND–3600 for seismic design. However, the rules in Article NB–3200 of Section III of the ASME BPV Code contain criteria applicable to the seismic design of components other than piping systems. The NRC revises § 50.55a(b)(1)(iii) to clarify that the limitation only applies to the seismic design of piping.

ASME BPV Code, Section XI

The final rule revises § 50.55a(b)(2) to incorporate by reference the 2004 Edition of the ASME BPV Code, Section XI, Division 1, subject to the modifications and limitations discussed in the following paragraphs:

10 CFR 50.55a(b)(2)(xi)—Class 1 Piping

Paragraph 50.55a(b)(2)(xi) states that ''licensees may not apply IWB–1220, ''Components Exempt from Examination,'' of Section XI, 1989 Addenda through the latest edition and addenda incorporated by reference in paragraph (b)(2) of this section, and shall apply IWB–1220, 1989 Edition.'' Subarticle IWB–1220 of the 1989 Edition of the ASME BPV Code, Section XI, exempts certain components (such as small bore piping) from the volumetric and surface examinations. However, welds or portions of welds that are inaccessible due to being encased in concrete, buried underground, located inside a penetration, or encapsulated by guard pipe were included in components for exemption from examination and incorporated in the edition and addenda of the ASME BPV Code, Section XI, after the 1989 Edition. The NRC previously did not agree with the incorporation of these types of welds for exemption from examination because the NRC believed that these welds should be examined to monitor their structural integrity. Therefore, the NRC prohibited the use of 1989 addenda through the latest editions and addenda of the ASME BPV Code, Section XI, regarding the application of IWB–1220 in 10 CFR 50.55a(b)(2)(xi) (64 FR 51394; September 22, 1999).

The revision to the regulation removes 10 CFR 50.55a(b)(2)(xi), thereby permitting the use of ASME BPV Code, Section XI, IWB–1220 of any edition or addenda of ASME BPV Code, Section XI, incorporated by reference in 10 CFR 50.55a. The condition placed upon Section XI, IWB–1220 in 10 CFR 50.55a(b)(2)(xi) is no longer necessary because of the following:

1. Licensees can select an alternate weld for inspection that does not have limitations.

2. Licensees have committed to perform augmented inspections of break exclusion zone (BEZ) welds which are located in inaccessible areas such as containment penetrations or encapsulated by guard pipe to the extent practical under the BEZ criteria.

3. Boiling water reactor (BWR) licensees have followed the provisions of Generic Letter 88–01, ''NRC Position on IGSCC [intergranular stress corrosion cracking] in BWR Austenitic Stainless Steel Piping,'' and the associated NRC report, NUREG–0313, ''Technical Report on Material Selection and Process Guidelines for BWR Coolant Pressure Boundary Piping,'' and the provisions of the BEZ criteria (Reference: Branch Technical Position MEB 3–1 attached to Standard Review Plan 3.6.2) apply to the examination of the welds such as those that are located inside containment penetrations or encapsulated by guard pipe.

4. Licensees of plants whose construction permits were issued after January 1, 1971, are required to have ASME Class 1 and Class 2 components designed and provided with access to enable the performance of ISIs, and the removal of the limitation on the use of IWB–1220(d) would not permit welds to be located in reactor coolant pressure boundary components (including Class 1 components permitted to be designed to Class 2 rules) that are encased in concrete, buried underground, located inside a penetration, or encapsulated by guard pipe.

10 CFR 50.55a(b)(2)(xiii)—Mechanical Clamping Devices

Paragraph 50.55a(b)(2)(xiii) is removed from the regulation. This paragraph permitted licensees to use the provisions of Code Case N–523–1, ''Mechanical Clamping Devices for Class 2 and 3 Piping.'' Instead, Code Case N–523–2 provides updated requirements to those of Code Case N–523–1, has been accepted in Regulatory Guide (RG) 1.147, Revision 15, ''Inservice Inspection Code Case Acceptability, ASME BPV Code, Section XI, Division 1,'' and Revision 15 is incorporated by reference into 10 CFR 50.55a(g)(4)(i) and 10 CFR 50.55a(g)(4)(ii). Therefore, 10 CFR 50.55a(b)(2)(xiii) no longer serves any useful purpose and is removed.

10 CFR 50.55a(b)(2)(xv)—Appendix VIII Specimen Set and Qualification Requirements

Paragraph 50.55a(b)(2)(xv) in the current 10 CFR 50.55a regulation specifies provisions that may be used to modify implementation of Appendix VIII of Section XI, 1995 Edition through the 2001 Edition of the ASME BPV Code with regard to ultrasonic examinations of piping systems. The change specifies that licensees who have been approved by the NRC to use later editions and addenda than the 2001 Edition of the ASME BPV Code shall use the 2001 Edition of Appendix VIII. Licensees cannot use Appendix VIII to the editions and addenda of the ASME Code Section XI that are later than the Appendix VIII to 2001 Edition.

10 CFR 50.55a(b)(2)(xx)—System Leakage Tests

10 CFR 50.55a(b)(2)(xx) in the current 50.55a regulation requires certain hold time when performing system leakage tests in accordance with IWA–5213(a) of the 1997 through 2002 addenda of the ASME Code Section XI. Since the publication of the current 10 CFR 50.55a, the NRC has noticed an NDE issue that involves the system leakage tests when performed in accordance with IWA–4540(a). 10 CFR 50.55a(b)(2)(xx) is revised to address the NDE issue. The requirements in current 10 CFR 50.55a(b)(2)(xx) are not changed. The revised 10 CFR 50.55a(b)(2)(xx) provides new requirements. The revision requires, as part of repair and replacement activities (by welding or brazing under the 2003 Addenda through the latest edition and addenda incorporated by reference in 10 CFR 50.55a(b)(2)), that NDE be performed in accordance with subarticle IWA–4540(a)(2) of the 2002 Addenda of the ASME BPV Code, Section XI, after a system leakage test is performed per subarticle IWA–4540(a)(2) of the 2003 Addenda through later editions and addenda of the ASME BPV Code, Section XI. This provision requires that after repair or replacement activities (1) the NDE method and acceptance criteria of the 1992 Edition, or later, of Section III be performed and met prior to returning the system to service, and that (2) a system leakage test be performed in accordance with IWA–5000 prior to, or as part of, returning the system to service.

10 CFR 50.55a(b)(2)(xxi)(A)—Table IWB–2500–1 Examination Requirements

Paragraph 10 CFR 50.55a(b)(2)(xxi)(A) in the current 50.55a regulation allows the use of the visual examination with

enhanced magnification in lieu of an ultrasonic examination. Because of the latest development in visual examination requirements in the ASME Code, Paragraph 10 CFR 50.55a(b)(2)(xxi)(A) is revised to be consistent with the condition for Code Case N–648–1, ''Alternative Requirements for Inner Radius Examination of Class I Reactor Vessel Nozzles, Section XI, Division 1.'' in RG 1.147, Revision 15, which requires the assumption of a limiting flaw aspect ratio when using the allowable flaw length criteria in Table IWB–3512–1 during an enhanced visual examination. The revision states ''The provisions of Table IWB–2500–1, Examination Category B–D, Full Penetration Welded Nozzles in Vessels, Items B3.40 and B3.60 (Inspection Program A) and Items B3.120 and B3.140 (Inspection Program B) in the 1998 Edition must be applied when using the 1999 Addenda through the latest edition and addenda incorporated by reference in paragraph (b)(2) of this section. A visual examination with magnification that has a resolution sensitivity to detect a 1-mil width wire or crack, utilizing the allowable flaw length criteria in Table IWB–3512–1, 1997 Addenda through the latest edition and addenda incorporated by reference in paragraph (b)(2) of this section, with a limiting assumption on the flaw aspect ratio (i.e., a/l=0.5), may be performed instead of an ultrasonic examination.'' The limitation on the flaw aspect ratio is needed because visual examination cannot determine the depth of cracks. A visual examination requirement may be applied only when a limiting flaw aspect ratio of 0.5 is assumed. A flaw aspect ratio of less than 0.5 would not be conservative. As shown in Table IWB–3512–1, there are no flaw aspect ratios higher than 0.5. Therefore, assuming a flaw aspect ratio of 0.5 is appropriate.

10 CFR 50.55a(g)(6)(ii)(A)—Augmented Examination of Reactor Vessel

Paragraph 50.55a(g)(6)(ii)(A) is removed from the regulation. This paragraph required a one-time, augmented ISI program for those systems and components the Commission determined that added assurance of structural reliability was necessary. Paragraph 50.55a(g)(6)(ii)(A) was incorporated in the regulations in 1992 to require all current licensees to conduct a one-time, expedited examination of reactor vessel shell welds. Examination requirements were specified in item B1.10, ''Shell Welds,'' of Examination Category B–A, ''Pressure Retaining Welds in Reactor Vessel,'' in Table IWB–2500–1, ''Examination Categories'' of the 1989 Edition of the ASME BPV Code, Section XI, Division 1. Because all the licensees have completed the subject augmented examination of the reactor vessel shell welds, the requirements in 10 CFR 50.55a(g)(6)(ii)(A) and associated subparagraphs are no longer needed. Future licensees need not conduct this augmented examination, because new Code provisions should adequately address the degradation to which the augmented examination was directed.

10 CFR 50.55a(g)(6)(ii)(D)—Reactor Vessel Head Inspections

On September 30, 2002, the Davis-Besse Lessons Learned Task Force (LLTF) issued a report containing 51 recommendations for actions that the NRC should take to address areas that the LLTF considered contributors to the Davis-Besse event. On November 26, 2002, the senior NRC management review team endorsed all but two of the task force's recommendations. One endorsed high-priority recommendation was the following:

> The NRC should encourage American Society of Mechanical Engineers Boiler and Pressure Vessel Code (ASME Code) requirement changes for bare metal inspections of nickel based alloy nozzles for which the code does not require the removal of insulation for inspections. The NRC should also encourage ASME Code requirement changes for the conduct of non-visual non-destructive examination (NDE) inspections of VHP [vessel head penetration] nozzles. Alternatively, the NRC should revise Title 10 Code of Federal Regulations (10 CFR) Part 50.55a to address these areas.

Section XI of the ASME Code, which is incorporated by reference into NRC regulations by 10 CFR 50.55a, ''Codes and standards,'' currently specifies that inspections of the reactor pressure vessel (RPV) head need only include a visual check for leakage on the insulated surface or surrounding area. Experience has shown that these inspections may not detect small amounts of leakage from an RPV head penetration with cracks extending through the nozzle or the J-groove weld. Such leakage can create an environment that leads to circumferential cracks in RPV head penetration nozzles and/or corrosion of the RPV head.

The NRC issued Order EA–03–009, ''Interim Inspection Requirements for Reactor Pressure Vessel Heads at Pressurized Water Reactors,'' dated February 11, 2003, which modified licensees' licenses to require specific inspections of the reactor pressure vessel head and associated penetration nozzles at pressurized water reactors. In September 2003, industry representatives through the Materials Reliability Program provided industry input to support industry alternative inspection programs through various public meetings and MRP–95, ''Materials Reliability Program: Generic Evaluation of Examination Coverage Requirements for the Reactor Pressure VHP Nozzles, (ML032740424).'' In response to internal review and stakeholder input, the NRC issued First Revised Order EA–03–009, February 20, 2004 (Order), which refined the inspection requirements of NRC Order EA–03–009 by taking into account lessons learned from inspections performed from February 2003 to January 2004.

On July 7, 2004, after an assessment which concluded that ASME Code requirement revisions would not be complete in 2004, the NRC issued a Commission Paper (SECY–04–0115) requesting Commission approval of a rulemaking plan to incorporate into 10 CFR 50.55a the RPV head and associated head penetration inspection requirements contained in the Order.

The Commission, in a Staff Requirements Memorandum, dated August 6, 2004, approved an alternative option to evaluate the RPV inspection requirements of an upcoming ASME Code Case or revision of the ASME Code for incorporation into 10 CFR 50.55a.

In March 2006, the ASME approved Code Case N–729–1, Alternative Examination Requirements for PWR Reactor Vessel Upper Heads With Nozzles Having Pressure-Retaining Partial-Penetration Welds, which provides an alternative long-term inspection program for RPV upper heads. The NRC participated in ASME Code development and approval of N–729–1. The NRC has reviewed the final version of Code Case N–729–1, and with conditions, finds it provides reasonable assurance of public health and safety from failure of the reactor pressure vessel upper head and penetration nozzles. Therefore, the NRC is pursuing this rulemaking activity to incorporate by reference the inspection requirements of Code Case N–729–1, as conditioned, into 10 CFR 50.55a.

The experience of the Davis-Besse RPV head degradation and the discovery of leaks and nozzle cracking at other plants over the past seven years reinforce the need for effective regulatory required inspections of the RPV head and penetration nozzles. The absence of an effective inspection regime could, over time, result in unacceptable circumferential cracks in RPV head penetration nozzles or in the degradation of the RPV head by

corrosion from leaks in the reactor coolant pressure boundary. These degradation mechanisms increase the probability of a loss of reactor coolant pressure boundary event through ejection of a nozzle or other rupture of the RPV head. The result of this rulemaking would be the establishment of inspection requirements that result in an extremely low probability of abnormal leakage, of rapidly propagating failure and of gross rupture of the reactor pressure vessel head and penetration nozzles.

The Code Case N–729–1 inspection plan for RPV upper heads with Alloy 600/182/82 penetration nozzles requires periodic bare metal visual (BMV) examinations and periodic nonvisual examinations using ultrasonic testing (UT), eddy current testing (ET), or dye penetrant testing of the penetration nozzle base metal. BMV examinations are performed in order to identify primary coolant leakage based on the presence of boric acid deposit accumulations. Nonvisual examinations are performed in order to identify flaws which could lead to leakage or failure of the penetration nozzle.

These same inspections are required to be performed for RPV upper heads with Alloy 690/152/52 penetration nozzles, but the frequency of inspection is greatly reduced. This reduction is due to the enhanced resistance these materials have demonstrated against PWSCC.

Paragraph 50.55a(g)(6)(ii)(D) is added to the regulation to require licensees to comply with the reactor vessel head inspection requirements of ASME Code Case N–729–1, subject to conditions, by December 31, 2008. Compliance to Code Case N–729–1; with conditions regarding inspection frequency, examination coverage, qualification of ultrasonic examination, and re-inspection intervals; would be equivalent to complying with NRC Order EA–03–009, dated February 11, 2003, and First Revised Order EA–03–009, dated February 20, 2004. Thus, once a licensee implements Code Case N–729–1, with conditions, the First Revised NRC Order EA–03–009 no longer applies to that licensee and is deemed to be withdrawn. This allows licensees to transfer from the Order requirements to the requirements of 10 CFR 50.55a(g)(6)(ii)(D).

Footnote 10 to 10 CFR 50.55a(b)(2) is removed because Code Case N–729–1, as conditioned, replaces the requirements of the NRC Order EA–03–009 cited in that footnote.

10 CFR 50.55a(g)(6)(ii)(E)—Reactor Coolant Pressure Boundary Visual Inspections

A new paragraph 10 CFR 50.55a(g)(6)(ii)(E) is added to require all current and future licensees to apply ASME Section XI, Code Case N–722, with conditions. Code Case N–722 provides requirements for bare metal visual examination of full and partial penetration welds in Class 1 components that are fabricated with Alloy 600/82/182 material. Surfaces required to be examined by the bare metal visual method have to be unobstructed by debris, paint, insulation or other sources of interference. 10 CFR 50.55a(g)(6)(ii)(E) requires the use of N–722 plus four additional conditions. Condition (1) requires that PWR licensees implement N–722 except for those welds that have been mitigated by weld overlay or stress improvements. Condition (2) requires that if leakage occurs from a component, licensees take additional actions to characterize the orientation of the crack that caused the leakage. Condition (3) requires that if the crack that leads to leakage is circumferentially oriented and potentially the result of primary water stress-corrosion cracking, licensees perform non-visual sample inspections of the population of the components. Condition (4) requires that the ultrasonic examinations of the butt welds as required by Condition (2) and (3) follow the appropriate supplement of Appendix VIII of the ASME Code, Section XI.

The visual examinations specified in Code Case N–722 are additional requirements beyond the current NDE requirements of Table IWB–2500–1 in the ASME Code, Section XI. The application of ASME Code Case N–722 is necessary because current inspections are inadequate and the safety consequences can be significant should the components fail due to cracking. NRC's determination that existing inspections of the reactor coolant pressure boundary (RCPB) are inadequate is based upon the degradation of RPV head penetration nozzles at Davis-Besse and the discovery of leaks and cracking at other plants, such as Oconee and Arkansas Nuclear One Unit 1. The absence of an effective inspection regime could, over time, result in unacceptable circumferential cracking or the degradation of reactor coolant system (RCS) components by corrosion from leaks in the RCPB. These degradation mechanisms increase the probability of a loss-of-coolant accident. The inspections required by the 2004 Edition of the ASME BPV Code, Section XI, are inadequate because Examination Category B–P, ''All Pressure Retaining Components,'' of Table IWB–2500–1, only requires a visual examination of the reactor vessel with the insulation in place during a system leakage test each refueling outage. Visual inspections may not detect gradual leakage as confirmed by industry experience.

Both the NRC and the industry took short-term actions to address PWSCC in the RCPB because of limitations of the ASME BPV Code inspection programs to address PWSCC in the RCPB. In addition to issuing bulletins, the NRC issued Order EA–03–009 and First Revised Order EA–03–009 to quickly establish interim inspection requirements for RPV upper heads at PWRs. However, these measures addressed the issue only temporarily, and for specific locations. The industry also responded with compensatory measures (e.g., by specifying that a one-time, bare-metal visual inspection of all RCS nickel-based alloy components and weld locations be performed within two refueling outages). However, these were only short-term measures.

The ASME also took actions to address PWSCC. An ASME task group concluded that more rigorous inspections than those currently provided by the ASME BPV Code were needed in the areas most susceptible to PWSCC. The task group developed ASME Code Case N–722 to enhance the current ASME BPV Code requirements for detection of leakage and corrosion in the components considered to be susceptible to PWSCC. The Code Case specifies bare-metal visual examinations for all RCS pressure retaining components fabricated from Alloy 600/82/182 materials. This Code Case was approved by ASME in July 2005 and was published in Supplement 6 to the 2004 Code Cases. However, the Code Case is not mandatory for industry to follow. The Code Case improves upon existing ASME BPV Code inspection requirements, because it specifies *bare metal* visual examinations.

Beyond the bare metal visual inspection requirements and frequencies of inspections, ASME Code Case N–722 is relatively limited in scope. The NRC is requiring non-visual inspection for items where leakage is identified in Class 1 components. The additional non-visual NDE is required to determine whether circumferential cracking is present in the flawed material and if multiple circumferential flaws have initiated. Leakage detected by visual examination only identifies that a flaw exists, and is not able to characterize flaw orientations and

locations. The NRC is requiring NDE scope expansion once a circumferential flaw is identified in these components because once flaws are found, favorable conditions must be assumed to exist for additional flaws to develop in other similar components in similar environments. Circumferential cracking has occurred, and is a particularly serious safety concern because it could, if undetected by NDE, lead to a complete severing of the piping and a loss-of-coolant accident.

Therefore, the NRC is requiring the application of Code Case N–722 with additional conditions. The conditions require additional NDE when leakage is detected and expansion of the sample size if a circumferential PWSCC flaw is found. Operating experience has shown that bare metal visual inspections alone are not sufficient and that NDE is necessary in order to detect cracking. The requirements for the schedule for conducting the initial inspections are specified in a new footnote to the new paragraph.

ASME OM Code

The revision to § 50.55a(b)(3) incorporates by reference the 2004 Edition of the ASME OM Code subject to no new modifications or limitations.

Paragraph (b)(3)(iv)(D) is revised to be less specific with regard to paragraph references in subsection ISTC [Inservice testing, the Code for Operation and Maintenance of Nuclear Power Plants] to eliminate inconsistencies in paragraph numbering. This is considered to be an editorial change that does not affect the intent or implementation of the current modification regarding the discontinuance of Appendix II condition monitoring programs of check valves.

IV. Generic Aging Lessons Learned Report

In September 2005, the NRC issued, ''Generic Aging Lessons Learned (GALL) Report,'' NUREG–1801, Volumes 1 and 2, Revision 1, for applicants to use in preparing their license renewal applications. The GALL report evaluates existing programs and documents the bases for determining when existing programs are adequate without change or augmentation for license renewal. Section XI, Division 1, of the ASME BPV Code is one of the existing programs in the GALL report that is evaluated as an aging management program (AMP) for license renewal. Subsections IWB, IWC, IWD, IWE, IWF, and IWL of the 2001 Edition up to and including the 2003 Addenda of Section XI of the ASME BPV Code for ISI were evaluated in the GALL report and the conclusions in the GALL report are valid for this edition and addenda.

In the GALL report, Sections XI.M1, ''ASME Section XI Inservice Inspection, Subsections IWB, IWC, and IWD,'' XI.S1, ''ASME Section XI, Subsection IWE,'' XI.S2, ''ASME Section XI, Subsection IWL,'' and XI.S3, ''ASME Section XI, Subsection IWF,'' describe the evaluation and technical bases for determining the adequacy of Subsections IWB, IWC, IWD, IWE, IWF, and IWL, respectively. In addition, many other AMPs in the GALL report rely in part, but to a lesser degree, on the requirements in the ASME BPV Code, Section XI.

The NRC has evaluated Subsections IWB, IWC, IWD, IWE, IWF, and IWL of Section XI of the ASME BPV Code, 2004 Edition as part of the § 50.55a amendment process to incorporate by reference the 2004 Edition of the ASME BPV Code to determine if the conclusions of the GALL report also apply to AMPs that rely upon the ASME BPV Code edition that is incorporated by reference into § 50.55a by this final rule. The NRC finds that the 2004 Edition of Sections III and XI of the ASME BPV Code, as modified and limited in this final rule, are acceptable and the conclusions of the GALL report remain valid. Accordingly, an applicant may use Subsections IWB, IWC, IWD, IWE, IWF, and IWL of Section XI of the 2004 Edition of the ASME BPV Code, as modified and limited in this final rule, as acceptable alternatives to the requirements of the 2001 Edition up to and including the 2003 Addenda of the ASME BPV Code, Section XI, referenced in the GALL AMPs in its plant-specific license renewal application. Similarly, a licensee approved for license renewal that relied on the GALL AMPs may use Subsections IWB, IWC, IWD, IWE, IWF, and IWL of Section XI of the 2004 Edition of the ASME BPV Code as acceptable alternatives to the AMPs described in the GALL report.

However, a licensee must assess and follow applicable NRC requirements with regard to changes to its licensing basis.

The GALL report includes AMPs that are based on the requirements in the 2001 Edition through the 2003 Addenda of Section XI of the ASME BPV Code but in which the AMPs may recommend additional augmentation of the Code requirements in order to achieve aging management for license renewal. The technical or regulatory aspects of the AMPs, for which augmentation is recommended, also apply when implementing the 2004 Edition of Section XI of the ASME BPV Code. A license renewal applicant may either augment its AMPs in these areas, as described in the GALL report, or propose alternatives (exceptions) for the NRC to review as part of a plant-specific program element aspect of its AMP.

The NRC currently provides license renewal guidance for augmented inspections of PWR upper reactor vessel heads and their penetration nozzles in GALL AMP XI.M11A, ''Nickel-Alloy Penetration Nozzles Welded to the Upper Reactor Vessel Closure Heads of Pressurized Water Reactors (PWR Only).'' The current program elements and aging management recommendations in GALL AMP XI.M11A are based on the augmented inspection requirements in the First Revised Order EA–03–009, ''Issuance of First Revised Order (EA–03–009) Establishing Interim Inspection Requirements for Reactor Pressure Vessel Heads at Pressurized Water Reactors.'' For licensees that have been granted a renewed operating license and have committed to an AMP that is based on both conformance with GALL AMP XI.M11A and compliance with First Revised Order EA–03–009, the licensees may update the program elements of their AMP to reflect compliance with the new requirements in 10 CFR 50.55a(g)(6)(ii)(D) and (E) without having to identify an exception to GALL AMP XI.M11A. For new or current license renewal applicants, they may reference conformance with GALL AMP XI.M11A and compliance with the new augmented inspection requirements in paragraphs 10 CFR 50.55a(g)(6)(ii)(D) and (E) without the need for taking an exception to the program elements in GALL AMP XI.M11A.

V. Availability of Documents

Document	Public document room	Electronic reading room	ADAMS No.
ASME BPV Code*			N/A
ASME OM Code*			N/A
ASME Code Case N–722	X		ML070170676
ASME Code Case N–729–1	X		ML070170679

Document	Public document room	Electronic reading room	ADAMS No.
Regulatory Analysis	X		ML081550317
EA–03–009	X	X	ML030380470
First Revised NRC Order EA–03–009	X	X	ML040220181
GALL Report, NUREG–1801		X	ML012060392
			ML012060514
			ML012060521
			ML012060539
Staff Requirements Memorandum dated September 10, 1999			ML003751061
RG 1.147, Revision 15	X	X	ML072070419

*Available on the ASME Web site.

VI. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Public Law 104–113, requires agencies to use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or is otherwise impractical. Public Law 104–113 requires Federal agencies to use industry consensus standards to the extent practical; it does not require Federal agencies to incorporate by reference a standard into the regulations in its entirety. The law does not prohibit an agency from generally adopting a voluntary consensus standard while taking exception to specific portions of the standard if those provisions are deemed to be ''inconsistent with applicable law or otherwise impractical.'' Furthermore, taking specific exceptions furthers the Congressional intent of Federal reliance on voluntary consensus standards because it allows the adoption of substantial portions of consensus standards without the need to reject the standards in their entirety because of limited provisions which are not acceptable to the agency.

The NRC is amending its regulations to incorporate by reference a more recent edition of Sections III and XI of the ASME BPV Code and ASME OM Code, for construction, ISI, and inservice testing of nuclear power plant components. ASME BPV and OM Codes are national consensus standards developed by participants with broad and varied interests, in which all interested parties (including the NRC and licensees of nuclear power plants) participate. In an SRM dated September 10, 1999, the Commission indicated its intent that a rulemaking identify all parts of an adopted voluntary consensus standard that are not adopted, and to justify not adopting such parts. The parts of the ASME BPV Code and OM Code that the NRC is not adopting; or is adopting with conditions, modifications, or limitations under which the Codes may be applied; are identified in Section III of this document and in the regulatory analysis. If the NRC did not conditionally accept ASME Code Editions and Addenda, it would disapprove these items entirely. The effect would be that licensees would need to submit a larger number of relief requests which would be an unnecessary additional burden for both the licensee and the NRC. This situation fits the definition of ''impractical'' under Public Law 104–113. For these reasons, the treatment of ASME Code Editions and Addenda, and conditions, modifications, or limitations placed on them in this final rule do not conflict with any policy on agency use of consensus standards specified in Office of Management and Budget Circular A–119.

VII. Finding of No Significant Environmental Impact: Environmental Assessment

This action is in accordance with NRC's policy to incorporate by reference in 10 CFR 50.55a new editions and addenda of the ASME BPV and OM Codes to provide updated rules for constructing and inspecting components and testing pumps, valves, and dynamic restraints (snubbers) in light-water nuclear power plants. ASME Codes are national voluntary consensus standards and are required by the National Technology Transfer and Advancement Act of 1995, Public Law 104–113, to be used by government agencies unless the use of such a standard is inconsistent with applicable law or otherwise impractical.

NEPA requires Federal government agencies to study the impacts of their ''major Federal actions significantly affecting the quality of the human environment'' and prepare detailed statements on the environmental impacts of the proposed action and alternatives to the proposed action (42 U.S.C. 4332(C); NEPA § 102(C)).

The Commission has determined under NEPA, as amended, and the Commission's regulations in subpart A of 10 CFR part 51, that this rule, is not a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required.

The rulemaking will not significantly increase the probability or consequences of accidents; no changes are being made in the types of effluents that may be released off-site; there is no increase in occupational exposure; and there is no significant increase in public radiation exposure. Some of the changes concerning ensuring the integrity of the RCPB would reduce the probability of accidents and radiological impacts on the public. The rulemaking does not involve non-radiological plant effluents and has no other environmental impact. Therefore, no significant non-radiological impacts are associated with the action.

The determination of this environmental assessment is that there will be no significant off-site impact to the public from this action.

VIII. Paperwork Reduction Act Statement

This rule increases the burden on licensees to report requirements and maintain records for examination requirements in ASME BPV Code Section XI IWB–2500(b). The public burden for this information collection is estimated to average 3 hours every ten years per request. Because the burden for this information collection is insignificant, OMB clearance is not required. Existing requirements were approved by the OMB, approval number 3150–0011.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

IX. Regulatory Analysis

The NRC has prepared a regulatory analysis on this final rule. The analysis is available for review in the NRC's PDR, located in One White Flint North, 11555 Rockville Pike, Rockville, Maryland. In addition, copies of the regulatory analysis may be obtained as indicated in Section V of this document.

X. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this amendment will not, if promulgated, have a significant economic impact on a substantial number of small entities. This amendment affects the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of small entities set forth in the Regulatory Flexibility Act or the Small Business Size Standards set forth in regulations issued by the Small Business Administration at 13 CFR part 121.

XI. Backfit Analysis

The NRC's Backfit Rule in 10 CFR 50.109 states that the Commission shall require the backfitting of a facility only when it finds the action to be justified under specific standards stated in the rule. Section 50.109(a)(1) defines backfitting as the modification of or addition to systems, structures, components, or design of a facility; or the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission rules or the imposition of a regulatory staff position interpreting the Commission rules that is either new or different from a previously applicable NRC position after issuance of the construction permit or the operating license or the design approval.

Section 50.55a requires nuclear power plant licensees to construct ASME BPV Code Class 1, 2, and 3 components in accordance with the rules provided in Section III, Division 1, of the ASME BPV Code; inspect Class 1, 2, 3, Class MC, and Class CC components in accordance with the rules provided in Section XI, Division 1, of the ASME BPV Code; and test Class 1, 2, and 3 pumps, valves, and dynamic restraints (snubbers) in accordance with the rules provided in the ASME OM Code. This rule incorporates by reference the 2004 Edition of Section III, Division 1, of the ASME BPV Code; Section XI, Division 1, of the ASME BPV Code; and the ASME OM Code.

Incorporation by reference of more recent editions and addenda of Section III, Division 1, of the ASME BPV Code does not affect a plant that has received a construction permit or an operating license or a design that has been approved, because the edition and addenda to be used in constructing a plant are, by rule, determined on the basis of the date of the construction permit, and are not changed thereafter, except voluntarily by the licensee. Thus, incorporation by reference of a more recent edition and addenda of Section III, Division 1, does not constitute a ''backfitting'' as defined in § 50.109(a)(1).

Incorporation by reference of more recent editions and addenda of Section XI, Division 1, of the ASME BPV Code and the ASME OM Code affect the ISI and IST programs of operating reactors. However, the Backfit Rule does not apply to incorporation by reference of later editions and addenda of the ASME BPV Code (Section XI) and OM Code. The NRC's policy has been to incorporate later versions of the ASME Codes into its regulations. This practice is codified in § 50.55a which requires licensees to revise their ISI and IST programs every 120 months to the latest edition and addenda of Section XI of the ASME BPV Code and the ASME OM Code incorporated by reference in § 50.55a that is in effect 12 months prior to the start of a new 120-month ISI and IST interval.

Other circumstances where the NRC does not apply the Backfit Rule to the incorporation by reference of a later Code into the regulations are as follows:

(1) When the NRC takes exception to a later ASME BPV Code or OM Code provision but merely retains the current existing requirement, prohibits the use of the later Code provision, limits the use of the later Code provision, or supplements the provisions in a later Code, the Backfit Rule does not apply because the NRC is not imposing new requirements. However, the NRC explains any such exceptions to the Code in the Statement of Considerations and regulatory analysis for the rule;

(2) When an NRC exception relaxes an existing ASME BPV Code or OM code provision but does not prohibit a licensee from using the existing Code provision, the Backfit Rule does not apply because the NRC is not imposing new requirements and;

(3) Modifications and limitations imposed during previous routine updates of § 50.55a have established a precedent for determining which modifications or limitations are backfits or require a backfit analysis (e.g., final rule dated October 1, 2004 (69 FR 58804). The application of the backfit requirements to modifications and limitations in the current rule are consistent with the application of backfit requirements to modifications and limitations in previous rules.

There are some circumstances in which the incorporation by reference of a later ASME BPV Code or OM Code into 10 CFR 50.55a introduces a backfit. In these cases, the NRC performs a backfit analysis or documented evaluation in accordance with § 50.109. These include the following:

(1) When the NRC incorporates by reference a later provision of the ASME BPV Code or OM Code that takes a substantially different direction from the existing requirements, the action is treated as a backfit, *e.g.*, 61 FR 41303 (August 8, 1996).

(2) When the NRC requires implementation of later ASME BPV Code or OM Code provision on an expedited basis, the action is treated as a backfit. This applies when implementation is required sooner than it would be required if the NRC simply incorporated the Code by reference without any expedited language, *e.g.*, 64 FR 51370 (September 22, 1999).

(3) When the NRC takes an exception to an ASME BPV Code or OM Code provision and imposes a requirement that is substantially different from the existing requirement as well as substantially different than the later Code, *e.g.*, 67 FR 60529 (September 26, 2002).

The backfitting discussion for the revisions to 10 CFR 50.55a is set forth as follows:

1. Remove 10 CFR 50.55a(b)(2)(xi) Concerning Components Exempt From Examination

This change removes an existing limitation on the use of 1989 Addenda and later editions and addenda of the ASME BPV Code, Section XI, regarding the use of subarticle IWB–1220 in the examinations of welds in the inaccessible locations. Licensees have either committed to perform augmented inspection or have followed the provisions of Generic Letter 88–01 and NUREG–0313 in examining the inaccessible welds. Therefore, this change is not considered as a backfit under 10 CFR 50.109.

2. Remove 10 CFR 50.55a(b)(2)(xiii) Concerning the Provisions of Code Case N–523–1, ''Mechanical Clamping Devices for Class 2 and 3 Piping''

10 CFR 50.55a(b)(2)(xiii) states that ''Licensees may use the provisions of

Code Case N–523–1, ''Mechanical Clamping Devices for Class 2 and 3 Piping.'' 10 CFR 50.55a(b)(2)(xiii) does not require, but provides an option for, licensees to use Code Case N–523–1. In 2000, ASME updated Code Case N–523–1 to N–523–2 without changes to technical requirements. Code Case N–523–2, ''Mechanical Clamping Devices for Class 2 and 3 Piping,'' has been accepted in RG 1.147, Revision 15, which is incorporated by reference into 10 CFR 50.55a(g)(4)(i) and 10 CFR 50.55a(g)(4)(ii). Code Case N–523–2 may be used by licensees without requesting authorization. According to RG 1.147, Revision 15, Code Case N–523–1 has been superseded by Code Case N–523–2. It is stated in RG 1.147, Revision 15, that ''After the ASME annuls a Code Case and the NRC amends 10 CFR 50.55a and this guide [RG 1.147], licensees may not implement that Code Case for the first time. However, a licensee who implemented the Code Case prior to annulment may continue to use that Code Case through the end of the present ISI interval. An annulled Code Case cannot be used in the subsequent ISI interval unless implemented as an approved alternative under 10 CFR 50.55a(a)(3) * * *'' The NRC has not annulled or prohibited the use of Code Case N–523–1 in RG 1.147, Revision 15. Licensees who have used Code Case N–523–1 may continue to use it. The NRC is not imposing new requirements by removing 10 CFR 50.55a(b)(2)(xiii). Therefore, the removal of 10 CFR 50.55a(b)(2)(xiii) is not a backfit.

3. Modify 10 CFR 50.55a(b)(2)(xv) To Implement Appendix VIII of Section XI, the 1995 Edition Through the 2004 Edition of the ASME BPV Code

This change updates the edition of the ASME BPV Code in 10 CFR 50.55a(b)(2)(xv). Therefore, is not considered as a backfit under 10 CFR 50.109.

4. Add 10 CFR 50.55a(b)(2)(xx) to Require NDE Provision in IWA–4540(a)(2) of the 2002 Addenda of Section XI When Performing System Leakage Tests

Subarticle IWA–4540(a)(2) of the 2002 Addenda of the ASME BPV Code, Section XI, requires an NDE be performed in combination with a system leakage test during repair/replacement activities. Subarticle IWA–4540(a)(2) of the 2003 Addenda through later editions and addenda of the ASME BPV Code, Section XI, does not specify an NDE after a system leakage test. The addition requires, as part of repair and replacement activities, that a NDE be performed per IWA–4540(a)(2) of the 2002 Addenda of the ASME BPV Code, Section XI, after a system leakage test is performed per subarticle IWA–4540(a)(2) of the 2003 Addenda through later editions and addenda of the ASME BPV Code, Section XI.

As stated previously, when the NRC takes exception to a later ASME BPV Code provision but merely retains the existing requirement, prohibits the use of the later Code provision, limits the use of the later Code provision, or supplements the provisions in a later Code, the Backfit Rule does not apply because the NRC is not imposing new requirements. The addition retains the system leakage test requirement in IWA–4540(a)(2) of the 2003 Addenda through the later editions and addenda of the ASME BPV Code, Section XI, but supplements it with the NDE of IWA–4540(a)(2) of the 2002 Addenda of the Code. However, the NRC has approved a few licensees to use IWA–4540(a) of the 2003 addenda of the ASME Code, Section XI without imposing the NDE requirement in conjunction with the system leakage tests. Therefore, some licensees may currently use the provisions of IWA–4540(a) in the 2003 Addenda without having to perform NDE. Because 10 CFR 50.55a(b)(2)(xx) imposes NDE requirements after these licensees are allowed not to perform the required NDE, the additional NDE requirements in 10 CFR 50.55a(b)(2)(xx) may be considered backftting under 10 CFR 50.109(a)(1) for these licensees. However, the NRC believes that the NDE requirements are necessary for compliance with Commission requirements and/or license provisions. Therefore, a backfit analysis need not be prepared under the ''compliance'' exception in 10 CFR 50.109(a)(4)(i). The following discussion constitutes the documented evaluation to support the invocation of the compliance exception.

A system leakage test does not verify fully the structural integrity of the repaired or replaced piping components. NDE examinations will most likely detect whether cracks exist and thereby ensure the structural integrity of the repaired or replaced components. The general design criteria (GDC) for nuclear power plants (Appendix A to 10 CFR part 50) provide the regulatory requirements for the NRC's assessment of the potential for, and consequences of, degradation of the reactor coolant pressure boundary (RCPB). The applicable GDCs include GDC 14 and GDC 31. GDC 14 specifies that the RCPB be designed, fabricated, erected, and tested so as to have an extremely low probability of abnormal leakage, of rapidly propagating failure, and of gross rupture. GDC 31 specifies that the probability of rapidly propagating fracture of the RCPB be minimized.

The nuclear plants that were licensed before GDC were incorporated in 10 CFR Part 50 also would not be in compliance with their licensing basis which requires maintenance of the structural and leakage integrity of the RCPB.

Cracking of primary system piping as a result of the repair or replacement is a non-compliance with GDC 14 because the RCPB must be fabricated and tested as to have an extremely low probability of abnormal leakage, of rapidly propagating failure and of gross rupture. Without an NDE, there would be no confirmation as to whether cracks exist in the component. The volumetric examination (NDE) will verify the structural integrity of the component as part of the repair or replacement activity. If a crack, especially a circumferential crack in a pipe, is not detected, it would increase the probability of rapidly propagating fracture of RCPB (i.e., a non-compliance with GDC 31). Therefore, cracking, if undetected, would be detrimental to the structural and leakage integrity of the RCPB. The NDE requirements in conjunction with system leakage testing of 50.55a(b)(2)(xx) will ensure the structural and leakage integrity of the RCPB, assuring an extremely low probability of abnormal leakage, and minimizing the probability of a rapidly propagating fracture of the RCPB.

The NRC concludes that those licensees who use subsection IWA–4540(a) of the 2003 addenda of the ASME Code, Section XI will not be in compliance with GDC and their licensing basis for the structural integrity of piping components throughout the term of their license (including any renewal periods) absent the imposition of NDE examination in conjunction with the system leakage testing. The NRC concludes, therefore, that 10 CFR 50.55a(b)(2)(xx) is a compliance backfit under 10 CFR 50.109(a)(4)(i).

5. Revise 10 CFR 50.55a(b)(2)(xxi) To Be Consistent With the NRC's Imposed Condition for Code Case N–648–1 in RG 1.147, Revision 15

This change aligns the conditions imposed on visual examinations in 10 CFR 50.55a(b)(2)(xxi) with the conditions imposed on Code Case N–648–1 in RG 1.147, Revision 15. The imposed conditions do not represent a new NRC position. Therefore, this change is not considered as a backfit under 10 CFR 50.109.

6. Remove 10 CFR 50.55a(g)(6)(ii)(A) and Associated Subparagraphs on the Augmented Examination of the Reactor Vessel

This change removes a one-time examination requirement which has been completed by all current licensees, and, therefore, is not considered as a backfit under 10 CFR 50.109. Future licensees will be subject to other Code provisions that preclude the need for this one-time examination.

7. Add Paragraph (D) to 10 CFR 50.55a(g)(6)(ii)—Reactor Vessel Head Inspections

The current regulatory requirements for RPV head inspection are set forth in the First Revised NRC Order EA–03–009, dated February 20, 2004. Order EA–03–009 was issued to ensure that boric acid corrosion of RPV heads and PWSCC of RPV head penetration nozzles and welds, which could result in failure of the RPV head or head penetrations, are promptly identified and corrected. The NRC determined that Order EA–03–009 constitutes backfitting as defined in 10 CFR 50.109(a)(1), but that the actions mandated by the Order were necessary for reasonable assurance of adequate protection to public health and safety. Therefore, a backfit analysis was not prepared for the Order in accordance with § 50.109(a)(4)(ii). Section III of the Order also stated, in part, ''It is appropriate and necessary to the protection of public health and safety to establish a clear regulatory framework, pending the incorporation of revised inspection requirements into 10 CFR 50.55a.''

This rule revokes Order EA–03–009 as the current regulatory requirement for RPV head inspection, and replace it with ASME Code Case N–729–1, as modified in 10 CFR 50.55a per 10 CFR 50.55a(g)(6)(ii)(D)(1). All current licensees will be required to implement ASME Code Case N–729–1, with the limitations and conditions denoted by this rule. The Code Case provisions on RPV head and head penetration inspections are somewhat different from those established in Order EA–03–009, and will require a licensee to modify its procedures for inspection of its RPV head and head penetrations to meet the requirements on the Code Case. Accordingly, NRC imposition of the Code Case may be deemed to be a modification of the procedures to operate a facility resulting from the imposition of new regulation, and as such, this rulemaking provision may be considered backfitting under 10 CFR 50.109(a)(1). The NRC continues to find that RPV head inspections are necessary for adequate protection of public health and safety, and that the requirements of Code Case N–729–1, with the limitations and conditions denoted by this rule, represents an acceptable approach, developed by a voluntary consensus standards organization, for performing future RPV head and head penetration inspections. The NRC believes, in keeping with the intent of the National Technology Transfer and Advancement Act, that it is preferable to endorse a voluntary consensus standard such as Code Case N–729–1, with the limitations and conditions denoted by this rule, rather than continuing to rely upon the requirements embodied in Order EA–03–009. Therefore, the NRC concludes that NRC approval of Code Case N–729–1, with the limitations and conditions denoted by this rule, by incorporation by reference of that Code Case into § 50.55a, constitutes a redefinition of the requirements necessary to provide reasonable assurance of adequate protection of public health and safety. Therefore, a backfit analysis was not prepared for this portion of the final rule, in accordance with § 50.109(a)(4)(iii).

8. Add Paragraph (E) to 10 CFR 50.55a(g)(6)(ii)—Reactor Coolant Pressure Boundary Visual Inspections

The NRC is adding 10 CFR 50.55a(g)(6)(ii)(E) to require augmented inspections of Class 1 components fabricated with Alloy 600/82/182 materials. The augmented inspection will consist of the requirements in Code Case N–722 which specifies ISI for PWR ASME Code Class 1 components containing materials susceptible to PWSCC and NRC imposed conditions to the Code Case to require additional NDE when leakage is detected and expansion of the inspection sample size if a circumferential PWSCC flaw is detected. The intent of conditioning the Code Case is to identify leakage of and prevent unacceptable cracks and corrosion in Class 1 components, which are part of RCPB. The requirements may be considered backfitting under 10 CFR 50.109(a)(1). However, the NRC believes that the requirements are necessary for compliance with Commission requirements and/or license provisions. Therefore a backfit analysis need not be prepared under the ''compliance'' exception in 10 CFR 50.109(a)(4)(i). The following discussion constitutes the documented evaluation to support the invocation of the compliance exception.

Failure of the RCPB could result in unacceptable challenges to reactor safety systems that, combined with other failures, could lead to the release of radioactivity to the environment. Based on PWSCC experience in PWRs, the NRC concludes that there is a reasonable likelihood that PWR licensees would not be in compliance with appropriate regulatory requirements and current licensing basis with respect to structural integrity and leak-tightness throughout the term of the operating license, should PWSCC occur in their plants. The general design criteria (GDC) for nuclear power plants (Appendix A to 10 CFR part 50) provide the regulatory requirements for the NRC's assessment of the potential for, and consequences of, degradation of the RCPB. The applicable GDCs include GDC 14 and GDC 31. GDC 14 specifies that the RCPB be designed, fabricated, erected, and tested so as to have an extremely low probability of abnormal leakage, of rapidly propagating failure, and of gross rupture. GDC 31 specifies that the probability of rapidly propagating fracture of the RCPB be minimized.

The nuclear plants that were licensed before GDC were incorporated in 10 CFR Part 50 also would not be in compliance with their licensing basis which requires maintenance of the structural and leakage integrity of the RCPB.

Leakage of primary system coolant as a result of PWSCC in Alloy 600/82/182 material is a non-compliance with GDC 14 and 31 and licensing bases because there have been many cases of leakage as a result of PWSCC of Alloy 600/82/182 material in PWRs. Therefore, leakage as a result of PWSCC has not been shown to be of extremely low probability (i.e., a non-compliance with GDC 14). In addition, the operating experience has shown that the crack growth rate of PWSCC in Alloy 600/82/182 material can be rapid. If PWSCC is not detected and removed, a crack, especially a circumferential crack in a pipe, would increase the probability of rapidly propagating fracture of RCPB (i.e., a non-compliance with GDC 31). Therefore, PWSCC in Alloy 600/82/182 material, if undetected, would be detrimental to the structural and leakage integrity of the RCPB. Code Case N–722 with conditions provides inspection requirements to detect PWSCC so that licensees can repair or replace the affected components, thereby maintaining the structural and leakage integrity of the RCPB, assuring an extremely low probability of abnormal leakage, and minimizing the probability of a rapidly propagating fracture of the RCPB.

The NRC concludes that licensees will not be in compliance with GDC and their licensing basis for structural and leakage integrity of Class 1 components

that were made of Alloy 600/82/182 material throughout the term of their license (including any renewal periods) absent the imposition of Code Case N–722 with conditions. The NRC concludes, therefore, that 10 CFR 50.55a(g)(6)(ii)(E) is a compliance backfit under 10 CFR 50.109(a)(4)(i).

XII. Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 50.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

■ 1. The authority citation for part 50 continues to read as follows:

Authority: Secs 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, Sec. 2902, 106 Stat. 3123 (42 U.S.C. 5841). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955, as amended (42 U.S.C. 2131, 2235), sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(d), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

■ 2. Section 50.55a is amended by:

■ A. Revising paragraph (b) introductory text, (b)(1) introductory text, (b)(1)(iii), (b)(2) introductory text , (b)(2)(xv) introductory text, (b)(2)(xx) and (b)(2)(xxi)(A), (b)(3) introductory text, and (b)(3)(iv)(D);

■ B. Removing and reserving paragraphs (b)(2)(xi) and (b)(2)(xiii), and (g)(6)(ii)(A); and

■ C. Adding paragraphs (g)(6)(ii)(D) and (g)(6)(ii)(E), to read as follows:

§ 50.55a Codes and standards.

* * * * *

(b) The following standards have been approved for incorporation by reference by the Director of the Federal Register pursuant to 5 U.S.C. 552(a) and 1 CFR part 51: Sections III and XI of the ASME Boiler and Pressure Vessel Code and the ASME Code for Operation and Maintenance of Nuclear Power Plants, which are referenced in paragraphs (b)(1), (b)(2), and (b)(3) of this section; NRC Regulatory Guide 1.84, Revision 34, ''Design, Fabrication, and Materials Code Case Acceptability, ASME Section III'' (October 2007); NRC Regulatory Guide 1.147, Revision 15, ''Inservice Inspection Code Case Acceptability, ASME Section XI, Division 1'' (October 2007); and Regulatory Guide 1.192, ''Operation and Maintenance Code Case Acceptability, ASME OM Code'' (June 2003), which list ASME Code cases that the NRC has approved in accordance with the requirements in paragraphs (b)(4), (b)(5), and (b)(6) of this section; ASME Code Case N–729–1, ''Alternative Examination Requirements for PWR Reactor Vessel Upper Heads With Nozzles Having Pressure-Retaining Partial-Penetration Welds, Section XI, Division 1'' (Approval Date: March 28, 2006), which has been approved by the NRC with conditions in accordance with the requirements in paragraph (g)(6)(ii)(D) of this section; and ASME Code Case N–722, ''Additional Examinations for PWR Pressure Retaining Welds in Class 1 Components Fabricated with Alloy 600/82/182 Materials, Section XI, Division 1'' (Approval Date: July 5, 2005), which has been approved by the NRC with conditions in accordance with the requirements in paragraphs (g)(6)(ii)(E) of this section. Copies of the ASME Boiler and Pressure Vessel Code, the ASME Code for Operation and Maintenance of Nuclear Power Plants, ASME Code Case N–729–1, and ASME Code Case N–722 may be purchased from the American Society of Mechanical Engineers, Three Park Avenue, New York, NY 10016 or through the Web *http://www.asme.org/Codes/*. Single copies of NRC Regulatory Guides 1.84, Revision 34; 1.147, Revision 15; and 1.192 may be obtained free of charge by writing the Reproduction and Distribution Services Section, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; or by fax to 301–415–2289; or by e-mail to *DISTRIBUTION@nrc.gov.* Copies of the ASME Codes and NRC Regulatory Guides incorporated by reference in this section may be inspected at the NRC Technical Library, Two White Flint North, 11545 Rockville Pike, Rockville, MD 20852–2738 or call 301–415–5610, 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.*

(1) As used in this section, references to Section III of the ASME Boiler and Pressure Vessel Code refer to Section III, and include the 1963 Edition through 1973 Winter Addenda, and the 1974 Edition (Division 1) through the 2004 Edition (Division 1), subject to the following limitations and modifications:

* * * * *

(iii) *Seismic design of piping.* Applicants and licensees may use Articles NB–3200, NB–3600, NC–3600, and ND–3600 for seismic design of piping, up to and including the 1993 Addenda, subject to the limitation specified in paragraph (b)(1)(ii) of this section. Applicants and licensees may not use these Articles for seismic design of piping in the 1994 Addenda through the latest edition and addenda incorporated by reference in paragraph (b)(1) of this section.

* * * * *

(2) As used in this section, references to Section XI of the ASME Boiler and Pressure Vessel Code refer to Section XI, and include the 1970 Edition through the 1976 Winter Addenda, and the 1977 Edition (Division 1) through the 2004 Edition (Division 1), subject to the following limitations and modifications:

* * * * *

(xi) [Reserved]

* * * * *

(xiii) [Reserved]

* * * * *

(xv) *Appendix VIII specimen set and qualification requirements.* The following provisions may be used to modify implementation of Appendix VIII of Section XI, 1995 Edition through

the 2001 Edition. Licensees choosing to apply these provisions shall apply all of the following provisions under this paragraph except for those in § 50.55a(b)(2)(xv)(F) which are optional. Licensees who use later editions and addenda than the 2001 Edition of the ASME Code shall use the 2001 Edition of Appendix VIII.

* * * * *

(xx) *System leakage tests.*

(A) When performing system leakage tests in accordance with IWA–5213(a), 1997 through 2002 Addenda, the licensee shall maintain a 10-minute hold time after test pressure has been reached for Class 2 and Class 3 components that are not in use during normal operating conditions. No hold time is required for the remaining Class 2 and Class 3 components provided that the system has been in operation for at least 4 hours for insulated components or 10 minutes for uninsulated components.

(B) The NDE provision in IWA–4540(a)(2) of the 2002 Addenda of Section XI must be applied when performing system leakage tests after repair and replacement activities performed by welding or brazing on a pressure retaining boundary using the 2003 Addenda through the latest edition and addenda incorporated by reference in paragraph (b)(2) of this section.

(xxi) * * *

(A) The provisions of Table IWB–2500–1, Examination Category B–D, Full Penetration Welded Nozzles in Vessels, Items B3.40 and B3.60 (Inspection Program A) and Items B3.120 and B3.140 (Inspection Program B) of the 1998 Edition must be applied when using the 1999 Addenda through the latest edition and addenda incorporated by reference in paragraph (b)(2) of this section. A visual examination with magnification that has a resolution sensitivity to detect a 1-mil width wire or crack, utilizing the allowable flaw length criteria in Table IWB–3512–1, 1997 Addenda through the latest edition and addenda incorporated by reference in paragraph (b)(2) of this section, with a limiting assumption on the flaw aspect ratio (i.e., a/l=0.5), may be performed instead of an ultrasonic examination.

* * * * *

(3) As used in this section, references to the OM Code refer to the ASME *Code for Operation and Maintenance of Nuclear Power Plants,* and include the 1995 Edition through the 2004 Edition subject to the following limitations and modifications:

* * * * *

(iv) * * *

(D) The applicable provisions of subsection ISTC must be implemented if the Appendix II condition monitoring program is discontinued.

* * * * *

(g) * * *

(6) * * *

(ii) * * *

(A) [Reserved]

* * * * *

(D) *Reactor vessel head inspections.*

(*1*) All licensees of pressurized water reactors shall augment their inservice inspection program with ASME Code Case N–729–1 subject to the conditions specified in paragraphs (g)(6)(ii)(D)(2) through (6) of this section. Licensees of existing operating reactors as of [insert final date of rule] shall implement their augmented inservice inspection program by December 31, 2008. Once a licensee implements this requirement, the First Revised NRC Order EA–03–009 no longer applies to that licensee and shall be deemed to be withdrawn.

(*2*) Note 9 of ASME Code Case N–729–1 shall not be implemented.

(*3*) Instead of the specified 'examination method' requirements for volumetric and surface examinations in Note 6 of Table 1 of Code Case N–729–1, the licensee shall perform volumetric and/or surface examination of essentially 100 percent of the required volume or equivalent surfaces of the nozzle tube, as identified by Figure 2 of ASME Code Case N–729–1. A demonstrated volumetric or surface leak path assessment through all J-groove welds shall be performed. If a surface examination is being substituted for a volumetric examination on a portion of a penetration nozzle that is below the toe of the J-groove weld [Point E on Figure 2 of ASME Code Case N–729–1], the surface examination shall be of the inside and outside wetted surface of the penetration nozzle not examined volumetrically.

(*4*) By September 1, 2009, ultrasonic examinations shall be performed using personnel, procedures and equipment that have been qualified by blind demonstration on representative mockups using a methodology that meets the conditions specified in (50.55a(g)(6)(ii)(D)(*3*)(*i*) through (50.55a(g)(6)(ii)(D)(*3*)(*iv*), instead of the qualification requirements of Paragraph –2500 of ASME Code Case N–729–1. References herein to Section XI, Appendix VIII shall be to the 2004 Edition with no Addenda of the ASME BPV Code.

(*i*) The specimen set shall have an applicable thickness qualification range of +25 percent to −40 percent for nominal depth through-wall thickness. The specimen set shall include geometric and material conditions that normally require discrimination from primary water stress corrosion cracking (PWSCC) flaws.

(*ii*) The specimen set shall have a minimum of ten (10) flaws which provide an acoustic response similar to PWSCC indications. All flaws shall be greater than 10 percent of the nominal pipe wall thickness. A minimum of 20 percent of the total flaws shall initiate from the inside surface and 20 percent from the outside surface. At least 20 percent of the flaws shall be in the depth ranges of 10–30 percent through wall thickness and at least 20 percent within a depth range of 31–50 percent through wall thickness. At least 20 percent and no more than 40 percent of the flaws shall be oriented axially.

(*iii*) Procedures shall identify the equipment and essential variables and settings used for the qualification, and are consistent with Subarticle VIII–2100 of Section XI, Appendix VIII. The procedure shall be requalified when an essential variable is changed outside the demonstration range as defined by Subarticle VIII–3130 of Section XI, Appendix VIII and as allowed by Articles VIII–4100, VIII–4200 and VIII–4300 of Section XI, Appendix VIII. Procedure qualification shall include the equivalent of at least three personnel performance demonstration test sets. Procedure qualification requires at least one successful personnel performance demonstration.

(*iv*) Personnel performance demonstration test acceptance criteria shall meet the personnel performance demonstration detection test acceptance criteria of Table VIII—S10–1 of Section XI, Appendix VIII, Supplement 10. Examination procedures, equipment, and personnel are qualified for depth sizing and length sizing when the RMS error, as defined by Subarticle VIII–3120 of Section XI, Appendix VIII, of the flaw depth measurements, as compared to the true flaw depths, do not exceed ⅛ inch (3 mm), and the root mean square (RMS) error of the flaw length measurements, as compared to the true flaw lengths, do not exceed ⅜ inch (10 mm), respectively.

(*5*) If flaws attributed to PWSCC have been identified, whether acceptable or not for continued service under Paragraphs –3130 or –3140 of ASME Code Case N–729–1, the re-inspection interval must be each refueling outage instead of the re-inspection intervals required by Table 1, Note (8) of ASME Code Case N–729–1.

(*6*) Appendix I of ASME Code Case N–729–1 shall not be implemented without prior NRC approval.

(E) *Reactor coolant pressure boundary visual inspections.*[1]

(*1*) All licensees of pressurized water reactors shall augment their inservice inspection program by implementing ASME Code Case N–722 subject to the conditions specified in paragraphs (g)(6)(ii)(E)*(2)* through *(4)* of this section. The inspection requirements of ASME Code Case N–722 do not apply to components with pressure retaining welds fabricated with Alloy 600/82/182 materials that have been mitigated by weld overlay or stress improvement.

(*2*) If a visual examination determines that leakage is occurring from a specific item listed in Table 1 of ASME Code Case N–722 that is not exempted by the ASME Code, Section XI, IWB–1220(b)(1), additional actions must be performed to characterize the location, orientation, and length of crack(s) in Alloy 600 nozzle wrought material and location, orientation, and length of crack(s) in Alloy 82/182 butt welds. Alternatively, licensees may replace the Alloy 600/82/182 materials in all the components under the item number of the leaking component.

(3) If the actions in paragraph (g)(6)(ii)(E)*(2)* of this section determine that a flaw is circumferentially oriented and potentially a result of primary water stress corrosion cracking, licensees shall perform non-visual NDE inspections of components that fall under that ASME Code Case N–722 item number. The number of components inspected must equal or exceed the number of components found to be leaking under that item number. If circumferential cracking is identified in the sample, non-visual NDE must be performed in the remaining components under that item number.

(4) If ultrasonic examinations of butt welds are used to meet the NDE requirements in paragraphs (g)(6)(ii)(E)*(2)* or (g)(6)(ii)(E)*(3)* of this section, they must be performed using the appropriate supplement of Section XI, Appendix VIII of the ASME Boiler and Pressure Vessel Code.

* * * * *

For the U.S. Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 18th day of August 2008.

R.W. Borchardt,

Executive Director for Operations.

[FR Doc. E8–20624 Filed 9–9–08; 8:45 am]

BILLING CODE 7590–01–P

[1] For inspections to be conducted every refueling outage and inspections conducted every other refueling outage, the initial inspection shall be performed at the next refueling outage after January 1, 2009. For inspections to be conducted once per interval, the inspections shall begin in the interval in effect on January 1, 2009, and shall be prorated over the remaining periods and refueling outages in this interval.

Federal Register

Wednesday,
September 10, 2008

Part III

Securities and Exchange Commission

17 CFR Parts 239, 240, and 249

Exemption From Registration Under Section 12(G) of the Securities Exchange Act of 1934 for Foreign Private Issuers; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 239, 240 and 249

[Release No. 34–58465; International Series Release No. 1309; File No. S7–04–08]

RIN 3235–AK04

Exemption From Registration Under Section 12(G) of the Securities Exchange Act of 1934 for Foreign Private Issuers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to the rule that exempts a foreign private issuer from having to register a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 (''Exchange Act'') based on the submission to the Commission of certain information published by the issuer outside the United States. The exemption allows a foreign private issuer to have its equity securities traded in the U.S. over-the-counter market without registration under Section 12(g). The adopted rule amendments will eliminate the current written application and paper submission requirements under Rule 12g3–2(b) by automatically exempting from Exchange Act Section 12(g) a foreign private issuer that meets specified conditions. Those conditions will require an issuer to maintain a listing of its equity securities in its primary trading market located outside the United States, and require it to publish electronically in English specified non-United States disclosure documents. As a result, the adopted amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-United States disclosure documents and thereby to make better informed decisions regarding whether to invest in that issuer's equity securities through the over-the-counter market in the United States or otherwise. As is currently the case, issuers must continue to register their securities under the Exchange Act to have them listed on a national securities exchange or traded on the OTC Bulletin Board.

DATES: *Effective Date:* October 10, 2008.

FOR FURTHER INFORMATION CONTACT: Elliot Staffin, Special Counsel, at (202) 551–3450, in the Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Commission Rules 12g3–2 [1] and 15c2–11 [2] under the Exchange Act,[3] Forms 15F,[4] 40–F,[5] and 6–K [6] under the Exchange Act, and Form F–6 [7] under the Securities Act of 1933 (''Securities Act'').[8]

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[1] 17 CFR 240.12g3–2.
[2] 17 CFR 240.15c2–11.
[3] 15 U.S.C. 78a *et seq.*
[4] 17 CFR 249.324.
[5] 17 CFR 249.240f
[6] 17 CFR 249.306.
[7] 17 CFR 239.36.
[8] 15 U.S.C. 77a *et seq.*

I. Executive Summary and Background

A. Introduction

Exchange Act Rule 12g3–2(b) [9] exempts a foreign private issuer [10] from Section 12(g) registration [11] if, among other requirements, the issuer furnishes to the Commission on an ongoing basis information it has made public or is required to make public under the laws of its jurisdiction of incorporation, organization or domicile, pursuant to its non-U.S. stock exchange filing requirements, or that it has distributed or is required to distribute to its security holders (collectively, its ''non-U.S. disclosure documents'').[12] The Commission adopted Rule 12g3–2(b) more than 40 years ago in order to exempt from Section 12(g) registration foreign companies that have not obtained a listing on a national securities exchange or otherwise sought a public market for their equity securities in the United States.[13]

Acquiring the Rule 12g3–2(b) exemption enables a foreign private issuer to have its equity securities traded on a limited basis in the over-the-counter market in the United States while avoiding registration under Exchange Act Section 12(g). Typically a foreign private issuer obtains the Rule 12g3–2(b) exemption in order to have established an unlisted, sponsored or unsponsored depositary facility for its American Depositary Receipts (''ADRs'').[14] Establishing the Rule 12g3–

[9] 17 CFR 240.12g3–2(b).

[10] See the definition of foreign private issuer at Exchange Act Rule 3b–4(c) (17 CFR 240.3b–4(c)).

[11] When read in conjunction with Exchange Act Rules 12g–1 (17 CFR 240.12g–1) and 12g3–2(a) (17 CFR 240.12g3–2(a)), Exchange Act Section 12(g) requires an issuer to file an Exchange Act registration statement regarding a class of equity securities within 120 days of the last day of its fiscal year if, on that date, the number of its record holders is 500 or greater, the number of its U.S. resident holders is 300 or more, and the issuer's total assets exceed $10 million.

[12] Current Exchange Act Rule 12g3–2(b)(1)(iii) (17 CFR 240.12g3–2(b)(1)(iii)).

[13] Release No. 34–8066 (April 28, 1967). For additional background on the initial adoption of Rule 12g3–2(b), see Part I.A of Release No. 34–57350 (February 19, 2008), 73 FR 10102 (February 25, 2008) (''Proposing Release'').

[14] An ADR is a negotiable instrument that represents an ownership interest in a specified number of securities, which the securities holder has deposited with a designated bank depositary. The filing of Securities Act Form F–6 (17 CFR 239.36) is required in order to establish an ADR facility. The eligibility criteria for the use of Form F–6 include the requirement that the issuer of the deposited securities have a reporting obligation under Exchange Act Section 13(a) or have established the exemption under Rule 12g3–2(b). See General Instruction I.A.3 of Form F–6. While required to be registered on Form F–6 under the Securities Act, ADRs are exempt from registration under Exchange Act Section 12(g) pursuant to current Exchange Act Rule 12g3–2(c) (17 CFR 240.12g3–2(c)).

2(b) exemption also permits registered broker-dealers to fulfill their current information obligations concerning foreign private issuers' securities for which they seek to publish quotations.[15] It further facilitates resales of an issuer's securities to qualified institutional buyers (''QIBs'') under Rule 144A.[16]

1. Current Rule 12g3–2(b) Requirements

Currently, in order to establish the Exchange Act Rule 12g3–2(b) exemption, a foreign private issuer must initially submit to the Commission a list of its non-U.S. disclosure requirements as well as copies of its non-U.S. disclosure documents published since the beginning of its last fiscal year.[17] An issuer must further submit its non-U.S. disclosure documents on an ongoing basis in order to maintain the exemption. The current Rule provides that an issuer need only submit copies of information that is material to an investment decision for the purpose of obtaining or maintaining the exemption.[18] At the time of the initial submission, an issuer must also provide the Commission with the number of U.S. holders of its equity securities and the percentage held by them, as well as a brief description of how its U.S. holders acquired those shares.[19]

Rule 12g3–2(b) currently requires that an applicant submit all of the necessary non-U.S. disclosure documents and other information before the date that a registration statement would otherwise become due under Section 12(g).[20] Once an issuer has timely submitted its application and obtained the exemption, the issuer may surpass any of the record holder, U.S. resident holder, or asset thresholds that would otherwise trigger an obligation to register a class of securities under Section 12(g) or the rules thereunder, as long as it maintains the exemption by submitting the required non-U.S. disclosure documents.

For most of its 40-year history, the Rule 12g3–2(b) disclosure regime has mandated paper submissions. Even after the adoption of EDGAR filing rules for foreign private issuers, the Commission has required a foreign private issuer to submit its initial Rule 12g3–2(b) supporting materials in paper.[21] The Commission has based this treatment of Rule 12g3–2(b) materials on the analogous treatment of applications for an exemption from Exchange Act reporting obligations filed pursuant to Exchange Act Section 12(h).[22]

In March 2007, the Commission voted to adopt amendments to Rule 12g3–2, which enable a foreign private issuer to claim the Rule 12g3–2(b) exemption immediately upon the effectiveness of its termination of Exchange Act registration and reporting pursuant to contemporaneously adopted Exchange Act Rule 12h–6.[23] The March 2007 amendments require an issuer that has obtained the Rule 12g3–2(b) exemption, upon the effectiveness of its termination of registration and reporting pursuant to Rule 12h–6, to publish specified non-U.S. disclosure documents in English on an ongoing basis on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, rather than submit that information in paper to the Commission.[24] The amendments further permit, but do not require, a foreign private issuer that has obtained or will obtain the Rule 12g3–2(b) exemption, upon application to the Commission and not pursuant to Rule 12h–6, to publish electronically in the same manner its non-U.S. disclosure documents required to maintain the exemption.[25]

The March 2007 amendments further clarified the English translation requirements under Rule 12g3–2(b).[26] The amendments provide that, when electronically publishing its non-U.S. disclosure documents required to maintain the Rule 12g3–2(b) exemption, at a minimum, a foreign private issuer must electronically publish English translations of the following documents if in a foreign language:

- Its annual report, including or accompanied by annual financial statements;
- Interim reports that include financial statements;
- Press releases; and
- All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.[27]

2. Proposed Rule 12g3–2 Amendments

In February 2008, we proposed amendments to Rule 12g3–2(b) in order to adapt that exemptive regime to the several significant developments occurring since its initial adoption four decades ago.[28] Those developments include the increased globalization of securities markets, advances in information technology, and the increased use of ADR facilities by foreign companies to trade their securities in the United States, which have multiplied the number of foreign companies engaged in cross-border activities, as well as increased the amount of U.S. investor interest in the securities of foreign companies. Just as those developments led us to re-evaluate and revise the Commission rules governing when a foreign private issuer may terminate its Exchange Act registration and reporting obligations, so those same factors have led us to reconsider as well the Commission rules that determine when a foreign private issuer must enter the Section 12(g) registration regime.

We proposed to amend Exchange Act Rule 12g3–2 to permit a foreign private issuer to claim the Rule 12g3–2(b) exemption, without having to submit an application to, or otherwise notify, the Commission, as long as:

[15] Brokers currently can comply with their obligations under Exchange Act Rule 15c2–11 (17 CFR 240.15c2–11) when a foreign company has established and maintains the Rule 12g3–2(b) exemption by, in part, reviewing the information furnished to the Commission under the exemption. See Rule 15c2–11(a)(4) (17 CFR 240.15c2–11(a)(4)).

[16] See Securities Act Rule 144A(d)(4) (17 CFR 230.144A(d)(4)).

[17] Current Exchange Act Rule 12g3–2(b)(1)(i) (17 CFR 240.12g3–2(b)(1)(i)). Historically, an issuer has submitted its home jurisdiction materials as part of a letter application to the Commission, which has been processed through the Office of International Corporate Finance in the Division of Corporation Finance. The written application process does not apply to an issuer that receives the Rule 12g3–2(b) exemption upon the effectiveness of its Exchange Act deregistration pursuant to Exchange Act Rule 12h–6 (17 CFR 240.12h–6).

[18] Current Exchange Act Rule 12g3–2(b)(3) (17 CFR 240.12g3–2(b)(3)). As examples of material information, the Rule lists an issuer's financial condition or results of operations, changes in its business, the acquisition or disposition of assets, the issuance, redemption or acquisition of securities, changes in management or control, the granting of options or other payment to directors or officers, and transactions with directors, officers or principal security holders.

[19] Current Exchange Act Rule 12g3–2(b)(1)(v) (17 CFR 240.12g3–2(b)(1)(v)). An issuer must also disclose the dates and circumstances of the most recent public distribution of securities by the issuer or an affiliate.

[20] Current Exchange Act Rule 12g3–2(b)(2) (17 CFR 240.12g3–2(b)(2)).

[21] See Release No. 33–8099 (May 14, 2002), 67 FR 36678 (May 24, 2002).

[22] 15 U.S.C. 78*l*(h). We require the filing of Section 12(h) exemptive applications in paper pursuant to Regulation S–T Rule 101(c)(16) (17 CFR 232.101(c)(16)).

[23] See Release No. 34–55540 (March 27, 2007), 72 FR 16934 (April 5, 2007).

[24] Current Exchange Act Rule 12g3–2(e) (17 CFR 240.12g3–2(e)).

[25] Current Exchange Act Rule 12g3–2(f) (17 CFR 240.12g3–2(f)).

[26] Current Exchange Act Rule 12g3–2(b)(4) (17 CFR 240.12g3–2(b)(4)) provides that copies furnished to the Commission of press releases and any materials distributed directly to security holders must be in English, and states that English summaries and versions may be used instead of English translations. However, the rule does not specify what other documents must be translated fully into English, and when summaries or versions may be used.

[27] Note 1 to Current Exchange Act Rule 12g3–2(e).

[28] Release No. 34–57350.

• The issuer is not required to file or furnish reports under Exchange Act Section 13(a)[29] or 15(d);

• The issuer currently maintains a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities;

• Either:

○ The average daily trading volume (''ADTV'') of the subject class of securities in the United States for the issuer's most recently completed fiscal year has been no greater than 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

○ The issuer has terminated its registration of a class of securities under Exchange Act Section 12(g), or terminated its obligation to file or furnish reports under Exchange Act Section 15(d), pursuant to Exchange Act Rule 12h–6; and

• Unless claiming the exemption in connection with or following its recent Exchange Act deregistration, the issuer has published specified non-U.S. disclosure documents, required to be made public from the first day of its most recently completed fiscal year, in English on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market.

As proposed, a foreign private issuer that met the above requirements would be immediately exempt from Exchange Act registration under Rule 12g3–2(b) even if, on the last day of its most recently completed fiscal year, it exceeded the asset and shareholder thresholds for Section 12(g) registration, and although the 120-day window for filing a registration statement under Section 12(g) had elapsed. Further, as proposed, an issuer could immediately claim the Rule 12g3–2(b) exemption upon the effectiveness of, or following its recent Exchange Act deregistration, whether pursuant to the older exit rules of Rule 12g–4 or 12h–3,[30] or Rule 12h–6, or the suspension of its reporting obligations under Section 15(d),[31] if it met the above requirements other than the electronic publication condition for its most recently completed fiscal year.

The proposed rules would require any issuer, whether a prior registrant or not, to maintain the Rule 12g3–2(b) exemption by publishing its specified non-U.S. disclosure documents on an ongoing basis and for each subsequent fiscal year, in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. The proposed rules would require the electronic publication in English of the same types of information required under the March 2007 amendments.

As proposed, the Rule 12g3–2(b) exemption would remain in effect until:

• The issuer no longer satisfies the electronic publication condition;

• The issuer no longer maintains a listing for the subject class of securities on one or more exchanges in its primary trading market;

• The ADTV of the subject class of securities in the United States exceeds 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the issuer's most recently completed fiscal year, other than the year in which the issuer first claims the exemption; or

• The issuer registers a class of securities under Exchange Act Section 12 or incurs reporting obligations under Exchange Act Section 15(d).

B. Principal Comments Regarding the Proposed Rule Amendments

We received letters from 32 commenters, including law firms, business, industry and legal trade associations, depositary banks, financial advisory firms, and an OTC market participant. Most commenters strongly supported the Commission's proposals to eliminate the written application process for the Exchange Act Rule 12g3–2(b) exemption and replace the paper submission process for an issuer's non-U.S. disclosure documents with mandated electronic publication as a condition to claiming and maintaining the exemption.

However, most commenters were critical of the proposal that, as a condition to claiming and maintaining the Rule 12g3–2(b) exemption, a foreign private issuer's U.S. ADTV must be no greater than 20% of its worldwide ADTV for the issuer's most recently completed fiscal year. Those commenters urged us either to eliminate the trading volume condition in its entirety or else increase the U.S. ADTV threshold to a higher percentage, such as 35%, 40% or 50% of worldwide ADTV. Some commenters also requested that we impose a trading volume condition only as an initial requirement for claiming the exemption, and not as a condition for continued use in subsequent years.

Other areas receiving comment included whether:

• To adopt the foreign listing condition as a requirement for either initially claiming the exemption or maintaining it in subsequent years;

• To permit an issuer to publish English summaries, brief English descriptions, or English versions instead of English translations of its non-U.S. disclosure documents;

• To provide a period of time for an issuer to cure a deficiency in its compliance with one or more conditions before it would be required to register under the Exchange Act;

• To require an issuer to provide some form of public notice that it was claiming and intended to rely on the Rule 12g3–2(b) exemption;

• To modify Form F–6 in light of the rule amendments, including whether to adopt provisions regarding unsponsored ADR facilities; and

• To grandfather any issuer having the Rule 12g3–2(b) exemption before the effective date of the rule amendments.

C. Summary of the Adopted Rule Amendments

We have carefully considered commenters' concerns regarding the proposed amendments to Rule 12g3–2(b), and have addressed many of them in the rule amendments that we are adopting today. Most notably, we have determined to adopt a trading volume measure solely as part of the foreign listing/primary trading market condition, and not as a separate condition. As adopted, the rule amendments will enable a foreign private issuer to claim the Rule 12g3–2(b) exemption,[32] without having to submit a written application to the Commission, as long as the issuer:

• Currently maintains a listing of the subject class of securities on one or more exchanges in its primary trading market, which is defined to mean, as proposed, that:

[29] 15 U.S.C. 78m(a).

[30] 17 CFR 240.12g–4 or 240.12h–3. Both Rules 12g–4 and 12h–3 permit an issuer to exit the Exchange Act reporting regime following the filing of a Form 15 (17 CFR 249.323), which certifies that the issuer has fewer than 300 record holders or less than 500 record holders and total assets not exceeding $10 million on the last day of each of its most recent 3 fiscal years.

[31] An issuer may suspend its Section 15(d) reporting obligations under Rule 12h–3 or Section 15(d) itself. The statutory section provides that suspension occurs if, on the first day of the fiscal year, other than the year in which the issuer's registration statement went effective, the issuer's record holders number less than 300.

[32] By the use of the term ''claim'' in his release, we do not mean to imply that a foreign private issuer must apply for or provide notice of the Rule 12g3–2(b) exemption in order to qualify for that exemption. Rather, as amended, the Rule 12g3–2(b) exemptive regime is meant to be self-executing.

○ At least 55 percent of the trading in the subject class of securities on a worldwide basis took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year; and

○ If a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions, the trading for the issuer's securities in at least one of the two foreign jurisdictions is greater than the trading in the United States for the same class of the issuer's securities;

• The issuer is not required to file or furnish reports under Exchange Act Section 13(a) or 15(d), as proposed; and

• Unless claiming the exemption upon or following its recent Exchange Act deregistration, the issuer has published in English specified non-U.S. disclosure documents, from the first day of its most recently completed fiscal year, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market.[33]

The adopted rule amendments will require an issuer to maintain the Rule 12g3–2(b) exemption by electronically publishing the specified non-U.S. disclosure documents for subsequent years. An issuer will lose the exemption if it:

• Fails to publish electronically the required non-U.S. disclosure documents;

• No longer meets the foreign listing/primary trading market condition; or

• Incurs Exchange Act reporting obligations.

We are adopting the rule amendments regarding English translation requirements, as proposed. While we decline to permit the use of ''brief English descriptions'' or ''English versions,'' we have clarified that, generally, an issuer may provide an English summary for a non-U.S. disclosure document if such a summary would be permitted for a document submitted under cover of Form 6–K [34] or Exchange Act Rule 12b–12(d)(3).[35]

We are adopting conforming amendments to Form F–6 and Rule 15c2–11. Other adopted rule amendments include eliminating, as proposed:

• The current provision that generally prohibits the Rule 12g3–2(b) exemption tosuccessor issuers;

• The rarely used ability of a Canadian issuer filing under the Multijurisdictional Disclosure System (''MJDS'') to obtain the Rule 12g3–2(b) exemption for a class of equity securities while having Exchange Act reporting obligations regarding a class of debt securities;

• The current provision that prohibits an issuer from relying on the Rule 12g3–2(b) exemption if its securities are traded through an automated inter-dealer quotation system; and

• The related provision grandfathering Nasdaq-traded companies meeting specified conditions from Rule 12g3–2(b)'s automated inter-dealer quotation system prohibition.

While the adopted rule amendments do not include a grandfathering provision, we are establishing, as proposed, a three-year transition period to provide sufficient time for any current Rule 12g3–2(b)-exempt issuer, which will no longer qualify for the exemption under the rule amendments, either to comply with all of the conditions of amended Rule 12g3–2(b) or register under the Exchange Act. We also are establishing, as proposed, a three-month transition period following the effectiveness of the rule amendments during which the Commission will accept and process any non-U.S. disclosure documents submitted in paper by Rule 12g3–2(b)-exempt issuers. Thereafter, the Commission will no longer process paper Rule 12g3–2(b) submissions.

By enabling a qualified foreign private issuer to claim the Rule 12g3–2(b) exemption automatically, and without regard to the number of its U.S. shareholders, the adopted rule amendments should encourage more foreign private issuers to claim the Rule 12g3–2(b) exemption. That would enable the establishment of additional ADR facilities, make it easier for broker-dealers to fulfill their obligations under Exchange Act Rule 15c2–11 with respect to the equity securities of a non-reporting foreign private issuer, and facilitate the resale of a foreign company's securities to QIBs in the United States under Securities Act Rule 144A. Consequently, the adopted rule amendments should foster the increased trading of a foreign private issuer's securities in the U.S. over-the-counter market.

By requiring the electronic publication in English of specified non-U.S. disclosure documents for an issuer claiming the Rule 12g3–2(b) exemption, the adopted amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-U.S. disclosure documents, and make better informed decisions regarding whether to invest in that issuer's equity securities through the over-the-counter market in the United States or otherwise. Thus, the adopted amendments should foster increased efficiency in the trading of the issuer's securities for U.S. investors.

II. Discussion

A. Foreign Listing Condition

We are adopting, as proposed, the condition that, in order to be eligible to claim the Rule 12g3–2(b) exemption, an issuer must currently maintain a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities.[36] This condition is substantially similar to the foreign listing condition adopted as part of the March 2007 amendments.[37]

The purpose of the foreign listing condition is to help assure that there is a non-U.S. jurisdiction that principally regulates and oversees the trading of the issuer's securities and the issuer's disclosure obligations to investors. This foreign listing condition increases the likelihood that the principal pricing determinants for a foreign private issuer's securities are located outside the United States, and makes more likely the availability of a set of non-U.S. securities disclosure documents to which a U.S. investor may turn for material information when making investment decisions about the issuer's securities in the U.S. over-the-counter market.

Several commenters supported the proposed foreign listing condition substantially as proposed or at least in principle.[38] Some commenters supported a condition that would require an issuer to be subject to a recognized foreign regulatory authority and a set of public disclosure obligations, but would not require a foreign listing.[39] We decline to adopt such a provision because, among other factors, we believe it could be difficult for market participants to determine whether an issuer is in fact subject to a

[33] These rule amendments relate solely to the application of Exchange Act Section 12(g) and not to antifraud or other provisions of the U.S. federal securities laws.

[34] 17 CFR 249.306.

[35] 17 CFR 240.12b–12(d)(3).

[36] Exchange Act Rule 12g3–2(b)(1)(ii) (17 CFR 240.12g3–2(b)(1)(ii)).

[37] Exchange Act Rule 12h–6(a)(3) (17 CFR 240.12h–6(a)(3)).

[38] See, for example, the letter of the Bank of New York (''BNY''), dated April 25, 2008. This letter, along with other comment letters, is available at *http://www.sec.gov/comments/s7-04-08/s70408.shtml.*

[39] See, for example, the letter of Sullivan & Cromwell, dated April 25, 2008.

complying foreign regulatory regime. In addition, a listing on a securities market generally involves the affirmative action of an issuer to be traded on that market and to be subject to the listing requirements of that market, including applicable ongoing disclosure requirements. The foreign listing requirement therefore supports one of the underlying purposes of the Rule 12g3–2(b) exemption—to make material information available to investors.

A few commenters opposed the foreign listing condition on the grounds that it would impose costs on those issuers that have not yet obtained a foreign listing, and which are likely to be smaller companies.[40] As we noted when proposing the rule amendments, the foreign listing condition is consistent with the Commission staff's past and current practice of administering the Rule 12g3–2(b) exemption. Any issuer, regardless of size, has had to obtain a foreign listing before it could receive the exemption. Accordingly, the adopted rule should impose no new burdens in this regard.[41]

1. The Primary Trading Market Definition

The adopted rule amendments define primary trading market, as proposed, to mean that at least 55 percent of the worldwide trading in the issuer's subject class of securities took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. The rule amendments further instruct that, if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for that purpose, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities.[42]

As proposed, we have based the adopted definition on the definition of primary trading market under the March 2007 amendments. Like the earlier amendments, the amendments we are adopting today will permit an issuer to aggregate its securities over multiple markets in one or two foreign jurisdictions in recognition that many foreign private issuers have listings on more than one exchange in one or more non-U.S. markets.[43]

Some commenters urged the Commission to adopt a primary trading market definition that would permit an issuer to aggregate its trading over an unlimited number of foreign jurisdictions or permit an issuer's trading in its primary foreign markets to comprise less than 55 percent of its worldwide trading.[44] We decline to adopt these suggestions because, by defining an issuer's primary trading market to comprise no more than two foreign jursidictions, it becomes more likely that an eligible issuer will be subject to an overseas regulator with principal authority for regulating the issuance and trading of the issuer's securities and the issuer's disclosure to investors. Similarly, requiring an issuer's primary non-U.S. trading to constitute no less than 55 percent of its worldwide trading helps assure that a clear majority of an issuer's securities trading occurs outside the United States. If the United States was the sole or principal market for a foreign private issuer's securities, then the Commission would have a greater regulatory interest in subjecting the foreign company to the Exchange Act reporting regime.

The adopted rule amendments will not require an issuer establishing the exemption, but not deregistering, to have maintained a foreign listing for the previous twelve months, or for some other specified period of time, as was required under the March 2007 amendments. As noted in the Proposing Release, we see no reason to exclude newly listed foreign companies from eligibility. Many foreign exchanges require substantial initial disclosure before a listing is accepted. Moreover, there is currently no similar requirement for a non-reporting company applying for the Rule 12g3–2(b) exemption.

Under Rule 12h–6, an issuer must certify that, at the time it files its Form 15F,[45] it meets that rule's foreign listing requirement. That issuer will also have to meet Rule 12g3–2(b)'s foreign listing requirement upon the effectiveness of its Exchange Act termination of registration and reporting under Rule 12h–6 in order to be able to claim the Rule 12g3–2(b) exemption. Since typically that effectiveness occurs 90 days from the date of filing of the Form 15F, we expect most Form 15F filers will satisfy the adopted foreign listing requirement under Rule 12g3–2(b).[46]

2. Elimination of the Proposed 20 Percent Trading Volume Condition

In addition to the trading volume standard under the primary trading market definition, we proposed that an issuer's U.S. ADTV must be no greater than 20 percent of its worldwide ADTV for its most recently completed fiscal year. We have determined not to adopt this separate trading volume condition.

Most commenters opposed the 20 percent trading volume condition. Several commenters maintained that a foreign private issuer cannot control the level of U.S. trading of its equity securities because U.S. investors are able to purchase a foreign private issuer's securities in the issuer's home market and subsequently trade them in the United States, or purchase the issuer's securities through unsponsored ADR facilities in the United States. According to these commenters, those factors could cause an issuer's U.S. trading volume to exceed the proposed trading volume threshold and thereby require the issuer to register its securities in the United States although

[40] See, for example, the letter of the American Bar Association, Business Law Section (''ABA''), dated April 30, 2008.

[41] As is currently the case, an issuer that, on the last day of its most recently completed fiscal year, has not exceeded the 500 worldwide holder threshold under Exchange Act Section 12(g), the 300 U.S. holder threshold under Rule 12g3–2(a), or the $10 million annual aset threshold under Rule 12g–1, could claim an exemption from Section 12(g) registration for a class of equity securities based upon one or more of those provisions, and would not have to comply with Rule 12g3–2(b)'s foreign listing or other conditions, if it chose not to rely on that rule for its exemption from Section 12(g) registration. However, such an issuer would have to claim the Rule 12g3–2(b) exemption, and satisfy all of its conditions, if it sought to have established an ADR facility for its equity securities. ADRs must be registered on a Form F–6, which requires an issuer of the deposited securities to be either an Exchange Act reporting company or have the Rule 12g3–2(b) exemption.

[42] Note 1 to Rule 12g3–2(b)(1) (17 CFR 240.12g3–2(b)(1)).

[43] As under the earlier amendments, measurement for the primary trading market determination will be by reference to ADTV as reported by the relevant market. An issuer would measure the ADTV of on-exchange transactions in its securities aggregated over one or two foreign jurisdictions against its worldwide trading volume. The issuer could include in this measure off-exchange transactions in those jurisdictions comprising the numerator only if it includes those off-exchange transactions when calculating worldwide trading volume in the denominator. This denominator would consist of U.S. ADTV, which must include both on-exchange and off-exchange transactions, and non-U.S. ADTV, which must include on-exchange transactions, but could also include off-exchange transactions. See Note 1 to Rule 12g3–2(b)(1) and Release No. 34–55540 at 72 FR 16934, 16939.

[44] See, for example, the letters of JPMorgan Chase Bank (''JPMorganChase''), dated April 18, 2008, and the Organization for International Investment (''OFII''), dated April 23, 2008.

[45] 17 CFR 249.324. Similar to a Form 15, Form 15F is the form that a foreign private issuer must file to certify that it meets the conditions for terminating its Exchange Act registration and reporting obligations under Rule 12h–6.

[46] Unless the Commission objects, termination of an issuer's reporting and registration under Rule 12h–6 is effective 90 days after the filing of its Form 15F. Exchange Act Rule 12h–6(g)(1) (17 CFR 240.12h–6(g)(1)).

it has not voluntarily sought a public market there.[47]

Some commenters further stated that the proposed trading volume condition would likely discourage foreign private issuers from establishing or maintaining sponsored ADR facilities or engaging in exempted offerings in the U.S., such as private placements and Rule 144A resales, to the detriment of U.S. investors.[48] In addition, commenters noted that the proposed trading volume condition would be unnecessary should the Commission adopt the proposed foreign listing condition and accompanying definition of primary trading market.[49]

After consideration of the comments, we have determined that adopting these amendments without the 20 percent trading volume condition is consistent with the protection of U.S. investors. Most of the foreign private issuers that currently claim the Rule 12g3–2(b) exemption have U.S. trading volumes that fall below the proposed 20 percent threshold although there is no mandatory trading volume condition.[50] We expect that the primary trading market provision will serve to protect U.S. investors by making it more likely that foreign companies claiming the exemption will be subject to disclosure requirements where they are listed.

3. Treatment of Compensatory Stock Options

Currently, the scope of the exemption afforded to a class of equity securities under Rule 12g3–2(b) may include compensatory stock options that relate to that class of equity securities.[51] Some commenters expressed their concern that, as proposed, the scope of the amended rule would not include compensatory stock options since the exemption extends to a class of equity securities, the compensatory stock options would likely be deemed a separate class, and the compensatory stock options would typically not be listed in the issuer's primary trading market.[52]

It is not our intention to change the scope of Rule 12g3–2(b) in this regard. Accordingly, we have added a note to the amended rule to clarify that compensatory stock options for which the underlying securities are in a class exempt under Rule 12g3–2(b) are also exempt under that rule.[53]

B. Non-Exchange Act Reporting Condition

We are adopting the condition, as proposed, that in order to be eligible for the Rule 12g3–2(b) exemption, an issuer must not have any reporting obligations under Exchange Act Section 13(a) or 15(d).[54] Like the current non-Exchange Act reporting condition of Rule 12g3–2(b),[55] the purpose of this provision is to prevent an issuer from claiming the Rule 12g3–2(b) exemption when it already has incurred active Exchange Act reporting obligations.

1. Non-Reporting Issuers

A foreign private issuer will satisfy the proposed non-reporting condition if it does not already have reporting obligations under either Exchange Act Section 13(a) or 15(d). Since Section 13(a) imposes reporting obligations on an issuer that has registered a class of securities under Section 12, a foreign private issuer that has an effective registration statement filed with the Commission under Section 12(b),[56] for example, covering a class of debt securities, or Section 12(g), covering a particular class of equity securities, would be ineligible to claim the exemption. This treatment is consistent with the current Exchange Act reporting prohibition under Rule 12g3–2(b).[57]

We received relatively few comments on the proposed non-reporting condition. While some commenters supported the proposed condition,[58] others requested that, in the interest of increasing the flexibility of capital raising in the United States for foreign private issuers, we permit an issuer to claim the Rule 12g3–2(b) exemption with respect to a particular class of equity securities although it has Exchange Act reporting obligations regarding a class of debt securities or a different class of equity securities.[59] We decline to adopt this suggested modification because we believe that it could cause confusion for investors and other market participants regarding the scope of an issuer's Exchange Act reporting obligations and the protections available under the Exchange Act.

Currently an issuer may apply for the Rule 12g3–2(b) exemption, although it may have exceeded the Section 12(g) shareholder thresholds on the last day of its most recently completed fiscal year, as long as the statutory 120-day period for filing a Section 12(g) registration statement has not lapsed.[60] We proposed to eliminate this 120-day submission requirement because, under the revised Rule 12g3–2(b) exemptive scheme, we did not believe that this requirement would be necessary to protect investors.

The revised exemption does not depend on an issuer's determination of the number of its worldwide or U.S. shareholders, and does not require that it submit a written application disclosing that information. Instead, it affirmatively requires a foreign private issuer to meet a foreign listing requirement and electronically publish specified material non-U.S. disclosure documents in English. If we also required an issuer to claim the exemption within the 120-day period, we believe some issuers, particularly smaller ones, would be unable to meet that deadline.[61] Those issuers would have to wait until the end of their current fiscal year and the start of a new 120-day period before they could claim the exemption. We see little benefit in requiring issuers to wait several months before being able to claim the exemption. On the other hand, providing the exemption and encouraging these issuers to publish their material non-U.S. disclosure documents in English should benefit U.S. investors. Commenters uniformly agreed with our assessment on this issue. Therefore, we are eliminating the 120-day requirement for issuers under Rule 12g3–2(b), as proposed.

2. Deregistered Issuers

Under the adopted, revised exemptive scheme, a foreign private issuer that has suspended its Exchange Act reporting obligations upon the filing of Form 15, pursuant to Rule 12g–4 or 12h–3, or Form 15F, pursuant to Rule 12h–6, will

[47] See, for example, the letters of Cleary Gottlieb Steen & Hamilton LLP (''Cleary Gottlieb''), dated April 25, 2008, and EuropeanIssuers, dated April 25, 2008.

[48] See, for example, the letters of the International Bar Association, dated April 25, 2008, and Linklaters, dated April 24, 2008.

[49] See, for example, the letters of BNY and O'Melveny & Myers LLP, dated April 25, 2008.

[50] See the Memo by Jennifer Marietta-Westberg, Office of Economic Analysis, dated March 10, 2008, which is available at *http://www.sec.gov/comments/s7-04-08/s70408-2.pdf*.

[51] See current Exchange Act Rule 12g3–2(b)(1), which states that ''securities'' of a foreign private issuer shall be exempt from Section 12(g) if the rule's conditions are met.

[52] See the letter of Gloria W. Nusbacher and 24 other attorneys.

[53] Note 3 to Exchange Act Rule 12g3–2(b)(1).

[54] Exchange Act Rule 12g3–2(b)(1)(i) (17 CFR 240.12g3–2(b)(1)(i)).

[55] Current Exchange Act Rule 12g3–2(d)(1) (17 CFR 240.12g3–2(d)(1)).

[56] 15 U.S.C. 78l(b).

[57] Current Exchange Act Rule 12g3–2(d)(1).

[58] See, for example, the letter of Sullivan & Cromwell.

[59] See, for example, the letter of OFII.

[60] Current Exchange Act Rule 12g3–2(b)(2) (17 CFR 240.12g3–2(b)(2)).

[61] Under current Rule 12g3–2(b), several issuers have applied for the exemption although the 120-day period has lapsed.

satisfy the non-reporting requirement upon the effectiveness of its deregistration, assuming that it has not otherwise incurred additional Exchange Act reporting obligations. Similarly, a foreign private issuer that has suspended its reporting obligations pursuant to the statutory terms of Section 15(d) will satisfy the non-reporting condition immediately upon its determination that it had less than 300 shareholders as of the beginning of its most recent fiscal year.

Thus, unlike the current rule, the adopted rule amendments will not require an issuer to look back over the previous eighteen months and determine whether it had Exchange Act reporting obligations during that period.[62] We eliminated the eighteen month requirement when adopting the March 2007 rule amendments that granted the Rule 12g3–2(b) exemption automatically to a foreign private issuer upon the effectiveness of its termination of Exchange Act registration and reporting pursuant to Rule 12h–6. We see no reason to treat differently foreign private issuers that have terminated their Section 12(g) registration under the older Rule 12g–4 or suspended their Section 15(d) reporting obligations pursuant to that statutory section or under Rule 12h–3 and following the filing of Form 15. Elimination of a lengthy waiting period will hasten the electronic publication of a foreign private issuer's non-U.S. disclosure documents required under the exemption and, thus, help improve the ability of U.S. investors to make informed decisions regarding that issuer's securities. Commenters uniformly supported this revision, which we are adopting as proposed.

C. Electronic Publishing of Non-U.S. Disclosure Documents

1. Electronic Publishing Requirement To Claim Exemption

We are adopting, as proposed, the requirement that, unless in connection with or following a recent Exchange Act deregistration, in order to claim the Rule 12g3–2(b) exemption, an issuer must have published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, information that, from the first day of its most recently completed fiscal year, it:

- Has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile;
- Has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and
- Has distributed or been required to distribute to its security holders.[63]

These are the same categories of information that the Commission has historically required a non-reporting company to submit in paper when applying for the exemption under Rule 12g3–2(b).[64] They also are the same non-U.S. disclosure documents that, more recently, the Commission has required an issuer to publish electronically in order to maintain its Rule 12g3–2(b) exemption claimed upon the effectiveness of its deregistration under Rule 12h–6.[65] Commenters strongly supported this electronic publication requirement.[66]

The purpose of this non-U.S. electronic publication condition is to provide U.S. investors with ready access to material information when trading in the issuer's equity securities in the over-the-counter market.[67] This condition also will assist U.S. investors who are interested in trading the issuer's securities in its primary securities market. Moreover, having a foreign private issuer's key non-U.S. disclosure documents electronically published in English will assist broker-dealers in meeting their Rule 15c2–11 obligations and facilitate resales of that issuer's securities to QIBs under Rule 144A.

As under the current rule, the adopted amendments will require an issuer only to publish electronically information that is material to an investment decision regarding the subject securities,[68] such as:

- Results of operations or financial condition;
- Changes in business;
- Acquisitions or dispositions of assets;
- The issuance, redemption or acquisition of securities;
- Changes in management or control;
- The granting of options or the payment of other remuneration to directors or officers; and
- Transactions with directors, officers or principal security holders.[69]

2. Electronic Publishing Requirement to Maintain Exemption

In order to maintain the Rule 12g3–2(b) exemption, the adopted amendments will require an issuer to publish the same information specified in the prior fiscal year provision, on an ongoing basis and for subsequent fiscal years, on its Internet Web site or through an electronic information delivery system in its primary trading market.[70] This requirement will apply to any issuer claiming the exemption, whether or not a former Exchange Act registrant. Like the prior fiscal year publication condition, this ongoing publication condition will help assure that investors and other market participants have access to an issuer's specified non-U.S. disclosure documents, in English, which are material to an investment decision. Most commenters strongly supported this ongoing non-U.S. electronic publication condition.

Similar to the current rule,[71] the adopted rule amendments will require an issuer to publish electronically its non-U.S. disclosure documents promptly after the information has been made public, pursuant to its home jurisdiction laws, non-U.S. stock exchange rules, or shareholder meeting rules and practices.[72] As under current Commission staff practice, what constitutes ''promptly'' will depend on the type of document and the amount of time required to prepare an English

[62] Current Exchange Act Rule 12g3–2(d)(1) provides that the Rule 12g3–2(b) exemption is generally not available to a foreign private issuer that, during the preceding 18 months, has registered a class of securities under Exchange Act Section 12 or had an active or suspended Section 15(d) reporting obligation.

[63] Exchange Act Rule 12g3–2(b)(1)(iii) (17 CFR 240.12g3–2(b)(1)(iii)) and Note 2 to Exchange Act Rule 12g3–2(b)(1). As proposed, the adopted amendments do not require a deregistered issuer to satisfy the non-U.S. publication requirement in order to claim the Rule 12g3–2(b) exemption since that issuer will have filed Exchange Act reports for the prior fiscal year upon which investors may rely.

[64] Current Exchange Act Rule 12g3–2(b)(1)(i).

[65] Current Exchange Act Rule 12g3–2(e)(2).

[66] While commenters uniformly supported the electronic publication condition, some questioned the proposed requirement to provide English translations of specified non-U.S. disclosure documents. See Part II.C.3 of this release.

[67] Any trading of a foreign private issuer's Rule 12g3–2(b)-exempt securities in the United States would have to occur through an over-the-counter market such as that maintained by the Pink Sheets, LLC since, as of April, 1998, the NASD has required a foreign private issuer to register a class of securities under Exchange Act Section 12 before its securities could be traded through the electronic over-the-counter bulletin board administered by Nasdaq. See, for example, NASD Notice to Members (January 1998).

[68] Exchange Act Rule 12g3–2(b)(3)(i) (17 CFR 240.12g3–2(b)(3)(i)). Although the substantive requirements are the same, we have made conforming changes to General Instruction E and Part II, Item 9 of Form 15F to reflect the renumbering of the non-U.S. publication requirements of Rule 12g3–2(b).

[69] These are the same types of information specified in current Exchange Act Rule 12g3–2(b)(3) (17 CFR 240.12g3–2(b)(3)).

[70] Exchange Act Rule 12g3–2(b)(2)(i) (17 CFR 240.12g3–2(b)(2)(i)).

[71] Current Exchange Act Rule 12g3–2(b)(1)(iii).

[72] Exchange Act Rule 12g3–2(b)(2)(ii) (17 CFR 240.12g3–2(b)(2)(ii)). Form 6–K imposes a similar requirement.

translation. Currently an issuer typically must electronically publish or submit in paper a copy of a material press release on or around the same business day of its original publication.

The adopted amendments will permit an issuer to meet Rule 12g3–2(b)'s electronic publication requirement concurrently with the publishing in English of a non-U.S. disclosure document through an electronic information delivery system generally available to the public in its primary trading market. Thus, if an issuer's non-U.S. stock exchange or securities regulatory authority permits the issuer to publish electronically a required report on its electronic delivery system, and the public has ready access to the report and other documents maintained on the system,[73] that electronic publication solely will satisfy the proposed Rule 12g3–2(b)'s electronic publishing requirements.

3. English Translation Requirement

We are adopting, as proposed, the condition that, in order to claim or maintain the Rule 12g3–2(b) exemption, an issuer must publish electronically, at a minimum, English translations of the following documents if in a foreign language:

- Its annual report, including or accompanied by annual financial statements;
- Interim reports that include financial statements;
- Press releases; and
- All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.[74]

These are the same documents for which an issuer that has deregistered under Rule 12h–6 must currently provide English translations.[75]

Some commenters requested that we permit an issuer to provide brief English descriptions or English versions of specified non-U.S. disclosure documents instead of English translations.[76] We decline to adopt this suggestion because, as we stated in the Proposing Release, the specified non-U.S. disclosure documents are the same documents for which the Commission staff has historically required English translations because of their importance to investors.[77]

Some commenters also requested that we provide guidance regarding when an issuer may provide an English summary instead of an English translation.[78] Generally, if, as a registrant, an issuer could submit an English summary for a non-U.S. disclosure document under cover of Form 6–K or pursuant to Exchange Act Rule 12b–12(d)(3), it can do so when claiming or maintaining the Rule 12g3–2(b) exemption.

D. Elimination of the Written Application Requirement

The adopted rule amendments eliminate the current requirement that, in order to obtain the Rule 12g3–2(b) exemption, if not proceeding under Rule 12h-6, a foreign private issuer must submit written materials, typically in the form of a letter application, to the Commission. These materials currently include a list of the issuer's non-U.S. disclosure requirements, the number of U.S. holders of its subject securities and the percentage of outstanding shares held by them, the circumstances in which its U.S. holders acquired those securities, and the date and circumstances of the most recent public distribution of the securities of the issuer or its affiliate.[79] As long as an issuer satisfies the adopted rule's conditions, it no longer has to submit these materials to the Commission. Commenters strongly supported eliminating the written application process.

Elimination of Rule 12g3–2(b)'s written application process for all foreign private issuers is consistent with our adoption of an automatic application of the Rule 12g3–2(b) exemption upon the effectiveness of an issuer's deregistration under Rule 12h-6. Moreover, since the adopted rule amendments permit an issuer to claim the Rule 12g3–2(b) exemption based on a foreign listing/primary trading market condition, regardless of the number of its U.S. shareholders, the current shareholder information requirement would be of marginal use. Further, since, as adopted, as a condition to claiming and maintaining the Rule 12g3–2(b) exemption, an issuer will have to publish electronically its non-U.S. disclosure documents, investors should be able to ascertain many of the issuer's non-U.S. disclosure requirements from a review of those publicly available documents.

From time to time, the Commission has published a list of issuers claiming the Rule 12g3–2(b) exemption that have submitted relatively current information pursuant to that rule.[80] Commission staff has compiled this list based on a review of submitted paper documents. As we stated in the Proposing Release, as part of the streamlining of the Rule 12g3–2(b) process that the adopted rule amendments are intended to effect, the Commission anticipates it will no longer publish these lists subsequent to the effective date of the new rules.[81]

Some commenters suggested that, as a substitute for these lists, we adopt a requirement that an issuer must notify the Commission and other market participants that it is claiming and intends to rely on the Rule 12g3–2(b) exemption.[82] We decline to adopt such a notice requirement because we believe that, as other commenters have noted, a notice requirement could run contrary to the goal of encouraging an issuer to claim the Rule 12g3–2(b) exemption and electronically disseminate its non-U.S. disclosure documents in English.[83] Nevertheless, an issuer that wants to provide notice to investors, broker-dealers and other market participants may do so by, for example, stating on its Internet Web site that it has electronically published specified non-U.S. disclosure documents in order to claim or maintain the Rule 12g3–2(b) exemption.

E. Duration of the Amended Rule 12g3–2(b) Exemption

As adopted, the amended Rule 12g3–2(b) exemption will remain in effect until an issuer:

- No longer electronically publishes the specified non-U.S. disclosure documents required to maintain the exemption;
- No longer maintains a listing for the subject class of securities on one or more exchanges in a primary trading market, as defined by the rule; or

[73] An example of such a system is the System for Electronic Document Analysis and Retrieval (''SEDAR'') maintained by the Canadian Securities Administrators.

[74] Exchange Act Rule 12g3–2(b)(3)(ii) (17 CFR 240.12g3–2(b)(3)(ii)).

[75] Note 1 to Current Exchange Act Rule 12g3–2(e) (17 CFR 240.12g3–2(e)).

[76] See, for example, the letters of Sullivan & Cromwell and Simpson Thacher & Bartlett (''Simpson Thacher''), dated April 18, 2008.

[77] See Part II.D.1 of the Proposing Release. We similarly eliminated the ability of foreign registrants to provide English versions or brief English descriptions of specified non-U.S. documents submitted under cover of Form 6–K because of the vagueness and lack of utility of such versions and descriptions submitted to the Commission. *See* Release No. 33–8099 (May 14, 2002), 67 FR 36678 (May 24, 2002).

[78] See, for example, the letters of Shearman & Sterling, dated April 25, 2008, and Sullivan & Cromwell.

[79] Current Exchange Act Rules 12g3–2(b)(1), (2) and (5). As part of the written application process, an issuer must also submit paper copies of its non-U.S. disclosure documents published since the first day of its most recently completed fiscal year.

[80] See, for example, Release No. 34–51893 (June 21, 2005), 70 FR 37128 (June 28, 2005).

[81] See the Proposing Release at n. 86.

[82] See, for example, the letters of Simpson Thacher and Sullivan & Cromwell.

[83] See the letters of Ziegler, Ziegler & Associates, dated April 28, 2008, and BNY.

• Registers a class of securities under Section 12 of the Exchange Act or incurs reporting obligations under Section 15(d) of the Exchange Act.[84]

The duration of the amended Rule 12g3–2(b) exemption is similar to the duration of the current exemption. Both depend on an issuer's continued compliance with the requirement to publish its non-U.S. disclosure documents. Under both provisions, Section 12 registration or the incurrence of Section 15(d) reporting obligations terminates the exemption.[85] Moreover, currently, if an issuer can no longer claim the Rule 12g3–2(b) exemption because it has not complied with the rule's publication requirements, it must determine on the last day of the fiscal year whether, because of its record holder count, it would be required to register a class of securities under Section 12(g). The same would hold true under the rule amendments for a non-compliant issuer.

We are also adopting the provision, as proposed, that an issuer will lose the Rule 12g3–2(b) exemption if it no longer meets the foreign listing condition. An issuer will no longer satisfy the foreign listing condition either because it is no longer listed in its primary trading market, or because the one or two foreign jurisdictions in which it trades no longer qualifies as its primary trading market, as defined by the rule. Since the definition of primary trading market uses a trading volume standard for the issuer's most recently completed fiscal year, an issuer will have to redetermine its relative U.S. and foreign trading volumes on an annual basis.

Some commenters opposed basing the duration of the Rule 12g3–2(b) exemption on whether an issuer remains listed in its primary trading market.[86] We believe this provision is necessary in order to help ensure the continued availability of a set of non-U.S. disclosure documents to which investors may turn when making decisions regarding an issuer's securities. It is also necessary to help make sure that an issuer's principal trading market has not become the U.S. market, which would require the issuer to register and report under the Exchange Act.

Some commenters requested that we at least establish a ''cure'' period, such as six or twelve months, during which an issuer would either have to correct any deficiency or else register under the Exchange Act.[87] We decline to adopt a specific cure period. We believe that in order to best protect investors, an issuer that finds itself not in compliance with any of the conditions required to maintain the Rule 12g3–2(b) exemption must either re-establish compliance with the rule in a reasonably prompt manner or else register under the Exchange Act.

There is no cure period for domestic issuers that find they are subject to registration under Section 12(g). Thus, foreign private issuers are treated in a similar manner as domestic issuers in this respect. As noted, foreign private issuers may be able to avoid registration by re-establishing compliance with Rule 12g3–2(b), for example, by relisting its securities in its primary trading market.

F. Elimination of the Successor Issuer Prohibition

The adopted rule amendments will eliminate the provision that precludes an issuer from obtaining the Rule 12g3–2(b) exemption if, following the issuance of shares to acquire by merger, consolidation, exchange of securities or acquisition of assets, it has succeeded to the Exchange Act reporting obligations of another issuer.[88] Until recently, the sole exception to this successor issuer prohibition was for Canadian companies that registered the securities to be issued in the transaction on specified MJDS registration statements under the Securities Act.[89]

As part of the March 2007 rule amendments, we adopted a provision that permits a successor issuer to terminate its newly acquired Exchange Act reporting obligations as long as it meets Rule 12h–6's substantive requirements for equity or debt securities issuers.[90] We also amended Exchange Act Rule 12g3–2 to permit a successor issuer to claim the Rule 12g3–2(b) exemption upon the effectiveness of its termination of Exchange Act registration and reporting under Rule 12h–6. We see no reason to treat differently a successor issuer that qualifies for deregistration under one of the older exit rules, Rule 12g–4 or 12h–3, or under Section 15(d).

Elimination of the successor issuer prohibition will help encourage a successor issuer to claim the Rule 12g3–2(b) exemption and electronically publish its specified non-U.S. disclosure documents in English. No commenter opposed the proposed elimination of the successor issuer prohibition. Accordingly, we are removing the successor issuer prohibition under Rule 12g3–2(b), as proposed.

G. Elimination of the Rule 12g3–2(b) Exception for MJDS Filers

The adopted rule amendments will eliminate the Rule 12g3–2 provisions that make the Rule 12g3–2(b) exemption available to Canadian issuers that have only filed with the Commission specified registration statements under the MJDS,[91] although they may have filed those registration statements within the previous 18 months or to effect transactions in which they would succeed to Exchange Act reporting obligations.[92] Because the adopted amendments will eliminate the 18 month and successor issuer prohibitions under Rule 12g3–2(b), they will remove as unnecessary the MJDS filer exceptions to those prohibitions.

The adopted rule amendments will also eliminate the current ability of a Canadian issuer that already has the Rule 12g3–2(b) exemption, but that subsequently acquires Exchange Act reporting obligations as a MJDS filer, for example, with regard to a class of debt securities, to retain the Rule 12g3–2(b) exemption for its equity securities. Such a MJDS filer currently may submit its

[84] Exchange Act Rule 12g3–2(c) (17 CFR 240.12g3–2(c)).

[85] See, for example, current Exchange Act Rule 12g3–2(e)(3). A Rule 12g3–2(b)-exempt issuer that acquires an Exchange Act reporting company following an exchange of shares, and thereby succeeds to the target company's Exchange Act reporting obligations under Exchange Act Rule 12g–3 (17 CFR 240.12g–3) or Exchange Act Rule 15d–5 (17 CFR 240.15d–5), would lose the Rule 12g3–2(b) exemption upon succession. If such successor issuer qualified for deregistration under Exchange Act Rule 12h–6, it could claim the Rule 12g3–2(b) exemption upon deregistration.

[86] See the letters of the ABA and Sullivan & Cromwell. The primary objection was that adherence to the electronic publication condition should be a sufficient basis for maintaining the exemption as it is under the current rule.

[87] See, for example, the letter of the OFII.

[88] Current Exchange Act Rule 12g3–2(d)(2). An issuer succeeds to the Exchange Act reporting obligations of another either under Exchange Act Rule 12g–3 (17 CFR 240.12g–3) or 15d–5 (17 CFR 240.15d–5).

[89] The specified MJDS registration statements are Forms F–8, F–9, F–10 and F–80 (17 CFR 239.38, 239.39, 239.40, and 239.41).

[90] 17 CFR 240.12h–6(d). Under that rule, a non-Exchange Act reporting foreign private issuer that has acquired a reporting foreign private issuer in a transaction exempt under the Securities Act, for example, under Rule 802 (17 CFR 230.802), or Securities Act Section 3(a)(10) (15 U.S.C. 77c(a)(10)), may qualify immediately for termination of its Exchange Act reporting obligations under Rule 12h–6, without having to file an Exchange Act annual report, as long as the acquired company's reporting history fulfills Rule 12h–6's prior reporting condition and the successor issuer meets the rule's other conditions.

[91] The Commission adopted the Rule 12g3–2 provisions when adopting the MJDS in order to encourage Canadian issuers to use the MJDS. See Release No. 33–6879 (October 22, 1990), 55 FR 462881 (November 2, 1990), as adopted in Release No. 33–6902 (June 21, 1991), 56 FR 30036 (July 1, 1991). The MJDS generally permits a qualified Canadian issuer to file with the Commission its Canadian registration statements and reports under cover of the MJDS forms.

[92] Current Exchange Act Rules 12g3–2(d)(1) and (2).

non-U.S. disclosure documents simultaneously to fulfill its Exchange Act reporting obligations under the MJDS and its non-U.S. publication obligations under Rule 12g3–2(b).[93]

We proposed to eliminate this ability of a MJDS filer simultaneously to maintain the Rule 12g3–2(b) exemption both because few issuers have ever used that ability and because it no longer is the case that a MJDS filer must file the same documents to fulfill its obligations under the Exchange Act and Rule 12g3–2(b). Since the enactment of the Sarbanes-Oxley Act,[94] and Commission rules adopted under that Act, Canadian issuers must respond to several U.S. disclosure requirements when preparing their Form 40–F annual reports.[95]

Only one commenter opposed eliminating this rarely used ability to be a MJDS filer while simultaneously claiming the Rule 12g3–2(b) exemption.[96] The primary ground for objection was that some issuers may already be relying on the ability to use MJDS reports for this dual purpose. We continue to believe that this ability is rarely used if at all. Moreover, as explained below, we are adopting a three-year transition period following effectiveness of the adopted rule amendments, that will provide ample time for a MJDS registrant of debt securities, which has simultaneously claimed the Rule 12g3–2(b) exemption for a class of equity securities, to register that class of securities under the Exchange Act.[97]

Accordingly, we are adopting the elimination of this MJDS provision, as proposed.[98] Under the adopted rule amendments, a MJDS registrant will be eligible to claim the Rule 12g3–2(b) exemption on the same grounds as other foreign registrants. If it has recently exited the Exchange Act reporting regime under Rule 12h–6, 12g–4 or12h–3 or Section 15(d), it can claim the exemption, assuming it satisfies the rule amendments' other conditions. Otherwise, the filing of a MJDS registration statement under the Securities Act or Exchange Act will trigger Exchange Act reporting obligations and preclude that issuer from claiming the exemption.

H. Elimination of the ''Automated Inter-Dealer Quotation System'' Prohibition and Related Grandfathering Provision

The adopted amendments will also eliminate the provision generally prohibiting a foreign private issuer from claiming the Rule 12g3–2(b) exemption if it has securities or ADRs quoted in the United States on an automated inter-dealer quotation system,[99] which, until recently, referred to the inter-dealer quotation system administered by the National Association of Securities Dealers Inc., and known as Nasdaq. The Commission initially adopted this prohibition in 1983 because of its belief that, since its establishment in 1971, Nasdaq had so matured into a trading system with substantial similarities to a national securities exchange that Nasdaq-traded foreign private issuers should be required to meet the same disclosure standards as exchange-traded foreign private issuers.[100] We are eliminating this prohibition, as proposed, because Nasdaq has since become a national securities exchange.[101]

When the Commission adopted the automatic inter-dealer quotation system prohibition, it recognized that the general prohibition could cause some Nasdaq-quoted foreign companies that already had obtained the Rule 12g3–2(b) exemption to withdraw from Nasdaq. Therefore, the Commission excepted from that prohibition securities that:

- Were quoted on Nasdaq on October 5, 1983 and have been continuously traded since;
- Were exempt under Rule 12g3–2(b) on October 5, 1983 and have remained so since; and
- After January 2, 1986, were issued by a non-Canadian company.[102]

The adopted rule amendments will eliminate this grandfathering provision because, as we stated in the Proposing Release, due to developments occurring since its adoption, we no longer believe the grandfathering provision is necessary. Only nine of the grandfathered issuers remain listed on Nasdaq.[103] Pursuant to Commission order, Nasdaq is now a national securities exchange, and those issuers must register their securities under Exchange Act Section 12(b) by August 1, 2009 if they wish to remain listed on Nasdaq.[104] Pursuant to the terms of the Commission order, as long as the nine grandfathered issuers continue to comply with the conditions of Rule 12g3–2(b), brokers and dealers may trade their securities in reliance on the Rule 12g3–2(b) exemption until the above deadline for Exchange Act registration. Those few commenters that addressed the issue supported the proposed elimination of the grandfathering provision.[105] Accordingly, we are adopting the elimination, as proposed.

I. Revisions to Form F–6

Currently, a registrant of ADRs must state on Form F–6, the registration statement used to register ADRs under the Securities Act, that the issuer of the deposited securities against which the ADRs will be issued is either an Exchange Act reporting company or furnishes public reports and other documents to the Commission pursuant to Rule 12g3–2(b).[106] We proposed to require a Form F–6 registrant to state that, if the issuer of deposited securities is not an Exchange Act reporting company, such issuer publishes information in English required to maintain the Rule 12g3–2(b) exemption on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. The registrant would also have to disclose the issuer's address of its Internet Web site or the

[93] Under the current rules, a Canadian issuer that checks the appropriate box on the cover of each filed Form 40–F and submitted Form 6–K is able to use those Exchange Act reports to maintain its Rule 12g3–2(b) exemption as well.

[94] Public Law 107–204, 116 Stat. 745 (2002).

[95] See, for example, Form 40–F's certifications required concerning an issuer's disclosure controls and procedures and its internal controls over financial reporting, and the disclosure required concerning its audit committee financial expert, its code of ethics, and its off-balance sheet arrangements.

[96] See the letter of Osler, Hoskins & Harcourt, dated April 28, 2008.

[97] See Part II.K.1 below.

[98] The adopted rule amendments remove the instruction on the cover page of Form 40–F and Form 6–K requiring a registrant to indicate whether it also is furnishing the materials pursuant to Rule 12g3–2(b).

[99] Current Exchange Act Rule 12g3–2(d)(3) (17 CFR 12g3–2(d)(3)).

[100] Release No. 34–20264 (October 6, 1983), 48 FR 46736 (October 14, 1983).

[101] Nasdaq ceased operations as an automated inter-dealer quotation system and became a national securities exchange effective August 1, 2006. See Release No. 34–53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).

[102] Current Exchange Act Rule 12g3–2(d)(3). The Commission based the more limited grandfathering of Canadian securities on the more active U.S. market for those securities, which had led to abuses under Rule 12g3–2(b). Release No. 34–20264.

[103] Letter from Edward S. Knight to Nancy M. Morris (July 31, 2006), attached to Release No. 34–54240 (July 31, 2006), 71 FR 45246 (August 8, 2006).

[104] Release No. 34–54241 (July 31, 2006), 71 FR 45359 (August 8, 2006). The Commission granted the grandfathered issuers an additional three years to register their securities under Section 12(b) in order to avoid disruptions in the trading of their securities caused by their delisting from Nasdaq and to provide them with time to meet U.S. disclosure requirements.

[105] See the ABA letter and the letter of the Pink OTC Markets Inc. (''Pink OTC''), dated April 10, 2008.

[106] Part I, Item 2 of Form F–6. Form F–6 states that the registrant is the legal entity created by the deposit agreement for the issuance of ADRs for the deposited securities.

electronic information delivery system in its primary trading market.[107]

Some commenters stated that, if the Commission elects not to publish an annual list of Rule 12g3–2(b)-exempt issuers, it will be difficult for a depositary of an unsponsored ADR facility[108] to determine that the issuer of the subject securities has complied with the electronic publication condition of Rule 12g3–2(b). Those commenters requested that, for unsponsored facilities, we either eliminate the Form F–6 condition that an issuer must be subject to Exchange Act reporting or must furnish reports required under Rule 12g3–2(b),[109] or revise the proposed Form F–6 amendment to permit the depositary to base its representation concerning an issuer's Rule 12g3–2(b) electronic publication upon the depositary's reasonable, good faith belief.[110]

We are not revising the requirement under Form F–6 that the issuer of the deposited securities be either an Exchange Act reporting company or be exempt from registration under Rule 12g3–2(b) because such revision would eliminate any ongoing disclosure obligations as a condition of Form F–6 registration, which would not be in the best interest of investors. However, we are amending Form F–6 to state that, in the case of an unsponsored ADR facility, a Form F–6 filer may base its representation that the issuer publishes information in English required to maintain the exemption from registration under Exchange Act Rule 12g3–2(b) upon the filer's reasonable, good faith belief after exercising reasonable diligence.[111] Except for this one change, we are adopting the Form F–6 amendment, as proposed.

Currently an issuer that does not seek to have its securities traded in the United States in the form of ADRs is able, by not formally establishing the Rule 12g3–2(b) exemption and submitting documents to the Commission, to restrict the ability of ADR depositary banks to establish unsponsored ADR facilities. Because the adopted rule amendments will expand the availability of the Rule 12g3–2(b) exemption by making it available to all otherwise eligible foreign private issuers that post materials to their Web sites or publish them through an electronic information delivery system in their primary trading market, ADR depositaries will be able to establish unsponsored ADRs on this expanded group of foreign private issuers based upon their reasonable, good faith belief, after exercising reasonable diligence, that those issuers comply with Rule 12g3–2(b).[112]

We solicited comment on whether, because of the expanded availability of the Rule 12g3–2(b) exemption under the proposed rule amendments, we should require, as a condition to the registration of ADRs on Form F–6, that the issuer give its consent to the depositary, or at least that the depositary must have notified the issuer of its intention to register ADRs and must not have received an affirmative statement of objection from the issuer. Those few commenters that addressed this matter disagreed on whether imposing such additional conditions on the creation of unsponsored ADR facilities was necessary or advisable.[113] Given this disagreement, and because we concur with those commenters who stated that imposing such additional conditions could run counter to the goal of streamlining the Rule 12g3–2(b) regime for the benefit of investors and issuers,[114] we are not adopting at this time any additional conditions regarding the formation of unsponsored ADR facilities.

J. Amendment of Exchange Act Rule 15c2–11

Exchange Act Rule 15c2–11[115] contains requirements that are intended to deter broker-dealers from initiating or resuming quotations for covered over-the-counter securities that may facilitate a fraudulent or manipulative scheme. The Rule currently prohibits a broker-dealer from publishing (or submitting for publication) a quotation for a covered over-the-counter security in a quotation medium unless it has obtained and reviewed current information about the issuer.[116] One of the specified types of information satisfying this Rule 15c2–11 obligation is information furnished to the Commission pursuant to Rule 12g3–2(b). A broker-dealer must make this information reasonably available upon request to any person expressing an interest in a proposed transaction involving the security with the broker-dealer.[117]

We proposed to amend Rule 15c2–11 to conform to the proposed rule amendments so that a broker-dealer must have available the information that, since the beginning of its last fiscal year, the issuer has published pursuant to the Rule 12g3–2(b) exemption. We further proposed to permit a broker-dealer to fulfill its Rule 15c2–11 obligation to make reasonably available upon request the information published pursuant to Rule 12g3–2(b) by providing the requesting person with appropriate instructions regarding how to obtain the information electronically. This reflects our view that most investors will have ready access to the electronically published documents of Rule 12g3–2(b)-exempt issuers.

The proposed amendment of Rule 15c2–11 received little comment. Because this proposal will make it easier for broker-dealers to fulfill their Rule 15c2–11 obligations for the benefit of investors, we are adopting it, as proposed. Because some issuers currently still make paper submissions to maintain their Rule 12g3–2(b) exemption, we expect that, during the first year of the amended rules' effectiveness, a broker-dealer may have to resort to both paper submissions and electronically published materials in order to fulfill its Rule 15c2–11 obligations regarding a particular issuer.

[107] A registrant that has effected a Form F–6 registration statement before the effective date of these final rules would not have to amend the Form F–6 to provide the issuer's Internet Web site address until the registrant's first substantive amendment of the Form F–6. However, once a registrant has disclosed the issuer's Internet address on the Form F–6, it should promptly amend the Form F–6 to disclose a subsequent change in that address.

[108] Currently an ADR facility may be either sponsored or unsponsored. With a sponsored facility, the issuer of the deposited securities is a party to the deposit agreement along with the depositary and is able to exercise some control regarding the terms and operations of the facility. With an unsponsored facility, the depositary solely controls the terms and operations of the facility.

[109] See the letter of JPMorganChase.

[110] See the letters of Ziegler, Ziegler & Associates and BNY.

[111] See the Note to Form F–6, Part I, Item 2.

[112] ADR depositaries will also be able to establish sponsored ADR facilities with foreign private issuers that choose to have their shares represented by ADRs in the United States.

[113] See the letters of Cleary Gottlieb and EuropeanIssuers, both of which favored requiring a depositary to notify an issuer before establishing an unsponsored ADR facility, and requiring it to terminate an unsponsored facility created without the consent of an issuer if the issuer decides to create a sponsored facility. But see the letters of BNY and Pink OTC, both of which opposed the adoption of a condition requiring a depositary to obtain the consent of an issuer before establishing an unsponsored ADR facility, and the letter of Deutsche Bank, dated April 21, 2008, which stated that, because, in practice, depositary banks typically obtain the issuer's consent before establishing an unsponsored ADR facility, a rule requiring such consent was not necessary.

[114] See the letters of BNY and Pink OTC.

[115] 17 CFR 240.15c2–11.

[116] Rule 15c2–11(a) (17 CFR 240.15c2–11(a)). The broker-dealer must also have a reasonable basis for believing that the issuer information, when considered along with any supplemental information, is accurate and is from a reliable source.

[117] Rule 15c2–11(a)(4) (17 CFR 240.15c2–11(a)(4)).

Eventually, however, a broker-dealer will only have to look to an issuer's electronically published materials for the purpose of Rule 15c2–11.

K. Transition Periods

1. Regarding Section 12 Registration

While we believe most issuers that currently have the Rule 12g3–2(b) exemption will continue to be able to claim the exemption upon the effectiveness of the adopted rule amendments, some may not be able to do so because, for example, they no longer maintain a foreign listing or their principal foreign trading market comprises less than 55 percent of their worldwide trading and, therefore, does not meet the definition of primary trading market under the amended rule. Those issuers will have to file a Section 12 registration statement if they are unable to meet all of the amended rule's conditions or fail to qualify under another exemption from Section 12(g). In order to provide those issuers with sufficient time to prepare for and complete the Section 12 registration process, including obtaining required audited financial statements, we are adopting a three-year transition period, as proposed. Those issuers must become Exchange Act registrants no later than three years from the effective date of the adopted rule amendments if they are unable to comply fully with all of the amended rule's conditions.[118]

We believe this three-year transition period is necessary for the benefit not just of issuers, but of broker-dealers and investors as well. If a currently exempt issuer is unable to claim the Rule 12g3–2(b) exemption upon the effectiveness of the rule amendments because it no longer has a foreign listing or cannot meet the primary trading market definition, but continues to comply with the electronic publishing condition, a broker-dealer will be able to rely on that issuer's electronic postings to meet its Rule 15c2–11 obligations to investors and to facilitate resales of that issuer's securities in Rule 144A transactions during the transition period.

Several commenters urged the Commission to grandfather indefinitely current Rule 12g3–2(b)-exempt companies.[119] Most of those issuers also stated their support for a three-year transition period as an alternative to a grandfathering provision.[120] We decline to adopt a grandfathering provision because, in the interest of protecting investors, we believe that any issuer that claims the Rule 12g3–2(b) exemption must comply fully with the foreign listing condition and definition of primary trading market. Adoption of a three-year transition period will enable issuers to achieve full compliance with Rule 12g3–2(b) or Exchange Act registration without unduly burdening them.

2. Regarding Processing of Paper Submissions

We expect that, following the effectiveness of the adopted rule amendments, some Rule 12g3–2(b)-exempt companies will continue to submit their non-U.S. disclosure documents in paper to the Commission either because they are unaware of the amendments or lack electronic publishing capabilities. In order to assist those companies in complying with the new amendments, and because there may also be some investors who currently do not have ready access to the Internet, we are adopting a three-month transition period, as proposed. During this period, the Commission will continue to process paper Rule 12g3–2(b) submissions and make them publicly available in the Public Reference Room for three months following the effectiveness of the rule amendments. Thereafter, the Commission will no longer process paper Rule 12g3–2(b) submissions. An issuer that continues to make Rule 12g3–2(b) submissions in paper after this three-month period, and does not publish the submitted documents electronically as required, will no longer be able to claim the Rule 12g3–2(b) exemption.

Those commenters that addressed the matter supported such a transition period,[121] although one commenter suggested a one-year period instead of a three-month period.[122] Because of recent advances in information technology, we continue to believe that three months will be sufficient time for all Rule 12g3–2(b)-exempt issuers to develop the capabilities to publish electronically their non-U.S. disclosure documents, and for investors and other interested persons to determine how and where to access those electronically published documents.

III. Paperwork Reduction Act

The final rule amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[123] The title of the affected collections of information are submissions under Exchange Act Rule 12g3–2 (OMB Control No. 3235–0119) and Securities Act Form F–6 (OMB Control No. 3235–0292). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the amendments to Rule 12g3–2 and Form F–6 is mandatory.

Exchange Act Rule 12g3–2 is an exemptive rule that, under paragraph (b) of that rule, provides an exemption from Exchange Act Section 12(g) registration for a foreign private issuer that, on an ongoing basis, either submits copies of its material non-U.S. disclosure documents to the Commission in paper or publishes those documents on its Internet Web site or through an electronic information delivery system in its primary trading market. We adopted paragraph (b) of Rule 12g3–2 in order to provide information for U.S. investors concerning foreign private issuers with limited securities trading in U.S. capital markets.

Securities Act Form F–6 is the form used to register ADRs, which are a special type of security issued by a U.S. bank, representing a specified amount of securities issued by a foreign company that are deposited with the bank. We adopted Form F–6 in order to provide investors with information concerning a foreign company's ADRs, as disclosed in the deposit agreement, which must be attached as an exhibit to the Form F–6.

The hours and costs associated with making submissions under Exchange Act Rule 12g3–2(b) and preparing and filing Form F–6 constitute reporting and cost burdens imposed by those collections of information. We based our estimates of the effects that the final rule amendments will have on those collections of information primarily on our review of the most recently completed PRA submissions for Rule 12g3–2(b) documents and Form F–6, on the particular requirements for those submissions and form, and on other information, for example, concerning relative U.S. and foreign trading volume for foreign private issuers whose equity securities trade in the U.S. over-the-counter market.

[118] We adopted a similar three-year transition period to enable those grandfathered Nasdaq-traded foreign companies that were Rule 12g3–2(b)-exempt to register under Section 12(b) after Nasdaq became an exchange. *See* Release No. 34–54241 (July 31, 2006), 71 FR 45359 (August 8, 2006).

[119] See the letters of the ABA, BNY, JPMorganChase, Pink OTC, and Shearman & Sterling.

[120] The ABA suggested a five-year transition period.

[121] See the letters of the ABA, BNY and Pink OTC.

[122] See the BNY letter.

[123] 44 U.S.C. 3501 *et seq.*

The final rule amendments to Exchange Act Rule 12g3–2 will permit a foreign private issuer to claim the Rule 12g3–2(b) exemption, without having to submit paper copies of written materials to the Commission, if, among other requirements, it maintains a listing of the subject class of securities on one or more exchanges in its primary trading market. The final rule amendments define primary trading market to mean that at least 55 percent of the trading in the issuer's subject class of securities on a worldwide basis took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. The final rule amendments also provide that, if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of meeting the primary trading market definition, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities.

The final rule amendments further require that, as a condition to claiming the Rule 12g3–2(b) exemption, a non-Exchange Act reporting issuer must publish in English specified non-U.S. disclosure documents required by Rule 12g3–2(b) for its most recently completed fiscal year on its Internet Web site or through an electronic information delivery system in its primary trading market, instead of requiring their submission in paper as part of a written application to the Commission. The final rule amendments also require an issuer similarly to publish electronically specified non-U.S. disclosure documents in English on an ongoing basis for subsequent fiscal years as a condition to maintaining the Rule 12g3–2(b) exemption, rather than permitting their submission in paper to the Commission.

The final amendments to Form F–6 will require a registrant to state that the issuer of the deposited securities, which is not an Exchange Act reporting company, publishes information in English required to maintain the Rule 12g3–2(b) exemption on the issuer's Internet Web site or through its primary trading market's electronic information delivery system.[124] The final amendments will also require the registrant to disclose the address of the issuer's Internet Web site or electronic information delivery system. A registrant that already has an effective Form F–6 will have to disclose the address of where the issuer electronically publishes its non-U.S. disclosure documents under Rule 12g3–2(b) when the registrant first amends its Form F–6 following the effective date of the final rule amendments.

We have prepared the annual burden and cost estimates of the final rule amendments on Rule 12g3–2(b) submissions or publications and Form F–6 based on the following current estimates and assumptions:

- A foreign private issuer incurs 75% of the burden required to produce each Rule 12g3–2(b) submission or publication, excluding the initial application for the Rule 12g3–2(b) exemption and English translation work, and 25% of the burden required to perform work for the initial application and English translation for the Rule 12g3–2(b) submissions or publications;
- Outside firms, including legal counsel, accountants and other advisors incur 25% of the burden required to produce each Rule 12g3–2(b) submission or publication, not including the initial application for the Rule 12g3–2(b) exemption and English translation work, at an average cost of $400 per hour, and 75% of the burden required to produce the initial application at an average cost of $400 per hour, and 75% of the burden resulting from English translation work at an average cost of $125 per hour;
- English translation work constitutes on average 25% of the total work required for the Rule 12g3–2(b) submissions;
- A registrant satisfies 25% of the burden required to produce each Form F–6; and
- Outside firms, including legal counsel, accountants and other advisors, satisfy 75% of the burden required to produce each Form F–6 at an average cost of $400 per hour.

We published a notice requesting comment on the collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[125] We received several comment letters regarding the proposed rule amendments, although none addressed their estimated effects on the collection of information requirements. We have revised the proposed rule amendments in response to those comments. As a result, we have revised the estimated reporting and cost burdens of the rule amendments, as discussed below.

A. Rule 12g3–2(b) Submissions or Publications

We estimate that, currently under Rule 12g3–2(b), on an annual basis:

- 1,036 foreign private issuers claim the Rule 12g3–2(b) exemption;
- Each issuer makes on average 12 submissions or publications, for a total of 12,432 submissions or publications under Rule 12g3–2(b);
- Production of those Rule 12g3–2(b) submissions or publications requires a total of 49,728 burden hours, or an average of 4 burden hours per submission or publication (for all work performed by foreign private issuers and outside firms);
- Of those total burden hours, 13,700 hours result from work incurred by 685 issuers to produce their initial Rule 12g3–2(b) applications;[126]
- Foreign private issuers incur a total of 25,943 burden hours[127] to produce the Rule 12g3–2(b) submissions or publications, or an average of 2.1 burden hours per submission or publication;[128] and
- Outside firms perform service at a total cost of $7,656,375[129] to produce

[124] The final amendments provide that the registrant of an unsponsored ADR facility may make the required representation based upon its reasonable good faith belief after exercising reasonable diligence.

[125] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[126] We previously estimated that 685 issuers obtained the Rule 12g3–2(b) exemption before the adoption of Rule 12h–6, which eliminated the application process for issuers that deregister pursuant to that new rule. See Release No. 34–55540. All of the 685 issuers obtained the Rule 12g3–2(b) exemption after having submitted a letter application to the Commission. Based on a review of several Rule 12g3–2(b) applications, and an assessment of Rule 12g3–2(b)'s requirements and current practice, we estimated then, and continue to estimate, that it takes approximately 20 hours on average to complete a Rule 12g3–2(b) letter application. 685 × 20 hrs. = 13,700 hrs.

[127] 49,728 hrs. − 13,700 hrs. = 36,028 hrs. for work excluding application work. 36,028 hrs. × .25 = 9,007 hrs. for English translation work. 36,028 hrs. − 9,007 hrs. = 27,021 hrs. × .75 = 20,266 hrs. for non-English translation work. 9,007 hrs. × .25 = 2,252 hrs. for English translation work. 13,700 hrs. × .25 = 3,425 hrs. for application work. 20,266 hrs. + 2,252 hrs. + 3,425 hrs. = 25,943 hrs. for total work performed by foreign private issuers. 25,943 hrs./12,432 = 2.1 hrs per submission or publication.

[128] The last OMB-approved submission for Rule 12g3–2(b) reported 31,080 burden hours for foreign private issuers. Our current estimate of 25,943 burden hours is due to our assessment of the average annual burden hours required to produce written applications under Rule 12g3–2(b), most of which are incurred by outside firms. The decrease in hours represents an adjustment to the previous OMB-approved burden estimate for Rule 12g3–2(b), which we noted when submitting the PRA estimate for the Proposing Release.

[129] 27,021 hrs. × .25 = 6,755 hrs. × $400/hr. = $2,702,000 for non-English translation work. 9,007 hrs. × .75 = 6,755 hrs. × $125/hr. = $844,375 for English translation work. 13,700 hrs. × .75 = 10,275 hrs. × $400/hr. = $4,110,000 for application work. $2,702,000 + $844,375 + $4,110,000 = $7,656,375 for total work performed by outside firms.

the Rule 12g3–2(b) submissions or publications.[130]

We estimate that, on an annual basis, up to 350 additional foreign private issuers could claim the Rule 12g3–2(b) exemption as a result of the amendments to Rule 12g3–2 we are adopting today.[131] This increase in the number of Rule 12g3–2(b)-exempt issuers would cause:

- The number of issuers claiming the Rule 12g3–2(b) exemption to total 1,386;
- The number of Rule 12g3–2(b) publications to total 16,632;[132]
- The number of burden hours required to produce these Rule 12g3–2(b) publications to total 59,528 hours (for all work performed by issuers and outside firms);[133]
- The number of burden hours incurred by foreign private issuers to produce the Rule 12g3–2(b) publications to total 37,206 hours, or 2.2 burden hours per publication;[134] and
- Outside firms perform services at a total cost of $5,860,050[135] to produce the Rule 12g3–2(b) publications.[136]

B. Form F–6

We currently estimate that, on an annual basis:

- 150 registrants file Form F–6;
- Each registrant files one Form F–6, for a total of 150 Form F–6s;
- Production of these Form F–6s requires 150 burden hours, or one burden hour per Form F–6 (for all work performed by registrants and outside firms);
- Of those total hours, registrants incur 38 hours to produce the Form F–6s, or an average of .25 hours per Form F–6;[137] and
- Outside firms perform services at a total cost of $45,000 to produce the Form F–6s.[138]

We estimate that, on an annual basis, approximately 350 additional registrants could file Form F–6 as a result of the final rule amendments. We further estimate that, as a result of the final rule amendments, the burden required to produce each Form F–6 would increase by .5 hours. This increase in the number of Form F–6s and burden hours would cause:

- The number of Form F–6s filed to increase by 350 for a total of 500;
- The total hours required to produce the Form F–6s to increase by 525 hours for a total of 675 hours, or 1.35 hours per Form F–6;[139]
- The number of burden hours incurred by registrants to produce the Form F–6s to increase by 131 hours to 169 hours, or.34 hours per Form F–6;[140] and
- Outside firms to perform services at a total cost of $202,400 (an increase of $157,400)[141] to produce the Form F–6s.[142]

IV. Cost-Benefit Analysis

A. Expected Benefits

The adopted rule amendments are designed to encourage more foreign companies, which have not listed or otherwise publicly sold their securities in the United States, to claim the Rule 12g3–2(b) exemption, and thereby require them to publish on the Internet material disclosure documents in English, enhancing the ability of U.S. investors to trade equity securities of such companies in the U.S. over-the-counter market. The Rule 12g3–2(b) exemption permits a foreign company to have established an unlisted ADR facility under which its equity securities are traded as ADRs in the U.S. over-the-counter market for the convenience of U.S. investors, even if its U.S. investors exceed the Section 12(g) shareholder thresholds.[143] The Rule 12g3–2(b) exemption also permits a foreign company to have its equity securities traded in the form of ordinary shares through the U.S. over-the-counter market, makes it easier for broker-dealers to fulfill their obligations under Exchange Act Rule 15c2–11, and facilitates the resale of a foreign company's securities to qualified institutional buyers in the United States under Securities Act Rule 144A.

The adopted rule amendments should result in new investment opportunities in foreign securities for U.S. investors by encouraging more foreign companies to claim the Rule 12g3–2(b) exemption and thereby have their securities traded in the United States over-the-counter market. The new investment opportunities in foreign securities may also lead to improved diversification in the portfolios of U.S. investors.

The adopted rule amendments will encourage more foreign companies to

[130] The last OMB-approved submission for Rule 12g3–2(b) reported $4,895,100 in total costs for outside firms. Our current estimate of $7,656,375 is due to the previously noted assessment of the average annual burden hours required to produce written applications under Rule 12g3–2(b). This increase in costs represents an adjustment to the previous OMB-approved cost estimate for Rule 12g3–2(b), which we noted when submitting the PRA estimate for the Proposing Release.

[131] We previously estimated that the proposed rule amendments would cause an additional 150 issuers to claim the Rule 12g3–2(b) exemption. We have increased the estimated number of issuers affected by the final rule amendments in part due to the elimination of the proposed condition that would have required an issuer to have its U.S. trading volume no greater than 20 percent of its worldwide trading volume for its last fiscal year. Under the final rule amendments, an issuer must still meet the foreign listing/primary trading market condition, which effectively limits the issuer's U.S. trading volume to no greater than 45%. The increase in the estimated number of issuers affected by the final rule amendments is also due to a reconsideration of the number of unsponsored ADR facilities that could result from the amended rules.

[132] 1,386 × 12 = 16,632 publications.

[133] 16,632 × 4 hrs. = 66,528 hrs. 350 × 20 hrs. = 7,000 hrs. of work saved by the elimination of the written application requirement. 66,528 hrs. − 7,000 hrs. = 59,528 hrs.

[134] 59,528 hrs. × .25 = 14,882 hrs. for English translation work. 59,528 hrs. − 14,882 hrs. = 44,646 hrs.; 44,646 hrs. × .75 = 33,485 hrs. for non-English translation work; 14,882 hrs. × .25 = 3,721 hrs. for English translation work; 33,485 hrs. + 3,721 hrs. = 37,206 total hrs. incurred by foreign private issuers. 37,206 hrs./16,632 = 2.2 hrs. per publication. This represents an increase of 6,126 hrs. from the most recent OMB-approved burden estimate for Rule 12g3–2(b) submissions or publications. Using a rate of $175/hr. for in-house work, the adopted amendments could result in $6,511,050 of in-house costs incurred by foreign private issuers compared to $5,439,000 of in-house costs based on the previous OMB-approved burden estimate for Rule 12g3–2(b) submissions or publications. 37,206 hrs. × $175/hr. = $6,511,050. 31,080 hrs. × $175/hr. = $5,439,000.

[135] 44,646 hrs. × .25 = 11,162 hrs. × $400/hr. = $4,464,800 for non-English translation work; 14,882 hrs. × .75 = 11,162 hrs. × $125/hr. = $1,395,250 for English translation work; $4,464,800 + $1,395,250 = $5,860,050 for total costs incurred by outside firms. This represents an increase of $964,950 from the most recent OMB-approved cost estimate for Rule 12g3–2(b) submissions or publications.

[136] Based on the above estimates, the amendments could result in a $2,037,000 increase in Rule 12g3–2(b) costs. $6,511,050 + $5,860,050 = $12,371,100 in total post-amendment Rule 12g3–2(b) costs. $5,439,000 + $4,895,100 = $10,334,100 in total pre-amendment Rule 12g3–2(b) costs. $12,371,100 − $10,334,100 = $2,037,000 increase in Rule 12g3–2(b) costs.

[137] 150 hrs. × .25 = 38 hrs.

[138] 150 hrs. × .75 × $400/hr. = $45,000.

[139] For the additional 350 filers: 350 × 1.5 hrs. = 525 hrs., 525 hrs. + 150 hrs. = 675 hrs., 675 hrs./500 = 1.35 hrs. per Form F–6.

[140] 675 hrs. × .25 = 169 hrs., 169 hrs. − 38 hrs. = 131 hrs., 169 hrs./500 = .34 hr. per Form F–6. Using a rate of $175/hr. for in-house work, the adopted amendments could result in $29,575 of in-house costs incurred by foreign private issuers compared to $6,650 of pre-amendment in-house costs. 169 hrs. × $175/hr. = $29,575. 38 hrs. × $175/hr. = $6,650.

[141] 675 hrs. × .75 = 506 hrs. × $400/hr. = $202,400. $202,400 − $45,000 = $157,400.

[142] Based on the above estimates, the amendments could result in a $180,325 increase in Form F–6 costs. $29,575 + $202,400 = $231,975 in total post-amendment Form F–6 costs. $6,650 + $45,000 = $51,650 in total pre-amendment Form F–6 costs. $231,975 − $51,650 = $180,325 increase in Form F–6 costs. Thus, considering the estimated effects on both Rule 12g3–2(b) submissions and publications and Form F–6, the amendments could result in a $2,217,325 increase in total costs. $2,037,000 + $180,325 = $2,217,325.

[143] Use of an ADR facility makes it easier for a U.S. investor to receive dividends in U.S. dollars. Moreover, because the clearance and settlement process for ADRs generally is the same for securities of domestic companies that are traded in U.S. markets, a U.S. holder of an ADR is able to hold securities of a foreign company that trades, clears and settles within automated U.S. systems and within U.S. time periods.

claim the Rule 12g3–2(b) exemption by reducing the costs of obtaining that exemption for foreign private issuers in two ways. First, the rule amendments will enable an otherwise eligible issuer to claim the Rule 12g3–2(b) exemption, regardless of the number of its U.S. security holders, as long as it maintains a listing of the subject class of equity securities on one or more exchanges in no more than two foreign jurisdictions constituting its primary trading market. The rule amendments define ''primary trading market'' to mean that at least 55 percent of the worldwide trading volume of the issuer's subject class of securities occurs in no more than two foreign jurisdictions, and the trading volume in one of the foreign jurisdictions must be larger than the U.S. trading volume for the same class of securities. Currently Rule 12g3–2(b) requires an issuer to disclose the number of its U.S. security holders and the percentage of its outstanding securities held by them when applying for the Rule's exemption from Exchange Act registration.[144] Since it is typically more difficult for a foreign company to calculate the number of its U.S. holders than to determine its U.S. or foreign trading volume, the adopted rule amendments should make it easier for more foreign companies to claim the exemption and thereby have their securities traded in the U.S. over-the-counter market for the benefit of U.S. investors.

Second, the adopted rule amendments will eliminate the current written application process that requires an issuer to submit in paper specified information concerning, for example, its non-U.S. disclosure requirements, along with paper copies of its non-U.S. disclosure documents published since the beginning of its last fiscal year. Since outside law firms typically perform most of the work required for the application, the rule amendments should reduce Rule 12g3–2(b) costs for foreign companies and encourage more of them to have their securities traded in the U.S. over-the-counter market pursuant to the Rule 12g3–2(b) exemption for the benefit of U.S. investors.

The adopted rule amendments will further benefit U.S. investors by requiring any foreign company that claims the Rule 12g3–2(b) exemption to publish in English specified non-U.S. disclosure documents on its Internet Web site or through an electronic information delivery system that is generally available to the public in its primary trading market. Currently an issuer that has obtained the Rule 12g3–2(b) exemption upon application may submit its non-U.S. documents on an ongoing basis in paper to the Commission. By requiring the electronic publication in English of specified non-U.S. documents for any issuer claiming the Rule 12g3–2(b) exemption, the adopted amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-U.S. disclosure documents and make better informed decisions regarding whether to invest in that issuer's equity securities.

B. Expected Costs

Investors will incur costs from the adopted rule amendments to the extent that the amendments encourage more foreign companies, which otherwise would be required to register their equity securities under the Exchange Act, to claim the Rule 12g3–2(b) exemption, where the information, enforcement remedies, and other effects of registration are valuable to investors. We estimate that, on an annual basis, approximately 350 additional foreign private issuers could claim the Rule 12g3–2(b) exemption as a result of the adopted amendments to Rule 12g3–2. Some less technologically capable investors may also incur costs resulting from the search and retrieval of a foreign company's electronically published documents. However, we expect those costs to be less than the costs that investors currently must incur to obtain written copies of a foreign company's non-U.S. disclosure documents submitted in paper to the Commission.

A foreign company will incur costs resulting from the amended rule's requirement to publish electronically specified non-U.S. disclosure documents in English to the extent that it is not already required to, or does not already, do so pursuant to any applicable law or rule. A foreign private issuer will also incur costs resulting from its required annual determination regarding whether it is still in compliance with the amended rule's primary trading market provision. However, those costs will likely be less than the costs that an issuer currently must incur when calculating the number of its U.S. holders pursuant to Rule 12g3–2(b).

If, because of those costs, the foreign company does not claim or maintain the Rule 12g3–2(b) exemption, U.S. investors interested in trading in the securities of that company would have to resort to trading in the company's non-U.S. primary trading market. Those U.S. investors could incur costs associated with finding and contracting with a broker-dealer who is able to trade in the foreign reporting company's primary trading market. U.S. investors could also face additional costs resulting from currency conversion and higher transaction costs trading the securities in a foreign market. U.S. investors would also incur costs from lost investment opportunities and possibly lost diversification benefits to the extent that they choose not to trade in a foreign company's securities that are not available in the U.S. over-the-counter market.

V. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation Analysis

When adopting rules under the Exchange Act, Section 23(a)(2) of the Exchange Act[145] requires us to consider the impact that any new rule will have on competition. Section 23(a)(2) also prohibits us from adopting any rule that will impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, Section 2(b)[146] of the Securities Act and Section 3(f) of the Exchange Act[147] require the Commission to consider whether the action will promote efficiency, competition and capital formation.

In the Proposing Release, we considered the proposed rule amendments in light of the standards set forth in the above statutory sections. We solicited comment on whether, if adopted, the proposed rule amendments would result in any anti-competitive effects or promote efficiency, competition and capital formation. We further encouraged commenters to provide empirical data or other facts to support their views on any anti-competitive effects or any burdens on efficiency, competition or capital formation that might result from adoption of the proposed amendments.

We did not receive any comments or any empirical data in this regard concerning the proposed amendments. Accordingly, since the adopted rule amendments are similar to the proposed rule amendments, we continue to believe the amended rules will

[144] An issuer must also currently recalculate the number of its U.S. security holders when applying for reinstatement of the Rule 12g3–2(b) exemption should it lose that exemption due to non-compliance with the Rule's ongoing requirements.

[145] 15 U.S.C. 78w(a)(2).

[146] 15 U.S.C. 77b(b).

[147] 15 U.S.C. 78c(f).

contribute to efficiency, competition and capital formation.

The adopted amendments revise the rules that determine when a foreign private issuer may claim the exemption from Exchange Act Section 12(g) registration under Exchange Act Rule 12g3–2(b). That exemption permits limited trading of an issuer's exempted equity securities in the over-the-counter market in the United States as long as the issuer submits its non-U.S. disclosure documents to the Commission, notwithstanding that the issuer exceeds the Section 12(g) registration thresholds. Many foreign private issuers rely on the Rule 12g3–2(b) exemption to have established ADR facilities, which make it easier for U.S. investors to trade in those issuers' equity securities. The Rule 12g3–2(b) exemption also makes it easier for broker-dealers to meet their Exchange Act Rule 15c2–11 obligations, and effect the resale of a foreign private issuer's securities to QIBs under Securities Act Rule 144A.

The adopted rule amendments will permit a foreign private issuer to claim the Rule 12g3–2(b) exemption without having to submit a paper application to the Commission, as is currently required, if, among other conditions, the issuer maintains a listing on one or more exchanges in no more than two foreign jurisdictions that constitute its primary trading market. The adopted rule amendments will also require an issuer to publish in English specified non-U.S. disclosure documents on its Internet Web site or through an electronic information delivery system that is generally available to the public in its primary trading market. Currently an issuer that has obtained the Rule 12g3–2(b) exemption by application may submit its non-U.S. disclosure documents in paper to the Commission.

By enabling a qualified foreign private issuer to claim the Rule 12g3–2(b) exemption automatically, and without regard to the number of its U.S. shareholders, as is currently the case, the adopted rule amendments should encourage more foreign private issuers to claim the Rule 12g3–2(b) exemption by lowering the costs of obtaining that exemption. Consequently, the adopted rule amendments should increase the efficiency of foreign private issuers' claiming the exemption and foster the trading of foreign companies' equity securities in the U.S. over-the-counter market, for example, by enabling the establishment of additional ADR facilities and making it easier for broker-dealers to meet their Rule 15c2–11 obligations with respect to foreign securities. The enhanced ability of investors to trade foreign securities in the United States should help encourage competition between domestic and foreign firms for investors in the U.S. over-the-counter market.

Moreover, by requiring the electronic publication in English of specified non-U.S. disclosure documents for any issuer claiming the Rule 12g3–2(b) exemption, the adopted amendments should make it easier for U.S. investors to gain access to a foreign private issuer's material non-U.S. disclosure documents and make better informed decisions regarding whether to invest in that issuer's equity securities. Thus, the proposed amendments should foster increased efficiency in the trading of the issuer's securities.

VI. Regulatory Flexibility Act Certification

Under Section 605(b) of the Regulatory Flexibility Act,[148] we certified that, when adopted, the proposed rule amendments would not have a significant economic impact on a substantial number of small entities. We included this certification in Part VI of the Proposing Release. While we encouraged written comments regarding this certification, no commenters responded to this request.

VII. Statutory Basis and Text of Rule Amendments

We are adopting the amendments to Securities Act Form F–6, Exchange Act Rules 12g3–2 and 15c2–11, and Exchange Act Forms 40–F, 6–K, and 15F under the authority in Sections 6, 7, 10 and 19 of the Securities Act[149] and Sections 3(b), 12, 13, 23 and 36 of the Exchange Act.[150]

Text of Rule Amendments

List of Subjects in 17 CFR Parts 239, 240 and 249

Reporting and recordkeeping requirements, Securities.

■ For the reasons set out in the preamble, we are amending Title 17, Chapter II of the Code of Federal Regulations as follows.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 1. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 2. Amend Form F–6 (referenced in § 239.36) by revising Item 2 of Part I to read as follows:

Note: The text of Form F–6 does not and this amendment will not appear in the Code of Federal Regulations.

FORM F–6

Registration Statement Under the Securities Act of 1933 for Depositary Shares Evidenced by American Depositary Receipts

* * * * *

Part I—Information Required In Prospectus

* * * * *

Item 2. Available Information

Provide the information in either (a) or (b) below, whichever is applicable.

(a) State that the foreign issuer publishes information in English required to maintain the exemption from registration under Rule 12g3–2(b) under the Securities Exchange of 1934 on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. Then disclose the address of the foreign issuer's Internet Web site or the electronic information delivery system in its primary trading market.

(b) State that the foreign issuer is subject to the periodic reporting requirements of the Securities Exchange Act of 1934 and accordingly files reports with the Commission. Then disclose that these reports are available for inspection and copying through the Commission's EDGAR system or at public reference facilities maintained by the Commission in Washington, DC.

Note to Item 2: In the case of an unsponsored ADR facility, you may base your representation that the issuer publishes information in English required to maintain the exemption from registration under Exchange Act Rule 12g3–2(b) upon your reasonable, good faith belief after exercising reasonable diligence.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–

[148] 5 U.S.C. 605(b).

[149] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s.

[150] 15 U.S.C. 78c, 78*l*, 78m, 78w, and 78mm.

20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 4. Amend § 240.12g3–2 by revising paragraphs (b), (c), and (d), and removing paragraphs (e) and (f), to read as follows:

§ 240.12g3–2 Exemptions for American depositary receipts and certain foreign securities.

* * * * *

(b)(1) A foreign private issuer shall be exempt from the requirement to register a class of equity securities under section 12(g) of the Act (15 U.S.C. 78*l*(g)) if:

(i) The issuer is not required to file or furnish reports under section 13(a) of the Act (15 U.S.C. 78m(a)) or section 15(d) of the Act (15 U.S.C. 78o(d));

(ii) The issuer currently maintains a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities; and

(iii) The issuer has published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, information that, since the first day of its most recently completed fiscal year, it:

(A) Has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile;

(B) Has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and

(C) Has distributed or been required to distribute to its security holders.

Note 1 to Paragraph (b)(1): For the purpose of paragraph (b) of this section, *primary trading market* means that at least 55 percent of the trading in the subject class of securities on a worldwide basis took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. If a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of this paragraph, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities. When determining an issuer's primary trading market under this paragraph, calculate average daily trading volume in the United States and on a worldwide basis as under Rule 12h–6 under the Act (§ 240.12h–6).

Note 2 to Paragraph (b)(1): Paragraph (b)(1)(iii) of this section does not apply to an issuer when claiming the exemption under paragraph (b) of this section upon the effectiveness of the termination of its registration of a class of securities under section 12(g) of the Act, or the termination of its obligation to file or furnish reports under section 15(d) of the Act.

Note 3 to Paragraph (b)(1): Compensatory stock options for which the underlying securities are in a class exempt under paragraph (b) of this section are also exempt under that paragraph.

(2)(i) In order to maintain the exemption under paragraph (b) of this section, a foreign private issuer shall publish, on an ongoing basis and for each subsequent fiscal year, in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, the information specified in paragraph (b)(1)(iii) of this section.

(ii) An issuer must electronically publish the information required by paragraph (b)(2) of this section promptly after the information has been made public.

(3)(i) The information required to be published electronically under paragraph (b) of this section is information that is material to an investment decision regarding the subject securities, such as information concerning:

(A) Results of operations or financial condition;

(B) Changes in business;

(C) Acquisitions or dispositions of assets;

(D) The issuance, redemption or acquisition of securities;

(E) Changes in management or control;

(F) The granting of options or the payment of other remuneration to directors or officers; and

(G) Transactions with directors, officers or principal security holders.

(ii) At a minimum, a foreign private issuer shall electronically publish English translations of the following documents required to be published under paragraph (b) of this section if in a foreign language:

(A) Its annual report, including or accompanied by annual financial statements;

(B) Interim reports that include financial statements;

(C) Press releases; and

(D) All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

(c) The exemption under paragraph (b) of this section shall remain in effect until:

(1) The issuer no longer satisfies the electronic publication condition of paragraph (b)(2) of this section;

(2) The issuer no longer maintains a listing of the subject class of securities on one or more exchanges in a primary trading market, as defined under paragraph (b)(1) of this section; or

(3) The issuer registers a class of securities under section 12 of the Act or incurs reporting obligations under section 15(d) of the Act.

(d) Depositary shares registered on Form F–6 (§ 239.36 of this chapter), but not the underlying deposited securities, are exempt from section 12(g) of the Act under this paragraph.

■ 5. Amend § 240.15c2–11 by revising paragraph (a)(4) to read as follows:

§ 240.15c2–11 Initiation or resumption of quotations without specific information.

* * * * *

(a) * * *

(4) The information that, since the beginning of its last fiscal year, the issuer has published pursuant to § 240.12g3–2(b), and which the broker or dealer shall make reasonably available upon the request of a person expressing an interest in a proposed transaction in the issuer's security with the broker or dealer, such as by providing the requesting person with appropriate instructions regarding how to obtain the information electronically; or

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 6. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 7. Amend Form 40–F (referenced in § 249.240f), the cover page, by removing the second to last paragraph, which pertains to information furnished pursuant to Rule 12g3–2(b), including the check boxes.

Note: The text of Form 40–F does not and this amendment will not appear in the Code of Federal Regulations.

■ 8. Amend Form 6–K (referenced in § 249.306), the cover page, by removing the two paragraphs, which pertain to information furnished pursuant to Rule 12g3–2(b), following the second Note, including the check boxes.

Note: The text of Form 6–K does not and this amendment will not appear in the Code of Federal Regulations.

■ 9. Amend Form 15F (referenced in § 249.324) by revising General Instruction E and Item 9 of Part II to read as follows:

Note: The text of Form 15F does not and this amendment will not appear in the Code of Federal Regulations.

FORM 15F

Certification of a Foreign Private Issuer's Termination of Registration of a Class of Securities Under Section 12(G) of the Securities Exchange Act of 1934 or Its Termination of the Duty To File Reports Under Section 13(A) or Section 15(D) of the Securities Exchange Act of 1934

* * * * *

General Instructions

* * * * *

E. Rule 12g3–2(b) Exemption

Regardless of the particular Rule 12h–6 provision under which it is proceeding, a foreign private issuer that has filed a Form 15F regarding a class of equity securities shall receive the exemption under Rule 12g3–2(b) (17 CFR 240.12g3–2(b)) for the subject class of equity securities immediately upon the effective date of its termination of registration and reporting under Rule 12h–6. Refer to Rules 12g3–2(b)(2) and (b)(3) (17 CFR 240.12g3–2(b)(2) and (b)(3)) and Rule 12g3–2(c) (17 CFR 240.12g3–2(c)) for the conditions that a foreign private issuer must meet in order to maintain the Rule 12g3–2(b) exemption following its termination of Exchange Act registration and reporting.

* * * * *

Part II

Item 9. Rule 12g3–2(b) Exemption

Disclose the address of your Internet Web site or of the electronic information delivery system in your primary trading market on which you will publish the information required to maintain the exemption under Rule 12g3–2(b).

Instruction to Item 9

Refer to Rule 12g3–2(b)(3)(ii) (17 CFR 240.12g3–2(b)(3)(ii)) for instructions regarding providing English translations of documents required to maintain the Rule 12g3–2(b) exemption.

* * * * *

By the Commission.

Dated: September 5, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–20995 Filed 9–9–08; 8:45 am]

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Federal Register

Wednesday,
September 10, 2008

Part IV

The President

Proclamation 8286—Patriot Day

Federal Register
Vol. 73, No. 176
Wednesday, September 10, 2008

Presidential Documents

Title 3—

The President

Proclamation 8286

Patriot Day, 2008

By the President of the United States of America

A Proclamation

September 11, 2001, was etched into America's memory when 19 terrorists attacked us with barbarity unequaled in our history. On Patriot Day, we cherish the memory of the thousands of innocent victims lost, extend our thoughts and prayers to their families, and honor the heroic men and women who risked and sacrificed their lives so others might survive.

Since 9/11, we have recognized the threat posed by terrorists to the safety of the American people and worked to protect our homeland by fighting terrorists abroad. We are confronting terrorism by advancing freedom, liberty, and prosperity as an alternative to the ideologies of hatred and repression. Our Nation pays tribute to our courageous men and women in uniform serving around the world and the devoted members of our law enforcement, public safety, and intelligence communities at home who work night and day to protect us from harm and preserve the freedom of this great Nation.

Seven years ago, ordinary citizens rose to the challenge, united in prayer, and responded with extraordinary acts of courage, with some giving their lives for the country they loved. On Patriot Day, we remember all those who were taken from us in an instant and seek their lasting memorial in a safer and more hopeful world. We must not allow our resolve to be weakened by the passage of time. We will meet the test that history has given us and continue to fight to rid the world of terrorism and promote liberty around the globe.

By a joint resolution approved December 18, 2001 (Public Law 107–89), the Congress has designated September 11 of each year as ''Patriot Day.''

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim September 11, 2008, as Patriot Day. I call upon the Governors of the United States and the Commonwealth of Puerto Rico, as well as appropriate officials of all units of government, to direct that the flag be flown at half-staff on Patriot Day. I also call upon the people of the United States to observe Patriot Day with appropriate ceremonies, activities, and remembrance services, to display the flag at half-staff from their homes on that day, and to observe a moment of silence beginning at 8:46 a.m. eastern daylight time to honor the innocent Americans and people from around the world who lost their lives as a result of the terrorist attacks of September 11, 2001.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of September, 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. E8–21253
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LIST OF PUBLIC LAWS

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